



Draft: Literature Review on Voluntary Social and Environmental Standards and Governance

Mai-Lan Ha
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654 13th Street
Oakland, CA, 94610
+1-510-251-1600
www.pacinst.org

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Glossary of Terms

Co-regulation – refers to cooperation between civil society, business, and governments to meet regulatory objectives.

Civil regulation – employs private, non-state, or market-based regulatory frameworks to govern multinational firms and global supply networks. They seek to imbed international markets and firms in a framework of global rules and norms by establishing standards for responsible business conduct as well as mechanisms for promoting compliance with them.¹

Eco-Labels –voluntary labels which convey information to consumers about the environmental implications associated with all elements in the product’s life. ²

Multi-stakeholder standards – guidelines, recommendations, or rules developed collaboratively by a group of organizations including businesses, NGOs, and government representatives that look to enhance responsible behavior of businesses.³

New governance – refers to a school of governance theory that is fairly heterogeneous examining “new processes emerging which range from informal consultation to highly formalized systems that seek to affect behavior but differ in many ways from traditional command and control regulation.”⁴

Non-governmental regulatory strategies – these strategies function along the lines of outsourced production, regulating firms across their supply chains through voluntary standards, internal and external monitoring systems, and new sanctions and incentives.⁵

Non-state market driven governance – terminology to describe standards and certification systems where rule-making clout does not come from traditional Westphalian state-centered sovereign authority but rather from companies along the market’s supply chain, who make their own individual evaluations as to whether to comply to the rules and procedures of these private governance systems.⁶

Self -regulation – “regulation of the conduct of individual organizations, or groups of organizations, by themselves.”⁷

Private governance – full range of ways that organizations not directly affiliated with the state attempt to organize their affairs.⁸

¹ Vogel, 2.

² Vitalis, 2.

³ Fransen and Kolk, 668.

⁴ Kolben, 422.

⁵ O’Rourke, 2.

⁶ Cashore, et al., 2004, 4.

⁷ Bartle and Vass.

⁸ Kernaghan Webb, 11.

Private regulatory regimes – refer to broad non-state practices aimed at regulating different issues (such as labour or environmental issues).⁹

Private voluntary standards – standards developed and adopted by private bodies (that may be enforced by third-party certification) and whose adoption is not mandatory.¹⁰

Private voluntary social and environmental standards and certification – standards focused on environmental and social issues that are developed by industry groups, NGOs, or through cooperation between the two sectors. Adoption of the standards is not mandatory and compliance is maintained through independent third-party auditing and certification.

Regulatory standard setting – the organization and control of economic and social activities by means of making, implementing, monitoring, and enforcing rules. These rules are, however, voluntary.¹¹

Soft-Law – the defining features of soft law are the dominance by actors and by sources of authority other than governments and an inter-subjective consciousness on the part of the agencies involved of the principles, norms, rules, and decision-making procedures involved.¹²

Transnational private regulation – coalitions of non-state actors codify, monitor, and in some cases certify firms' compliance with labour, environmental, human rights, or other standards of accountability.¹³

Voluntary codes and initiatives – commitments not required by legislation or regulations, agreed to by one or more individuals or organizations, intended to influence or control behavior, to be applied in a consistent manner or to reach a consistent outcome.¹⁴

Voluntary sustainability standards – developed by industry consortia, NGOs, or in partnership between the two. They link producers, exporters, and buyers across national boundaries. They use the power of the supply chain in an attempt to drive sustainable production, to build and protect the reputation of brands, and to secure future supplies.¹⁵

⁹ Adapted from Kolben's definition of private labour regulatory regime. 407.

¹⁰ Henson and Humphrey, 1630.

¹¹ Abbott and Snidal, 1.

¹² Kirton and Trebilock, 10.

¹³ Bartley, 2007, 298.

¹⁴ Kernaghan Webb, 10.

¹⁵ Vorley, et al., 4.

Introduction

Over the past two decades there has been a rapid increase in the number of instruments called private voluntary social and environmental standards (PVSES). The instruments address issues ranging from labour conditions to energy efficiency to responsible water usage in current global production processes. They include a wide range of actors from both the public and private sector in their design, implementation, and monitoring. As they have grown, practitioners within the private voluntary social and environmental standards field are now trying to better understand what the role of these PVSES should be vis-à-vis traditional government public policy. This literature review takes a critical look into this area, examining a range of studies by academics, civil society, as well as multilateral organizations as they understand the role of PVSES and their interaction with public policy.

The paper proceeds in the following manner:

- 1) The first section frames how the authors have understood PVSES. It takes a broad approach by first proposing how governance and new governance are understood. It then looks at what the drivers are for the emergence of new governance tools and concludes with a typology of the PVSES schemes.
- 2) The second section looks at how private governance interacts with public policy, looking broadly at voluntary codes and self-regulation, and more closely at corporate social responsibility, non-state market driven instruments, and PVSES in the developing world. It concludes with a discussion of what an ideal relationship between private governance and public policy should be.
- 3) The third section looks specifically at discussions about PVSES in the context of multilateral trade and the World Trade Organization (WTO).
- 4) The fourth section examines the literature around PVSES and democracy, looking at both internal and external elements of PVSES and democracy.
- 5) The conclusion outlines the main findings of this literature review.

Governance and New Governance

The literature in economics, political science, international relations, sociology, and law has broadened to include not only studies in state-led government action and responsibility but also towards broader understandings of *governance*. There has been a great amount of theoretical discussion around what *governance* means. Timothy Cadman finds governance to be “portrayed as essentially social-political in nature, and understood as ongoing processes of interaction between social groups and forces within public and private institutes. Interaction is key, 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.”¹⁶ Alternatively, Kevin Kolben takes a different approach by defining governance as “a process in which regulatory authority and legitimacy have become de-centered from the state and from government.”¹⁷ In both these definitions, it is clear that governance includes a broad range of actors from both the public and private sector. If we take Cadman’s definition, governance is the interaction between a range of actors who work through processes and institutions to channel ideas and power to reach a particularly desirable outcome. It is within this broader framework that studies in private voluntary environmental and social standards and public policy are studied today.

The non-state, private or “co-arrangements” where both state and non-state actors collaborate to meet desirable objectives mentioned in the above definitions of governance include a wide range of organizations, arrangements, or institutions that are described using a number of different terms including “soft law,”¹⁸ “private regulatory regimes,”¹⁹ “civil regulation,”²⁰ and “voluntary codes/initiatives.”²¹ These can be categorized as fitting into a school of governance theory coined “new governance.” The field of “new governance” itself is fairly varied covering a range of ideas, but that overall encompass:

new processes emerging which range from informal consultation in highly formalized systems that seek to affect behavior but differ in many ways from traditional command and control regulation. These processes... may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.²²

Within new governance literature, “soft law” studies focus on standards and mechanisms that are not legally enforceable by the state. Trebilock defines soft law instruments as consisting primarily of two sets of tools: voluntary standards that “serve as equivalents” to legislation, government law, and regulation and the “informal institutions at the international, transnational, and national levels that depend on voluntarily supplied participation, resources, and consensual actions of their members.”²³ These instruments exist in tandem with traditional governmental command and control regulations that set legally enforceable requirements for compliance. Voluntary standards in this case include everything from standards and certification to voluntary corporate codes of conduct. Similarly, the literature on “private regulatory regimes,” “private governance,” “civil regulation,” “voluntary codes/initiatives”

¹⁶ Cadman, 3.

¹⁷ Kolben, 411.

¹⁸ Kirton & Trebilock, 4.

¹⁹ Kolben, 1.

²⁰ Vogel and Power define civil regulations as not rooted in public authority but are based on soft or private law. They are not replacement for states, but are rather a broader tool for social capacity or agency.

²¹ Kernaghan Webb, other authors. Defined as commitments that don't require legislation or regulation, agreed to by one or more individuals or organizations, intended to influence or control behavior, applied in a consistent manner to reach a consistent outcome.

²² Kolben, 422.

²³ Kirton & Trebilock, 4.

focuses on the variety of tools covered under these categorizations including standards and certification schemes, corporate codes of conduct, company ethics statements, management systems, and other non-governmental organization (NGO) led instruments such as the Global Reporting Initiative.²⁴ These scholars also find that the defining feature of these instruments is that they do not necessarily rely on the state for their legitimization nor are they necessarily legislated by the state. They lie in the private or voluntary spheres where they are either created by a single entity (i.e., NGO, company, industry association, etc.) or in a multi-stakeholder setting (that may include the state) looking to address social and environmental problems.

Drivers for the Establishment of New Governance Instruments

There is general consensus among scholars that the globalized nature of current production processes has meant that traditional command and control regulation that focuses on regulating domestic industry has not been able to fully regulate global production chains.²⁵ In response to this need, a plethora of new tools have emerged to work towards better regulating global production chains, however, there is wide variance in the origins of these tools.

Neoliberalism

A number of scholars cite the rise in the neo-liberal agenda as being at the forefront of the drive towards alternative forms of governance. Under this theory, the neo-liberal agenda arose out of efforts in the 1970s that place belief in a “set of ideas stressing faith in free markets and the associated political agenda of removing impediments to the flows of capital,”²⁶ creating a strong push for the establishment of governance systems that are non-state in character and in practice. The neoliberal argument, cited by Timothy Bartley, Marc Eisner, Reinhard Steuer, Dara O’Rourke, Benjamin Cashore, and David Vogel, places the rise in private modes of governance, including standards and certification systems, in tandem with the move by governments to downsize their traditional command-control roles. In place of traditional command-control regulation, the neoliberal agenda pushes for more market-based endeavors to flourish. These in turn bring about industry-led initiatives (such as codes of conduct) or civil-society-led efforts to utilize market forces towards encouraging better behavior (such as PVSES) or a hybrid of the two. The neoliberal agenda gives legitimacy and provides the space for these alternative forms to grow at the same time as it creates the mechanisms for global trade to flourish.

The neoliberal agenda argument also focuses on the role that multilateral trade institutions, including both the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO), have on limiting the traditional regulatory actions that governments can take to

²⁴ Gordon, 5-7.

²⁵ Much of the literature on private regulation have premised the rise of new regulatory systems upon the inability of traditional command and control mechanisms to respond to globalized trade due to their inability to regulate beyond a state’s borders. (Vogel, Cadman, Webb, Gordon, Purchase, Bartley, Mayer and Gereffi).

²⁶ Bartley, 311.

regulate industry. Timothy Bartley, in particular, argues that the limitations these institutions place on governments forced governments to turn towards alternate mechanisms.²⁷ A more in-depth look at this interaction and an exploration of the WTO will be discussed in later sections.

Governance Gaps

The literature on the relationship between the rise of new governance systems and the government's role in this process is sizeable. A number of scholars cite either governance gaps or failure in traditional processes as the impetus for the rise in private governance systems, corporate social responsibility, and the private voluntary environmental and social standards and certification movement (O'Rourke, Cashore, Kolben, Vogel, Fransen and Kolk, Nelson, Bendell et al., Mayer and Gereffi).

Mayer and Gereffi write that in developing countries, where the majority of current production processes have shifted, government "lack[s] the ability, and to some extent the will, to regulate the production in their jurisdiction."²⁸ Even in developed countries, Bryn Purchase writes that "the financial capacity of the State is now also constrained in a manner that significantly reduces its competitive advantage in monitoring and enforcement ... at the same time, the State has in general suffered a secular decline in its legitimacy or credibility in dealing with collective problems."²⁹

Dara O'Rourke also references scholars who attribute the rise of these new instruments to "the weakening national governments (due to globalization, neoliberal movements to shrink the state, or simply the failure of state bureaucracies)."³⁰ In this vacuum, the scholars argue, private and voluntary initiatives have emerged to fill the perceived governance gaps independently of government action.

Vogel takes a slightly more nuanced approach to the governance gap argument by arguing that a governance gap does not necessarily mean that there is an overall *governance deficit*, as state-based governance still exists. Vogel writes, "the power of global firms does not dwarf that of national governments: sovereignty is not at bay and the power of states is neither declining or in retreat... the scope and extent of business regulations continues to expand in many countries, as well as globally."³¹ However, he writes that it is the "inability or unwillingness of states" to actually implement these regulations that lead to the governance gap.³²

Authors, including Benjamin Cashore and Michael Conroy, cite the creation of the Forest Stewardship Council as a response to a governance gap to prevent deforestation. These scholars argue that the failure of the 1992 Rio Earth Summit to create a legally enforceable convention reinforced belief that government and intergovernmental process were incapable of providing necessary solutions to agreed upon environmental problems. In response, civil society led efforts in concert with leading companies to

²⁷ See Bartley, 2004, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions."

²⁸ Mayer and Gereffi, 4.

²⁹ Purchase, 79.

³⁰ O'Rourke, 4.

³¹ Vogel, 14.

³² Ibid.

create a market differentiating instrument. These efforts resulted in the first forest management, standards, certification, and labeling scheme, the FSC.³³

Government driven or complementary

However, there are also a number of scholars who cite the important role that governments play in setting the policy framework or by playing a direct role in the establishment of alternative governance mechanisms in order to meet their own policy objectives. These scholars find that private regulatory mechanisms cannot be explained away as purely market-based initiatives in response to governance gaps. Instead they argue that the relationship between the two factors is much more complicated and intertwined. A number of scholars (Bryne Purchase, Kathryn Gordon, Marc Eisner, and David Cohen) cite the complementary nature of government public policy to align these new voluntary initiatives with public policy objectives. They argue that a contraction of the state, especially in the North, has meant that the state has deliberately turned to these new mechanisms to fulfill previous government-led command-control regulation.

Amongst these scholars, Tim Bartley's framework for analysis synthesizes elements of the neoliberal argument with governance gap thinking into a broader context that includes political factors and the role of government in the rise of private voluntary social and environmental standards and certification systems. He argues that instead of examining the rise of standards and certification systems in the absence of the state, a more accurate understanding would employ a "political-institutional approach."³⁴ This theory places general institution building in

A political, cultural, or professional project led by strategically positioned and socially skilled "institutional entrepreneurs." Institutional building projects are deeply embedded in the existing order, which shapes the resources, political opportunities, and cultural scripts out of which a new order can be fashioned.³⁵

Further, Bartley finds that "private transnational regulation through certification" arose not only in the current social or cultural context, but also from conflicts among different actors in attempting to regulate global capitalism. He makes three main claims:

- 1) State, NGOs, and social movements are key players in the rise of certification, playing entrepreneurial roles that go beyond merely pressuring firms.
- 2) The formation of certification systems reflects processes of contestation and negotiation, embedded in a complex, multilevel institutional landscape.
- 3) Institutionalized rules and cultural scripts rooted in neoliberalism channel the trajectory of institution building and facilitate the rise of private regulatory firms.³⁶

³³ Conroy, 62 and Cashore et al., 2007, 159-160.

³⁴ Bartley, 313.

³⁵ Bartley, 309.

³⁶ Ibid. 310.

Applied to the same FSC framework, Bartley contends that in response to a series of boycotts on forestry products (due to deforestation) in the 1980s, a group of forestry firms looked to create a certification system to differentiate their products from others, giving them a competitive advantage. Bartley argues that if a purely market-based approach was pursued, private industry would have been able to independently and successfully utilize PVSES and certification systems as a solution to this collective problem. Instead he finds that a range of players, including NGOs (the Rainforest Action Network, Greenpeace, and WWF) and governments were vital for the establishment of the first forest standards and certification system, the FSC.

Bartley examines the conflicts in the NGO sector where environmentalists were divided over the correct course of action in addressing the problem of deforestation. Although many supported boycott efforts, others hoped to establish a “positive” alternative for companies to change their practices. One such NGO, Friends of the Earth, was at the forefront of developing positive alternatives and even managed to convince an existing intergovernmental organization, the International Tropical Timber Organization (ITTO) to consider standards and certification as a possible tool to encourage better business practices. Bartley finds that when this effort failed because governments from timber-exporting countries protested, finding the scheme to be a non-tariff barrier to trade under the GATT, it represented both an international conflict and the power of neo-liberal institutions to preclude governmental-led solutions to environmental or social problems.³⁷ Bartley contends that these conflicts, combined with NGO frustration, led NGOs to work with industry to set up an alternative solution.

Bartley also points to the role that governments played in the founding of the FSC. In particular, he cites the actions of the Austrian government in providing key financial support to the FSC vital for its start-up. The Austrian government took this step after traditional state regulation that would restrict the import of unsustainable wood products was threatened with WTO GATT action as a non-tariff barrier to trade.³⁸ In response to this threat, the Austrian government at the national level deliberately sought new avenues to meet the same goal by allocating the funds that would have been used to create and enforce state regulations to be given to the FSC instead. In response, other European governments, including the Dutch and the Swiss, also decided to provide financial support to the FSC as a response to local environmentalists’ pressure to take action against deforestation. In addition to government support, Bartley cites the extensive monetary support the FSC received from foundations who saw certification as an important policy tool to meet broader sustainable development policy objectives.

Bartley argues that only a political institutional approach can unpack the “critical role of other actors – especially NGOs, governments, and sometimes foundations – in building and crafting certification associations.”³⁹ He argues that the difficulties and conflicts between the different groups as they worked towards a common objective directly led to this particular type of outcome. Further, in addition to

³⁷ Ibid. 320.

³⁸ Ibid. 321.

³⁹ Ibid. 338.

conflicts and negotiations between different groups, the strength of a neo-liberal agenda that both gave credibility to non-state-centered approaches and limited government regulation (as seen by the threat of WTO action against the Austrian government's state-led approach to the problem of deforestation) was vital to the rise of PVSES and certification systems.

A Typology for Private Governance and Private Voluntary Social and Environmental Standards

In an attempt to give some clarity to what "private governance" entails, scholars have developed typologies for private governance instruments created to perform regulatory roles. A study by Tracey Roberts identifies two distinct methods for categorizing the different types of private governance institutions. To Roberts, these institutions are distinct in 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."⁴⁰ The first, more traditional method, has been to classify the institutions based on the type of organization that give rise to it, whether business, government, civic, or a hybrid form among these organizations.⁴¹ However, she finds that this method does not allow for an adequate comparison for how the systems really meet their objectives. Instead, she argues that a better method would be to develop a typology of these instruments based on their regulatory functions, from agenda-setting, negotiation of standards, implementation, monitoring, and enforcement.⁴² Categorizing the instruments based on their functions rather than their affiliation allows for a better comparison between these private instruments and their effectiveness in performing their regulatory roles.

Within the new governance literature is a focus on the proliferation of private voluntary social and environmental standards and certification systems. What exactly then are "private standards," "voluntary standards," or PVSES and certification systems? It should be understood that standards are not a new phenomenon. Historically, they developed to fulfill primarily technical or product specification functions, such as the Underwriters Laboratories standards and labeling for electrical components or the International Organization for Standardization's (ISO) norms for labeling film sensitivity. However, for the purposes of this paper, the focus will be on social or environmental standards designed to address contemporary social and environmental problems. One classification for PVSES was developed by Jason Morrison and Naomi Roht-Arriaza.⁴³ They classify PVSES by who creates them as follows:

- 1) Quasi-Private standards cover those developed by the International Organization for Standardization (ISO) and those developed by the International Electrotechnical Commission

⁴⁰ Roberts 3.

⁴¹ Roberts, 5.

⁴² Ibid.

⁴³ Jason Morrison and Naomi Roht-Arriaza, "Private and Quasi-Private Standard Setting." 2006.

and the Codex Alimentarius Commission. These are quasi private as they involve both private and public organizations in the crafting of the standard and gain their legitimacy from the close relationship they have with public institutions such as the World Trade Organization and national-level governments. In fact, although the ISO is an independent organization, its governance and function is comprised of national standard-setting bodies that may be a private entity, government agency, or a hybrid between the two. As each country is allowed only one representative, the make-up of the ISO means that all decisions that come out from it are necessarily a mixture between public and private institutions. The standards developed by the ISO focus predominantly on delineating management systems necessary to meet environmental or social objectives.

- 2) Non-state Environmental and Social Certification labeling programs are created by non-governmental organizations or industry either independently or in concert with a wide group of stakeholders including industry representatives and producer groups. These standards require certain performance levels and on-the-ground assessments. In turn those that meet these levels are awarded a label or a trademark.
- 3) Standards developed through cooperation between intergovernmental organizations and the private sectors include those developed by international institutions that can be utilized by both public and private actors. Like ISO standards, these standards “straddle the line between public and private.”⁴⁴ Some examples of these standards include UNEP’s 1994 Code of Ethics on International Trade in Chemicals. These collaborations can also result in codes of conduct such as the OECD’s Guidelines for Multinational Enterprises.⁴⁵

The authors also classify standards according to their functions:

- 1) Technical specifications and performance standards refer to those traditional technical standards around product specification such as kitchen appliances. However they also exist for environmental and social standards that establish minimum performance requirements, such as in energy use or water quality. They can also act as best-in-class standards that go above and beyond the minimum when compared to other products in the same arena.
- 2) Process and management standards look at the manufacturing and production processes and give criteria for evaluating “the procedures a company has in place to manage the quality of the production process, instead of the product itself.”⁴⁶ These standards also include environment management systems that work towards meeting defined corporate goals, but they do not set performance levels. These standards include ISO 9001 and ISO 14001.

⁴⁴ Ibid. 505.

⁴⁵ Ibid. 500-506.

⁴⁶ Ibid. 507.

- 3) Measurement and reporting standards refer to standards that focus on measurement and disclosure of social or environmental impacts of corporate activities. These have included such standards as the Greenhouse Gas Protocol.⁴⁷

In a 2010 brief, ISO draws a distinction between “international standards and private standards.”⁴⁸ According to ISO, the defining characteristics of “international standards” are that they “[are] developed using the core WTO (World Trade Organization) TBT (Technical Barriers to Trade) principles of transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and addressing the concerns of developing countries ... and are open to worldwide participation.”⁴⁹ Further, ISO asserts that the development of its international standards complies with four principles:

- 1) To provide market-driven international standards, based on objective information and knowledge.
- 2) To meet the needs and concerns of all relevant stakeholders, including public authorities... without seeking to establish, drive or motivate public policy, regulations, or social and political agendas.
- 3) To recognize that the development of regulation, public policy or the development and interpretation of international treaties are the role of government or treaty organizations
- 4) To [develop standards supporting public policy] within proven structures, operational approaches, and participation models detailed in ... existing directives and development procedures.⁵⁰

ISO goes on to define “formal” international standards based upon a criterion that includes the recognition of WTO TBT principles and recognition by governments.

Features such as ISO NSB (National Standard Bodies) national coordination and representation; NSBs associated remits from their governments; NSB disciplines of the TBT Code of Good Practice; and ISO’s adherence to the principles of international standards set out in the TBT agreements’ second triennial review, all contribute to ISO’s broad recognition as a developer of “formal” international standards.⁵¹

ISO includes within this category not only its own standards, but also those developed by its collaborators, the International Electrotechnical Commission and the International Telecommunication Union. All other standards developed outside of ISO and its collaborators are labeled “private standards.” ISO has divided these “private standards” into three categories:

- 1) Private standards in the ICT Sector.

⁴⁷ Ibid.

⁴⁸ ISO, “International Standards and Private Standards.” 2010.

⁴⁹ ISO, 2.

⁵⁰ ISO, 2.

⁵¹ ISO, 4.

- 2) Private standards developed by the retail and agri-food Industry. These include GlobalGap and the Global Food Safety Initiative (GSFI) standards.
- 3) Private standards related to social and environmental aspects.⁵² Within this last category, ISO includes a wide range of standards including standards that address carbon footprints, eco-labels, standards that promote the sustainable management of natural resources, fair trade standards, organizational accountability, and social responsibility standards. According to ISO, these standards may be developed by anyone from NGOs to industry and may or may not adhere to the WTO TBT's Code of Good Practice.⁵³

One common distinction used to differentiate standards, especially food-related standards, is to divide them into product and process standards. Gary Smith's article on private food standards offers a useful explanation of these two categories. Product standards are those related to the quality and safety of the item while process standards are those that are concerned with how a product is produced. Process standards can include anything from organic labeling to labour standards. To go even further, process standards may be further divided into management systems standards that give guidance for the development of "a framework for a holistic"⁵⁴ management approach (such as ISO 14001 for environmental management systems) or performance standards (such as IFOAM) that define a certain level that a product must meet and can include anything from social performance (e.g., no child labour); environmental performance (e.g., level of pollution related to the processing of the product); or safety or quality of a product (e.g., amount of pesticide residue left).⁵⁵ Another term used to describe these types of process standards is used by the WTO, who labels them NPR-PPM standards or non-product-related-process and production method standards.

A separate study by Bill Vorley, et al. breaks down a type of these process standards, which they call "voluntary sustainability standards," into two major categories: business-to-business standards and consumer-targeted standards. Within these categories are also a number of subcategories that straddle the two major categories.

- 1) Business-business standards are standards that "assist organizations in making decisions about suppliers and businesses."⁵⁶ These standards focus primarily on changing business and producer behavior within a value chain. They can be developed by industry or by non-governmental organizations. Two examples of business-business standards include SA8000 that promotes better labour practices and GLOBALGAP that focuses on the prevention of food contamination.
- 2) Consumer-targeted standards "often have certification marks or logos that can be used on packaging to differentiate a product to its final consumer."⁵⁷ These standards look to influence

⁵² Ibid. 6-7.

⁵³ ISO, 2 and 7.

⁵⁴ ISO Website, "ISO 14001" http://www.iso.org/iso/iso_14000_essentials

⁵⁵ Smith, 13.

⁵⁶ Vorley, et al., 18.

⁵⁷ Ibid.

consumer behavior by providing information (through labeling, brands, or marks) that help consumers with their purchasing decisions. Examples of these standards include Fairtrade and organic labeling.

- 3) Commodity-specific standards are also a business-business type of standard, however they are commodity- or sector-specific and work towards changing production in the entire sector (forestry, soy, palm oil, coffee, etc.). Most of these standards do not rely on the consumer for their success; rather they rely on the commodity traders, manufacturers, and retailers to drive the demand for the more sustainably produced products.⁵⁸
- 4) Company-specific standards represent a mix of business-to-business and consumer-targeted standards. Their defining feature is that businesses create the standard, such as Starbucks CAFÉ Practices, Carrefour's AGIR, or Tesco's Nurture.⁵⁹
- 5) A final subcategory Vorley et al. identify are GAP-based standards with consumer labels. These standards integrate the GAP standards with other social and environmental criteria (such as incorporation of ILO conventions, minimal use of water and energy, etc.). An example of this standard is Utz, which integrates GAP standards with the SA8000 and others and utilizes a labeling to inform consumers.⁶⁰

Scholars from Yale's School of Forestry and Environmental Studies also examine these same "voluntary sustainability standards," however they term these as non-state market-driven governance mechanisms (NSMD).⁶¹ These scholars define these as NSMD governance mechanisms because "rule-making clout does not come from traditional Westphalian state-centered sovereign authority but rather from companies along the market's supply chain, who make their own individual evaluations as to whether to comply to the rules and procedures of these private governance systems."⁶² Further discussion of this categorization and its implications for public policy are explored further on.

Both the Food and Agriculture Organization (FAO) and the United Nations Industrial Development Organization (UNIDO) have also developed their own categorization of the standards landscape. As both the FAO and UNIDO are focused in specific areas, their standards typology is also limited. As the name FAO implies, it is mostly concerned with food- and agricultural-related products. Its typology takes an even narrower view, looking only at those private standards related to fisheries and aquaculture and classifies standards based on "content [process vs. product standards]; certification and verification methods [first, second, or third party certification]; standards developer [buyers such as retailers, groups of producers or industry bodies, coalition of retail firms, or independent non-profits and NGOs]; and focus [business-to-business or business-to-consumer]."⁶³ Likewise, UNIDO's mandate is focused on

⁵⁸ Ibid. 21.

⁵⁹ Ibid. 21-22.

⁶⁰ Vorley, 18-24.

⁶¹ Benjamin Cashore and the Yale School of Forestry first developed the term that has been picked up by a number of other scholars in the field.

⁶² Cashore, et al., 2004, 4.

⁶³ FAO, 8.

industrial development; hence its typology focuses on three large industries: garments, footwear, and furniture. It identifies three types of private standards: buyer codes of conduct, certificates, and product labels.⁶⁴

Relationship between Private Governance and Public Policy

Private Regulation and Public Policy

The literature on how private regulatory systems bump up against public policy has grown in recent years. There are four avenues where these relationships have been examined: the first is in the context where private governance, voluntary codes, and self-regulation are created by and are complementary to government policy making (Eisner, Purchase, Bartle and Vass, Gordon, Mayer and Gereffi); the second examines how transnational standards are constrained by national level legislation or policy (Bartley); the third looks at governments' attempt to embed better regulatory practices by their own industries operating overseas (Vogel); and finally the fourth studies how "non-governmental regulatory strategies"⁶⁵ can undermine national and local public policy (O'Rourke). All the authors agree that governments bear the primary responsibility for establishing the main regulatory framework within their own borders. They further stress that the success of these private initiatives depends on how they become embedded over time in government policy making.

Under the first avenue, Marc Eisner argues that private environmental governance is often and necessarily grounded in national public policy and institutions. He reintroduces the concept of "regulatory capitalism" developed by David Levi-Flaur that emphasizes the "delegation of regulatory duties to non-state actors, the growing role of corporate and associate-based self-regulation, and new instruments for monitoring directing corporate activity... the key feature of regulatory capitalism includes the proliferation of regulatory instruments to ensure corporate social responsibility."⁶⁶ Eisner sees "private environmental governance" tools including "corporate association" and "standards-based forms of environmental self-governance"⁶⁷ as necessarily imbedded into national public policy and institutions, not as independent phenomena that arose out of pure market forces. This is because the power of the mechanisms to shape corporate decision making is dependent on national regulatory policies; as national regulatory policy changes (either by contracting or expanding), the ability or space for these new tools and mechanisms to influence corporate behavior also fluctuates. Eisner points out that in many cases, government public policy has been particularly proactive in creating integrated co-regulatory systems whereby governments delegate authority to firms to self-regulate their sectors in tandem with existing public regulation.

⁶⁴ UNIDO Study.

⁶⁵ O'Rourke, 2.

⁶⁶ Eisner, 491.

⁶⁷ Ibid. 1.

Ian Bartle and Peter Vass further explore the relationship between private initiatives and state public policy making. Their work looks specifically at “self-regulation” and its relationship to the state. They define “self-regulation” as “the regulation of the conduct of individual organizations, or groups of organizations, by themselves.”⁶⁸ Bartle and Vass divide the relationship between “self-regulation” and the state into two main categories, “mandated” and “non-mandated.” Within these two broad categories are a number of subcategories including:

- 1) **Co-operative** – co-operation between regulator and regulated in the development and implementation of statutory regulation.
- 2) **Delegated** – the delegation of the implementation of statutory duties by a public authority to self-regulatory bodies.
- 3) **Devolved** – the specification of self-regulatory schemes in statute but devolved by government and parliament to self-regulatory bodies.
- 4) **Facilitated** – self-regulation explicitly and proactively supported by the state, but the scheme is not backed by statute,
- 5) **Tacitly supported** – self-regulation schemes have little explicitly state support but are ‘tacitly’ supported, close to ‘pure self-regulation.’ Voluntary Action is central but is (often implicitly) conditioned and constrained by state action.⁶⁹

As this categorization shows, they view the state as implicitly involved in all forms of regulation, including “self-regulation.”⁷⁰ Even in the “tacitly supported” self-regulation category, Bartle and Vass find that the state is vital to the formation of any self-regulatory scheme. They give two examples from Britain: the establishment of the Press Complaints Commission (PCC) and self-regulation in alternative medicine (acupuncture, herbal medicine, etc.). Bartle and Vass find that the PCC, a non-statutory independent body, was only set up by industry in the face of a threat of government legislation. In the case of alternative medicine, they find that government plays an important role in monitoring the self-regulatory regimes, and cite the role of the UK Department of Health in issuing reports on these regimes. They argue that government monitoring carries with it an implicit understanding that monitoring can lead to statutory regulation if self-regulation is not meeting its objectives.⁷¹

Bartle and Vass’s work moves on to explore how states have been involved in promoting these efforts of self-regulation either by setting up governmental organizations or by passing legislation that promotes self-regulation. Bartle and Vass introduce the concept of “subsidiarity” to describe the relationship of delegating downward key state functions to non-state organizations and bodies. Bartle and Vass argue that self-regulation by industry can substitute for direct regulation, but that states must take on oversight responsibilities by establishing systems for transparency and accountability to ensure that industry self-regulation is actually achieving its intended purpose.

⁶⁸ Bartle and Vass, 888.

⁶⁹ Bartle and Vass, 891.

⁷⁰ Ibid. 889-890.

⁷¹ Ibid. 895.

Bartley's 2011 work builds upon his earlier work about the emergence of "transnational standards" to examine how they interact with public policy. He finds that on-the-ground realities reflect the "complexity that results when multiple sets of rules are layered."⁷² He finds that there is great, "complementarity, rivalry, and hybridity in the interplay of multiple standards."⁷³ In this vein, Bartley contends that transnational standards cannot be understood without understanding how they interact with existing national laws and regulations as well as local customary law. He finds that when applied to a case example of forestry governance in Indonesia, the FSC interacts on multiple levels with both national law and local customary laws and does not "bypass the state."⁷⁴ He cites the difficulty of maintaining FSC certification for forests because of conflicts between FSC certification requirements and local national laws in the realm of community rights. He looks specifically at the issue of obtaining free, informed, and prior consent from communities in order to operate, one key principle required for FSC certification. However, in practice, it is difficult to meet this requirement when government authorities grant logging permissions prior to actual community consultations. In effect, the ability of the FSC and other transnational standards to carry out their missions is constrained by government regulations and laws and cannot be seen as simply "transcending national law."⁷⁵

Others, including Gereffi, Mayer, Purchase, and Gordon merely mention the need for synergy between public efforts and private efforts that play a key role in achieving policy objectives. David Vogel's work stresses the "embedded liberalism" argument, that these "civil regulations" are a product of government efforts to embed better regulatory practices (through self-regulatory or voluntary means) to their own corporations who operate in areas where regulation may be weak or non-existent, especially in regions that are outside a sovereign nation state's borders.⁷⁶

Finally, Dara O'Rourke's review of the literature analyzing non-governmental systems of labour standards touches on a key issue, namely the potential of non-governmental labour standards systems to undermine local laws and initiatives. She cites studies and opinion pieces that express worries that the non-governmental systems can impede local unionization, undermine traditional regulatory processes, or lead to companies co-opting NGOs and preventing NGOs from playing their oversight roles.⁷⁷

One opinion piece she cites is a 2001 article by David Justice that argues that company codes of conduct can undermine strong local unions already in place. David Justice writes that part of the implementation and verification process for these company labour codes requires "independent monitoring ... [which] will introduce outside organisations into the workplace ... that may have the effect of discouraging or

⁷² Bartley, 2011, 519.

⁷³ Ibid.

⁷⁴ Ibid. 534.

⁷⁵ Ibid. 532-533.

⁷⁶ Vogel, 10.

⁷⁷ O'Rourke, 22.

preventing workers from joining or forming their own organizations.”⁷⁸ A separate 2002 Nadvi and Waltring general study of standards systems assumes that “the growing influence of global standards in global markets is likely to weaken national standards. National standards must increasingly comply with international norms, or risk becoming irrelevant.”⁷⁹ O’Rourke also refers to a 2001 study that cites how NGOs working as monitors for non-governmental systems of labour standards in Central America may be “supplanting the unions’ role as worker representatives by discussing wages and working conditions with factory managers, a process that will actually help power companies to avoid union organizing, enforceable collective agreements, and government regulation.”⁸⁰

Corporate Social Responsibility and Public Policy

Within the discussion of private governance is the specific discussion around the growth of corporate social responsibility (CSR) and its role in governance of the private sector. Many of the tools identified and utilized in the sphere of private governance are, in fact, critical to the work of corporate responsibility. Several scholars examine the roles that governments have in CSR and identify different mechanisms and themes around which governments are engaged in CSR activities. CSR here means “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”⁸¹ Among these scholars, there is great similarity in how they understand the reasoning and the push factors for government use of corporate social responsibility practices.

Among studies on the CSR landscape are two conducted by Fox, et al. and Ward that develop a baseline approach to understanding the landscape of the public sector’s role in CSR. The first study by Fox, et al. identifies four specific roles: mandating, facilitating, partnering, and endorsing, while a later Ward study added a fifth role, demonstrating. These roles are examined around ten key themes, including: 1) setting and ensuring compliance with minimum standards; 2) the public policymaking role of business; 3) issues in corporate governance; 4) responsible investment; 5) philanthropy and community development; 6) stakeholder engagement and representation; 7) pro-CSR production and consumption; 8) pro-CSR certification beyond compliance standards and management systems; 9) pro-CSR reporting and transparency; and 10) engagement in multilateral processes, guidelines, and conventions.

Two further recent works, one by the UN Global Compact (UNGC) in cooperation with Bertelsmann Stiftung and one by academic Reinhard Steurer further builds upon the work of Fox, et al. and Ward to look specifically at government’s role in promoting CSR activities. The UNGC/Bertelsmann study analyzes trends in public policies to promote CSR and looks at the opportunities for government to work with the private sector to meet development objectives. In contrast, Steurer’s paper focuses on analyzing and

⁷⁸ Justice, D. <http://www.cleanclothes.org/resources/ccc/corporate-accountability/code-implementation-a-verification/426>

⁷⁹ Nadvi and Waltring, 4.

⁸⁰ Ibid.

⁸¹ Steurer, 50.

building a typology for existing public policies on CSR in Europe. Both papers find that governmental engagement in developing CSR policy is critical to the overall success of the government's own sustainable development objective as well as for their role in creating more competitive industries.

The UNGC paper takes the basic framework developed by Fox, et al., Ward, and a previous Bertelsmann Stiftung paper to further identify key types of policy interventions and action areas to shape a public policy agenda to promote CSR activities. From the initial five areas identified by Fox, et al. and Ward, they have amended these into four types of interventions: awareness-raising, partnering, soft law, and mandating.⁸² In contrast to "soft law" used previously, the authors define soft law interventions here to mean all "non-regulatory interventions [such as the] promotion of universal principles ... [included in] the UN Global Compact."⁸³ In addition to this set of interventions, the UNGC paper also identifies five possible action areas that may be included in a public policy agenda; these include: 1) corporate governance; 2) reporting and disclosure; 3) community involvement and development; 4) responsible management and production; and 5) responsible consumption.⁸⁴

Reinhard Steurer's work takes a slightly different approach by examining the academic literature, mainly from the management field, that look at why governments are interested in CSR. He identifies "five literature-based propositions":

- 1) Governments are interested in CSR because business activities can help governments meet policy objectives around not only sustainable development and environmental protection but also foreign policy goals focused on development and humanitarian assistance.
- 2) CSR is an attractive complement to hard-law regulations where new regulations may not be political viable or feasible. CSR can provide a third way for achieving objectives that lies somewhere between "socialism and capitalism that provides social protections while strengthening national economic competitiveness."⁸⁵
- 3) Governments "define CSR negatively with conventional social and environmental regulations because 'voluntary business contribution to sustainable development starts where the legal framework ends.'"⁸⁶ Governments can then play an active role in defining the concept and fostering CSR practices.
- 4) CSR coincides with a broader transition away from top-down governance towards a more "network-like and partnering modes of self and co-regulation."⁸⁷ CSR becomes a complement to

⁸² Awareness-raising refers to tools that are used to create a common understanding of corporate responsibility among companies and stakeholders. Tools may include internet platforms and award schemes, training, and capacity building. Partnering can include dialogues, collective action, or capacity building among different stakeholders. Soft law approaches are non-binding regulatory policies including OECD Guidelines for Multinational Enterprises. Mandating refers to minimum standards for businesses around the environment, corruption, etc.

⁸³ UNGC, Bertelsmann Stiftung, Chapter 2.

⁸⁴ UNGC and Bertelsmann Stiftung, 16-21.

⁸⁵ Steurer, 50, citing Virginia Haufler.

⁸⁶ Steurer, 50.

⁸⁷ Ibid. 51.

new governance where governments are no longer the sole key players, but can play a necessary role in co-regulation. Co-regulation refers to cooperation between civil society, business, and governments to meet regulatory objectives.

- 5) CSR is fundamental in managing business relations with a variety of stakeholders by reshaping roles and relations between people. This concept means that the roles and interactions between civil society, business, and government are also shaped by CSR activities. Hence, governments will likely play an important role in being involved in these discussions.⁸⁸

Steurer posits that these propositions provide the motivation for governments to play an increasing role in shaping and promoting CSR. He then outlines a typology that in many ways mirrors both the works of Fox, et al. as well as Bertelsmann Stiftung but creates a matrix between the types of policy instruments and policy themes. His typology of CSR policy instruments and themes include:

- 1) Legal instruments, if they have a “mandating character,” that may go beyond recommendations but are fairly weak with no real enforcement or binding elements.
- 2) Economic instruments that are positive incentives, such as tax breaks.
- 3) Hybrid approaches that involve a mixture of all these instruments.
- 4) Partnering instruments that involve public-private partnerships, multi-stakeholder platforms, and other methods that bring together different actors working together.

These instruments are complemented by four policy themes: raising awareness, transparency, socially responsible investment, and leading by example.

Steurer goes on to further explore what the implications of CSR policies mean for relationships between business and government. He finds that although CSR first gained prominence in countries with strong neoliberal policies (the U.S. under Reagan and the UK under Thatcher) it is currently the strongest in countries with strong regulatory environments (Scandinavian countries). The growth of CSR in strong regulatory environments points to what he calls a “new embeddedness” where business self-regulation is embedded into the welfare state’s public policy agenda. Businesses, he finds, support CSR policies because they also gain advantages since CSR policies promote greater transparency in business practices, bringing about “lower bureaucratic costs due to easier and faster processes to get licenses, permits and other necessary official documents.”⁸⁹ In this sense, CSR not only leads to better social and environmental outcomes but also improves business functions.

Steurer concludes that government promotion of CSR policies has led to a fundamental shift in business-government relations. The shift represents a move away from a hierarchal regulatory state towards a more “networked, enabling, relational, or embedded form of societal co-regulation.”⁹⁰ This

⁸⁸ Ibid. 51.

⁸⁹ Ibid. 66.

⁹⁰ Ibid.

characterization points to a more networked form of regulation where business self-regulation and societal co-regulation work together and are embedded in a regulatory state leading to overall increases in environmental and social regulation.

In striving to understand the many voluntary initiatives in existence and available for businesses to meet their responsibilities, the World Bank compiled a compendium of corporate codes of conduct and voluntary standards in key sectors including the apparel, footwear and light manufacturing, agribusiness, tourism, mining, and oil and gas. The compendium not only seeks to understand the types of tools available, but also seeks to see how these initiatives align with recognized intergovernmental norms, such as ILO conventions or environmental treaties. This survey acknowledges that many of the voluntary standards of codes of conduct do indeed draw upon or seek to fulfill these recognized norms. For example, in analyzing whether certain codes (such as SA8000, WRAP) comply with international norms around forced labour, the compendium cross-references whether these voluntary codes meet ILO conventions including Convention 29 (specifically on Forced Labour) as well as its augmented version (No. 105) for the abolition of forced labour.

Non-State Market Driven Governance and Public Policy

One of the most influential bodies of work focused on private voluntary social and environmental standards is the work completed by Benjamin Cashore and the Yale School of Forestry and Environmental Sciences. Cashore's work utilizes a different term to refer to PVSES. He defines them as "non-state market driven" (NSMD) governance mechanisms. As mentioned previously, the term points to the fact that rule-making and authority do not derive from the state, but rather from companies, markets, and supply chains.⁹¹ According to Cashore, these NSMD governance instruments are unique because they have four distinct characteristics not necessarily captured by broader terminology such as private voluntary regulations or standards. These characteristics include:

- 1) The absence of state authority to force compliance and "adherence to rules" with the mechanisms or systems.
- 2) The presence of an internal multi-stakeholder evaluation process that grants authority to the system.
- 3) The market's supply chain providing an institutional setting in which authority is granted.
- 4) The existence of an enforcement mechanism based on verifiable on the ground compliance.⁹²

In Cashore's work, public policy is not directly addressed. However he alludes to the power that these NSMD mechanisms can have in driving greater regulatory roles for governments. One mechanism he identifies as resulting in the uptake of NSMD government mechanisms is the creation of the "California" effect. The "California" effect, also known as the "Race to the Top" effect, explains the motivation of

⁹¹ Cashore, 2002, 504.

⁹² Cashore, 2004, 20.

firms who function in highly regulated and coveted markets to push for increased environmental or social regulations. The California effect maintains that these already highly regulated firms will support stringent regulations if these regulations are applied to their competitors. In the long run, the consequences of these more stringent regulations, supported by both the private and public sectors, result in better environmental or social outcomes. In this case, government public policy is vital for these “ratcheting up effects” to result.

Cashore proposes a “two-pronged strategy” for bringing about more stringent regulation. The first is to reward companies who are performing well in already highly regulated markets. By providing an incentive for better practices, it would encourage other businesses to adopt certification schemes to improve their own performance in order to reap the benefits of good practice. In conjunction with this “carrot” approach, Cashore proposes a second “stick” strategy that would punish those bad performers by not allowing them into lucrative markets. These two “prongs” not only encourage the uptake of NSMD governance mechanisms but also support public policy making that result in better environmental and social regulations.⁹³

A second study conducted Kelly Levin, Benjamin Cashore, and Jonathan Koppell looks specifically at how NSMD governance mechanisms can work to help states and intergovernmental processes to meet their own sustainable development objectives. They look at the development of the Gold Star Standard in promoting the Clean Development Mechanism (CDM).⁹⁴

The Gold Star Standard was developed by a number of NGOs including the World Wildlife Fund in 2002 to address civil society concerns that many approved CDM projects had environmental weaknesses (i.e., projects had negative environmental impacts, did not actually reduce carbon dioxide emissions, or had inadequate environmental impact assessments) or do not meet the CDM’s goal of providing sustainable development benefits (due to insufficient stakeholder processes or a focus on larger over smaller projects that are more likely to lead to local sustainable development benefits).⁹⁵ The Gold Star Standard is a best practice standard that requires projects to not only meet the CDM’s requirements but also its own criteria (focused on whether a project adequately meets the “additionality” component of the CDM and leads to added environmental and social benefits).

In Levin, Cashore, and Koppell’s paper, the Gold Star Standard is examined in terms of its ability to promote the goals of the CDM by offering a market incentive (through a decrease in reputational and financial risks and increased credibility) for business engagement and to provide guidance on how to develop a successful carbon offset program. The study finds that the Gold Standard is beneficial not only to businesses but also for the CDM program to meet its own environmental and sustainable development objectives. In this case, international public policy in sustainable development is an essential prerequisite for the existence of the standard; in turn the standard provides a tool for meeting that policy’s objectives.

⁹³ Cashore, et al., 2007, 170-171.

⁹⁴ Levin, Cashore, and Koppell, 10-11.

⁹⁵ Ibid. 12-13.

Private Voluntary Standards in the Developing World

Literature on private voluntary environmental and social standards in the developing world takes two different approaches. Some studies consider the adoption of global private voluntary environmental and social standards in developing countries while others look at private voluntary environmental and social standards developed by national or local governments and organizations in developing countries. As the environmental and social standards movement initially arose amongst Northern groups, it has only been in recent years that standards and initiatives have been developed by Southern governments or organizations. One common theme emerges in all of these studies: the importance of local cultural, societal, historical, and political contexts in shaping the emergence, uptake, and eventual success of a standard.

One interesting and highly relevant work in this field was completed by Anne Tallontire, looking at initiatives that arose in Kenya. Her research considers not only issues related to internal value chain governance, or as she terms it, elements of the “vertical value chain,” but instead goes further to identify the “horizontal” elements of standards and certification. In her latest publication on “horizontal” value chain issues, she examines the impacts of private standards⁹⁶ beyond the buyers and sellers (part of the vertical chain) to include also civil society actors, governments, donors, workers, and their representatives. By taking a much broader approach, Tallontire’s study attempts to understand how a variety of actors interact in legislative, executive, and judicial aspects of governance. She applies this framework to two standards, KenyaGap (dealing with food safety and benchmarked to GlobalGap) and HEBI (concerned with labour standards and developed based on the Ethical Trading Initiative (ETI)) to understand how power relations shape discussions around these initiatives and impact the initiatives on the ground. Both initiatives are premised on the belief that localizing the standards by developing them through collaboration with local stakeholders (including companies, civil society, unions, communities) would have the “potential of opening up and strengthening regulatory systems, and bringing in new voices and mechanisms for motivating improvement in global supply chains.”⁹⁷ For both initiatives, Tallontire’s work in legislative governance analysis highlights a lack of proper consultation and representation in the development of the standards.

In the case of KenyaGap, the influence of donors and technical NGO experts plays the major role in its development to the exclusion of smaller stakeholders. In the case of HEBI, conflict between NGO representatives and lack of union representation means that it never fully “took off.” In particular, Tallontire cites the lack of union representation as particularly detrimental to HEBI, since HEBI is a multi-stakeholder initiative focused on labour issues. For HEBI to be successful, union representation to the body is necessary to give it credibility as a multi-stakeholder initiative. However, perception from NGOs that unions are “too close to government to properly undertake its role” (and therefore lacked independence) meant that unions were not accepted in the organization.⁹⁸

⁹⁶ Tallontire, et al. define private standards to “cover all standards set outside the realms of public sector.” 428.

⁹⁷ Tallontire citing O’Rourke, 429.

⁹⁸ Ibid.

The overall analysis of these initiatives finds that outside influence in the form of international civil society and donors play a greater role in all aspects of legislative, judicial, and executive governance. In the end, the attempt at localizing the standards failed. In the case of KenyaGap, buyers continue to favor GlobalGap standards over the adapted KenyaGap standard, while the internal conflicts between local groups never allowed HEBI to sufficiently emerge.

Another study by Ralph Espach studies the effectiveness of FSC and Responsible Care in Argentina and Brazil and what factors enabled them to be effective. Espach defines effectiveness based on the following criteria:

- 1) The size and diversity of regime membership.
- 2) The effects of membership on the environmental practices of member firms.⁹⁹

The choice of Argentina and Brazil allows Espach to compare the regimes in two countries with similar trade, economic, and political structures necessary for the success of the private voluntary social and environmental standards systems. He examines the effectiveness criteria through four “general factors”: market demand for certified goods, transnational actors, governmental support, and industry concentration, to determine whether any of these factors lead to a more effective regime. He finds that independently, none of these factors have been the key variable for the success of both the FSC and Responsible Care in Brazil and their failure in Argentina. Instead, he finds that it is “the local interest groups and coalitions who support these regimes” that leads to success.¹⁰⁰ It is the strength and power of on- the-ground advocates and those civil society groups who support the regimes that is the final key to bringing about business participation and environmental harm reduction.

In order to build these strong civil society and local advocate networks, Espach points to historical pathways taken by each country that either helped to build civil society organizational strength and adoption of international best practices or hindered their growth. He points to Brazil’s long-term battle to save the Amazon as the key driver in developing strong local civil society networks. A similar struggle was lacking in Argentina.¹⁰¹ Although Espach finds that government support of the initiatives did not necessarily lead to greater success in Argentina and Brazil, the case is not true in Bolivia. Instead, Espach finds government support in the form of legislation requiring sustainable forest management standards (whose provisions were very similar to those of the FSC) in order to obtain licenses to log to be vital for the uptake of the FSC in Bolivia.¹⁰² It was then easy for firms to adopt the FSC to meet both government regulations and gain access to lucrative Northern markets.

⁹⁹ Espach, 35.

¹⁰⁰ Espach, 131.

¹⁰¹ Ibid. 132-133.

¹⁰² Ibid. 135.

Similarly, we see that in other countries such as China, government policy is a cornerstone in the establishment of standard and certification systems. This view is reflected in a co-authored Accountability and China's State Council, Development Research Center strategy paper. The strategy paper, "Advancing Sustainable Competitiveness of China's Transnational Corporations," looks closely at the role of corporate social responsibility and "voluntary sustainability standards" in balancing economic competitiveness with the realization of the environmental and social issues that come with industrial expansion.¹⁰³ Long, Zadek, and Wickerham's strategy paper goes on to advocate for China's engagement in the establishment of voluntary sustainability standards and certification systems and in fact makes a series of recommendations aimed specifically at government policy to promote both the "development and application" of standards.¹⁰⁴ One of the first Chinese-led initiatives to develop such a standard is the creation of CSC9000T by China's Textile and Apparel Council, a government led industry group.

Some authors have even argued that it is the responsibility of governments to develop national-level standards. Spencer Henson and John Humphrey specifically argue that in many developing countries it is the governments' responsibility to either develop their own national standards programs for products and processes or for governments or producers to brand or own international standards, such as creating KenyaGap.¹⁰⁵ They find that in response to the rise in Northern developed private voluntary standards systems, it is vital for Southern governments and local organizations to play a more active role either in the governance of existing standards or the establishment of local standards.

Governmental Use of Private Standards

A critical study used by the environmental and standards community to understand the interaction between public policy and standards is one conducted by the ISEAL Alliance in 2008. The study seeks to understand how governments use private voluntary standards to meet their objectives. Their analysis finds two types of drivers: governance and mission drivers. By governance drivers, the authors find there are two sets: those related to governance (e.g., alignment with international norms) or those related to operational practices. The five governance drivers they include are:

- 1) Best practice in independent verification.
- 2) International recognition and credibility.
- 3) Sharing resources.
- 4) Reputational risk management.
- 5) Promoting change without regulatory burden.

¹⁰³ Zadek, Wickerham and Long Guoqiang. "Advancing Sustainable Competitiveness of China's Transnational Corporations," 2009.

¹⁰⁴ Ibid. 57-58.

¹⁰⁵ Hensen and Humphrey, 1642.

However, these are more in line with the market incentives or efficiencies governments may gain through the adoption of private voluntary standards, rather than governance drivers per se. The second set, mission (or policy objective) drivers, are when “governments choose to engage with a voluntary standards because the standard’s mission relates to the public policy objective it aims to deliver.” The presentation of case studies around the drivers include “development and cooperation via fair trade, improving working condition and labour practices via SA8000, and using organic certification to add value to agricultural products.”¹⁰⁶ The overall premise of the study was to identify why governments use standards and to find ways for this use to be more widespread based on the assumption that standards are critical for a “win-win” (economic growth and environmental protection) situation.

It should be noted that outside of this study, ISEAL’s other publications, including its Code of Good Practice, Impacts Code, or other guidance documents make no reference to public policy, whether in the setting of standards, or in evaluating their impacts on the ground. During ISEAL’s 2011 Public Day Conference, “Scaling Up the Impacts of Standards Systems,” on 9 June 2011, one session was devoted to the interaction between governments and voluntary standards systems. During this session, the same underlying assumptions around governments’ use of private voluntary standards existed, i.e., that governmental use of standards is beneficial for governments to meet policy objectives or to expand their own market presence.

Proposed Frameworks for Appropriate Relations between Private Governance and Public Policy

A number of key studies offer frameworks for formulating a desirable relationship between private governance tools and state-led public policy.

A study by Albareda on CSR advocates for a co-responsibility framework around three different sectors: government, civil society, and business. Here, governments play the lead role as mediators between the NGO and private sectors – facilitators and leaders between different stakeholder groups to identify new innovative avenues for meeting regulatory goals and create “win-win relationships.” However, Albareda also stresses the need to take this approach only after taking into account and understanding a country’s political realities and local contexts around welfare, traditions, and the social agenda.¹⁰⁷

A second approach by David Cohen (similar in vein to Bartle and Vass’s idea of subsidiarity) is one where government plays the role of a public interest mediator, setting broad objectives which voluntary mechanisms can meet. In turn governments can ensure that there is sufficient oversight around the development and implementation of the tools in order to meet policy objectives. Kolben’s work around transnational labour regulations also reflects these recommendations. Kolben terms his approach an “integrative approach to transnational regulatory regimes.”¹⁰⁸ In Kolben’s theoretical model, the state is neither ignored nor bypassed; instead a system is created where the state is re-centered as a vital actor

¹⁰⁶ ISEAL, 2008, 15-17.

¹⁰⁷ Albareda, 360.

¹⁰⁸ Kolben, 405.

that recognizes the role of private voluntary initiatives. The state's role then, is to establish communication channels between different sectors and actors that allow them to work towards meeting regulatory goals.

These approaches are similar to Abbott and Snidal's examination of the role of the state in what they call "regulatory standard setting." After establishing a "governance triangle around states, firms, and NGOs" that places a wide range of regulatory standards (including SAI, IFOAM, CERES, WRAP, OECD MNE guidelines) in a spectrum to examine their relationships with one another and their ability to perform regulatory roles, Abbott and Snidal look specifically at the state's role. They find that firms and NGOs are the main players who are constantly engaged in a "bargaining game" among each other for their own interests throughout the regulatory process. In this scenario, Abbott and Snidal find that the state's role is predominantly one in the "background" at each stage of the regulatory process as follows:

- 1) Agenda-setting: the state can 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 still create norms that standards include into their own schemes. The inclusion of state-generated norms lends a sense of legitimacy to RSS schemes. When states issue new or amend existing policies or norms it represents a shift in legitimate state positions that may have an effect on the bargaining between firms and NGOs, signaling a new level of expectations that can strengthen the hand of one entity over the other.
- 3) Implementation: states role is limited except in the areas of procurement or by providing 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 to be required of RSS schemes.
- 5) Enforcement: the states' role is indirect through the threat of statutory or mandatory regulation as the impetus for firms to adopt better practices.¹⁰⁹

Looking at NSMD governance mechanisms, Levin, Cashore, and Koppell's work explicitly creates the idea of a *symbiotic framework* around the systems and public policy making. In this study, both national and international public policy play a vital role in creating the arena and policy framework for meeting sustainability objectives. However, the NSMD governance mechanisms do not undermine these policies, but instead work in a symbiotic relationship to ensure that the policy reaches its goals. Without each other, neither can be successful. In the case of the Gold Standard, its legitimacy derives from the existence of the internationally backed CDM: without the Gold Standard, the CDM lacks a key tool for real implementation. As the Gold Standard is adopted by more businesses or companies, it may reach a point for the CDM to adopt the Gold Standard or its content officially into the CDM itself.

¹⁰⁹ Abbott and Snidal, 43-47.

Private Voluntary Standards and the Multilateral Trade System

In addition to national or transnational public policy making, private voluntary environmental and social standards have also become a major area of discussion for today's multilateral trading system. Over the past decade, greater attention has been placed upon examining PVSES and their relationship to state's legal commitments under the World Trade Organization (WTO). The development of PVSES has become an area of particular concern to states insofar as they relate to the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.

Additionally, authors have cited the negative consequences that PVSES have on market access for developing countries. One of the most scathing rebukes of the PVSES and eco-labeling¹¹⁰ was conducted by Vangelis Vitalis for the OECD Roundtable on Sustainable Development. Vitalis speculates that there has been a correlation between the rise in voluntary eco-labeling schemes and the decrease in tariff measures from developed countries, perhaps marking an attempt by developed country producers to institute a "marketing edge to help alleviate the impact of tariff reduction."¹¹¹ He finds three main problems with the application of private voluntary eco-labels to products and trade.

- 1) Some voluntary eco-labels may become de-facto market standards (as they become the accepted norm due to their market dominance) that consumers use to make their purchasing decisions.
- 2) Many schemes apply a "one size fits all" approach that doesn't allow for differentiating processes in one part of the world over another.
- 3) Many of these schemes are developed in partnership with domestic producers who may have a vested interest in the scheme to be created in a certain way to benefit their own local market.¹¹²

Vitalis cites several examples:

- 1) **Turtle labeling scheme:** In response to the WTO's ruling against the U.S. government's requirement that all shrimp imports require turtle exclusion devices on fishing trawlers, United States-based NGOs including the Sierra Club and the Earth Land Institute worked with U.S. shrimp industries to develop a turtle-friendly label. The NGOS also worked successfully with U.S. supermarkets to stock only turtle-friendly labeled products. By 1999, this campaign had shifted the shrimp market, with 75% of all shrimp carrying the turtle-friendly label. Vitalis argues that this created a de facto market requirement for all shrimp to be turtle-friendly and excluded imports from developing countries that do not carry the label. Vitalis finds that this is discriminatory as fishing practices in many developing countries are very different and the use of turtle-exclusionary devices would not be useful or necessary in these local conditions.¹¹³

¹¹⁰ Eco-labels discussed in this paper are defined as: voluntary labels which convey information to consumers about the environmental implications associated with all elements in the product's life. The paper focuses explicitly on non-governmental voluntary eco-labels. Vitalis, 2.

¹¹¹ Ibid. 4.

¹¹² Ibid.

¹¹³ Vitalis, 4-5.

- 2) **The Marine Stewardship Council:** Developing countries worry that if market demand for eco-labeled fish increases, MSC requirements may become a non-tariff barrier to trade for developing countries. Vitalis cites concern that the artisanal or small-scale nature of fishing schemes in developing country (that make up about 90% of workers) would have a particularly difficult time in meeting the MSC's requirements as they have limited data on species – data that is required to institute a MSC management program.¹¹⁴
- 3)

SPS Agreement

Sanitary and phytosanitary measures cover food and agricultural related issues. The SPS agreement spells out specific SPS areas where states may take action on issues related to health and life. These areas are defined in the General Agreement on Trade and Tariffs (GATT) as provisions “that are ‘necessary to protect human, animal or plant life or health.’”¹¹⁵ Under the SPS agreement, WTO Members are allowed to take necessary actions for these purposes, but they must be “based on scientific principles and not be maintained without scientific evidence.”¹¹⁶ In this framework, private voluntary standards related to food safety and quality fall within the SPS agreement. States are required to ensure that organizations within their territories endeavor to align as much as possible with these statutes.

A paper by Michael Roberts, examining private standards and multilateral trade rules, highlights concerns raised by countries especially in the food sector to the SPS committee, particularly around the application of the GlobalGap standard. At the forefront of these complaints was one raised by St. Lucia and the Grenadines:

EurepGap (now GlobalGap) and St. Lucia and the Grenadines – In 2005 St. Lucia and the Grenadines raised concern over EurepGap measures on banana imports before the SPS Committee. EurepGap is a voluntary standard developed by European retailers that seeks to set standards around good agricultural practices, particular those related to food safety issues, pesticide use, and genetically modified foods. St. Lucia and the Grenadines raised issue with EurepGap's requirements on pesticide use on banana exports were more stringent than existing European Government regulations and were therefore a trade barrier. The concern, supported by Jamaica, Peru, Ecuador, and Argentina also noted that the governments were responsible for the actions of non-governmental entities within their borders.¹¹⁷

Due to the concerns raised by St. Lucia and the Grenadines, the SPS Committee has now adopted private voluntary standards as a key area of focus for its working agenda and as of 2011 agreed to continue to share information around private standards and to coordinate work between the SPS Committee and its

¹¹⁴ Ibid. 6.

¹¹⁵ Wouters, Marx, Hachez, 2009, 8.

¹¹⁶ Ibid.

¹¹⁷ “SPS CTTE Considers Private Sector Standards: Struggles Continue with S&D” www.ictsd.org/i/news/bridgesweekly/6158. Also Roberts, 254.

three sister organizations, the WHO-FAO codex Alimentarius on food safety, the World Organization for Animal Health (OIE), and the International Plant Protection Convention (IPPC).

TBT Agreement

A number of other non-food- and agriculture-related private voluntary standards, mostly product-related, are subject to the TBT agreement. Under this agreement, several articles apply to private voluntary standards. Article 2 refers to the responsibility of member governments to not create or adopt technical regulations that create “unnecessary obstacles to international trade” while adopting “existing international standards” for their own regulations. In regard to non-government bodies and their standards, it places the onus on member states to utilize “reasonable measures” to ensure the non-government-initiated standards comply with the provisions of Article 2. In addition, Article 4 of the Agreement defines how private voluntary standards development should meet the defined Code of Good Practice as defined by the TBT.

The Code of Good Practice applies to the development of all standards and includes the following provisions:

- 1) To follow the principles of non-discrimination.
- 2) To avoid creating unnecessary obstacles to international trade.
- 3) To comport standards with existing international standards (except where such international standards would be ineffective or inappropriate).
- 4) To engage with relevant international standardizing bodies.
- 5) To avoid duplication or overlap of the work of other international standardizing bodies.
- 6) To specify standards for products requirements in terms of performance rather than design or descriptive characteristics.
- 7) To ensure transparency and consultation with interested parties.¹¹⁸

One of the few legal analyses of how private standards fit into the TBT agreement was submitted by the UK government to the TBT Committee in 2007. The study, conducted by Digby Gascoine and O’Connor and Company looks specifically at the jurisprudence and legal language in the TBT agreement and examines how private standards may be addressed. They find that “there is no case law that assists understanding of the applicability of the TBT Agreement to voluntary standards that are not product-related.”¹¹⁹ Hence process and production method standards, to which many private voluntary environmental and social standards belong, have thus far not been brought up under the TBT agreement.

¹¹⁸ Roberts, 271.

¹¹⁹ Gascoine, 7.

David Wirth's 2009 article takes a different approach, looking specifically at ISO standards and their relationship with the WTO. He finds that because the WTO TBT agreement specifically refers to government adoption of standards recognized by international standardizing body, which he maintains was written expressly to include ISO, these ISO standards can in effect set a "ceiling" for environmental and social standards.¹²⁰ This ceiling would require governments to justify any regulation that would be above what ISO standards require or be subject to possible legal action under the WTO. He writes: "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 rigor ... [which may] metamorphose from strictly private, non-governmental instruments to standards with international legal significance."¹²¹

Colombian Cut Flower Scheme – One of the earliest and often-cited examples of the negative implications of standards to market access was a submission to the WTO's Committee on Trade and the Environment in 1998 by Colombia over the private, voluntary eco-labeling program – Flower Label Programme (FLP), which was a German-industry-led NGO initiative that looked to restrict the use of toxic chemicals and pesticides. In its submission, the Colombian government argued that "the criteria used for the eco-labeling scheme were arbitrary; the scheme itself was applied in a discriminatory manner, imposed significant compliance costs, and was in fact a mandatory measure."¹²² The submission was tabled for discussion at the meeting.

However, in 1996, Colombia was already under pressure from NGOs (predominantly from Germany) over its cut flower programme and developed its own labeling scheme, Florverde. The scheme was developed by Asocoflores, an association of Colombia's leading flower exporters, and remains in place today.¹²³

Future Implications

Overall, scholarly work on private voluntary standards and the WTO find that while both TBT and SPS agreements apply to state-sponsored initiatives, there has been much less clarity about how the WTO should address non-state-sponsored private voluntary standards. Even in such literature as exists, the discussion focuses primarily in the SPS committee over product-specific food and agricultural safety standards. Transnational process and method standards dealing with social or other environmental protection issues have not been taken up by either committee as they fall into the criteria of NPR-PPMs. Even so, if some standards may be regarded as a technical regulation, many (including those members to ISEAL) have taken a proactive approach to align their standards with the TBT Code of Good Practice.

Samir Gandhi argues another interesting point in relation NGO standards under the TBT. He notes that no developing country government has yet officially mounted a legal challenge to an NGO standard in

¹²⁰ Wirth, 95.

¹²¹ Wirth, 96.

¹²² Gandhi, 860.

¹²³ WTO submission, WT/CTE/W/76G/TBT/W/60, "Environmental Labels and Market Access: Case Study on the Colombian Flower-Growing Industry."

the WTO. He reasons that this is because developing countries do not want to give legitimacy to any NPR-PPMs within the WTO. He writes that developing countries 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.”¹²⁴

One of the major issues facing private voluntary standards and the WTO lies in efforts towards mutual recognition between government public policy and private voluntary standards systems. If government uptake or utilization of private voluntary standards increases, private voluntary standards may become grounds for trade disputes if they become part of official government policy. Another key case that may have some bearing on the future relationship between private voluntary standards and certification and government policy is the recent eco-labeling decision made by the WTO over dolphin-safe labeling and tuna imports between the United States and Mexico. A WTO panel decision found that the voluntary use of eco-labeling of dolphin-safe tuna constituted a technical barrier to trade. Although this decision was brought against a government-sponsored voluntary program, it may have future implications for any government endorsement of private voluntary standards, certification, and eco-labeling program.

The Democratic Elements of Private Voluntary Social and Environmental Standards

This final section examines the democratic elements of PVSES systems by examining first how different scholars have examined the legitimacy of the systems and then moves on to examine both the internal and external democratic features of the systems. “Internal democracy” elements refer to how well a particular PVSES system reflects democratic elements identified by scholars as necessary for democratic decision making: participation, transparency, and accountability.¹²⁵ “External democracy” refers to how well PVSES are able to contribute towards building more democratic societies above and beyond their own structures.

Assessing Legitimacy

In the available literature on private voluntary standards systems and global governance, one sub-theme looks particularly at how these private voluntary standards gain legitimate rule-making authority and the ability to successfully act as non-state regulators. Several bodies of work explore this field, particularly analysis by Bernstein and Cashore that builds upon their work on “non-state market driven” governance and that by Timothy Cadman that examines the legitimacy of private voluntary standards in the forestry sector.

In an article published in 2007, Bernstein and Cashore develop an analytical framework for determining how these non-state market driven systems might gain legitimacy. In addition to arguing that these

¹²⁴ Ibid. 877.

¹²⁵ This definition of democracy is borrowed from one of the studies by Doris Fuchs.

systems have gained legitimacy due to their rise during a time when neo-liberal thought and a shift towards “democratic governance” provided the normative rationale for their acceptance, Bernstein and Cashore also develop a three-phase framework through which these NSMD systems gain legitimacy. The phases include: 1) initiation; 2) building widespread support; and 3) political legitimacy. They examine the many actors including both firms and non-firms who are involved in the creation, implementation, and continuation of NSMD systems. Bernstein and Cashore identify two distinctive dimensions to “legitimacy” of NSMD systems, namely “functional legitimacy – the idea that organizations serve functions that constituents value” and political legitimacy, “which emphasizes a shared sense of community and norm generation.”¹²⁶

During the initiation phase, Bernstein and Cashore argue that NSMD governance systems must gain support from firms who are concerned about their brands, those who understand the business case for adopting better practices, and those that are already performing close to the expectations of the standard. These firms represent the key constituency that is vital for the long-term continuation of the system; hence their acceptance of the system is vital for its long-term legitimacy. As these firms agree with the core values inherent in the standard, this initial initiation phase builds a small network of organizations and businesses that can develop ties, build trust, share norms, and build better practices towards ameliorating societal problems. Building initial acceptance and uptake conforms with the need to develop functional legitimacy while the second, building trust, builds political legitimacy.

In the second phase, the systems build functional legitimacy by striving to go beyond these initial firms to attract other firms who have a much higher compliance cost. Rather than joining out of the understanding that they should do the right thing, these firms are often pressed to join through sustained pressure and boycotts from outside groups who increase the cost of non-compliance. At the same time, the existing systems face pressure to lower their standards or create parallel systems that make it easier for these lower performers to join. The second phase is likely to witness the creation of new industry-led initiatives that are less stringent than the initial ones created. The second phase is associated with further norm generation and with acceptance among a larger group that there is fundamental need to change their practices, although the level of change may be understood in a variety of ways. This could lead towards further community building and the use of NSMD systems to meet performance expectations.

During the final phase, there is a critical mass of actors within a given certain sector who form a community that recognizes and gives NSMD systems the legitimacy to govern their action to meet greater objectives. Firms work through these NSMD systems to meet their own strategic interests.¹²⁷

Taking this initial framework, Steven Bernstein further amplifies the idea of legitimacy to understand whether these systems can be legitimate governance mechanisms. In his 2010 study, Bernstein concludes that NSMD systems are one of the few non-state structures that are truly legitimate governance mechanisms. Bernstein’s frame of “good” global governance covers several attributes: “the

¹²⁶ Bernstein and Cashore, 2007, 8.

¹²⁷ Bernstein and Cashore, 2007, 15.

sum of collective understandings and discourse about material capabilities; knowledge (normative, ideological, technical, and scientific); legitimacy (the acceptance and justification of the right to rule by relevant communities); and fairness (... notions of mutual respect, equal treatment, representation).”¹²⁸ When these are plotted, they create four blocks necessary for good global governance:

- 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, referring 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.

According to Bernstein, NSMD governance systems (including most, if not all ISEAL standards) meet these criteria.

Cadman’s book on forestry examines the legitimacy of two types of institutions working in the forestry governance space: private voluntary standards-setting institutions (both civil society and industry led), and multilateral institutions (the United Nations) through a lens that the “democratic elements” of an organization lend the institution its legitimacy. He measures legitimacy against two variables: the level of “productive deliberation and meaningful participation” that exist in an organization’s governance structures. He applies the following indicators: inclusiveness, equality, resources, accountability, and transparency, to measure these levels.¹²⁹ Cadman argues that the more an organization is both deliberative and participatory, the more it is legitimate. Of the institutions he studies, the FSC, ISO TC 207 and 14000 series, the Programme for the Endorsement of Forest Certification Schemes (PEFC), and the United Nations Forum on Forests, he finds that the FSC, due its highly deliberative and participatory governance mechanisms, is also the most legitimate organization working on forestry governance.

Internal Democracy – Participation

The literature on the internal democratic elements of voluntary standards systems is fairly extensive, and examines participation, transparency, and accountability of private voluntary social and environmental standards systems. Studies have found that even with well-regarded private voluntary standards and certification systems, serious questions remain concerning power dynamics and true equity in participation. In particular, studies highlight the clear disparities between developing and developed country participants.

Klaus Dingwerth’s study looks explicitly at the procedures that the well-regarded institution, the Forest Stewardship Council, implements in order to ensure equity or inclusivity amongst different stakeholders from the North and from the South. Dingwerth finds that even though the FSC takes a proactive approach towards establishing mechanisms to ensure parity between Northern and Southern voices,

¹²⁸ Bernstein, 2010, 99.

¹²⁹ Cadman, 23.

including equal representation in the three chambers of the general assembly and equal representation on the board of directors, true empowerment and parity do not occur. Although the FSC is a membership organization, with membership bestowing voting power in the FSC general assembly, it does not necessarily lead to true empowerment. He finds that the majority of representatives from the South are individuals while most members from the North are organizations. Dingwerth finds that these Northern organizations reflect a more “organized” effort and are therefore “stronger than Southern representation.”¹³⁰ In addition, the categorization of “Southern” countries is borrowed from the United Nations criteria for Low, Middle, and High Income countries. Grouped into the “South” are both low- and middle-income countries, thereby including such countries as Poland, Estonia, and Croatia which further skews representation towards more middle- and high-income countries. Similarly, geographic locations are not equally represented, with Latin America dominating much of the Southern representation while Asia and Africa are under-represented. The discourse at the FSC is also dominated by Northern viewpoints around sustainable development and “liberal environmentalism” rather than the potentially more critical discourses of Southern participants.¹³¹

Similarly, Doris Fuch’s examination of democracy and governance within the agri-food private standards also highlights the shortcoming of power relations between standards setters (usually from the North) and local implementers from the South. She applies a “democratic” legitimacy lens to private retail food governance including both industry- and civil-society led private voluntary standards and certifications. Fuchs looks specifically at participation, transparency, and accountability¹³² as core variables in finding whether these private retail food governance systems are legitimate. Like Dingwerth, she finds that although the systems analyzed (including the MSC, ETI, and GlobalGap) have governance structures that strive to be democratic, they fail to be truly inclusive. This is often due to financial constraints and power asymmetries inherent that cannot be solved merely by creating a platform for participation. She finds that these asymmetries likely further the interests or minimize risks for Northern groups rather than empowering Southern groups.¹³³ These asymmetries are found not only in opportunities for participation processes of governance and decision-making bodies, but also during monitoring and evaluation of companies and businesses involved in the systems.

Luc Fransen finds that although multi-stakeholder initiatives are much better defined with clear sets of criteria and are more demanding than other collaborative standards (including those developed by IGOs, NGOs, and business associations), their structures are still dominated by Northern NGOs. Within monitoring and implementation processes, he finds that there is too much reliance on independent or

¹³⁰ Dingwerth, 63

¹³¹ Ibid. 64.

¹³² Fuchs uses the following definitions for participation, transparency, and accountability. Participation: “the inclusion of all actors who are potentially affected by the decisions to ensure their autonomy under law, according to procedural arguments.” Transparency: “refers to the provision of timely, reliable and comprehensible information on the governance and performance characteristics of standards.” Accountability: “is needed in terms of internal and external auditing of regulations and standards, and more crucially in terms of the relationship between the governance institution and the affected stakeholders of the general public.” 357-358.

¹³³ Fuchs, et.al. 364.

professional auditing groups, rather than a focus on social auditing, that utilizes local societal groups and a diverse number of stakeholders to monitor compliance that would drive greater empowerment.¹³⁴

Some of these problems related to participation and the empowerment of Southern partners lie in decisions around organizational management. Anne Tallontire's work on governance issues in the fair trade movement points out several key problems. She finds that the fair trade movement (particularly focusing on Fairtrade Labeling Organizations International (FLO International)) has moved towards a mainstreaming agenda that treats the problems of trade as technical issues that can be addressed through value chain improvements over the building of relationships between buyers and sellers. This shift towards branding and mainstreaming brings the movement greater success in terms of its market share, but it has come at the cost of relational forms of trade that is focused on creating close linkages and partnerships between producer and buyer that goes beyond market access and technical capacity building.¹³⁵ Instead of empowering local producers and involving them in the process, creating greater impacts and inclusivity, this more modular relationship means local producers – mostly in developing countries - are merely an entity at the bottom of the value chain.¹³⁶

Internal Democracy – Transparency and Accountability

The internal democratic structures of standards systems have also been studied through the lens of transparency. Graeme Auld and Lars Gulbrandsen study the transparency aspects of private voluntary social and environmental standards to determine the level of actual local stakeholder engagement in the process as well as the accountability and legitimacy of the programs. They consider transparency through two lenses: procedural transparency (which views transparency in the processes and information sharing as decisions are made), and outcome transparency (which looks at how the outcomes of decisions are publicized or what behavior changes have or have not occurred through the implementation of a system).

Auld and Gulbrandsen apply their framework to PVSES and certification systems in forestry and fisheries. They find that increased transparency has not necessarily led to greater decision-making power for a wider group of stakeholders (particular smaller, less organized, Southern stakeholders) because merely providing information does not at the same time include a delegation of power to different groups in the process of decision making.¹³⁷ However, they do find that the FSC and MSC have highly developed procedural and outcome transparency that allow both organizations to respond to criticisms and build in better accountability mechanisms to increase their credibility. Overall Auld and Gulbrandsen find that concerted transparency practices by the FSC and MSC do result in greater accountability of the systems because they allow the systems and those industries that are certified by the systems to be held to account for what they do.¹³⁸

¹³⁴ Fransen, 677-678.

¹³⁵ Tallontire, 2009, 1009.

¹³⁶ Tallontire, 2009, 1011-1012.

¹³⁷ Auld and Gulbrandsen, 2009, 1.

¹³⁸ Auld and Gulbrandsen, 2010, 115.

ISO

Separately, a recent article by Coline Ruwet looks at the impact of globalization on the internal governance dimensions of ISO and its move towards greater democracy. Ruwet's ISO study looks specifically at how, in the past few years, as ISO moves towards engagement in social and environmental management spheres, it has likewise begun to necessarily change its governance structure. Ruwet charts the history of ISO focusing on what he terms the "second generation" of standards – societal standards that look at a product's "performance, hazards, quality, or ... manufacturing process"¹³⁹ – led by such organizations as SAI, GRI, and others who develop their standards through multi-stakeholder processes. With the rise of these new processes, traditional ISO standard-setting processes came to be criticized. Hence, the ISO 26000 process was more representative with a much broader stakeholder representation than past processes.

Ruwet concludes by asking key questions about the future of ISO – namely whether it will move towards greater "democratization" in the European model that focuses on greater transparency and participation in the standards development process, or if it will adopt an American model focused on increasing efficiencies. One pathway will lead the organization towards greater "democracy" while the other will not.¹⁴⁰

External Democracy

The literature on the impact of private voluntary standards on democracy as a political system is not as plentiful as the literature on the *internal* democratic elements of standards systems. However there are a handful of studies that seek to understand what the rise of non-traditional governance mechanisms means for external democratic structures. These studies take two basic divergent points. One examines how the systems help to deliver greater democratic potential by creating new processes for involvement from new stakeholders (Meidinger and Courville). The other takes a more critical view of private voluntary standards systems as taking an overly technical approach while also utilizing processes with clear democratic deficits that result in an overall deficient accountable democratic system (Bendell) or undermine democratic regulatory processes (Wirth).

An early study by Sasha Courville examines PVSES and looks at how the social auditing and accountability components of the systems can be used as a model for greater stakeholder involvement and positive regulatory outcomes. She posits the power of social auditing not merely as a technical apparatus to measure compliance but as a key tool for certification bodies to "shape social change in the private sector ... [which becomes] a mission driven activity that can be effectively carried out by NGOs."¹⁴¹

The traditional idea of democratic governance rooted in elections and nation-states is not effective in understanding the international landscape today given the types of governments and states in

¹³⁹ Ruwet, 16.

¹⁴⁰ Ibid, 20.

¹⁴¹ Courville, 277.

existence. Hence, Courville subscribes to an alternative view of democratic governance 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.’”¹⁴² She posits the ability of private voluntary standards and certification systems to affect democratic governance through four lenses: trust, accountability, ownership, and reflexivity. Under these four criteria, she finds that overall, the two case studies involving SAI and FLO reflect many values around good governance that enhance democracy. The key aspects of these systems include:

- 1) A balance between the independence of third-party certification with processes for learning and improvement. The process further builds trust through the establishment of positive incentives for systems rather than a negative frame around blame.
- 2) Responsiveness to the concerns of supporters and critics, which are continuing to improve.
- 3) Meaningful participation from stakeholders with built-in mechanisms for learning.
- 4) The audits maintaining both a system of routine verification and systems for greater flexibility depending on the local realities. These are also complemented by sanctions for non-compliance.

Overall, Courville finds that the systems enhance democratic structures as they not only adopt key international norms and stimulate necessary public discourse, but they also perpetuate an internally democratic organizational model that offers an alternative to how things are normally done. She finds that bringing together different voices from NGOs to trade unions, social movements, producers, and companies to demonstrate their support for certain environmental or social values builds the necessary institutional frameworks that are vital for democracies to operate.¹⁴³

Errol Meidinger’s study on transnational governance takes a similar approach. He looks specifically at 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.¹⁴⁴ Meidinger defines democracy as “rule by the people” that can take either aggregative (where people vote for their laws or their representatives vote on laws) or deliberative (where people develop laws together or their representatives reason together on laws) forms.¹⁴⁵ He argues that the incorporation of local and state laws; the maintenance of strict internal procedures around deliberative decision making, participation, transparency, and accountability; and the competition between systems will drive democratization forwards. He finds that the competitive nature of these supragovernmental regulations furthers “democratic experimentalism,” with the more legitimate organizations – those that are effective and gain widespread acceptance – driving out lesser systems. The competition for public acceptance among 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

¹⁴² Ibid, 282.

¹⁴³ Ibid, 293-294.

¹⁴⁴ Meidinger, 513-514.

¹⁴⁵ Ibid. 523.

groups, while also arriving at processes, norms, and acceptance that are vital in the development of greater transnational democracy.¹⁴⁶

David Wirth and Jem Bendell, writing in separate papers, take a more critical view of these private voluntary standards and certification systems. David Wirth's 2009 article looks at ISO standards, particularly ISO 14001 and those in the 14000 series. Wirth argues that a core problem with the ISO standard is its relationship with government public policy. Wirth finds that, unlike public regulations that are, in theory, designed to be responsive to the greater public good, ISO standards are often designed by and are responsive to private interests who are "motivated primarily by market-drive factors, such as profitability."¹⁴⁷ In turn these could undermine the "democratic legitimate" public regulatory processes. Wirth writes: "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."¹⁴⁸

Jem Bendell finds deficiencies in how private voluntary standard-setting processes actually function to result not in greater accountability and participation from stakeholders but that in fact decrease their real power and damage democratic processes. In a paper written in 2005, Bendell finds problems with the standards-setting, implementation, and auditing processes of many standards and certification systems. Taking SAI for example, Bendell finds that the organization takes an overly technical approach to labour problems, one supported by the private sector rather than undertaking a necessary political analysis to understand and find long-term solutions to the problem.

He finds SAI's focus on professionalism as a key positive attribute involving objectivity, confidentiality, neutrality, reasonableness, internationality, and speed as being actually detrimental to affecting on the ground change. Many of these positive attributes in fact are negative when they are actually applied. Speed, objectivity, and internationality (the idea that a standard can be applied anywhere globally through the existence of global auditing offices) fail to provide a true understanding of local on-the-ground realities, nor do they provide the time necessary to allow for these on-the-ground realities to be adequately reflected in auditing processes. In the case of internationality, Bendell argues that most "global auditing firms" have not sufficiently trained local staff in social auditing and therefore still rely on UK- or U.S.-based auditors. He takes particular issue with the idea that auditing can be neutral because engaging with people will require some judgment of facts on the ground. By adopting ISO standards on management and auditing practices developed to ascertain the qualities of inanimate objectives, the auditors cannot effectively understand the complicated political realities.¹⁴⁹

At the same time, Bendell finds that because these initiatives, with support from corporations, are gaining support, other more local and perhaps more accountable initiatives may not be recognized or be

¹⁴⁶ Ibid. 533.

¹⁴⁷ Wirth, 88.

¹⁴⁸ Ibid. 89.

¹⁴⁹ Bendell, 2005, 367.

allowed to take off. He instead proposes a new shift in discourse that looks past technical dimensions of participation and dialogue towards one that implements “stakeholder democracy” wherein “all stakeholders in an organization or activity have the same opportunity to govern that organization or activity.”¹⁵⁰ To do so requires empowerment at the grassroots level.

From this work, Bendell and his co-authors in 2010 develop an even more nuanced approach titled “democratic accountability.” This latest paper examines three types of standards: the wide range of standards (both technical and less technical such as environmental management and corporate responsibility) developed by the ISO (an international private standard setting body); the WRAP (an industry-led initiative); and the FSC (a multi-stakeholder-led initiative). They argue that democratic accountability – “accountability to ordinary people and to the legal framework through which governance is effected” – should be used as the basis to analyze these different standards organizations.¹⁵¹

Bendell and his co-authors are most critical of the potential of ISO in its growth to “impose ... private standards on governments.”¹⁵² This is done through the WTO TBT process that turns to “relevant international standards” when determining whether certain practices are unnecessary trade barriers. As ISO has built up the reputation as the leader on international standards, the WTO will necessarily turn to ISO. Similar to David Wirth’s argument, the problem of the ISO, according to Bendell, is that it is overly dominated by business interests that lobby the body to develop more standards in new fields such as environmental or social issues. Although ISO 26000 sought to be more participatory, Bendell still finds that there were clear problems due to lack of funding to maintain true genuine wide-ranging participation during the process. He finds that ISO needs to be “reworked to adhere ... to value-based criteria for legitimate decision-making on societal issues ... enhanced stakeholder consultation will not suffice in the longer term.”

A second case study on WRAP (The Worldwide Responsible Accredited Production) identifies problems with the accountability of the organization to its beneficiaries in the South. In El Salvador, Bendell offers a case example where WRAP undermines local initiatives. El Salvador has a local organization working on labour standard auditing, GMIES – the Salvadoran Independent Monitoring Group. However, WRAP predominantly uses U.S.-based firms for its local auditing practices. As more and more companies sign onto WRAP, these local initiatives become undermined.

One of the major issues that Bendell finds is the predominance and control of the ISO, even in the FSC and ISEAL’s Code of Good Practice. He finds that ISEAL, by employing ISO standards for accreditation and management in standard setting, replicates a “technocratic, top-down model of standard setting [that]

¹⁵⁰ Ibid. 372.

¹⁵¹ Bendell, et al., 2010, 132.

¹⁵² Ibid. 139.

misses an opportunity to engage with issues of direct accountability to intended beneficiaries.”¹⁵³ In doing so, it does not further democratic processes.

Conclusion

This literature review has sought to understand how private voluntary environmental and social standards and public policy have been thus far understood. It is clear that the relationship is complex with governments playing a crucial role (either implicitly or explicitly) in the rise of private voluntary environmental and social standards. Although many scholars point to a “governance gap” as the impetus for the rise of private governance systems, especially the rise of PVSES, the reasons for their emergence are more complicated and are a result of neoliberal thought and deliberate government action to delegate regulatory roles to more actors. Authors also point to the fact that PVSES cannot be understood in the absence of the state and national law. These points reflect the need for governments to still play the primary role in regulation and that the success of many private voluntary initiatives depends upon government action. This is especially true as governments utilize PVSES and CSR policies to meet public policy objectives.

It should be noted that Benjamin Cashore and Steven Bernstein’s work takes a different approach, finding private voluntary social and environmental standards, which they term NSMD governance instruments (to which many of the ISEAL standards belong), to be different from other private governance instruments. As opposed to others, they find that these, independently of the state, are the only ones that meet the legitimacy and “good governance” criteria.

In the relationship between PVSES and the rules of the multilateral trading system, it is still unclear how they might be judged if they were to come before a formal dispute resolution panel. So far, there has been limited-to-no discussion in the TBT or SPS committees. However, as governments contemplate whether to officially recognize PVSES, PVSES may come up for greater scrutiny.

Finally, although private voluntary standards have been praised for their more “democratic” aspects, they still embody clear deficiencies. This is particularly true of ISO standards which have been criticized for the domination of industry interests at the cost of wider public interests. Even other, lauded institutions such as the FSC, however, have not been able to truly build the power dynamic necessary to guarantee equal participation from all stakeholders. Although they hold great promise, they also must continue to reform their practices to ensure that their internal democratic elements are upheld and that they contribute to the promotion of external democracy.

¹⁵³ Ibid. 151.

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