

## Balancing Public and Private Regulation

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### 1. Introduction, scope and methodology

Before the topic of balancing public and private regulation is discussed, it might be useful to elaborate somewhat on these terms. International (or transnational) private regulation (in the CSR arena), sometimes referred to as self-regulation (which seems to be a narrower term), has a very broad meaning and encompasses many different private regulatory frameworks.<sup>1</sup> Self-regulation is defined as a set of private norms that have been established, sometimes in collaboration with others, by those who are bound by these rules: their representatives or an overarching body and these norms being enforced.<sup>2</sup> Self-regulation might also be defined as a framework in which societal actors to a certain extent accept responsibility for establishing and/or applying and/or enforcing such rules, if applicable, within a legislative or legal framework.<sup>3</sup> The key actors in such regimes include both non-governmental organizations (NGOs) and enterprises.<sup>4</sup> However, governments may be involved as well.<sup>5</sup> Although private regulation in many instances has a self-binding effect, in many cases it also intentionally affects third parties.<sup>6</sup> International private regulatory regimes are international (or transnational) in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties. I focus on a specific kind of international private regulation: Voluntary Sustainability Standards (VSS). VSS will be elaborated in the next section. Public regulation is a broad concept as well. I refer to public regulation as regulation which is adopted by national or international regulatory bodies which enjoy direct or indirect (democratic) legitimacy under a national constitution or (international) treaty.

Balancing (international) private and public regulation is a broad and challenging topic, which has been discussed in literature in diverging disciplines for some time. However, some of the literature describes the blurring lines between public and private regulation and not so much whether private regulation is a viable alternative alongside public regulation (collaboration) or as a replacement thereof. I do not aspire to provide a holistic solution or view on the topic within the limits of this contribution. Rather, I focus on this topic in connection with Voluntary Sustainability Standards (VSS) in supply chains and derive examples from two initiatives: UTZ Certified (coffee, cocoa and tea) and FSC (sustainable forest management). Furthermore, this contribution focusses on legal issues in connection with regulatory governance, although some sidesteps

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1 See, e.g., L. Catá Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Regulator', (2007) 39 *Connecticut Law Review*, no. 4, pp. 1739, 1751-1760. The explanation in this contribution focuses on international private regulation which has regulatory intentions or effects on social and economic behaviour. Norms governing such matters as identity are not the subject of this research.

2 A. Overmars, 'Effecten van Gedragscodes: Twee Recente Cases', (2011) *Bestuurswetenschappen*, no. 4, pp. 14 and 16.

3 I. Giesen, *Alternatieve Regelgeving in Privaatrechtelijke Verhoudingen*, *Preadvies NJV*(2007), pp. 74-78.

4 C. Scott et al., 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', (2011) 38 *Journal of Law & Society*, pp. 1 and 3.

5 Government involvement is rare in connection with VSS, but occurs in other (CSR) frameworks such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

6 Cf. A. Ogus & E. Carbonara, 'Self-regulation', in F. Parisi (ed.), *Production of Legal Rules* (2011), pp. 228, 228-230. For example, in supply chain regimes the rights of third parties might be implemented or protected. See, e.g., F. Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures', (2013) 36 *Fordham International Law Journal*, pp. 1557, 1582, 1589.

to other disciplines are made.<sup>7</sup> Its objective is to identify criteria from a legal perspective in order to assess under which conditions VSS might be effective and could thus provide a viable alternative alongside public regulation or as a replacement thereof. First, it will explain the concept of VSS (in supply chains). Then it will touch upon some issues connected with balancing public and private regulation to assist the reader in understanding why it is necessary to assess the effectiveness of VSS (from a legal perspective) and to better understand (the origin of) the criteria proposed. Then it will focus on the criteria to assess the effectiveness of VSS from a legal perspective because research on VSS does not usually take that perspective. This contribution thus adds to the existing research. It applies these criteria to the two examples (UTZ Certified and FSC) and compares them; this is a comparison which has not been made in the existing literature either.

This paper compares FSC as an example of certification which is of assistance to importers of wood so as to comply with due diligence requirements in 'Western' public regulation and building on a long tradition, with UTZ Certified as a purely private and relatively new certification scheme. An interesting difference between these schemes is that FSC, unlike UTZ Certified, amongst other things certifies compliance with all public regulation (in countries of origin) to prevent illegal logging. The assessment of compliance with this public regulation is obviously endorsed by the government whose regulation it concerns. Thus the nature of the endorsement by public authorities differs from the endorsement of voluntary standards, like UTZ Certified, by (mainly 'Western') governments. Beyond that, the governance of both initiatives differs and this might also be of influence on effectiveness.

The reason for choosing FSC is that FSC as one of the older international private standards initiatives has gained considerable attention in the literature and the functioning thereof is well described. Therefore, from this some indicators in connection with its effectiveness from the above-mentioned perspective can be derived. I have chosen UTZ Certified because it has published a report on its functioning based on research conducted by third parties, which provides useful insights for this comparison.

This paper is based on a literature review in connection with VSS focusing on legal issues. Furthermore, several reports on the functioning and effectiveness of (amongst others) UTZ Certified and FSC have been consulted to provide useful data in connection with these two initiatives.

## 2. VSS in supply chains

VSS are usually implemented in supply chains through a contractual mechanism which entails certification by third parties.<sup>8</sup> Certification generally entails: (i) the establishment of standards, (ii) certification assessment for compliance with the standards, (iii) a certification seal or label, (iv) accreditation of the certifier by an accreditation body, and (v) compliance monitoring.<sup>9</sup> These contractual mechanisms may be used to show (human rights) due diligence in a supply chain.<sup>10</sup> An overview of these contractual relationships is depicted in the figure below. The blue arrows mark the contractual relationships. Relationships of a different nature shape this mechanism. The 'real' supply chain is governed by the contractual relationships between the producer, the trader and the retailer.<sup>11</sup> Supply chain contracts usually entail a perpetual clause. This clause

7 See for a broader approach including other indicators M. Scheltema, 'Assessing Effectiveness of International Private Regulation in the CSR Arena', (2014) 13 *Richmond Journal of Global Law and Business* 2014, no. 2, p. 263, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2442715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442715)> (last visited 23 November 2015).

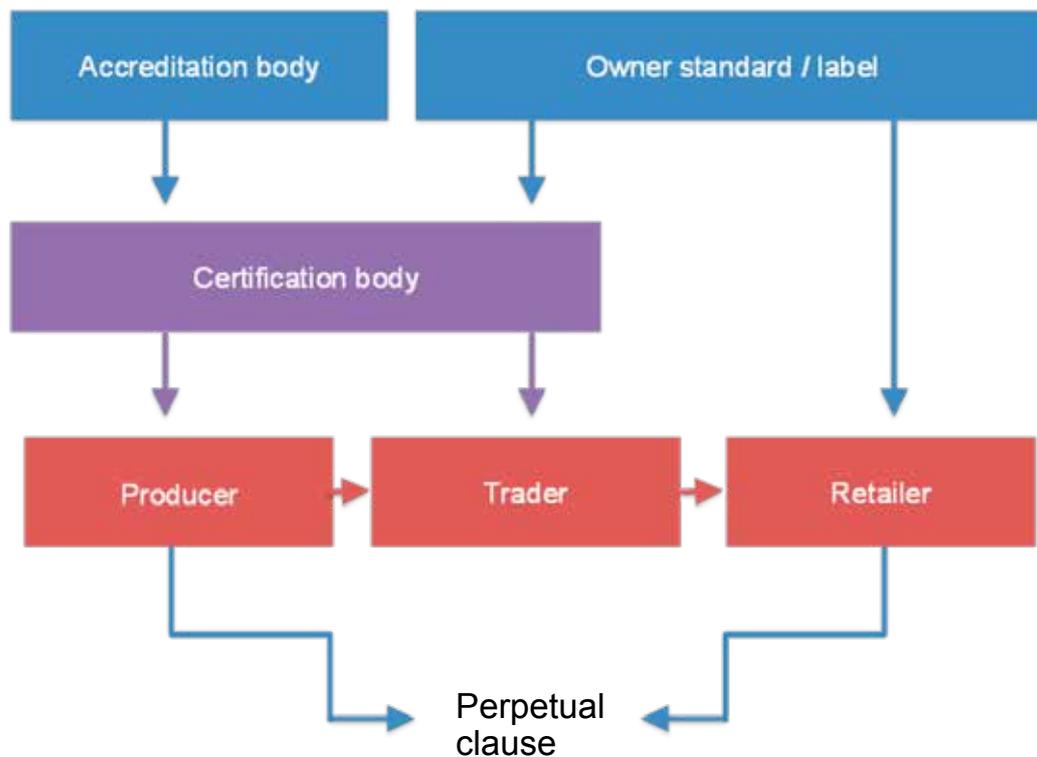
8 See Cafaggi, supra note 6, pp. 1561, 1566, 1580, 1601-1611 and in connection with food safety P. Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (2014), pp. 168 and 184 et seq. Sometimes certification is also prescribed by investors. Cf. Verbruggen, *ibid.*, p. 168. Cf. also on supply chain contracts (not being VSS) A.L. Vytupil, *Contractual control in the supply chain*, Ph.D. Thesis Utrecht University (2015), pp. 35-41 and 241-265.

9 See, e.g., A. Martinez Gandara, *The law and economics of eco-labels*, Ph.D. Thesis Erasmus University Rotterdam (2013), pp. 51-52 (in connection with ecolabels); G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund* (2012), p. 224 (on certification in general).

10 See on (human rights) due diligence in general e.g. SHIFT, *Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Businesses* (March 2015), <<http://www.shiftproject.org/publication/human-rights-due-diligence-high-risk-circumstances-practical-strategies-businesses>> (last visited 23 November 2015). Human rights due diligence might be prescribed by law in certain countries in connection with mining. See on this OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition* (2013), <[www.oecd.org/daf/inv/mne/mining.htm](http://www.oecd.org/daf/inv/mne/mining.htm)> (last visited 23 November 2015); O. Martin-Ortega, 'Human Rights Due Diligence for corporations: from voluntary standards to hard law at last?', (2014) 32 *Netherlands Quarterly of Human Rights*, no. 1, pp. 68-71.

11 The figure depicts a simplified supply chain, in reality these chains entail a higher number of intermediary parties.

obliges a contractual party to implement the relevant contractual requirements which it has to meet vis-à-vis its buyer in the contracts it concludes with its suppliers.<sup>12</sup> Certification is implemented in connection with the production of, for example, coffee, cocoa, tea and wood and in the supply chains to prevent an unauthorised diffusion of certified and non-certified commodities.<sup>13</sup> The certification body has contractual relationships with the producers and traders it certifies. These entities remunerate the certification body for its services. Furthermore, the certification body has a contractual relationship with the standard owner which allows it to provide certification services. This contractual relationship also implements the rules which govern the certification process. For example, it provides rules on the failure to meet the requirements for certification by the producer or trader.<sup>14</sup> Finally, the certification body has the permission of an accreditation body to provide certification services.<sup>15</sup> This accreditation body supervises all certification bodies in a specific country. Beyond that, a contractual relationship exists between the retailer and the standard owner if the retailer desires to make use of the (eco)label of the standard owner such as UTZ Certified or FSC. This contractual relationship usually entails a licence to use the trademark connected to the (eco)label and requirements for the proper use of the (eco)label.



VSS may vary from just (management) standards, threshold standards and continuous improvement standards to 'traffic light' systems.<sup>16</sup> A threshold standard requires the certified entity to meet all of the critical or mandatory criteria as well as a set percentage of the other criteria.<sup>17</sup> For example, FSC has developed principles and criteria which have to be complied with, but does not entail a continuous improvement system.<sup>18</sup> UTZ Certified has developed a continuous improvement model in which producer groups must meet entry requirements

12 Usually this clause is harnessed with a contractual penalty.

13 However, commodities of which the production as well as the supply chain have been certified are not always sold to the end-users with the (eco)labels of e.g. UTZ Certified, for example because the minimum content of certified commodities required to display the label on the product has not been met.

14 In these cases the certificate of a producer or trader might be suspended or eventually revoked.

15 This permission might be implemented in a contractual relationship or an administrative decision depending on the nature of the accreditation body. This body might be a private, semi-public or public entity, which varies per country.

16 Resolve, *Toward Sustainability, The Roles and Limitations of Certification* (2012), <[www.Resolve.org/site-assessment/files/2012/06/Report-Only.pdf](http://www.Resolve.org/site-assessment/files/2012/06/Report-Only.pdf)> (last visited 23 November 2015), p. 12 [hereinafter: Resolve Report].

17 Resolve Report, supra note 16, p. 12.

18 See for these principles and criteria <<https://ic.fsc.org/principles-and-criteria.34.htm>> (last visited 23 November 2015).

from the outset and additional criteria over time.<sup>19</sup> The Common Code for the Coffee Community (4C) scheme has a traffic light system in which 'red' criteria must be met and an average 'yellow' must be achieved overall.<sup>20</sup> Furthermore, some standards are developed to serve (providing reliable information to) consumers (B2C) and others to serve (providing reliable information to) business (B2B).<sup>21</sup> For example, UTZ Certified is aimed at consumers, while 4C is aimed at businesses. FSC performs both functions. Beyond that, 4C is considered to be a baseline standard whereas UTZ Certified is considered to be a best practice standard.<sup>22</sup>

### 3. Regulatory governance in connection with VSS

After explaining the functioning of VSS through contractual mechanisms, I will touch upon the concept of regulatory governance, which is related to balancing private and public regulation. Regulatory governance has a broad meaning and covers many aspects of (optimizing) regulatory regimes. It concerns, amongst other things, the topic of balancing public and private regulation and may be disaggregated into six components: (i) framing the regulatory agenda and setting objectives; (ii) formulating rules or norms; (iii) implementing rules within targets; (iv) gathering information and monitoring behaviour; (v) responding to non-compliance through sanctions and other forms of enforcement; and (vi) evaluating policy and providing feedback, including a review of the rules.<sup>23</sup> In terms of balancing public and private regulation components (ii)-(v) are of overriding importance and components (i) and (vi) play a role.

However, this contribution only provides an outline of the regulatory governance in connection with VSS and especially addresses legal issues. Issues (ii), (iv), (v) and (vi) seem to be the most important in connection with VSS. As has been elaborated above, VSS are deployed in supply chains. Supply chains raise difficult issues of leverage in terms of controlling CSR and the sustainability performance of (distant) suppliers which, unfortunately, cannot all be evaluated in this contribution. Hence, the topic of balancing public regulation and VSS is narrowed down to two topics: (i) are VSS effective as a means to control CSR and sustainability issues in supply chains from a legal perspective and, if so, (ii) which legal conditions have to be met for VSS to function?

### 4. Introduction of the effectiveness of VSS vis-à-vis public regulation

One might favour public regulation because VSS are often associated with a high sense of freedom to opt in or out of a certain sphere.<sup>24</sup> Parties who wish to join the regulatory bodies participating in the regime are free to do so. Thus the uptake of VSS might be rather limited or the requirements of the VSS might not be sufficiently strict.<sup>25</sup> Moreover, it lacks legitimacy (in the traditional sense) because of its detachment from traditional government mechanisms. Other reasons for preferring public regulation might be that VSS increase the risk of market disruption (due to a restriction of competition), free riders benefiting from the existence of VSS without adopting or implementing them, consumer detriment and insufficient protection against human rights violations and environmental damage.

That having been said, to date public regulation cannot be considered to be the silver bullet in the CSR arena, especially not on the international level. Research has revealed a considerable decrease in the

19 See <<https://www.utzcertified.org/aboututzcertified/standardcertification>> (last visited 11 January 2016).

20 Resolve Report, supra note 16, p. 12. See for a comparison of the 4C and UTZ Certified standards <<https://www.utzcertified.org/en/newsroom/utz-in-the-news/26584595-utz-certified-and-4c-standards-compared>> (last visited 23 November 2015).

21 IIED, *Building a roadmap to sustainability in agro-commodity production* (2013), <[www.aidenvironment.org/media/uploads/documents/201310\\_IFC2013\\_Building\\_a\\_roadmap\\_to\\_sustainability\\_Phase\\_I\\_report.pdf](http://www.aidenvironment.org/media/uploads/documents/201310_IFC2013_Building_a_roadmap_to_sustainability_Phase_I_report.pdf)> (last visited 23 November 2015), p. 3 [hereinafter: IIED Report].

22 IIED Report, supra note 21, p. 36.

23 See for these six components B. Eberlein et al., 'Transnational business governance interactions: Conceptualization and framework for analysis', (2014) 8 *Regulation & Governance*, p. 6, available at <<http://onlinelibrary.wiley.com/doi/10.1111/rego.12030/pdf>> (last visited 23 November 2015).

24 Cf. E.J. Balleisen & M. Eisner, 'The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Private Governance for Public Purpose', in J. Cisternino (ed.), *New Perspectives on Regulation* (2009), pp. 133 and 134, to be found at <[www.tobinproject.org](http://www.tobinproject.org)> (last visited 23 November 2015); D. Curtin & L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?', in C. Scott et al. (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (2011), p. 168.

25 IIED Report, supra note 21, p. xi.

number of treaties and an increase in private regulatory frameworks such as VSS since 2000 and thus the insufficiency of traditional international law.<sup>26</sup> Beyond that, adequate public regulation might be lacking or might be enforced rather poorly. VSS might bridge this gap to a certain extent.<sup>27</sup> Furthermore, public regulation is, by definition, involuntary in nature and might thus hamper compliance as opposed to standards which a company voluntarily adheres to, for example because of market demand. Beyond that, consensus exists over the inability of states to regulate global markets. Even where international standards exist, they are hardly uniformly implemented in public law. Therefore, for example, private (NGO-led) forestry protection regimes and the regulation of measures preventing and diminishing the effects of climate change are implemented.<sup>28</sup> Hence, VSS may fulfil national public policy objectives beyond the legal sphere of a nation state. The European Commission has also called for self- and co-regulation schemes in the area of CSR, as these are important means by which enterprises seek to meet their social responsibility.<sup>29</sup> Several other advantages and drivers of international private regulation are discerned,<sup>30</sup> which also apply in connection with VSS: (i) the need for harmonization and the reduction of transaction costs<sup>31</sup> and (ii) (timely) implementation of new techniques<sup>32</sup> and flexibility.<sup>33</sup>

From the foregoing one might conclude that VSS might be a viable alternative in supply chains.<sup>34</sup> However, it depends on the circumstances whether that holds true in practice. Therefore, it should be assessed which (public policy) objectives are strived for by certain VSS and whether the approach chosen (also considering the (interaction between) existing public regulation and private schemes) is likely to achieve these objectives.<sup>35</sup>

If public regulation on CSR topics is lacking in certain countries, governments are unable to agree on certain topics on a global level or diverging public regulation exists, VSS can be helpful to set global standards and may be preferable. A high rate of the adoption of international private standards through associational channels suggests the comparative organizational advantage of VSS over (domestic) public regulation.<sup>36</sup> Governments might ultimately see these private standards as guidance for adapting public regulation. This has occurred in the Ivory Coast and Ghana, where the governments now enforce quality criteria in connection with crops.<sup>37</sup> Standard systems may thus serve as a learning laboratory to test standards, verification systems, technologies, results, and other aspects on a reasonable scale, before broad mandatory application in public regulation.<sup>38</sup> They might also build consensus to help to identify key areas for improvement and be a driver for stakeholders to convalesce around a limited number of key issues. This enables governments to develop a focus on regulatory actions supported by stakeholders.<sup>39</sup>

26 E.g. J. Pauwelyn et al., 'International Informal Lawmaking: An Assessment and Template to Keep it Both Effective and Accountable', in J. Pauwelyn et al. (eds.), *Informal International Lawmaking* (2012), pp. 500-535.

27 Cf. C. Scott et al., 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', in C. Scott et al. (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (2011), p. 4.

28 F. Cafaggi, 'New Foundations of Transnational Private Regulation', in C. Scott et al. (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (2011), p. 26.

29 Communication from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25th 2011, COM(2011) 681, pp. 5, 9, 10. The Commission proposes a multi-stakeholder CSR platform in a number of relevant industrial sectors for enterprises, their workers, and other stakeholders to make public commitments on the CSR issues relevant to each sector and jointly monitor progress. See *ibid.*, p. 9.

30 Cafaggi, *supra* note 28, pp. 25-30; F. Cafaggi & A. Renda, 'Public and Private Regulation, Mapping the Labyrinth', (2012) CEPS Working Document no. 370, to be found at <[www.ceps.eu](http://www.ceps.eu)>, p. 6. See also Eberlein et al., *supra* note 23, pp. 9 and 10.

31 Cafaggi, *supra* note 28, p. 25; P. Utting, *Regulating Business via Multi-stakeholder Initiatives: a Preliminary Assessment*, UNRISD Research Project Promoting Corporate Environmental and Social Responsibility in Developing Countries: The Potential and Limits of Voluntary Initiatives (2001), p. 84. In connection with ecolabels, see Gandara, *supra* note 9, pp. 262-263.

32 Cafaggi, *supra* note 28, p. 27.

33 Balleisen & Eisner, *supra* note 24, pp. 133-134; Cafaggi, *supra* note 28, p. 47. Cf. Ogus & Carbonara, *supra* note 6, p. 234.

34 See on the means of implementing these standards in supply chains e.g. L. Vytupil, 'Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices', (2012) 8 *Utrecht Law Review*, no. 1, <http://doi.org/10.18352/ulr.186>, p. 155 and Vytupil, *supra* note 8. Cf. on private standards in supply chains Cafaggi, *supra* note 6, p. 1557.

35 See Scheltema, *supra* note 7, pp. 288-290.

36 C. Overdevest & J. Zeitlin, 'Assembling an experimentalist regime: Transnational governance interactions in the forest sector', (2014) 8 *Regulation & Governance*, p. 33.

37 IIED Report, *supra* note 21, pp. viii and 58.

38 Resolve Report, *supra* note 16, p. 85.

39 *Ibid.*

Obviously, private standards will especially be helpful if they are commensurate with local public legislation (and international obligations arising from e.g. treaties) and/or are accepted by local governments as a proxy to compliance with their own laws or an improvement of the local situation.<sup>40</sup> Thus, the relationship between VSS and national laws can be problematic. If one neglects this aspect numerous domestic structures might exist that frustrate, amplify, or reconfigure international private initiatives.<sup>41</sup> For example, the lack of a sufficient legal and management framework may hamper VSS.<sup>42</sup> Uncertainties over land tenure, property rights and community rights may undermine such private systems.<sup>43</sup> Corruption and poor enforcement might exacerbate this.<sup>44</sup> Furthermore, governmental regulation should not obstruct private standards. For example, Ghana used to have a state monopoly on the cocoa trade.<sup>45</sup> A state entity set the price for cocoa (regardless of prices on the world market). This system has partially been liberalized, but is still in place. As a result productivity is rather low and the results concerning sustainability are difficult to determine.<sup>46</sup> Therefore, VSS solutions for complex problems should also be adapted to local or regional legislation, conditions and concerns and preferably be negotiated with local governments in order to circumvent adverse interference by national regulation.<sup>47</sup>

Beyond that, governments have to remain vigilant as to whether these private regimes do not result in market disruption, consumer detriment and hamper trade.<sup>48</sup> For example, certification might exclude or complicate access to a certain market, because standards might favour producers in developed countries as they use production methods which are close to or compliant with these standards, whereas these methods are less common in developing countries.<sup>49</sup> The cost of certification might cause a further complication especially for smallholders.<sup>50</sup> However, VSS are only considered to raise trade barriers if they are not deployed in niche markets and are mandatory in practice.<sup>51</sup> In order to circumvent this obstacle 'Western' governments may negotiate these standards with the (developing) countries in which they are intended to be used. If an agreement with these countries is reached they should be WTO-compatible because they are voluntary and jointly agreed upon.<sup>52</sup> These issues are connected with market conditions and the effectiveness of VSS from an economic angle. As this paper focusses on legal issues these topics are not elaborated here.

Thus it depends on the (regulatory) conditions whether VSS are a viable alternative. Important issues are whether public regulation is lacking (on the global level), whether VSS are commensurate with local public regulation (if it exists) and are adapted to local conditions and concerns as well as to international obligations arising from e.g. treaties and whether they are accepted by local governments. If public regulation exists VSS might be a viable alternative too if the acceptance of (and thus compliance with) not too compelling public norms by market participants is rather poor and the public policymaker is aiming to incentivize the better performing part of the market to embark on higher standards and thus only desires to regulate the less performing part of the market. Thus it is highly inconceivable that VSS will replace public regulation altogether. It is more realistic to assume that public regulation and VSS will both play a role and should be aligned.

An important issue in connection with the foregoing is whether VSS themselves are effective. This should be assessed using an integrated multi-disciplinary (comparative) approach entailing legal, impact-

40 Overdevest & Zeitlin, supra note 36, p. 24.

41 T. Bartley, 'Transnational governance and the re-centered state: Sustainability or legality?', (2014) 8 *Regulation & Governance*, p. 95 in connection with timber regimes. Cf. Resolve Report, supra note 16, p. 89.

42 Cf. Resolve Report, supra note 16, p. 31.

43 Ibid.

44 Ibid.

45 IIED Report, supra note 21, p. 61.

46 Ibid.

47 Cf. Overdevest & Zeitlin, supra note 36, p. 24.

48 See Scheltema, supra note 7, pp. 346-348.

49 See e.g. Gandara, supra note 9, p. 159; G. Alvarez & O. von Hagen, 'When Do Private Standards Work? Literature Review Series on the Impacts of Private Standards; Part IV', ITC Technical Papers 21 (2012), available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2184314](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184314)> (last visited 7 December 2015), pp. 13-14.

50 Cf. K. Elliott, 'Is My Fair Trade Coffee Really Fair?', CGD Policy Paper 017 (2012), <<http://www.cgdev.org/content/publications/detail/1426831>> (last visited 7 December 2015), p. 7; Resolve Report, supra note 16, pp. 82 and 83. For example, RSPO has set up a Smallholders Support Fund to cover the cost of certification for smallholders. See IIED Report, supra note 21, p. 38.

51 Resolve Report, supra note 16, pp. 31 and 32. As a consequence several labels have addressed anti-trust issues and have explicitly laid down topics that can and cannot be discussed.

52 Overdevest & Zeitlin, supra note 36, p. 37.

assessment, legitimacy, governance and behavioural aspects.<sup>53</sup> Only effective VSS in the aforementioned sense are a viable alternative to public regulation in the just mentioned conditions.

As said, I will focus on the legal (effectiveness) perspective only. I will illustrate this perspective by comparing two examples of VSS: FSC (forestry) and UTZ Certified (cocoa, coffee and tea).

## 5. Effectiveness of VSS from a legal perspective

From a legal point of view, the effectiveness of international private regulation is primarily connected with its ability to materialize the objectives which this regulation aspires to realize.<sup>54</sup> These objectives may stem from spontaneous private regulation or government policy-induced private regulation.<sup>55</sup> However, unlike public regulation, it is often hard to assess whether these objectives have been achieved because it is unclear which specific and assessable objectives have been set. As for public regulation, this is typically clarified in the explanatory documents supporting the regulation. International private regulation often lacks such explanatory documents. As a result, the objectives of private regulation remain somewhat unclear. If private regulation aims at contributing to a better environment or human rights compatibility in doing business, it may be difficult to assess whether these objectives have been attained. Which environmental improvement suffices, and to what extent does the human rights situation need to improve? It is important to clarify the specific and assessable objectives that international private regulation aims to achieve.<sup>56</sup> Unless such objectives have been expressly articulated, it is rather difficult to assess whether international private regulation is effective in the sense that it achieves the objectives it aspires to realize.<sup>57</sup> In this respect, it is important that the private regulation and its supporting documents are publicized and made transparent.<sup>58</sup> Connected to this, it is important to create a transparent norm-setting process and to maintain sufficient autonomy on the part of the private rule-maker.<sup>59</sup> For instance, 'divergence of interests between the regulators and the regulated' might lead the members of the rule-setting body to prefer less desirable 'short-term actions [with no clear long-term objectives] that maximize their likelihood of being re-appointed'.<sup>60</sup>

However, this is not always true. If international private regulation is set to achieve specific public policy objectives, it might be possible to assess whether these exogenous objectives have been achieved.<sup>61</sup> This being the case, the international private regulation itself does not necessarily have to articulate such specific objectives. A legal effectiveness criterion, therefore, is whether international private regulation expresses specific and assessable objectives, which may be exogenous public policy objectives, and if so, whether they have been achieved. In this respect, international private regulation should be consistent with international public regulation or standards.<sup>62</sup> However, this does not mean that it should be consistent with all national

53 See Scheltema, *supra* note 7, pp. 277-283.

54 Scheltema, *supra* note 7, pp. 288-292; Cafaggi & Renda, *supra* note 30, p. 15. As far as the involvement of government is concerned, the origin of a legal system in a certain country might also be of influence on the CSR performance of corporations. See H. Liang & L. Renneboog, 'The Foundations of Corporate Social Responsibility', ECGI Finance, Working Paper No. 394 (2013).

55 Cafaggi & Renda, *supra* note 30, p. 12.

56 Cf. *Setting Social and Environmental Standards v6*, Iseal Alliance (December 2014), available at <<http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/standard-setting-code>> (last visited 16 December 2015), §§ 5.1.1 and 6.3.1 [hereinafter: ISEAL Code of Good Practice]. Private regulation should create, according to § 6.3 a logical framework. The indicators should not only indicate what they measure, but also how the indicators are measured and where the line is drawn between what is acceptable and what is not. See also MSI Evaluation Tool, The Institute for Multi-Stakeholder Initiative Integrity, <<http://www.msi-integrity.org>> (last visited 7 December 2012), p. 2 [hereinafter: MSI Evaluation Tool]. See also Principles for Better Self- and Co-Regulation and Establishment of a Community Practice, European Commission (Nov. 2, 2013), available at <<https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice>> (last visited 7 December 2015), Principle 1.4.

57 See Balleisen & Eisner, *supra* note 24, p. 136 (contending that such public policy goals should entail roughly measurable benchmarks).

58 Cf. ISEAL Code of Good Practice, *supra* note 56, § 5.7 (providing for the publication of the standards and the availability of supporting documents). See also MSI Evaluation Tool, *supra* note 56, p. 37. In this respect, the question might arise whether the private regulation and its supporting document should be publicized in multiple languages. In my opinion, this is not necessary per se because of problems of interpretation if the norms are translated into different languages and the question of which language is authentic arises. However, translations might be necessary for proper stakeholder engagement. See *ibid.*, p. 3.

59 Balleisen & Eisner, *supra* note 24, pp. 131, 134-35.

60 Cafaggi & Renda, *supra* note 30, p. 17.

61 Cf. Dimitropoulos, *supra* note 9, p. 244.

62 See also O.E. Herrnsstadt, 'Are International Framework Agreements a Path to Corporate Social Responsibility, (2007) 10 *University of Pennsylvania Journal on Business and Employment Law*, pp. 187, 196-201 (discussing International Framework Agreements on labor standards). Cf. Principles for Better Self- and Co-Regulation and Establishment of a Community Practice, *supra* note 56, Principle 1.5.

laws, because drafting such international private regulation is virtually impossible for a variety of reasons, including the fact that those national laws may be contradictory.<sup>63</sup>

Stemming from this, the private rule-maker has to assess whether effective private regulation exists in its particular field that achieves the public policy objectives that its regulatory framework is aiming at and in what respect it might contribute to the achievement of these objectives.<sup>64</sup> If international private regulation exists that effectively achieves the objectives aimed at by its regulatory framework, it should refrain from rulemaking, because this would only unnecessarily complicate the legal framework in its arena. Besides this, an effective private regulatory framework entails 'conflict of law' rules regarding cases in which this framework collides with other public or private regulation.<sup>65</sup>

Additionally, more precise and prescriptive commands generally result in better behaviour.<sup>66</sup> Because of this, the degree of precision has to be optimized.<sup>67</sup> It is important whether the international private regulation (i) entails clear norms/standards<sup>68</sup> that are interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) determines to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), and (iv) refers to applicable international norms and treaties (e.g. in the area of human rights or the environment).<sup>69</sup> Further, the specificity relates to the topics which the international private regulation is intended to cover and addresses whether it entails specific rules on all of these topics, such as international treaties on human rights, the environment, or in national regulation.<sup>70</sup> In order to achieve specificity and prescriptiveness, the existence of sufficient bureaucratic capacity and legal knowledge on the part of the regulator is required.<sup>71</sup> Effective international private regulation requires sufficient bureaucratic capacity and legal knowledge by the private rule-maker. If the private rule-maker does not have this capacity or knowledge, or is not willing to invest therein, it should refrain from participating.

After the drafting process, the work is not yet done. It is important that the norms are evaluated and, if necessary, reviewed on a regular basis. This evaluation should make use of past experiences with the norms, challenges of the norms as experienced by members or stakeholders, and should take into account grievances from stakeholders.<sup>72</sup> This process should be conducted in the same manner as the drafting process.

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63 In case international private regulation is not consistent with certain national laws, effective alternatives should be implemented regarding such countries. See, e.g., Utting, *supra* note 31, p. 86.

64 See MSI Evaluation Tool, *supra* note 56, p. 36. Cf. ISEAL Code of Good Practice, *supra* note 56, §§ 5.1.1, and 6.3.1. The public regulator might want to assess whether certain public policy goals are met as well. See Cafaggi & Renda, *supra* note 30, p. 29 (proposing joint assessment by the public and private regulator).

65 Cf. A. Fischer-Lescano & G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal on International Law*, pp. 999, 1018 (discussing the necessity and emergence of a new form of 'intersystemic conflict laws'); ISEAL Code of Good Practice, *supra* note 56, §§ 4.7, 6.4.1 (dealing with the situation in which international standards have to be adapted to local standards). Furthermore, § 4.7 establishes the duty to inform other standard-setting organizations that have developed related or similar international standards or a proposal to develop a new standard or revise an existing standard. It should also encourage the participation of this other standard-setting organization. These 'conflict of law' rules might stem from the private rule-maker, but also from governments.

66 See L. Kaplow, 'General Characteristics of Rules', in F. Parisi (ed.), *Production of Legal Rules* (2011), pp. 19, 20; A. Kolk & R. van Tulder, 'Setting New Global Rules? TNCs and Codes of Conduct', (2005) 14 *Transnational Corporations*, p. 9; B. Luppi & F. Parisi, 'Rules Versus Standards', in F. Parisi (ed.), *Production of Legal Rules* (2011), p. 43; Overmars, *supra* note 2, p. 17 (regarding codes of conduct); ISEAL Code of Good Practice, *supra* note 56, § 6.3.1.

67 See Kaplow, *supra* note 66, p. 19; Luppi & Parisi, *supra* note 66, pp. 43, 46-52 (arguing that the frequency of the application of a law is a crucial determinant of the optimal level of specificity).

68 Certain norms and standards might need to be adapted to local conditions. See Alvarez & von Hagen, *supra* note 49, pp. 21-22.

69 Cf. Kolk & van Tulder, *supra* note 66, pp. 13, 17 (regarding codes of conduct in the area of CSR with regard to child labour). However, concerning criterion (iv), some international norms only aim at governments and not at companies. Referral to these norms might complicate the enforceability of codes of conduct vis-à-vis companies. Furthermore, referring only to the norms of the home country of a company is less effective than a referral to international norms and preferably, if applicable, also to norms of host countries. See *ibid.* Cf. MSI Evaluation Tool, *supra* note 56, pp. 3, 23-25.

70 Cf. Kolk & van Tulder, *supra* note 66, p. 14.

71 Balleisen & Eisner, *supra* note 24, pp. 131, 134-35; see Alvarez & von Hagen, *supra* note 49, pp. 17, 18 (discussing sufficient capacity in general). Cf. Principles for Better Self- and Co-Regulation and Establishment of a Community Practice, *supra* note 56, Principle 2.5.

72 See, e.g., MSI Evaluation Tool, *supra* note 56, pp. 39-41 (requiring a review of internal governance, overall effectiveness, and awareness of affected population as well); Principles for Better Self- and Co-Regulation and Establishment of a Community Practice, *supra* note 56, Principles 2.1 and 2.3; ISEAL Code of Good Practice, *supra* note 56, § 5.8 (and 5.11) (demanding a regular – five-year – review and revision of standards to assess whether they meet their stated objectives). For this it is important that the rulemaking body is accessible to external parties and organizes regular meetings with stakeholders (if necessary, at different locations). See MSI Evaluation Tool, *supra* note 56, pp. 5-6.

Furthermore, in the rule-setting process, the rule-makers have to consider whether any possibilities for enforcement exist and whether the regulatory regime provides an effective conflict resolution mechanism. Last but not least, it is important to balance the disbursement of risks throughout the supply chain amongst the stakeholders involved.

Therefore, the legal avenue focuses on the objectives of VSS, the specificity and prescriptiveness of the standards, whether they provide ‘conflict of law’ rules in connection with other VSS or public regulation, the enforcement of private regulation, conflict resolution and the attribution of risks in supply chains.<sup>73</sup> Therefore, this avenue does not analyze the substantive private norms. It rather provides for ‘meta-rules’ on the formation and enforcement of such regulation and the resolution of conflicts in connection with these norms.

### 5.1. Goal attainment and specificity of VSS

In terms of goal attainment both FSC and UTZ Certified involve objectives they strive towards in terms of sustainability and social impact.<sup>74</sup> In order to assess whether these goals have been achieved (their actual impact) a clear and sufficiently selective objective is a necessary condition. However, having defined a clear objective does not mean that this objective has been attained. For example, unintended side-effects might occur. Therefore, next to clear objectives clear indicators/verifiers are needed to assess whether these objectives have been met. FSC does not provide for such indicators/verifiers. UTZ Certified deploys a list of 50 indicators to assess whether its goals have been achieved.<sup>75</sup> Furthermore, UTZ Certified has embarked on third party evaluations of the achievement of its objectives.<sup>76</sup> This impact study provides some evidence that at least part of its objectives have been met.

In terms of the specificity and prescriptiveness of the norms, UTZ Certified seems to involve more specific and prescriptive norms.<sup>77</sup> For example, it differentiates between different types of crops and provides for different VSS for coffee, cacao and tea. Furthermore, it entails, for example, more precise and practical commands regarding crop protection and transport. FSC seems to provide more general norms and some forestry experts say that these are not well adapted to different local circumstances and production processes. Nonetheless, both initiatives provide supporting (training) documentation to explain (the proper use of) the VSS.

### 5.2. Regular review

Both initiatives evaluate and review their VSS. Documentation which is (publicly) available reveals that FSC evaluates and reviews its VSS on a five-year basis.<sup>78</sup> However, as FSC refers to all local (public) norms (Section 1.5) this part of their VSS cannot be easily reviewed because local governments need to be engaged in and consent to this evaluation and review. Especially if local norms have been negotiated with Western countries (local forestry standards have been negotiated by many countries of origin and the EU)<sup>79</sup> it might be a difficult and lengthy process to review these norms. UTZ Certified states that it evaluates and reviews its VSS every five years.<sup>80</sup> As UTZ Certified refers to specific local public norms only (e.g. on labour conditions,

73 Scheltema, supra note 7, pp. 288-293.

74 Cf. on the (type of) norms they have implemented in connection with the social, environmental and economic dimension, J. Potts et al., *The State of Sustainability Initiatives Review* (2014), <[www.iisd.org/pdf/2014/ssi\\_2014.pdf](http://www.iisd.org/pdf/2014/ssi_2014.pdf)> (last visited 7 December 2015), pp. 71, 73 and 76 [hereinafter: SSI Review]. The human rights coverage of UTZ Certified is observed to be better than that of FSC. See SSI Review, p. 72. Furthermore, on environmental issues like water and energy indices both seem to entail less stringent norms than multiple commodity initiatives. See SSI Review, p. 80. Furthermore, the importance of climate change is an area for improvement in all initiatives. See SSI Review, p. 85.

75 See for these indicators <[www.utzcertified.org/images/stories/site/pdf/downloads/impact/4.%20utz%20certified%20\\_program%20indicators%20version%202.pdf](http://www.utzcertified.org/images/stories/site/pdf/downloads/impact/4.%20utz%20certified%20_program%20indicators%20version%202.pdf)> (last visited 7 December 2015).

76 *UTZ Certified Impact Report, January 2014, combining the results from 24 external impact studies and data from UTZ Certified*, <<https://utzcertified.org/en/mediacenter/reports-brochures/26582894>> (last visited 7 December 2015) [hereinafter: Impact Report].

77 However, the prescriptiveness of FSC norms has increased since 2008.

78 See <<https://ic.fsc.org/second-consultation-on-cw-documents.712.htm>> (last visited 7 December 2015).

79 E.g. the VPAs which the EU has concluded. See Overdevest & Zeitlin, supra note 36, p. 36.

80 UTZ Certified states that it conducts a five-year evaluation/review of its VSS. See <<https://www.utzcertified.org/en/aboututzcertified/monitoring-evaluation>> (last visited 11 January 2016).

minimum wages and national cocoa quality standards)<sup>81</sup> the review issue that FSC encounters does affect UTZ Certified to a lesser extent.

### 5.3. Conflict of law rules

It is important to involve 'conflict of law' rules which indicate which rule/standard will prevail if it contradicts other public or private regulations/standards. Such 'conflict of law' rules might entail the prevalence of obligatory public regulation over VSS if a clear conflict exists and the objectives of the VSS are not fundamentally challenged. If they are, the choice might be either to negotiate with the government concerning the regulation that it originates from if the exercise of leverage is viable, or to simply withdraw. If the obligatory public regulation is more general, does not relate to a specific issue that VSS cover or imposes lower standards and no clear conflict between the VSS and the public regulation exists, VSS might prevail. As far as possibilities exist to deviate from public regulation in (contractual) agreements VSS might prevail too. If a conflict exists between different VSS or between VSS and other private regulation, the most specific standard might prevail and if the standards are equally specific the standard most adequately adapted to the local situation or crop at hand should prevail. A solution connected to 'conflict of law' rules is the opportunity for VSS to mutually recognize (and collaborate with) each other and align standards where necessary and possible.<sup>82</sup> This might also increase the leverage of VSS vis-à-vis governments to solve issues they are unable to tackle alone. Furthermore, VSS might improve the applicability of standards to different contexts in sourcing countries, for example by accommodating different types of organizations.<sup>83</sup>

Conflict of law issues might also arise (and diminish the effectiveness of VSS) when VSS compete with public arrangements as is the case in connection with FSC. The EU has entered into Voluntary Partnership Agreements (VPAs) on the prevention of illegal deforestation.<sup>84</sup> The VPAs offer an opportunity for the EU and developing countries to participate in a jointly governed system of legality assurance, while imposing obligations on European timber firms to exercise due diligence in respecting local legal standards.<sup>85</sup> Legality assurance in terms of complying with the due diligence requirement entailed in public regulation can be more or less provided by VSS as well. However, whereas the legality requirements which are necessary to exercise due diligence are less stringent than the requirements laid down by VSS, such as FSC, this discourages participation in VSS if one merely seeks to comply with the legality requirement.

The need for 'conflict of law' rules becomes salient if, as the FSC does, it requires compliance with national laws (of the country of origin, Section 1.5)<sup>86</sup> and prescribes (in Section 4.7) the protection of indigenous sites. A deforestation permit in Indonesia requires complete deforestation of the grounds to which the permit pertains and is revoked if this requirement is not met.<sup>87</sup> Therefore, if indigenous sites are part of the grounds included in the permit national law does not permit the preservation thereof. FSC does not entail rules on how to address this issue. If the aforementioned 'conflict of law' rules would have been implemented, the choice would have been (as the FSC standards are fundamentally challenged) to negotiate with the Indonesian government or to withdraw. Furthermore, it is difficult to certify whether all national laws are complied with. In many instances a plethora of rules are applicable and it is difficult for certifiers to assess per country which laws might be relevant for a company. Beyond that, it might be disputed which rules do and do not apply and the meaning of certain rules might be unclear. As the starting point should be that a company operating in a certain country should comply with national laws it seems preferable, as UTZ Certified does, to certify specific national regulation only or even to refrain from that.

81 See for the cocoa standards requirement Code of Conduct Cocoa CO.B.7, <<https://www.utzcertified.org/attachments/article/26584809/EN%20UTZ%20Code%20of%20Conduct%20Cocoa%20Module%202014.pdf>> (last visited 11 January 2016).

82 Cf. IIED Report, supra note 21, p. 70.

83 Ibid.

84 The EU has negotiated these bilateral VPAs with developing countries in order to establish privately monitored licensing systems for the export of legally harvested wood to the European market. See Overdevest & Zeitlin, supra note 36, p. 36.

85 Ibid., p. 28.

86 Thus the certification of this standard de facto entails public supervision (especially if government agencies do not supervise or do so very infrequently).

87 See e.g. IIED Report, supra note 21, p. 43.

Other conflict of law issues are conceivable as well. For example, rather strict labour laws exist in the Brazilian coffee sector. However, these laws are considered to be too strict and compliance is rather poor. The Brazilian government tolerates this situation unlike VSS which require compliance with national labour laws. As a result Brazil is more sustainable in theory in terms of social conditions than many other coffee-producing countries, but this is hard to certify due to a lack of compliance with labour laws in practice.<sup>88</sup> This affects both FSC and UTZ Certified and requires rules or guidelines on responsible conduct in such conditions. Furthermore, a commodity exchange existed in Ethiopia which did not allow certified products to be sold as trading was anonymous and other means of trading were considered to be illegal. This problem is currently being addressed with a two-track coffee trading system, although full traceability is still not guaranteed.<sup>89</sup> Thus it is difficult to acquire UTZ Certification for Ethiopian coffee.

However, FSC does not entail 'conflict of law rules'. UTZ Certified provides some guidance on 'conflict of laws' but does not entail a holistic framework to address this issue. For example, it stipulates that the minimum working age is 15 or a lower age in case national regulation determines a lower age.<sup>90</sup> That said, it does not elaborate what should be done if the working age determined in local regulation is rather low (e.g. 10 years) and the objectives of UTZ Certified are fundamentally challenged. Furthermore, UTZ Certified refers to specific provisions in local regulation, for example on minimum wages for workers and national cocoa quality standards.<sup>91</sup> Although it does not entail an obligation to comply with all national laws in a certain country, it endorses these norms, especially if the national standard is higher than the UTZ Certified standard.

#### 5.4. Grievances

A further aspect by which to compare FSC and UTZ Certified is the way in which grievances are (effectively) dealt with.<sup>92</sup> FSC entails a requirement of establishing or participating in a company-based grievance mechanism (Section 4.6). However, having a company-based grievance mechanism as such does not indicate an effective resolution of grievances, but is of course a necessary ingredient to start with.<sup>93</sup> Moreover, FSC imposes no further requirements that the grievance mechanism has to comply with, not even the requirement that a written procedure should exist and be communicated to the relevant stakeholders. Therefore, it might be unclear to stakeholders that a mechanism actually exists and the procedure might be shaped at the discretion of the company. It might even change with every complaint. However, research conducted in Africa reveals that only one out of eight FSC certified logging companies whose grievance mechanisms have been evaluated lacks a written procedure.<sup>94</sup> That said, FSC does not entail an escalation mechanism (for example, to itself) if the company-based grievance mechanism does not result in a resolution of the conflict.<sup>95</sup>

UTZ Certified has developed its own grievance mechanism, which amongst other things involves the recording of complaints (Section 2.C of the code of conduct). This mechanism is elaborated in the UTZ Certified Complaint Handling Procedure.<sup>96</sup> Its mechanism involves an escalation procedure to UTZ Certified and even independent third party involvement if UTZ Certified itself is part of the conflict. This mechanism seems to be more independent than the company-based mechanisms prescribed by FSC and might therefore be more effective. However, its disadvantage might be that it is unclear whether complaints will be dealt with at the head office of UTZ Certified or at a local level (the latter seems to be more effective) as well as whether stakeholders confide in this mechanism, because it, for example, lacks (a referral to) a clear procedure and information on possible outcomes.<sup>97</sup>

88 Ibid., p. 59.

89 Ibid., p. 61.

90 Section 79 of the General Code.

91 See for the cocoa standards requirement Code of Conduct Cocoa CO.B.7, <<https://www.utzcertified.org/attachments/article/26584809/EN%20UTZ%20Code%20of%20Conduct%20Cocoa%20Module%202014.pdf>> (last visited 11 January 2016).

92 See on the importance of effective grievance mechanisms e.g. IIED Report, supra note 21, p. 36.

93 See for an elaboration Scheltema, supra note 7, pp. 331-339.

94 The data on this research have been kindly provided by Paolo Cerutti, a researcher in the CIFOR and EU Pro-Formal project, <[www.cifor.org/pro-forma](http://www.cifor.org/pro-forma)> (last visited 7 December 2015).

95 As has been noted in the just mentioned research the issue is sometimes referred to a government agency in such circumstances.

96 <[https://www.utzcertified.org/images/stories/site/pdf/special/101012\\_UTZ\\_CERTIFIED\\_Complaint\\_handling\\_procedure.pdf](https://www.utzcertified.org/images/stories/site/pdf/special/101012_UTZ_CERTIFIED_Complaint_handling_procedure.pdf)> (last visited 7 December 2015).

97 See on the requirements for and the effectiveness of such (non-judicial) grievance mechanisms e.g. Scheltema, supra note 7, pp. 331-339.

## 5.5. Enforcement

Both FSC and UTZ Certified entail (third party) certification. Certification might be helpful and is a common tool to monitor/support compliance with VSS (as well as public regulation).<sup>98</sup> FSC has certified a total of 184,371,469 ha of forests in 80 countries (involving 1,294 forest management certificates and 27,923 FSC chain of custody certificates (connected to supply chain certification)) as per 2014.<sup>99</sup> However, FSC does not certify itself but accredits certification bodies to do this.<sup>100</sup> Conversely, UTZ Certified issues the certificates itself, but engages independent third parties to monitor compliance with its standards.<sup>101</sup> UTZ Certified certifies 715,648 MT of coffee globally (from 212,914 smallholders),<sup>102</sup> 534,614 MT of cocoa (from 256,111 smallholders) and 65,132 MT of tea (from 30,757 smallholders).<sup>103</sup>

Although certification seems to be a thorough (contractual) system to monitor compliance, the competence of auditors is a major challenge for both FSC and UTZ Certified. To date, these auditors are mainly based in Western countries and by and large have limited capabilities to understand local social and ecological contexts in developing countries and other countries from where the products originate.<sup>104</sup> Conversely, the latter countries do not have enough auditing work to invest in auditor training and professional development.<sup>105</sup> Shared auditor services might bridge this gap as FSC and UTZ Certified might not have the economy of scale to engage (and train) the skilled auditors they need.<sup>106</sup> A further challenge is the integrity and conflict of interests of auditors.<sup>107</sup> This might even result in challenging decisions of certification bodies in national courts by (mainly) NGOs.<sup>108</sup> Faulty certification may result in the liability of the certifying body and in some instances ultimately a revocation (or annulment) of the licence to certify.<sup>109</sup> Besides this, procedural aspects of certification (such as a review of the documentation) might prevail over assessing the actual improvement of quality in an organization or changes in environmental impact.<sup>110</sup> Beyond that, the trustworthiness of certification depends on the length of the validity period of the certificates and the number of (additional) checks.<sup>111</sup>

These issues are connected to certification by both FSC and UTZ Certified. However, certification endorsed by legal requirements (FSC) might increase the demand and therefore increase the challenges connected with engaging skilled auditors. Conversely, as local public norms are involved, this might pave the way for (engaging skilled or educating) local auditors in the country of origin. That said, as more (local) auditors and certification bodies are involved the challenges of integrity and conflict of interest issues increase. To date UTZ Certified is mainly connected to Western standards. Thus the challenge of engaging skilled auditors is less salient. However, as Western standards are certified, it might be harder to appoint and educate local auditors.

98 See on the importance of safeguarding the credibility of claims about compliance with VSS the IIED Report, supra note 21, p. xi.

99 <<https://ic.fsc.org/preview.facts-and-figures-november-2014.a-3810.pdf>> (last visited 11 January 2016).

100 See for a list of accredited FSC certification bodies <<http://www.accreditation-services.com/archives/standards/fsc>> (last visited 7 December 2015).

101 <<https://www.utzcertified.org/en/aboututzcertified>> (last visited 7 December 2015).

102 The largest quantity of certified coffee is sold as UTZ Certified. However, 4C covers the largest amount of certified coffee produced. See SSI Review, supra note 74, pp. 164, 167 and 176.

103 In 2012/2013, see Impact Report, supra note 76, pp. 49-55. Furthermore, a considerable number of brands are making use of UTZ Certified. See <[https://www.utzcertified.org/en/?option=com\\_brandsdetails&partners-and-brands&task=filter&country=All&product=2](https://www.utzcertified.org/en/?option=com_brandsdetails&partners-and-brands&task=filter&country=All&product=2)> (last visited 7 December 2015). See also SSI Review, supra note 74, pp. 146 and 147.

104 Resolve Report, supra note 16, pp. 15 and 16. Cf. IIED Report, supra note 21, pp. xi, xii, 39, 47, 68 and 69. Furthermore, the ability to assess non-compliance is also dependent on gender and the specific training of auditors. See J.L. Short et al., 'Monitoring the Monitors: How Social Factors Influence Supply Chain Auditors', Harvard Business School Working Paper No. 14-032 2014 (June 4, 2015), available at: <<http://ssrn.com/abstract=2343802>> (last visited 7 December 2015).

105 Resolve Report, supra note 16, pp. 15 and 16.

106 Ibid., p. 16.

107 Ibid. See on this extensively Short et al., supra note 104, who observe that the number of violations found decreases if the same auditor certifies a company over a longer period, and in connection with food safety Verbruggen, supra note 8, pp. 206-208, 263 and 264.

108 Resolve Report, supra note 16, pp. 23 and 24.

109 Before revocation other less severe sanctions are viable such as warning letters, adverse publicity, the reimbursement of costs, notification to the accreditation body, a licence suspension and a fine. See in connection with food safety Verbruggen, supra note 8, pp. 199-202.

110 But cf. Utting, supra note 31, p. 93 (concerning the cost of certification). It should be noted that certification is not provided for in connection with the ISO standard on CSR, the ISO 26000 standard. See G. Schouten, *Tabling Sustainable Commodities through Private Governance, Processes of Legitimization in the Roundtables on Sustainable Palm Oil and Responsible Soy 68*, Ph.D. thesis, University of Wageningen (2013), pp. 132-33 (concerning the effectiveness of certification in connection with global agri-food standards).

111 Cf. SSI Review, supra note 74, p. 55.

In terms of the effectiveness of enforcement and the sanctioning of (non-compliance with) VSS a difference exists between FSC and UTZ Certified, because FSC assists in complying with public regulation in the EU and US.<sup>112</sup> This regulation involves ‘due diligence’ or ‘due care’ requirements that timber importers are expected to exercise in relation to VSS which entail obligations to comply with national laws in countries of origin (e.g. Indonesia) to prevent illegal logging.<sup>113</sup>

Article 4 of the EU Timber Regulation states that ‘certification or other third party verified schemes that include verification of compliance with applicable legislation may be used in the risk assessment procedure’.<sup>114</sup> Due diligence as required by this provision can be shown by (i) the possession of a VPA export licence, (ii) the establishment of a private risk management system, with full traceability, risk assessment, and risk mitigation procedures or (iii) participation in a recognized monitoring scheme, based on an independent verification of compliance with the standards required by the VPAs (mainly contained in national (forestry) legislation).<sup>115</sup> Therefore, the EU Timber Regulation provides for the public recognition of VSS such as FSC, subject to a comparative assessment of their legal standards, monitoring systems, and verification arrangements.<sup>116</sup>

The US has embarked on a campaign against illegal logging with the 2008 extension of the US Lacey Act from fish and wildlife to plants.<sup>117</sup> This amended Act, which dates back to 1900, declares it a criminal offence to import, trade, or otherwise handle any timber product harvested in violation of the laws applicable in the country of origin.<sup>118</sup> Penalties depend on the level of intent of the violator and the extent to which ‘due care’ was exercised to avoid foreseeable risks of trafficking in illegal products.<sup>119</sup>

Both the EU and US systems involve public and private supervision (and sanctioning), which obviously need to be aligned, for example in connection with the accumulation of sanctions and information sharing.<sup>120</sup>

However, VSS such as UTZ Certified are partially endorsed by public regulation in another way. For example, the US, the UK, New Zealand, and Australia have endorsed public guidelines on environmental claims, enforced by the public trade or environmental authorities.<sup>121</sup> If an environmental claim is made based on a (private) ecolabel which indicates compliance with certain VSS, the public authority might ask for sufficient documentary evidence to support this claim.<sup>122</sup> In specific cases, legislation on misrepresentation might also be of use to redress false environmental claims made by ecolabels by means of public enforcement.<sup>123</sup> For example, self-regulatory codes connected to unfair trade practices are encouraged by the EU. Moreover, Member States of the EU are required to penalize businesses’ abuse of self-regulatory codes through legislation.<sup>124</sup> That said, this type of public regulation does not endorse VSS as such but aims at preventing any abuse of (the labels connected to) them. Therefore, public enforcement seems more remote from the enforcement of VSS than the due diligence requirements. Only the latter (at least partially) address the ‘free

112 It is observed more broadly that few VSS have the internal expertise to implement robust monitoring and evaluation systems. See <<http://thecosa.org/wp-content/uploads/2014/01/The-COSA-Measuring-Sustainability-Report.pdf>> (last visited 7 December 2015), p. 72 [hereinafter: COSA Report].

113 Cf. also Resolve Report, supra note 16, p. 79.

114 Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010, pp. 23-34. See for this forest certification and regulation Bartley, supra note 41, p. 97; Overdeest & Zeitlin, supra note 36, p. 28.

115 Overdeest & Zeitlin, supra note 36, p. 38.

116 Ibid., p. 29.

117 Ibid., p. 40.

118 Ibid.

119 Ibid.

120 That said, this is a major challenge. See e.g. Scheltema, supra note 7, p. 331; Verbruggen, supra note 8, pp. 251 and 286-288 (in connection with food safety).

121 Gandara, supra note 9, pp. 215-16. The guidelines resemble the ISO 14021 standard on environmental claims. See *ibid.*, pp. 214-15. Absolute or wide ranging claims such as ‘environmentally friendly’ or ‘100% recyclable’ are considered to be deceptive per se. *Ibid.*, p. 216.

122 Gandara, supra note 9, pp. 216-338. However, Gandara contends that the current regulation is insufficient to deter greenwashing. *Ibid.*, pp. 343, 348.

123 *Ibid.*, p. 226. See on the importance of addressing this issue *ibid.*, p. 38.

124 L. Enneking, *Foreign direct liability and beyond*, Ph.D. thesis Utrecht University (2012), pp. 455-459; Scott et al., supra note 4, pp. 8-9. See, e.g., Council Regulation 2005/29, Unfair Trade Practices Directive, Art. 6(2)(b), OJ L 149, 11.6.2005, p. 22, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>> (last visited 7 December 2015). Furthermore, the Dutch Financial Markets Authority supervises whether the annual reports of companies listed at the Dutch stock exchange entail the main elements of CSR issues that are relevant to the company. See Dutch Corporate Governance Code, Principle II.1.2.d, available at <<http://commissiecorporategovernance.nl/download/?id=606>> (last visited 7 December 2015).

rider' issue. Free riders benefit from VSS without adopting or implementing them.<sup>125</sup> One of the ways in which they might benefit is the enforcement of VSS in a certain market against entities which have adopted this regulation but violate it.<sup>126</sup> Because of the existence of VSS which are certified and enforced publicly by private entities, consumers, for example, might (erroneously) trust that all market participants will comply with these VSS and to be monitored by this private regime. Therefore, public sanctioning of non-compliance is important for market actors which will only comply if their competitors are not gaining from this (because they want to preserve a level playing field). For them it is necessary that governments address the issue of free riders. If free riders are sanctioned by a government an incentive to comply exists.<sup>127</sup> Conversely, if public enforcement or the national legal environment is unclear, corrupt or opposes the objectives of certification, certification is severely hampered.<sup>128</sup>

Furthermore, VSS like FSC and UTZ Certified are deployed through contractual mechanisms in supply chains, for example by ultimately terminating the contract with a supplier and revoking the certificate.<sup>129</sup> This might pave the way (if necessary) for contractual enforcement through state courts (or in arbitration) and by public means if the decision rendered by the courts or arbitral tribunal is not complied with.<sup>130</sup> However, (ex post) sanctioning seems to be a measure of last resort. Standard owners and certification bodies rather rely on ex ante controls to harness and enhance compliance by certified companies.<sup>131</sup> Contractual provisions might play a role in achieving this. The standard owner might for example prescribe the use of bonuses in the (certified) supply chain depending on compliance and sustainability performance in its licensing agreements.<sup>132</sup>

Another example of public enforcement when there has been a violation of private standards is connected to trademark law. Both FSC and UTZ Certified are registered trademarks. The use of the mark is granted to every applicant who meets the VSS of FSC or UTZ Certified and is certified.<sup>133</sup> If a company advertises a product referring to such a label while it has not been granted permission to use the certification mark, all usual means to redress the infringement of a trademark might be invoked by FSC or UTZ Certified. The same applies if a company is granted the use of the certification mark but fails to meet its standards or is no longer certified, while the permission to use the mark may then be revoked. However, decisions from state courts on trademark infringements might not always provide effective access to public enforcement. It depends on the legal situation, and especially the implementation of the rule of law, in a specific country.

Last but not least, reputational risks emerging from liability for violation of environmental or social (workers' or human rights) norms might be reduced by participating in FSC or UTZ Certified and complying

125 See in connection with Fairtrade labels Elliott, supra note 50, p. 17.

126 Ogos & Carbonara, supra note 6, p. 231.

127 See also IIED Report, supra note 21, p. 45. E.g. Brazil has chosen to revise and enforce its forestry laws in order to put compliance within reach for the majority of producers and allowing a gradual convergence towards compliance with national law and sustainable production standards. See IIED Report, *ibid.*, p. 59.

128 *Ibid.*, p. 54.

129 Other less severe sanctions than the revocation of the certificate are viable such as a warning letter, corrective action and the suspension of certification. Revocation usually also results in the termination of the certification contract and sometimes a recertification is only possible after a certain period of time has elapsed. See in connection with food safety Verbruggen, supra note 8, pp. 196-198. It is important for the standard owner to ensure that these sanctions are imposed consistently by certification bodies in order to guard and enhance the credibility of the standard. However, this poses a challenge because the certification bodies have to sanction their paying customers. See in connection with food safety Verbruggen, *ibid.*, pp. 261, 263 and 264. Therefore, more centralized modes of enforcement (involving the standard owner) enhance uniformity and consistency. See in connection with food safety Verbruggen, *ibid.*, p. 271.

130 D. Casey & C. Scott, 'The Crystallization of Regulatory Norms', (2011) 38 *Journal of Law and Society*, p. 93; Verbruggen, supra note 8, pp. 168 et seq. Sometimes even extra-contractual liability (e.g. vis-à-vis consumers) might be imposed if a company does not comply with the certification scheme it has implemented. See in connection with food safety Verbruggen, *ibid.*, pp. 288 and 289. On supply chain initiatives and their problems, see generally Cafaggi & Renda, supra note 30, pp. 18-20. Furthermore, there are contractual remedies in these supply chain contracts, which are by and large aimed at enhancing compliance (or ultimately possibly termination) in connection with CSR issues instead of damages and in which reputational sanctions might play a role. Cafaggi, supra note 6, pp. 1614-1615, 1617.

131 See in connection with food safety Verbruggen, supra note 8, p. 269.

132 Furthermore, the standard owner might play a role in balancing the costs of compliance and monitoring, the risks connected to world market developments (prices) and of transport as well as the period within which payment can be expected between smallholders and (ultimate) buyers. See on these issues in connection with the production of grapes P.J. Ras & W.J. Vermeulen, 'Sustainable Production and the Performance of South African Entrepreneurs in a Global Supply Chain. The Case of South African Table Grape Producers', (2009) 17 *Sustainable Development*, p. 333. Cf. SSI Review, supra note 74, p. 49. In this respect it is important to notice that only 11% of the contracts between producers and buyers are in writing. See SSI Review, *ibid.*, p. 86.

133 See, more generally e.g., Gandara, supra note 9, p. 253.

with their VSS. Although this may not be considered as (public) enforcement, the risk of incurring reputational damage (liability) might endorse compliance with VSS. The same is true in connection with the risk of the loss of more remunerable markets that demand certified products.

### 5.6. Risk attribution in supply chains

A serious issue in supply chains not addressed by VSS (and thus not by FSC or UTZ Certified) is the attribution of risks. By and large most risks and costs are incurred by the producers. For example, the costs of compliance and monitoring are incurred by producers and they are exposed to the risks connected to world market developments (prices) and of transport.<sup>134</sup> Furthermore, the period in which payment can be expected by smallholders from (ultimate) buyers might be rather long.<sup>135</sup> Thus, it might be helpful if the standard owners would play a role in balancing the risks between (especially) producers and (ultimate) buyers. They might make a more balanced risk attribution part of the requirements for participating in the scheme. This approach seems to be more feasible than expecting producers and (ultimate) buyers to agree on a more balanced risk-sharing agreement. That said, such requirements might make VSS which impose them less attractive and, to date, no VSS entail such requirements. Therefore, a more broadly shared vision has to be developed that the attribution of risks is a problem that has to be addressed, just as, for example, the issue of a reasonable livelihood for producers has been addressed in the past.

## 6. Conclusion

In the foregoing the effectiveness of VSS is analysed from a legal perspective. The legal avenue focuses on the objectives of the private regulation itself and whether they provide 'conflict of law' rules in connection with other private regulation, the enforcement of private regulation, conflict resolution and the distribution of risks. As an example, I have compared the effectiveness of FSC and UTZ Certified in this respect. In a simplified form the foregoing leads to the following results:

Indicator	FSC	UTZ Certified
Clear objective	+	+
Specific and prescriptive norms	+/-	+
Regular (five-year) evaluation	+ (local public norms referred to are not easily reviewed)	+ (local public norms referred to are not easily reviewed)
Conflict of law rules	-	+/- (some guidance)
Grievances	+/- (prescribes company-based grievance mechanism, no escalation mechanism)	+ (prescribes grievance mechanism and the recording of complaints, third party escalation mechanism beyond UTZ Certified if UTZ itself is at stake, no further escalation mechanism)
Certification	+ (although expertise and integrity of auditors is a challenge)	+ (although expertise of auditors is a challenge)
Enforcement	+ (endorsed by public due diligence requirement and other recourse to public enforcement, tackles free-rider issue, might lessen reputational (liability) risk)	+/- (only recourse to public enforcement, might lessen reputational (liability) risk)
Attribution of risks	- (no provisions)	- (no provisions)

From these results UTZ Certified seems to perform slightly better. Differences in government endorsement seem to influence effectiveness. Apart from this, other differences between FSC and UTZ Certified have been

<sup>134</sup> See on these issues in connection with the production of grapes Ras & Vermeulen, supra note 132, p. 333.

<sup>135</sup> Ibid.

observed. These differences include goal attainment, prescriptiveness, evaluation, grievance mechanisms and enforcement.

That said, from these results no overarching implications in connection with the effectiveness of FSC and UTZ Certified can be inferred. As explained in the introduction more avenues to assess effectiveness exist and should be used to obtain the whole picture. More importantly, the approaches are intertwined. For example, conflict resolution (the legal approach) is of importance in connection with acceptance (stakeholder engagement) and governance too. Thus this paper does not provide a final answer as to the effectiveness of FSC and UTZ Certified. ■