

TRUST AND GLOBAL GOVERNANCE: ENSURING
TRUSTWORTHINESS OF TRANSNATIONAL
PRIVATE REGULATORS

ENRICO PARTITI*

I. INTRODUCTION	416	R
II. VSS AND HRDD AS REGULATORY STRATEGIES IN GLOBAL VALUE CHAINS	425	R
A. <i>Certify Everything</i>	429	R
B. <i>Multinational Corporations as Human Rights Regulators</i>	432	R
C. <i>Compensating for the Limits of Public Authority While Expanding Private Authority</i>	435	R
III. INSTITUTIONAL TRUST AND ITS TRANSPOSITION TO PUBLIC AND PRIVATE INTERPLAYS IN TRANSNATIONAL REGULATION	438	R
A. <i>The Foundations of Trust</i>	440	R
B. <i>Institutional Trust</i>	443	R
C. <i>The “Proceduralization” of Institutional Trust in Transnational Governance</i>	448	R
D. <i>Trust and Transnational GVC Regulation</i>	452	R
IV. THE INSTITUTIONAL TRUST OF PRIVATE AUTHORITY AND ITS USE BY PUBLIC AUTHORITY	457	R
A. <i>The Institutional Trust of Private Standards</i>	459	R
B. <i>Reinforcing Private Authority: Public Authority’s Use of VSS</i>	465	R

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C.	<i>Conferring on Corporations Regulatory Competences: HRDD and Public Authority</i>	471	R
D.	<i>An Emerging Institutional Trust for Corporations Implementing HRDD</i>	475	R
V.	CONCLUSION	481	R

Public authority is increasingly engaging with private actors for the purpose of transnationally regulating the social and environmental responsibility of global production. “Orchestration” of private actors takes place under limited possibility to influence and control the regulatory effects of private authority. This may lead to public authority legitimizing and indirectly reinforcing forms of regulation structurally dominated by economic interests. This article adopts a perspective based on the concept of institutional trust to frame the interaction between public and private authority, and between private authorities and those affected by it. The article uses the interplay between public regulators on the one hand, and voluntary sustainability standards (VSS) and companies implementing human rights due diligence (HRDD) on the other, to illustrate how the relation between different forms of authority unfolds. It then appraises the effects of this relation on those affected by private rules. The article evaluates these two types of interplay against a framework based on the concept of institutional trust. It concludes by setting forth suggestions for the employment of private forms of authority by public actors in transnational regulation of global value chains.

I. INTRODUCTION

The transnational regulation of social and environmental externalities in global production has been characterized by intricate difficulties. On the one hand, the countries where polluting or labor-intensive production is based face considerable hurdles and unwillingness to enact and enforce effective rules addressing social and environmental elements of production. A deadlock at the international level in elaborating detailed and enforceable rules has limited the possibility of comprehensive multilateral agreements on corporate conduct. On the other hand, the reach of unilateral action from Western countries, legitimate under certain circumstances, is constrained by jurisdiction-based limits of state regulations and World Trade Organization (WTO) rules.¹ Against this back-

1. This is, at least, according to the WTO. See generally Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/AB/R (adopted June 18, 2014) (ruling on the legitimacy, under the obligations of WTO agreements, of the “EU Seal Regime,” which prohibits the placing of seal products on the E.U.

drop, and part of a broader trend in global governance, private regulators setting up and enforcing voluntary regimes, rules, and procedures, formally disconnected from public authority, have always played an important role in the regulation of global production for ensuring social and environmental responsibility.² From codes of conduct to multi-stakeholder standards, private actors have often driven regulation of corporate responsibility and sustainability in global value chains (GVCs).³ Private rules have been established under a variety of rationales ranging from the markedly private interest-driven need to ensure coordination in value chains, control and monitor suppliers, and preempt legislation,⁴ to initiatives that attempt to set aside market logics and advance the protection of global public goods.⁵ Proliferation of private rules has led commentators to posit that, at the transnational level, the role of public authority has morphed into that of a coordinator, or an orchestrator, steering, through direct and indirect means, a wide assemblage of private actors and rule-makers, and engaging in regulatory cooperation with them.⁶ For public authority wanting to address the externality of production located abroad, or to generally bypass the inaction of countries where

market unless certain conditions are met); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) (ruling on obligations of the WTO agreements in relation to the importation, marketing, and sale of tuna and tuna related products in the United States).

2. See Jessica F. Green & Graeme Auld, *Unbundling the Regime Complex: The Effect of Private Authority*, 6 *TRANSNAT'L ENVTL. L.* 259, 260 (2017) (noting that private authority arises when governments cannot or chose not to regulate). For scholarship employing this perspective, see generally JESSICA F. GREEN, *RETHINKING PRIVATE AUTHORITY: AGENTS AND ENTREPRENEURS IN GLOBAL ENVIRONMENTAL GOVERNANCE* (2014) (examining the role of non-state actors in global environmental politics).

3. GREEN, *supra* note 2, at 81.

4. See generally Gary Gereffi et al., *The NGO-Industrial Complex*, 125 *FOREIGN POL'Y*, July/Aug. 2001, at 56 (discussing the introduction of certification institutions and their effect on global corporations).

5. See generally Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 *GOVERNANCE* 503 (2002) (discussing the emergence of nongovernmental organizations acting as regulatory authorities).

6. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT'L L.* 501, 564 (2009) (discussing how public authority has overcome a transnational orchestration deficit).

production is located, orchestration actively enlists private actors to bring rules to places otherwise difficult to reach for state-based legal instruments, such as the remote tiers of GVCs spanning across the globe. When engaging with and enlisting private regulatory actors, regulation becomes indirect, i.e., mediated by an intermediary over which public authority exercises limited control.⁷ This approach is becoming visible in the area of social and environmental responsibility connected to the operations of multinational corporations.

Voluntary sustainability standards (VSS) define and certify characteristics connected to sustainability-related features of products.⁸ A plethora of private initiatives now cover domains as diverse as biofuels, forestry products, jewelry and minerals, textiles, and social and environmental responsibility.⁹ In certain sectors, complying with private standards is becoming an essential condition to market access. Frequently, the institutionalization of corporate social responsibility (CSR) practices, and especially the pressure of civil society organizations, spur producers' uptake.¹⁰ As societal expectations about transnational business conduct evolve, VSS are increasingly used by companies because of their capacity to allocate rights and responsibilities in their GVCs, and enjoy considerable market success in some countries.¹¹ At the same time, public authorities have begun to actively make use of them to pursue public policy objectives. Private standards have started to appear in several measures that the European Union has enacted in regulating responsibility features of production.¹²

7. See generally INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS (Kenneth W. Abbott et al. eds., 2015) (discussing how international organizations can shape global governance through their limited resources and autonomy from states).

8. Axel Marx & Jan Wouters, *Competition and Cooperation in the Market of Voluntary Sustainability Standards*, in THE LAW, ECONOMICS AND POLITICS OF INTERNATIONAL STANDARDISATION 215, 215 (Panagiotis Delimatsis ed., 2015).

9. For an overview on the emergence and proliferation of voluntary sustainability standards, see generally *id.*

10. Abbott & Snidal, *supra* note 6, at 504.

11. Marx & Wouters, *supra* note 8, at 221–22.

12. See, e.g., Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, art. 6, 2017 O.J. (L 130) 1, 10 [hereinafter Regulation 2017/821] (articulating

A second visible expression of a private regulatory role in GVCs is human rights due diligence (HRDD). HRDD has emerged as a regulatory tool under the United Nations Guiding Principles on Business and Human Rights (UNGPs) and, similar to VSS, centers on private standards, processes, and internal management procedures.¹³ Under the UNGPs, the affirmation of a moral responsibility of business to respect human rights was coupled with the recommendation to employ internal, non-financial due diligence processes to monitor, assess, remedy, and report multinational corporations' impact on human rights, as well as any adverse impacts directly linked to their operations.¹⁴ This foregrounds a regulatory role of multinationals especially vis-à-vis their suppliers. Large firms are now increasingly employing due diligence processes to coordi-

private third-party audit standards for organizations involved in procuring specific minerals from conflicted areas); Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, art. 1(1), 2014 O.J. (L 330) 1, 4–5 [hereinafter Directive 2014/95/EU] (requiring certain large undertakings to report on human rights among other issues); Directive 2014/24/EU, of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, art. 42–43, annex VII, 2014 O.J. (L 94) 65, 121–22, 220 [hereinafter Directive 2014/24/EU] (instituting requirements for technical standards and labels in business transactions); Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010, Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, art. 6, 2010 O.J. (L 295) 23, 27–28 [hereinafter Regulation 995/2010] (articulating private due diligence standards for timber products and timber markets); Directive 2009/28/EC, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, art. 17–18, 2009 O.J. (L 140) 16, 36–40 [hereinafter Directive 2009/28/EC] (articulating private sustainability standards for biofuels and bioliquids).

13. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters.), *Rep. on the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, annex, princ. 4 (Mar. 21, 2011) [hereinafter UNGPs].

14. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters.), *Rep. on the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); *id.*

nate actors in their value chains and manage human rights risk.¹⁵ Public authorities in Western countries are beginning to require mandatory HRDD, at least by large corporations or those active in high-risk sectors for human rights.¹⁶ This interplay is a direct consequence of the overarching goal of the UNGPs to establish coordinating mechanisms in the domain of human rights capable of bringing together several areas of public and private governance.¹⁷

Public authority's increased employment of private authority in regulating responsibility features of global production represents a new step in global governance. From an implicit and informal carve-out of regulatory space, to private actors' direct consequence of the limits to public action that the international community imposed on itself, especially in the area of international economic law,¹⁸ public authority now begins to engage with and use private actors. Fragmentation of regulatory authority at the transnational level has urged public and private regulators to cooperate in order to ensure effective regulation.¹⁹ However, the study of the normative conditions for such cooperation or interplay has so far been unsatisfactory. Under which conditions should states and international organizations decide to deploy nonpublic authority to

15. See Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, 22 *BUS. ETHICS Q.* 145, 156 (2012) (discussing due diligence and human rights risk in the context of transnational corporations).

16. For an example from the United States, see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213–18 (codified as amended at 15 U.S.C. § 78m) (regulating conflict minerals). For an example from the European Union, EU, see generally Regulation 2017/821, *supra* note 12 (regulating minerals originating from conflicted and high risk areas via supply chain due diligence obligations).

17. John Gerard Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights*, 20 *GLOBAL GOVERNANCE* 5, 9 (2014).

18. See Petros C. Mavroidis & Robert Wolfe, *Private Standards and the WTO: Reclusive no More*, 16 *WORLD TRADE REV.* 1, 2 (2017) (discussing the limits of international regulation, particularly that related to the WTO).

19. See Rebecca Schmidt, *Protecting the Environment Through Sports? Public-Private Cooperation for Regulatory Resources and International Law*, 28 *EUR. J. INT'L L.* 1341, 1365 (2017) (asserting that neo-institutionalists have stressed the possibility of overcoming fragmentation with cooperation); see also generally Nico Krisch, *Liquid Authority in Global Governance*, 9 *INT'L THEORY* 237 (2017) (arguing analysis of authority under a deference model that recognizes the higher level of dynamism of global authority).

pursue public policy objectives? What are the prerequisites for employing private authority in pursuing public goals in GVCs?

While considerable swathes of GVCs regulation remain outside the interplay between public and private authority described herein, this contribution focuses on the narrower cases in which the former uses or activates the latter. It conceptualizes and brings to the fore a regulatory rationale for VSS and HRDD within the legal structures provided by states and international organizations. This article adopts an approach based on the concept of institutional trust to identify how the relation between public and private regulatory authority should be structured and, where possible, evaluates empirically its current structuring. Institutional trust simultaneously empowers and constrains both public and private forms of authority. For example, public authorities include procedural mechanisms to bind their decisions to the interests of those affected to ensure “other-regardingness” and “disinterestedness.”²⁰ They therefore ensure and signal their trustworthiness so that the trust of their subjects is justified or well-placed. When VSS and companies implementing HRDD are recruited or enrolled by public authority, regulation of value chains’ social and environmental risks and the political and legal relations between the authority’s sub-components is factually delegated to private bodies, such as private standard-setters or, as in the case of due diligence, even to individual business entities.²¹ Centering governance of important public policy goals on private regulators, however, necessitates a well-placed trust from public authority that the private actor used as intermediary²² will be able to pursue public goals in conjunction with its private interests. As the intermediary directly affects the position of a number of

20. Obligations of “other-regardingness” and “disinterestedness” have both been used to describe the “moral” characteristics of fiduciaries, and procedural mechanisms can “attempt to deal with the possibility of abuse.” ELJALIL TAUSCHINSKY, COMMISSION LOYALTY 71 (2016), https://pure.uva.nl/ws/files/2739810/178837_Tauschinsky_Thesis_complete_.pdf.

21. See, e.g., Directive 2014/95/EU, *supra* note 12, at 4 (delegating regulation and monitoring of risks and relations to the implicated business entities).

22. See generally Kenneth W. Abbott et al., *Theorizing Regulatory Intermediaries: The RIT Model*, 670 ANNALS AM. ACAD. POL. & SOC. SCI. 14 (2017) (discussing how private actors can function as intermediaries for governance and regulation).

actors affected by its regulatory effects, the conditions for that trust should be fulfilled too.

As it centers on the relational elements of the interplay and the conditions of regulatory authority, the perspective of trust offers a valuable theoretical lens through which to observe the evolving relation and growing engagement between public and private authority in GVCs. The perspective is also key to the relation between private authority and those it affects, since it is capable of observing and evaluating the presence of the conditions for trust with respect to specific groups of affected actors. Understanding that private regulators may be trustworthy from the perspective of some actors—for example, their targets—but not others—for example, the beneficiaries or specific affected groups—bears consequences for the relationship between public and private authority, and on the direction in which the private-public interplay should normatively unfold. The use of private authority by public authority brings to the fore a triadic trust relationship where public authority relies on private actors to govern sustainability-related features of production. Simultaneously, like all regulators, private regulators require the trust of those subjected to their rules, i.e., their targets.

Following a trust approach, a regulator does not just need trust from the targets of its measures (which are other business entities), but would also require the trust of its citizens. In a transnational space, lacking a *demos*, this group would include all those affected by the private regulator, such as holders of human rights, workers, and civil society at large. Finally, public authority engaging with private regulators should ensure the trust of those affected by the latter. This is particularly needed in the presence of many different private regulators with varying endowments of trustworthiness. Private regulators may seek the trust of a narrower group of subjects than public regulators do: For example, they may just seek the trust of their economically powerful targets. Private regulators may pursue a mix of private interests and collective goals; engaging with them requires either the selection of actors better able to achieve public policy objectives, or the presence of mechanisms to ensure that business interests are harnessed where

necessary by seeking the conditions for trust of other affected actors.²³

Legal research can contribute to the trust debate by studying—and prescribing—institutional and procedural mechanisms to build and enhance trust between different actors and specific regulators and regulatory arrangements. Long-lasting debates between legal scholars have centered on the “proceduraliz[ation]”²⁴ of transnational governance generally,²⁵ and more specifically of forms of private rulemaking.²⁶ Legal literature and traditional legal forms have, however, struggled to find appropriate categories to describe and appraise the informal engagement between intermediaries and private authorities in the regulation of transnational phenomena.²⁷ A particular urgency emerges to normatively assess this type of interplay, and to define the proceduralization mechanisms to be deployed on intermediaries with which engagement takes place through different legal instruments, but that are outside classic categories of delegation. The express use of private authority via legal instruments, different from other forms of less direct engagement such as funding and policy

23. See Jane Mansbridge, *A Contingent Theory of Accountability*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* 55, 58–60 (Mark Bovens et al. eds., 2014) (discussing how to create a trust-based system of accountability).

24. As in related literature, this article refers to “proceduralizing” and “proceduraliz[ation]” as the act of creating a formal method for a process, often by extending already existing procedures to other actors to whom they did not originally apply. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 587 (2000) (referring to the legislative extension of procedural requirements of the APA to private actors as “proceduralizing private relationships”).

25. Among the many articles written on this subject, see generally, for example, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005) (arguing that international procedures can be understood through a global administrative law framework); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907 (2004) (claiming that a constitutionalist model can appropriately analyze international procedures and transnational bodies).

26. See generally Fabrizio Cafaggi & Katharina Pistor, *Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation*, 9 REG. & GOVERNANCE 95 (2015) (arguing that self-determination is necessary in regulatory bodies consisting of private and public entities).

27. As evidence of this difficulty, see generally Abbott et al., *supra* note 22 (attempting to define the relationship between intermediaries and authorities as just one proposed model).

support, identifies strong forms of association. However, precisely because they are not structured along the classic requirements and conditions for delegation, they still cannot result in the extent of direct and indirect control, review, and proceduralization normally associated with delegation itself. Private regulators operate based on market and efficiency considerations and pursue private interests, and their rules are often characterized by limited consent and a factually mandatory character.²⁸ An increased employment of private authority in GVC regulation requires the extension of the normative basis for trusting relationships with private actors that are entrusted with fundamental public objectives. Lacking these conditions, the interplay risks legitimizing private actors operating on the basis of narrow business interests, and tarnishing the legitimacy of public authority.

In this context, the concept of trust illuminates the relationship between public and private regulatory authority and identifies means to mediate tensions between public regulatory needs necessitating private intermediaries, and utilitarian dynamics to which private activities may also respond. Trust offers a single primer to evaluate regulatory practices and strategies of both private and public actors. It transcends the public-private distinction in order to design mechanisms for legitimacy and accountability suitable to the current complex global governance configuration,²⁹ potentially applicable also to single corporations exercising regulatory functions. Simultaneously, trust enables a critical appraisal of the limited efforts by public authority to affect the operations—especially the procedures—of private authority when used as an intermediary in regulation. Trust also permits an assessment of the extent to which *private* authority necessitates and seeks trust and, importantly, the trust of *whom*, as well as the procedural mechanisms it establishes to ensure and signal trustworthiness to these actors. A trust perspective can thus offer fresh insight into the extension of democratic features to private actors when they are called upon to pursue public objectives.

28. Cafaggi & Pistor, *supra* note 26, at 96–97, 99.

29. *See generally* Freeman, *supra* note 24 (conceiving of governance as a set of relationships that public and private actors have negotiated between themselves).

This article begins by illustrating in Part II the differentiation between public and private authority adopted here, as well as the main features of VSS and HRDD, the reasons for their employment as regulatory strategies, and their interplay with public regulators. Drawing from legal and political science literature, with insights from sociology and organizational studies, Part III sketches a theoretical framework describing the conditions for trust between citizens and the private actors that have taken up a key role in the regulation of GVC sustainability. It identifies the concept of institutional trust as a virtuous constraint to authority, as it simultaneously empowers and limits the authority's actions by binding it to the interests of vulnerable actors. The same Part then introduces a triadic construction with three trust relationships: those between public authority and private authority; those between private authority and the actors subject to it; and those between public authority and the actors subject to it. Part IV then applies this framework to the relationship between public authority and private authority, and to the relationship between private authority and those subject to its regulatory effects. More specifically, Section A discusses the extent to which VSS independently respond to dynamics of institutional trust, and the extent to which, if any, they bind their decisions to the interest of vulnerable actors. Section B assesses E.U. authority's use of VSS as well as the effect of VSS on GVC governance and, especially, its impact on the conditions for trusting relations between schemes and those affected. Section C moves on to HRDD by looking at how public authority has grounded the basis for a potential trusting relationship between corporations and holders of human rights in the UNGPs. Section D then addresses the first steps that public authorities and corporations have taken to operationalize the conditions for trusting relations. Part V concludes.

II. VSS AND HRDD AS REGULATORY STRATEGIES IN GLOBAL VALUE CHAINS

The conceptualization of the divide between public and private authority, both within and beyond the state, has generated considerable literature.³⁰ Without delving into the details

30. For examples of this literature, see generally *id.* (discussing the distinction between, but interdependence of, public and private actors); Krisch,

of the political and ideological functions hiding behind the only apparent technical nature of the distinction, it is appropriate to clarify that this contribution embraces a somewhat formalistic approach in distinguishing between public and private based on the authority's explicit link with the state and its organs. The concept of public authority will therefore be used to identify states, in particular state (and E.U.) regulators especially when engaging with VSS, and international organizations. Private authority denotes forms of non-state ordering where private organizations or private collectives (self-)regulate, in particular economic activity and other activities connected to it.³¹ Private authority is not state-based, but nevertheless constitutes a legitimate, institutionalized form or expression of power normatively justified by those subjected to it.³² More specifically, private authority identifies situations where non-state actors make rules or set standards for other relevant actors to adopt.³³ With respect to the goals which can be identified as public or private in this constellation, private authority shall, however, not be equated exclusively with private goals such as the market, profit-seeking dynamics, or the sphere of private autonomy.³⁴ It is well-established that private authority

supra note 19 (distinguishing between public and private authority in discussing the effects of liquid authority); Schmidt, *supra* note 19 (discussing the need for public and private regulatory cooperation due to the differing resources and obstacles of both).

31. Freeman, *supra* note 24, at 551.

32. See generally THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (exploring the "sources, practices, and implications" of the emergence of private authority and accompanying "erosion of the authority of the state" by analyzing and comparing a variety of actors and assessing the potential for "reversal of the situation").

33. GREEN, *supra* note 2, at 42 (explaining how private authority can reduce transaction costs to resolve coordination problems). Note that "private actors who project authority have necessarily secured the consent—either implicitly or explicitly—from those who adopt their rules." GREEN, *supra* at 29.

34. See generally VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE SECTOR (2001) (exploring the phenomenon of industry self-regulation, which involves expanding the role of private actors beyond private goals). For a famous exploration of the lack of a clear-cut divide, see generally Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) (describing the blurred distinction between public and private in labor law).

operates in public domains,³⁵ i.e., in areas traditionally falling under the competences of public authority. Under certain circumstances, private authority is capable of advancing public policy objectives, as outlined by public interest deliberation mechanisms, between the different segments of society.³⁶ A public goal defined in such a way should not be aligned to the “collective” goal of the entire society, as it is, itself, the outcome of power dynamics.³⁷ Similarly, the pursuit of public goals by private regulators could either occur independently—i.e., as the underlying purpose of private action—or as a by-product of pursuing markedly private goals. For example, certain civil society and multi-stakeholder initiatives are grounded in interests and values which do not (or do not only) include those of businesses and their market logics.³⁸ Other initiatives instead offer possibilities for corporations to achieve economic efficiency and coordination, and to limit reputational damages while simultaneously impacting human rights, labor, and environmental practice positively.³⁹

35. For examples of the debate on this issue, particularly at the transnational stage, see generally GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010) (developing a framework for a private law regulatory methodology); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999) (exploring the phenomenon of international private authority historically, empirically, and theoretically); HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE* (2005) (addressing the interaction between public and private norms in the regulation of integrating markets). For an example at the national stage, specifically the United States, see generally Robert W. Hamilton, *Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 *TEX. L. REV.* 1329 (1978) (examining decision making in U.S. private standards organizations).

36. See, e.g., Klare, *supra* note 34, at 1370 (referring to “large corporate employer[s]” as “a prime instrument of public policy and planning”).

37. ANTHONY I. OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 54 (1994).

38. An example of this is fair trade schemes, which attempt to move beyond an exclusively market-based approach that would detrimentally affect small agricultural producers in light of their limited capacity to influence prices, and which instead center on alternative market models that pay price premiums and eliminate middlemen. TIM BARTLEY ET AL., *LOOKING BEHIND THE LABEL* 8–11 (2015).

39. See Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 *LEWIS & CLARK L. REV.* 397, 400 (2010) (evaluating “the legal risks posed to corporations that rely on codes of conduct”).

Where explicitly mobilized and employed by public authority, both VSS and the multinational corporations implementing HRDD can be considered private regulatory intermediaries. Intermediaries are (often private) actors mediating between a “regulator” and a “target” in the regulatory process.⁴⁰ Intermediaries play a fundamental role in implementation and enforcement through specific expertise and capacity that public authority does not possess. Like all regulators, intermediaries may operate on the basis of private interests and motives.⁴¹ It is therefore crucial to select an appropriate regulatory intermediary where possible,⁴² or to ensure that intermediaries are trustworthy for the objective pursued. In the public-private interplay in GVC regulation, public authority calls on private organizations to regulate public interests, such as the environmental and social consequences of global production. This, however, occurs outside both the sphere of a traditional, legally structured delegation of competences, and the extensive forms of public control and legal review normally associated with it. This lack of control may extend to the moment of the selection of the intermediary where the verification of certain requirements, if present at all, is superficial or absent.

This part begins by briefly describing the main features of VSS and HRDD. It then illustrates how transnational private regulatory authority in these guises is encouraged in various ways (in the case of HRDD, it is even established through U.N. instruments), and used by public authority with marginal control and conditionality—an issue to which this article will return in Part IV. Generally, regulators treat VSS deferentially in Western countries, such as through lenient competition law tests⁴³ or through very soft forms of control when incorpo-

40. Abbott et al., *supra* note 22, at 14–15.

41. See generally Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957) (discussing the role of intermediaries between people and the government in the context of economic and political theory).

42. See Abbott et al., *supra* note 22, at 29–30 (discussing risk of capture of intermediaries and ways to minimize that risk).

43. See Communication from the Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, 2011 O.J. (C 11) 1, 65 (stating that standardization agreements are normally procompetitive when they are open to competitors, proportionate, and non-binding).

rated into public measures.⁴⁴ The diffusion of HRDD is similarly linked to a clear regulatory preference emerging from international soft law instruments, and is reinforced by a growing patchwork of public “incorporations of the roughly sketched UNGP framework.”⁴⁵ Often, however, the processes and procedures that companies that implement due diligence should follow are not specified, and large autonomy is left to businesses to operationalize them.

A. *Certify Everything*

VSS define and certify sustainability-related features of products. These can include both tangible product features, but also production methods and even internal management procedures and criteria for reporting that are expected to bear a final impact on human rights, labor, and environmental objectives.⁴⁶ Their spectacular proliferation has led to the private certification of large shares of global production as sustainable.⁴⁷ Traditionally, producers have started and joined these schemes spurred by the economic opportunities of responsible consumerism, but especially by the pressure of threatened reputational damages, as well as the pressure that non-governmental organizations (NGOs) apply when campaigning.⁴⁸ In the meantime, a slow but steady process of institutionalization of CSR practices contributed to the generation of a strong demand for certifications by retailers and other downstream economic operators.⁴⁹ Private actors such as companies, retailers’ consortia, and multi-stakeholder NGOs are thus behind the establishment of VSS.⁵⁰

44. See *infra* Section IV(B).

45. See *infra* Section IV(C).

46. See generally Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC’Y REV. 691 (2003) (claiming that management-based regulation can be effective if the targets are heterogeneous and regulatory outputs are difficult to assess).

47. TIM BARTLEY ET AL., *supra* note 38, at 2 (2015).

48. See generally *id.* at 2–33 (examining the factors that motivate consumers to select certain products over others).

49. See *id.* at 19–20 (describing the “mainstreaming” and later formalization of certification).

50. See Abbott & Snidal, *supra* note 6, at 513, 516–20 (organizing transnational actors under a governance triangle).

VSS differ highly. Certain consensus-based standards have been observed to operate on the basis of seemingly inclusive procedural mechanisms.⁵¹ Some schemes explicitly support and foster alternative approaches to economic relations.⁵² Notable differences, however, persist between inclusive multi-stakeholder schemes, which establish permanent institutions to attempt a deliberative discourse over sustainability,⁵³ and standards drafted by business constituencies “in the shadow of the state,”⁵⁴ under the threat of more stringent legislation,⁵⁵ and imposed on other economic actors. These differences reflect a well-established distinction in regulation literature explaining why private actors engage in rulemaking activities. A public interest explanation posits that benevolent actors may create transnational rules to advance sustainability-related objectives.⁵⁶ Conversely, a private interest explanation is based on the assumption that private rulemaking satisfies self-serving interests of the actors participating in rulemaking, whether those interests are in protecting their reputations, obtaining access to a market, or just preempting and preventing public rules.⁵⁷

51. See Dara O’Rourke, *Multi-Stakeholder Regulation: Privatizing or Socializing Global Labor Standards?*, 34 *WORLD DEV.* 899, 911 (2006) (suggesting that a convergence of codes and monitoring systems have blurred together).

52. See *id.* (advocating that nongovernmental regulation “facilitate public mechanisms of external pressure” while also “motivat[ing] internal corporate mechanisms for finding problems”).

53. See Kernaghan Webb, *ISO 26000 Social Responsibility Standard as ‘Proto Law’ and a New Form of Global Custom: Positioning ISO 26000 in the Emerging Transnational Regulatory Governance Rule Instrument Architecture*, 6 *TRANSNAT’L LEGAL THEORY* 466, 499 (2015) (arguing that the ISO 26000 International Standard represents a “new approach to development of global social responsibility rule instruments”).

54. David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 *ANNALES AM. ACAD. POL. & SOC. SCI.* 12, 13 (2005).

55. Paul Verbruggen, *Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation*, 7 *REG. & GOVERNANCE* 512, 518 (2013).

56. See Cashore *supra* note 5, at 504–05 (discussing the motivations of “transnational private governance systems that derive their policy-making authority . . . from the manipulation of global markets and attention to consumer preferences,” and, in doing so, focusing on forestry certifications, which “recognize officially those companies and landowners who *voluntarily* operate ‘well-managed’ and ‘sustainable’ forestlands”).

57. For overviews of these motivations, see generally Luc Fransen, *Why Do Private Governance Organizations Not Converge? A Political-Institutional Analysis of*

The regulatory dimension of VSS witnessed a qualitative evolution when public authority began to directly employ them in public measures through peculiar forms of incorporation. In contrast to the earlier tactics of simply permitting and carving out regulatory space to private authority,⁵⁸ public authority has now started to actively engage with highly normative transnational private rules. This trend is very visible in the European Union, where a series of measures in the domain of GVC regulation permits the voluntary employment of VSS to demonstrate compliance with broad sustainability-related regulatory requirements, or even to define the details of a sustainable product. For example, the E.U. renewable energy directive (RED) allows producers to use schemes recognized by the European Commission to prove that their biofuels are in line with the sustainability requirements spelled forth in the directive.⁵⁹ Similarly, the directive on public procurement permits contracting authorities to employ VSS in their procurement by allowing producers, for instance, to use labels to prove that their products conform to the procurements' specification, or even to use a standard to define sustainability features of the contracted products.⁶⁰ Private standards also play a role in the E.U. regulation of timber⁶¹ and conflict minerals supply chains;⁶² their employment is also contemplated in the regulation on non-financial corporate reporting.⁶³ Conceptually, this evolution does not differ from the public-private engagement observable in other areas of business self-regulation, such as in

Transnational Labor Standards Regulation, 24 GOVERNANCE 359 (2011) (arguing that a pessimistic view better considers political differences between the interest groups that form and support private governance arrangements); Axel Marx, *Limits to Non-State Market Regulation: A Qualitative Comparative Analysis of the International Sport Footwear Industry and the Fair Labor Association*, 2 REG. & GOVERNANCE 253 (2008) (analyzing the circumstances under which a specific group of firms is likely to join a certification program).

58. Mavroidis & Wolfe, *supra* note 18, at 2.

59. Directive 2009/28/EC, *supra* note 12, at 39.

60. Directive 2014/24/EU, *supra* note 12, at 122.

61. See Regulation 995/2010, *supra* note 12, at 27–28 (requiring operators to maintain a due diligence system for lumber).

62. See Regulation 2017/821, *supra* note 12, at 10 (requiring regulation via third party audits for mineral importers).

63. Directive 2014/95/EU, *supra* note 12, at 4–5.

the area of technical standards.⁶⁴ In that domain, normative considerations, however present,⁶⁵ are less visible.⁶⁶ Differently, in light of both the pressing need for regulation of social and environmental externalities and the potentially deep ramifications of the phenomena, a regulatory approach characterized by association with private authority and voluntary measures stands out as an increasingly visible alternative to more markedly public and mandatory approaches, both at the national and international level.

B. *Multinational Corporations as Human Rights Regulators*

HRDD emerged as a prominent transnational regulatory strategy with the U.N. adoption of the UNGPs.⁶⁷ In contrast to the more or less spontaneous emergence of VSS from civil society movements, HRDD identifies a “responsibility” of corporations that public authority explicitly casts on businesses.⁶⁸ However, HRDD can generate profound regulatory effects.⁶⁹ The framework designed by John Ruggie constitutes an attempt to circumvent the limits of state-centered international law by actively enrolling private actors and their interests in the design and enforcement of mechanisms for responsible business conduct.⁷⁰ It does so through the establishment of a

64. See generally SCHEPPEL, *supra* note 35 (discussing the interaction between public and private norms in the regulation of integrating markets).

65. See Christian Joerges et al., *The Law's Problems with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation Under the 'New Approach'* 27–32 (Eur. Univ. Inst., Working Paper Law, Paper No. 99/9, 1999) (disagreeing with the argument that “standards-setting is inherently a public activity”).

66. Kenneth W. Abbott & Duncan Snidal, *International “Standards” and International Governance*, 8 J. EUR. PUB. POL'Y 345, 347–48 (2001) (discussing externalities and standards problems in coordination games).

67. See UNGPs, *supra* note 13, princ. 4 (authorizing states to require HRDD to “protect against human rights abuses” by businesses).

68. See generally Radu Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 1 TRANSNAT'L LEGAL THEORY 221 (2010) (discussing the emergence of corporate social responsibility, and distinguishing CSR from other mechanisms that civil society organizations advance).

69. See Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 423, 431 (2015) (finding that HRDD turns companies into regulators ‘imposing standards on their third-party suppliers in other countries’).

70. Ruggie, *supra* note 17, at 10.

“polycentric” system of governance, weaving together three separate governance systems: public governance, corporate governance, and civic governance.⁷¹ HRDD constitutes “a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.”⁷² Due diligence requires companies to investigate their supply chains, be aware of possible human rights risks connected to their activity, take action to remedy these risks, and communicate to the public about it.⁷³ What sets HRDD apart from other forms of self-regulation is the breadth of the regulatory competences cast onto transnational corporations outside direct public control. Companies are called on to regulate not just their own activities, but also their entire value chain through the definition of monitoring mechanisms and internal processes and indicators, and to enforce such regulation by means of leverage and measures directed against their suppliers, including discontinuance of commercial relations.⁷⁴

Lacking consensus over more direct means to regulate human rights impact on global production, public authority empowers and exploits the expertise-based regulatory capability that transnational corporations possess. An international instrument adopted by the United Nations has explicitly created HRDD as a regulatory effort.⁷⁵ The UNGPs have established and conferred upon multinational corporations specific regulatory tasks in GVCs affecting first-tier suppliers, second-tier suppliers, and potentially beyond, and affecting all holders of human rights impacted, or potentially impacted, by the activities of a corporation.⁷⁶ The public origin of this peculiar regulatory mandate grants to corporations a degree of legitimacy in pursuing regulatory objectives in GVCs. The prescription of procedural guarantees—such as ensuring participation of affected stakeholders in assessing human rights impacts and the

71. *Id.* at 9.

72. Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 71, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

73. Sarfaty, *supra* note 69, at 434–35.

74. *Id.* at 435–36.

75. UNGPs, *supra* note 13, princ. 4.

76. *Id.* princs. 17–18.

presence of grievances mechanisms⁷⁷—confer a veneer of procedural legitimacy to the practice of HRDD. The substance of HRDD is in the process of progressive refinement by layers of public and private tools as diverse as the standardization activities carried out by the Organization for Economic Cooperation and Development (OECD)⁷⁸ and the International Organization for Standardization (ISO);⁷⁹ private sectoral guidance documents such as that of the Thun Group of Banks for the financial sector;⁸⁰ rulings of OECD National Contact Points;⁸¹ national liability cases—among the many—on the duty of care;⁸² and multi-stakeholder initiatives supporting

77. *Id.* princs. 18, 25.

78. The sectoral OECD Guidance documents in the areas of garments and conflict minerals are examples of such standardization activities. *See generally* Org. Econ. Co-operation & Dev. [OECD], *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Mar. 7, 2018) [hereinafter *OECD Due Diligence Guidance in the Garment and Footwear Sector*], <https://www.oecd-ilibrary.org/docserver/9789264290587-en.pdf?expires=1578338764&id=id&accname=guest&checksum=0C560E28ADB2781623252878E73B10B4> (providing guidance to help companies in the garment and footwear sector avoid and address human rights issues in relation to their supply chains and operations); Org. Econ. Co-operation & Dev. [OECD], *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016) [hereinafter *OECD Due Diligence Guidance for Minerals from Conflict-Affected and High-Risk Areas*], <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> (providing guidance to “help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices”).

79. *See generally* Int’l Org. for Standardization, *ISO 26000: Guidance on Social Responsibility*, ISO 26000:2010(E) (Nov. 1, 2010) (providing guidance on social responsibility for organizations).

80. *See generally* THUN GRP. OF BANKS, PAPER ON THE IMPLICATIONS OF UN GUIDING PRINCIPLES 13B & 17 IN A CORPORATE AND INVESTMENT BANKING CONTEXT (2017), https://www.menschenrechte.uzh.ch/dam/jcr:19fd5d-74ca-4a90-ae48-fc6ec13acfdb/2017_12_Thun%20Group%20of%20Banks_Paper_UNGPs%2013b%20and%2017.pdf (discussing what actions banks should take in response to the UNGPs).

81. *See generally* Brazil National Contact Point, *Final Report: Kinross Gold Corporation/Association of Neighborhoods of Paracatu, Allegation of Non-Compliance*, NCP No. 01/2014 (Dec. 21, 2016) (recommending that the mining company at issue “conduct due diligence processes that assess the adverse effects of its mining activities, establishing a maximum distance between its mining operations and the [impacted] home dwellings”).

82. *See generally* Lungowe v. Vedanta Resources plc [2017] EWCA (Civ) 1528 (Eng.) (analyzing claims of duty of care under English law).

businesses' implementation of HRDD.⁸³ At national and regional levels, the creation of regulatory competences in the domain of human rights is sustained by a growing number of public instruments making (part of) HRDD mandatory, as further illustrated in Section D of Part III.

C. *Compensating for the Limits of Public Authority While Expanding Private Authority*

The two examples discussed herein represent two instances of mobilization of private action at different stages of maturity, while hiding, however, a similar approach by public authority. At the transnational stage, private governance regimes emerged not just because of a demand for rules caused by the lack of state regulation. Rationales behind competing private regimes such as VSS can be located on a continuum spanning pursuit of public policy goals on the one side, and coordination, profits, and greenwashing on the other.⁸⁴ Conversely, public authority's employment of private actors in the regulation of GVCs is a direct consequence of the limits of public powers. Public authority's use of private actors seems to represent a strategy to remedy the explicit functional constraints and limitations of public rules. VSS are used in E.U. measures to verify extraterritorially producers' compliance with E.U. requirements where the European Union would have neither the authority nor the technical capacity to do so.⁸⁵ Privately defined standards provide technical implementation for concepts originating in E.U. public instruments or international law.⁸⁶ In all forms of employment by E.U. authorities, VSS constitute evidence of legality and compliance with E.U. measures, albeit to varying degrees, and therefore

83. See generally Agreement on Sustainable Garment and Textile, July 4, 2016, *About This Agreement*, IRBC AGREEMENTS, <https://www.imvoconvenanten.nl/en/garments-textile/agreement> (last visited Jan. 6, 2020) (pledging support to minimize negative impacts that affect people in the garment and textile industries).

84. *Challenge the Label*, ISEAL, <https://www.isealalliance.org/challenge> (last visited Jan. 5, 2020).

85. Enrico Partiti, *Orchestration as a Form of Public Action: The EU Engagement with Voluntary Sustainability Standards*, 25 EUR. L.J. 94, 102 (2019).

86. See generally Natasha A. Affolder, *The Private Life of Environmental Treaties*, 103 AM. J. INT'L L. 510 (2009) (discussing the relationship between private environmental governance and intergovernmental environmental law).

directly affect the legal position of market operators.⁸⁷ In some cases, such as in the public procurement directive, VSS implement the broad concept of “sustainable” product on behalf of public authorities.⁸⁸ In a similar fashion, companies are required to implement management processes as HRDD in light of their greater knowledge of supply chains, the human rights risks connected to the processes, and their ability to exert effective economic and non-economic leverage over suppliers in different jurisdictions.⁸⁹

Reflecting the hybrid nature of transnational business regulation, both approaches are based on the assumption that regulating global production could not take place without an active engagement of private actors. Both approaches also resonate with theoretical accounts of fragmentation of authority at the transnational level, and the consequential need for cooperation between different public and private actors to achieve successful regulation.⁹⁰ VSS and HRDD illustrate how the formal structures of delegation, principal-agent relationships, and incorporation by reference are unsatisfactory in the description of both the complexity and the softness of the public-private interplay at the transnational level.⁹¹ The relationships between public authority and VSS, and public authority and companies operationalizing HRDD, can be better defined under a broader category of “cooperative interactions.”⁹² Both the interactions of public authority-VSS and public authority-HRDD have the effect of mutually reinforcing public and private authority by making public rules more effective while legitimizing private standards’ regulatory competences or companies’ license to operate.⁹³ Public authority thus comes to ex-

87. See generally Partiti, *supra* note 85 (discussing E.U. orchestration of VSS and its legal impacts).

88. *Id.* at 108–09.

89. UNGPs, *supra* note 13, princ. 19.

90. Schmidt, *supra* note 19, at 1365–66.

91. Peter L. Lindseth, *Agents Without Principals?: Delegation in an Age of Diffuse and Fragmented Governance*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW 107, 108 (Fabrizio Cafaggi ed., 2006).

92. Stepan Wood et al., *The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory*, 6 TRANSNAT’L LEGAL THEORY 333, 361 (2015).

93. Lars H. Gulbrandsen, *Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs*, 8 REG. & GOVERNANCE 74, 86–87 (2014).

exploit a particular form of epistemic knowledge of private standards and corporations, connected to their potential capacity to possess information and to their potentially effective regulatory options. This establishes a cooperative relationship of complementarity between public and private regulatory competences.⁹⁴

In some cases, such as that of VSS, interaction also begs the question of with whom public authority decides to interact; in other words, how it identifies an intermediary for GVC regulation that is fit for the purpose of pursuing public goals.⁹⁵ For HRDD, the question concerns how public authority ensures that corporations in fact address impacts on human rights, and do so in a satisfactory manner. These issues acquire particular importance where mechanisms of direct control are lacking. Public authority uses private standards in a piecemeal fashion, and without clear and consistent requirements.⁹⁶ Not always is the interaction between public and private regulators capable of generating frameworks that are effectively capable of transmitting public interest requirements to private regulators.⁹⁷ Generally, very rarely does public authority set explicit constraints on the economic dynamics permeating the actions of VSS schemes or, even more substantially, companies implementing HRDD.⁹⁸ Different forms of private authority operating under a diverse mix of public and private rationales, however, need to be selected, where possible, or stimulated in the correct direction by public authority.⁹⁹

With limited venues for control, interplay with private regulators ends up relinquishing key tasks—such as implementa-

94. Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & Soc'y 20, 41 (2011).

95. This is the vexed question of selectivity of trust: how to distinguish the trustworthy from the untrustworthy? *See generally* John J. Gabarro, *The Development of Trust, Influence and Expectations*, in INTERPERSONAL BEHAVIOR 290 (Anthony G. Athos & John J. Gabarro eds., 1978) (discussing trustworthiness and how to earn and identify it).

96. *See, See generally* Partiti, *supra* note 85.

97. For a different perspective suggesting the effectiveness of such interaction between regulators, see Schmidt, *supra* note 19, at 1364.

98. *See id.* at 1361 (suggesting that transnational regulation is hindered in its ability to regulate economic interactions due to lack of expertise).

99. *See* Mansbridge, *supra* note 23, at 59–60 (stating that a trust-based system requires that private and public actors be similarly interested enough to align for the purpose of cooperation).

tion and interpretation of national and international provisions, or monitoring and enforcement—to private actors, in light of their technical-epistemic competences and position in GVCs.¹⁰⁰ It can therefore be observed that public authority seems to generally trust (or more accurately, as it will be clarified in Part III, rely on) private actors as intermediaries with the purpose of regulating certain public values in global production. But is the operation of the regulatory competences of these private intermediaries capable of ensuring the pursuit of public goals and setting aside the exclusive pursuit of private, market-related business interests where necessary? Are there any conditions established by public authority in order to ensure that this would occur? As private actors play a crucial role in pursuing public objectives with profound implications for consumers, producers, holders of human rights, and other stakeholders, it should thus be asked whether the basis for a trusting relationship exists. If not, public authorities' active engagement with private authority should be matched by a corresponding degree of proceduralization of the trusting relationships. Proceduralization will then ensure trustworthiness of intermediaries vis-à-vis those affected.

III. INSTITUTIONAL TRUST AND ITS TRANSPOSITION TO PUBLIC AND PRIVATE INTERPLAYS IN TRANSNATIONAL REGULATION

Trust is relational. Trust and distrust address specific institutions or persons, in relation to certain tasks performed, and in connection to specific competences and reliability.¹⁰¹ As will be elucidated in this part, in personal cooperative relations or dynamics, trust signals the intention to accept vulnerability on the basis of positive expectations of the intentions or behavior of a third party. In an impersonal relationship—such as that between citizens and public or private authority, or between organizations—trust takes the form of institutional (rather than interpersonal) trust. Institutional trust captures the formalized and proceduralized nature of the relationship. In the relationship between subjects and an institution or pub-

100. Schmidt, *supra* note 19, at 1360–62.

101. See generally ONORA O'NEILL, *A QUESTION OF TRUST* (2002) (discussing the concept of trust and its practical applications).

lic and private authority,¹⁰² institutional trust ensures the subjects' trust towards the institution. Citizens' trust empowers the institution itself while, at the same time, establishing boundaries to its actions. As the interplay between public and private authority in the regulation of global production contemplates intermingled relations between varying actors, a number of trust-based relationships potentially emerge, and should be disentangled.

An account of well-placed trust requires the fulfilment of the conditions for trust. These are procedural guarantees for other-regardingness and disinterestedness in the operation of the trustee. Private regulators, even when they operate without connection to public authority, seem to respond to logics of trust; they attempt to project their trustworthiness through procedures for disinterestedness and other-regardingness.¹⁰³ Thanks to pressure from civil society organizations, citizens' trust in private standards and certification seems to be a necessary condition for their acceptance and viability. Private standards, therefore, design strategies to cultivate and enhance public trust by portraying themselves as independent, inclusive, and effective. Similarly, in the context of HRDD, institutional arrangements are created to foster dialogue between regulating entities and other stakeholders, including civil society organizations, so that their interests can be taken into account in the elaboration of HRDD strategies.¹⁰⁴ Public authorities making use of private regulators such as VSS, and companies implementing HRDD, rationally rely on other actors for the purpose of pursuing public goals in GVCs which, when used by public authority, become regulatory intermediaries.¹⁰⁵ Finally, as the pursuit of public goals affects several actors,

102. Trust literature normally employs the term *citizens*. For an example, see generally *id.* Due to the nature of the subject matter, when employed here, *citizens* has to be understood broadly as a general opposite to public authority, and thus also encompassing corporations and, in particular, producers. This article uses the word *subjects* more frequently in relation to *private* authority.

103. See Mansbridge, *supra* note 23, at 59–60 (discussing how a principal signals trust through procedures, and the circumstances under which it is possible for a principal to rely on “trust-based accountability”).

104. See Abbott et al., *supra* note 22, at 19–20 (discussing the goals of intermediaries, including civil society intermediaries, and how cooperation can advance these interests).

105. See *generally id.* (discussing the formation of intermediaries).

where public authority explicitly interacts with private regulators, a trust relationship is formed with those affected by the intermediaries' authority. Without procedural guarantees of the conditions for trust, and failing public authority to remedy, public authority's reliance on private intermediaries would undermine the basis for trusting relationships between certain affected actors and the private regulator.

After a theoretical illustration of the concept of trust and the trust-based relationships in Section A and B, Section C delves into questions of proceduralization of institutional trust in a transnational space, with particular reference to multi-stakeholder and global experimentalist governance structures. Section D will further elucidate the transposition of the framework to VSS and HRDD by introducing a triadic conception of trust and clarifying key concepts, such as which actors are considered subjects or affecteds. Part IV will then discuss the interaction between public and private authority against the concept of institutional trust.

A. *The Foundations of Trust*

The concept of trust has been pivotal to a considerable body of literature in disciplines as diverse as philosophy, psychology, sociology, organizational studies, and, only more recently, regulation and law.¹⁰⁶ Trust is a central feature to all relations between individuals¹⁰⁷ and organizations.¹⁰⁸ It enables cooperative behavior¹⁰⁹ and decreases transaction costs.¹¹⁰ It constitutes the foundation on which all agency relationships are formed and function; such relationships re-

106. For a recent example, see generally *TRUST IN REGULATORY REGIMES* (Frédérique Six & Koen Verhoest eds., 2016).

107. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (arguing that people obey laws based on legitimacy rather than fear of punishment); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (discussing the relationship between economic action and structure of social relations).

108. Susan P. Shapiro, *The Social Control of Impersonal Trust*, 93 AM. J. SOC. 623, 625 (1987) (suggesting that "trust describes a kind of social organization").

109. See generally *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* (Diego Gambetta ed., 1988) (discussing how cooperative relations can depend on trust).

110. See generally Debra Meyerson et al., *Swift Trust and Temporary Groups*, in *TRUST IN ORGANIZATIONS* 166 (Roderick M. Kramer & Tom R. Tyler eds. &

present an indispensable means of expanding the complexity of our modern societies.¹¹¹ Trust shapes a three-part relationship, where “A trusts B to do X.”¹¹² Personal trust contributes to creating a virtuous community committed to moral codes. It is an essential component of social capital, which is the fundamental feature of social organizations, and includes “values, norms, and networks” that enable cooperation and coordination for the mutual benefit.¹¹³

A frequently used definition frames personal trust as a psychological state encompassing the intention to accept vulnerability on the basis of positive expectations of the intentions or behavior of a third party.¹¹⁴ Vulnerability is a necessary component of trusting relations; without the presence of vulnerability, trust would be unnecessary, because the outcome of the trusted party’s behavior (the trustee) would bear no consequences on the trustor. Vulnerability entails a transfer of control to another party.¹¹⁵ In social sciences, trust is often associated with the idea of a “leap of faith.”¹¹⁶ This characterization highlights the fact that trust-based relationships emerge in the presence of risk and uncertainty about the future actions of the trustee,¹¹⁷ in the context of a relationship of interdependence where the goals of one party cannot be

trans., 1996) (arguing that temporary groups are able to function efficiently based on a unique trust for temporary cooperation).

111. See generally NIKLAS LUHMANN, *TRUST AND POWER* (Christian Morgner & Michael King eds., Polity Press 2017) (1979) (describing a theory of society grounded in relationships built on trust).

112. RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* 9 (2002).

113. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK* 167 (1993).

114. Roger C. Mayer et al., *An Integrative Model of Organizational Trust*, 20 *ACAD. MGMT. REV.* 709, 712 (1995). This is based on a certain commonality of approach between different disciplines concerned with the study of trust. See Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 *ACAD. MGMT. REV.* 393, 395 (1998) (arguing that it is agreed “[a]cross disciplines” that risk and interdependence are required for the conditions under which trust can emerge).

115. See JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 100 (1990) (identifying “actions that increase one’s vulnerability to another” as a form of trust because they involve the transferring of control, and arguing that such transfers are not limited to those situations in which the potential loss is greater than the potential gain).

116. GUIDO MÖLLERING, *TRUST: REASON, ROUTINE, REFLEXIVITY* 110 (2006).

117. COLEMAN, *supra* note 115, at 100.

achieved without relying on another.¹¹⁸ Trust is thus a hypothesis concerning future conduct, but one that is strong enough to form the basis of actual cooperative action.¹¹⁹ As a standard of behavior, trust is not defined in the abstract, but by the perspective of the trustors, their standards and values, and their relationships with their trustees.

According to a strand in trust literature, understanding trust as a choice to engage in cooperative action in spite of unavoidable contingency would encompass one of the possible mechanisms to manage social risks. People can either decide to trust, or turn to practices of “distrust”, such as monitoring, controlling, and sanctioning.¹²⁰ A large swath of scholarship discusses trust and control either as substitutes or complementary.¹²¹ Trust reduces complexity by making an informed bet on desirable future outcomes; on the other hand, control reduces complexity by regulating, and therefore eliminating, a number of possible outcomes. The first perspective treats control as in opposition to trust: when one trusts, one cannot directly control; when one controls, one does not trust, because control arises from distrust.¹²² A third position, more nuanced, supports the claim that trust and distrust complement and strengthen each other, and can be located on a continuum.¹²³ This position also allows the defusing of claims that control should be dismantled in favor of (blind) trust. This debate notwithstanding, other approaches to trust, such as the concept of institutional trust, incorporate mechanisms to bind

118. Blair H. Sheppard & Dana M. Sherman, *The Grammars of Trust: A Model and General Implications*, 23 *ACAD. MGMT. REV.* 422, 423–24 (1998).

119. Georg Simmel, *The Sociology of Secrecy and of Secret Societies*, 11 *AM. J. SOC.* 441, 450 (1906).

120. Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS*, *supra* note 109, at 94, 99–100.

121. *See, e.g., id.* (describing the relationship between risk and action in relation to trust as “complementary”); COLEMAN, *supra* note 115, at 100 (identifying actions that involve transferring control as a form of trust).

122. *See generally* PIERRE ROSANVALLON, *COUNTER-DEMOCRACY* (Arthur Goldhammer trans., 2008) (discussing the duality of modern “politics of distrust,” which can increase the power of the citizenry through encouraging vigilance and skepticism, but can also cause destructive forms of political denigration).

123. Frédérique Six, *Trust in Regulatory Relations: How New Insights from Trust Research Improve Regulation Theory*, 15 *PUB. MGMT. REV.* 163, 164–65 (2013).

the actions of the trustee. Despite not bypassing the dichotomy between trust and control by the trustor, the concept of institutional trust incorporates mechanisms to bind the actions of the trustee to the vulnerability of the trustor.¹²⁴ The trustor can proceduralize such mechanisms internally so as to avoid direct control from the trustee and, where necessary, mediate via deliberation between the interests of different trustees.¹²⁵

B. Institutional Trust

Public trust *in* organizations and systems, and trust *between* organizations, are multilevel constructs that are different than trust relationships established between individuals.¹²⁶ However, many considerations discussed above can be transposed. Obviously, one can neither trust each single individual within an organization, nor rely on the organization as a whole to have a singular psychological trusting disposition towards other organizations. Nevertheless, institutional trust also signals an engagement in cooperative behavior between institutions, or the justifiable acceptance of a form of authority in spite of uncertainty surrounding future action. When dealing with institutions, the expectations of a trustor are well-grounded and justifiable in the presence of a framework of procedural norms constraining behavior, specific organizational forms, and “social-control specialists,”¹²⁷ constituting an overarching legal and political structure.¹²⁸ A vulnerable party, i.e., a trustor, would never accept the consequences of the actions of the trustee without some assurance that the latter would act in a way that is desirable to the trustor. A trustor would reasonably put himself in a position of vulnerability only

124. Tom R. Tyler, *Trust and Democratic Governance*, in TRUST AND GOVERNANCE 269, 285 (Valerie Braithwaite & Margaret Levi eds., 1998).

125. See *infra* Section III(C).

126. Guido Möllering, *Trust, Institutions, Agency: Towards a Neoinstitutional Theory of Trust*, in HANDBOOK OF TRUST RESEARCH 355, 355 (Reinhard Bachmann & Akbar Zaheer eds., 2006). See generally Frens Kroeger, *Trusting Organizations: The Institutionalization of Trust in Interorganizational Relationships*, 19 ORG. 743 (2012) (analyzing trust on different levels in an interorganizational context).

127. Shapiro, *supra* note 108, at 635.

128. See generally Philip Pettit, *Republican Theory and Political Trust*, in TRUST AND GOVERNANCE, *supra* note 124, at 295 (discussing the republicanism perspective on the structure of political trust).

under certain conditions for trust. In the alternative, the relationship would be characterizable as one of dominance of the trustee over the trustor.

A key question concerns the conditions that would characterize trust as the best strategy to minimize uncertainty. The *trustworthiness* of the trustee is a crucial concept; it identifies the disposition of a trustee to meet the expectations of a trustor.¹²⁹ To consider trust to be the “reliance on another’s good will”¹³⁰ foregrounds the role of good faith and other-regarding procedures in trusting relations—especially present in the relationships with and between institutions—as a sign of trustworthiness. Trustworthiness is not connected to intersecting interests of trustor and trustee, but it is instead grounded on the specific competence of the trustee with which the trusting relation is initiated; and the responsiveness of the trustee to the trustor’s dependence, stemming from the goodwill of the former.¹³¹ Trusting an institution means that someone will follow that institution’s directions, because doing so is in his own best interest.¹³² At the same time, an institution knows that trust should be maintained in order to secure compliance and justify its rules.¹³³ This fact, in itself, limits and binds the actions of the institution in question to the vulnerability of the trustor.¹³⁴ In this way, trust puts a moral obligation on an institution (for example, a public regulator) via the normative expectation that it will act in the interest of those trusting it (i.e.,

129. Russell Hardin, *Trustworthiness*, 107 *ETHICS* 26, 41–42 (1996).

130. Annette Baier, *Trust and Antitrust*, 96 *ETHICS* 231, 234 (1986).

131. Arnon Keren, *Trust and Belief: A Preemptive Reasons Account*, 191 *SYNTHESE* 2593, 2609 (2014).

132. Tyler, *supra* note 124, at 280–81.

133. See John Braithwaite, *Institutionalizing Distrust, Enculturating Trust*, in *TRUST AND GOVERNANCE*, *supra* note 124, at 343, 346 (noting that in one study, compliance with regulations increased when chief executives in nursing homes believed that they had the trust of regulators); see also Russell Hardin, *Do We Want Trust in Government?*, in *DEMOCRACY AND TRUST* 22, 29 (Mark E. Warren ed., 1999) (“[T]he design of the roles and their related incentives will induce role-holders to do what they must do if the organization is to fulfill our trust.”).

134. See Cynthia Farina, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 *ADMIN. L. REV.* 287, 292 (1993) (“To take the power is to take on the responsibility of service with which it is invested.”).

the citizens).¹³⁵ As an effect, an institution acts in a trustworthy manner, in principle reinforcing trust among its subjects and, consequently, its authority. Trust thus binds a trustee to the expectations of the trustor, while empowering it at the same time.¹³⁶

Trust demands more than an expectation of a specific and clearly identifiable outcome; it also includes an expectation as to *how* such an outcome will be reached, i.e., by taking into the utmost account the vulnerability of the subjects.¹³⁷ However, a moral obligation is neither enforceable in itself, nor visible to the subjects. To have tangible effects, it requires internal procedures binding the trustee to ensure and signal trustworthiness. Such procedures are per se not tantamount to direct control from the trustor, but ensure goal alignment, responsiveness to the dependence and vulnerability of the trustor and, where multiple interests are at stake, deliberation. As already hinted, in an institutional context, trust is made visible through, and guaranteed by, procedural mechanisms ensuring that different interests are taken into account, especially those interests subject to the trustee (i.e., the targets that have to comply with its rules).¹³⁸ Assurance of goodwill is operationalized through procedural tools to ensure disinterestedness and other-regardingness. This is also visible empirically in a regulatory context. The more targets experience procedural justice, the more likely it is that regulation generates their trust.¹³⁹

As several other actors may be affected by the trustee's discretion, their interests and vulnerabilities should be taken into account for their trust to materialize and be well-placed or justified.¹⁴⁰ This allows affected actors, such as citizens and beneficiaries, to perceive a (private) regulator as independent

135. Orlando Patterson, *Liberty Against the Democratic State: On the Historical Contemporary Sources of American Distrust*, in DEMOCRACY AND TRUST, *supra* note 133, at 151, 153.

136. Vigilenca Abazi & Eljalil Tauschinsky, *Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union*, 11 UTRECHT L. REV. 78, 83 (2015).

137. Tom R. Tyler, *Trust Within Organisations*, 32 PERSONNEL REV. 556, 559 (2003).

138. Shapiro, *supra* note 108, at 635–36.

139. Frédérique Six & Koen Verhoest, *Trust in Regulatory Regimes: Scoping the Field*, in TRUST IN REGULATORY REGIMES, *supra* note 106, at 1, 9–10.

140. Tyler, *supra* note 137, at 562. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002) (explaining that voluntary deference to the

from the targets it regulates.¹⁴¹ On the one hand, private and self-serving interests cannot be completely removed from the activities of regulators or trustees. On the other, procedures ensure that a trustee does not act exclusively in its own interest, but that it instead acts in fairness, honesty, and integrity, and by incorporating the vulnerability of the trustors and those affected.¹⁴² This understanding of trust incorporates mechanisms to ensure the interest of the trustors. At the same time, it also allows us to look at the trust relationship from the perspective of the trustee, since it conceptualizes the trust of the trustor (and different trustors) as a constitutive element of the authority exercised by a trustee. Procedures also ensure legitimacy of a regulator—a key strategy to encourage compliance from the subjects¹⁴³—therefore further cementing the regulator’s authority. While proceduralization may not always be empirically equated to high levels of trust by different affected actors, it would nevertheless provide a yardstick to compare different degrees of trustworthiness. While public regulators include the interests of those affected *qua* citizens, a transnational private regulator may have a different and narrower constituency, upon whose trust it depends.

A related approach, based on instrumentalism and rational choice, conceptualizes trust as “encapsulated inter-

law is shaped by the actions of authority and the perception of their legitimacy).

141. See generally Neil Gunningham & Darren Sinclair, *Organizational Trust and the Limits of Management-Based Regulation*, 43 L. & SOC’Y REV. 865 (2009) (discussing the limits and benefits of management-based regulations, which are initiatives that focus on management practices in a firm in pursuing regulatory goals).

142. See Farina, *supra* note 134, at 291–93 (discussing the ethical obligations of public authority, and their necessity to public trust). See generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013) (discussing the role of public authorities as trustees of their people, and extending the discussion to the international level).

143. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 734 (1994) (discussing the underpinnings of authoritativeness based on assessment of legitimacy). For a discussion on the strengths of legitimacy over alternatives such as coercion and reward, see generally John Braithwaite, *Rewards and Regulation*, 29 J.L. & SOC’Y 12 (2002).

est.”¹⁴⁴ It acknowledges and centers on the role of the interests, goals, and ambitions of the trustor.¹⁴⁵ The presence of incentives would ensure that a broadly defined agent pursues the interests of its principal by serving at the same time its own interest.¹⁴⁶ Under this approach, trust is to be stimulated via incentives to enhance the trustee’s self-interest in pursuing the goals of the trustor.¹⁴⁷ In this scenario, trustworthiness would be associated with the commonality of interests between trustee and trustor. The problem with this approach is that when interests and behaviors of the trustee are unknown or unpredictable, a trusting relationship would not emerge. This article employs the term *reliance* to characterize a trusting relationship based on a rational choice congruence of interests where the motivations of the trustee in relation to the trustor do not matter as long as the expected outcome occurs, regardless of the procedures underpinning action.¹⁴⁸ This is the relationship between E.U. authorities and VSS, as illustrated in Section B of Part IV. By contrast, this contribution adopts the concept of trust to describe relationships grounded on the additional requirement that the trustee acts out of goodwill towards its subjects—which is made explicit through procedural mechanisms. In a nutshell, according to this perspective—and resonating with literature on input, throughput, and output legitimacy—trust would be “moral,” inclusive, and proceduralized, while reliance would be “pragmatic” and outcome-based.¹⁴⁹

144. HARDIN, *supra* note 85, at 1.

145. *Id.*

146. *Id.* at 24.

147. *Id.*

148. Following this perspective, and taking an approach arguably originating from Luhmann’s distinction between trust and confidence, see generally Michael Schwarz, *Let’s Talk About Trust, Baby! Theorizing Trust and Mutual Recognition in the EU’s Area of Freedom, Security and Justice*, 24 EUR. L.J. 124 (2018).

149. Cynthia Townley & Jay L. Garfield, *Public Trust*, in TRUST: ANALYTIC AND APPLIED PERSPECTIVES 95, 97 (Pekka Mäkelä & Cynthia Townley eds., 2013).

C. *The “Proceduralization” of Institutional Trust in Transnational Governance*

Since the early work of Teubner, legal scholarship has called for a reflexive function of the law.¹⁵⁰ A consequence of the functional differentiation of society into autopoietic systems,¹⁵¹ this approach requires a transition from legal rules identifying and prescribing precise substantive outcomes, towards legal rules centered on strategies capable of indirectly inducing the desired substantive end. State control is therefore replaced with effective internal control.¹⁵² The conditions for trust are grounded on the trustee’s goodwill towards vulnerable subjects, made visible through, and guaranteed by, procedures. Institutional trust arguably favors a “thick” conception of proceduralization, hinging on deliberation, mutuality, and consensus, rather than a “thin” conception based on mere bargaining and compromise,¹⁵³ as the former seems better suited to account for vulnerabilities. Such a thick conception of proceduralization also contemplates a mediating role for public authority, in order to ensure that key requirements of disinterestedness and other-regardingness are in fact respected, and to ensure that the authority chooses the particular mode of discourse appropriate for deliberation.¹⁵⁴ Public reasoning ensures other-regardingness and disinterestedness insofar as it requires the trustee to put forward reasons that participants in the rulemaking process understand, a process that itself compels the regulator to act reflexively and permits different subjects and affected actors to participate and have

150. For an example of Teubner’s observations on reflexive law, see generally Günther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC’Y REV. 239 (1983).

151. See generally NIKLAS LUHMANN, *SOCIAL SYSTEMS* (John Bednarz, Jr. & Dirk Baecker trans., Stanford Univ. Press 1996) (1984) (proposing a new vision of society as a self-producing or autopoietic system of communications).

152. See generally Teubner, *supra* note 150 (identifying areas of law where reflexive solutions of law are emerging to provide internal control for regulatory systems).

153. Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. LEGAL STUD. 597, 599 (2000).

154. Julia Black, *Proceduralizing Regulation: Part II*, 21 OXFORD J. LEGAL STUD. 33, 34 (2001).

their views taken into account.¹⁵⁵ Through such procedures, a private regulator can signal and ensure that it is not too close to its targets, and that it instead acts with goodwill towards a broad set of affected actors. In a transnational space, procedures are a key part of the legitimizing strategies initiated by private actors that have to assert their legitimacy and authority.¹⁵⁶ Principles of inclusiveness and participatory rights are prone to migration between different contexts and institutions, especially where strategic actors harness them in pursuit of their goals.¹⁵⁷

Proceduralization in both its thick and thin variants has been embraced by public regulatory strategies moving away from command-and-control in order to center on decentralization,¹⁵⁸ and in turn center on mutual learning and adaptation¹⁵⁹ and experimentalism.¹⁶⁰ At the supranational level, an interest in procedures has characterized different strands of legal and political science research normatively concerned with the lack of legitimacy and accountability of international and transnational bodies.¹⁶¹ The concept of trust highlights

155. See generally Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17 (Alan Hamlin & Philip Pettit eds., 1989) (proposing the concept of a deliberative democracy where “affairs are governed by the public deliberation of its members”).

156. See generally Rachael Diprose et al., *Transnational Policy Influence and the Politics of Legitimation*, 32 *REG. & GOVERNANCE* 223 (2018) (theorizing “strategies of policy influence exercised by transnational actors in multilevel governance settings, through which strategic efforts to legitimize transnational actors and forums are deployed as means of transnational policy influence”).

157. For an example of these principles in action in a transnational legal regime managed by the World Bank, see generally DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES* (2007).

158. Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World*, 54 *CURRENT LEGAL PROBS.* 103 (2001) (discussing the concept of “decentring,” according to which governments do not and should not have a monopoly on regulation).

159. See generally *REFLEXIVE GOVERNANCE* (Olivier De Schutter & Jacques Lenoble eds., 2010) (offering a framework for understanding modern patterns of governance that takes an approach based on learning).

160. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998) (proposing a new form of government called democratic experimentalism, wherein power is decentralized to empower citizens at the local level).

161. For an example of this research, see generally Kingsbury et al., *supra* note 25 (applying a global administrative law framework to understand inter-

the importance of other-regarding procedures and forms of non-decisional participation that are observed to be particularly lacking in global governance.¹⁶² Especially relevant for a disquisition on private standards and corporate regulatory responsibilities, the concepts of multi-stakeholder governance and global experimentalism are helpful for understanding the transposition of the proceduralized nature of institutional trust in a transnational private governance setting. Multi-stakeholder approaches constitute distinctive governance features of VSS, while experimentalism is beginning to emerge in the domain of HRDD and business and human rights.¹⁶³ These approaches constitute useful constructs in which it is possible to appraise the institutional trust of VSS and corporations implementing HRDD, and their capacity to account for vulnerability of subjects and other affected actors.

Since the inception of the Forest Stewardship Council, multi-stakeholder interest representation in standard-setting and standard management has rapidly become a hallmark of VSS.¹⁶⁴ While some initiatives still visibly respond to the interests of business, and only economic actors can exert a key role, multi-actor institutional arrangements and formal procedural inclusiveness have characterized many initiatives aiming at including the interests of affected rights-holders and labor and civil society actors.¹⁶⁵ Multi-stakeholder organizations are touted as fostering dialogue across different constituencies, enabling consensus building, and sharing knowledge and expertise.¹⁶⁶ Multi-stakeholder mechanisms allow non-business actors to play the role of watchdogs, and permit a broad con-

national bodies' interest in administrative law, which boosts legitimacy and accountability).

162. See Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 220 (2014) (discussing the concept of disregard in global governance).

163. See generally Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017) (introducing the experimentalist governance theory to respond to criticism of the international human rights regime).

164. Axel Marx, *Legitimacy, Institutional Design, and Dispute Settlement: The Case of Eco-Certification Systems*, 11 GLOBALIZATIONS 401, 401–02 (2014).

165. For an overview of such initiatives, see generally *id.*

166. See, e.g., *id.* at 403 (discussing how certification systems gain legitimacy through community building, which fosters communication and consensus).

sensus over the resulting regime.¹⁶⁷ Also, legal scholarship has observed that a multi-stakeholder approach permits wide participation of those affected by the regime, and ensures both transparency and an adaptive approach to accountability, though with a need for both consolidation and improvement.¹⁶⁸ The most positive appraisals of transnational private standard-settings have gone as far as claiming that certain private standards are based on a thick extent of proceduralization and on consent of all affected actors, which makes them normatively preferable even over international law.¹⁶⁹ Section A of Part IV will reflect on these characterizations with reference to empirical appraisals of multi-stakeholder standards.

Experimentalism has been described as an emerging governance feature observable at national, regional,¹⁷⁰ and global levels.¹⁷¹ Global experimentalism describes a multi-level, participatory, and collective problem-solving approach, where issues and potential solutions are framed in an open-ended manner, subject to peer review in light of locally generated knowledge.¹⁷² It is structurally characterized by deliberation and inclusiveness, which are recursively redefined on the basis of new information and experience.¹⁷³ Experimentalist regimes aim at the broadest possible participation of those affected, without, however, requiring a pre-identification of

167. Cf. John Roberts, *The Manufacture of Corporate Social Responsibility: Constructing Corporate Sensibility*, 10 *ORG.* 249, 259 (2003) (noting that when stakeholders control a corporation at a distance, they incentivize the corporation to act in those distant interests, even if those interests involve “moral sensibilit[ies]” that displace local moral interests).

168. Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *EUR. J. INT’L L.* 47, 78–82 (2006).

169. For an example of such a claim, see Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17 *J. INT’L ECON. L.* 739, 747–49 (2014).

170. See generally Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, in *THE OXFORD HANDBOOK OF GOVERNANCE* 169 (David Levi-Faur ed., 2012) (discussing the concept of experimentalist governance, with focus on national and regional governance).

171. See generally Gráinne de Búrca et al., *Global Experimentalist Governance*, 44 *BRIT. J. POL. SCI.* 477 (2014) (outlining the theory of global experimentalist governance).

172. *Id.* at 477.

173. *Id.* at 478.

these actors.¹⁷⁴ Cycles of revision will include new interests from those actors who self-identify as affected.¹⁷⁵ Experimentalism also encompasses the interactive dynamics between public and private ordering at multiple levels which, where linked together, contribute to a novel “learning organization.”¹⁷⁶ Public reasoning is expected by the private actors and networks involved, and public authority and civil society organizations are expected to exercise monitoring functions. Experimentalism is also visible in human rights global governance;¹⁷⁷ for instance, in the domain of business and human rights and HRDD, its features are present in the UNGPs.¹⁷⁸ Here, experimentalism contributes to the effectiveness of the regime in question via the presence of a varied group of actors—such as governments, trade unions, industry associations, and civil society organizations—within frameworks supporting industry’s operationalization of HRDD processes. Within a multi-actor, experimentalist architecture, business parties can recursively reflect upon their HRDD practices, “and scale-up their actions if necessary under mechanisms of peer pressure and review” as well as independent evaluation.¹⁷⁹ Institutionalized forms of cooperation between public authority, companies, and civil society organizations structurally support and, most importantly, verify and control businesses’ implementation of HRDD.¹⁸⁰ Notably, these processes contribute to the creation of institutional trust where the vulnerabilities of those affected by the regime—such as holders of human rights, local communities, and workers—can be advanced by civil society organizations and labor unions involved in the operationalization of HRDD.

D. *Trust and Transnational GVC Regulation*

The regulatory arrangements discussed herein can be visualized as a triad, characterized by three relationships: those

174. Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221, 251–52 (2008).

175. *Id.* at 251.

176. de Búrca et al., *supra* note 171, at 479.

177. de Búrca, *supra* note 163, at 287.

178. Ruggie, *supra* note 17, at 6.

179. Antoine Duval & Enrico Partiti, *The UN Guiding Principles on Business and Human Rights in (National) Action: The Dutch Agreement on Sustainable Garment and Textile*, 48 NETH. Y.B. INT’L L. 381, 396 (2018).

180. *Id.* at 398.

between public authority and private authority; those between private authority and those affected by it; and those between public authority and those affected by private authority as a consequence of a public-private interplay. Consistent with the regulator-intermediary-target (RIT) model discussed in literature on regulatory intermediaries, this triadic relationship problematizes the role of intermediary actors and their diverse goals,¹⁸¹ which may either be tamed or exacerbated by public interplay.¹⁸² However, the triad directs the focus of the inquiry on the intermediaries' relationship with their principals and, importantly, it takes a different approach towards the outcomes of intermediation. While the RIT model looks at the targets of regulation (for VSS and companies implementing HRDD, these targets would be other companies and producers), a trust-based triad looks at the outcome of the interplay on a range of actors—including producers, consumers, holders of human rights, local communities, labor forces, and suppliers—and on their dynamic feedbacks and involvement in rulemaking. In a sense, the triad is consistent with an extension of the RIT model, in which beneficiaries should be included in the intermediary's rulemaking activities.¹⁸³ Following the literature on multilevel trust, where trust at one level influences trust at another level,¹⁸⁴ the way the trusting relationships between, one, public authority and private intermediary, and two, private intermediary and those affected, are established and structured determines trust towards these specific forms of transnational governance characterized by public-private interaction.

The employment of a trust-based approach appears promising for the public-private interplays in transnational governance discussed herein. Its application to relationships between

181. See generally Abbott et al., *supra* note 22 (discussing the RIT model, including various problems of capture related to intermediaries).

182. See Walter Mattli & Jack Seddon, *New Organizational Leadership: Non-state Actors in Global Economic Governance*, 6 *GLOBAL POL'Y* 266, 274 (2015) (noting the imperative of international organizations to seek external support as a result of political masters).

183. Mathias Koenig-Archibugi & Kate Macdonald, *The Role of Beneficiaries in Transnational Regulatory Processes*, 670 *ANNALS AM. ACAD. POL. & SOC. SCI.* 36, 39 (2017).

184. See generally Bo Bernhard Nielsen, *Trust in Strategic Alliances: Toward a Co-Evolutionary Research Model*, 1 *J. TR. RES.* 159 (2011) (examining different levels of trust and their place in strategic alliances).

institutions, and to relationships between any public or private institution and those affected by its directives, allows observers to set aside the public-private dichotomy. Trust-based (and reliance-based) inter-institutional relations encompass a broad constellation of interactions and forms of cooperation. Trust is therefore helpful in illustrating how to structure a relationship with non-public forms of authority, i.e., by establishing safeguards in favor of those in a position of vulnerability compared to the private regulator. For trust to be well-placed, this relationship should be based on the conditions for trust of those affected. These expectations embedded in institutional trust justify a relationship with an institution exercising regulatory authority. Trust, in this sense, is connected to an understanding of the concept of legitimacy as grounded in the recognition of those whom a regulator aims to regulate.¹⁸⁵

Under a trust paradigm, different groups may be in a position of vulnerability vis-à-vis a trustor on the basis of the trust relationship in question and the goals of the trustee. In the first place, public authority relying on, or trusting, a private regime may be a peculiar subject of private regulation. In this scenario, public authority depends on private actors for the implementation of specific regulatory goals, and it is subject to specific vulnerability connected to the potential loss in legitimacy, which would derive from the intermediaries failing to comply with the conditions of trust for those affected by its rules, and from the intermediary not meeting its regulatory goals. In the relationship between private authority and those affected, regardless of a public-private interaction, those directly having to comply, more or less voluntarily, with an institution's directives are considered subjects. These are the targets, i.e., corporations and other producers. Several other actors, in addition to those directly regulated, can be considered affected. These actors notably include beneficiaries such as holders of human rights, local communities, and workers. As visible in multi-stakeholder and experimentalist governance

185. See generally Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571 (1995) (analyzing different forms of legitimacy arising in literature on organizational legitimacy). For a transposition of this framework to forms of non-state, market-driven regulators, see generally Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 *REG. & GOVERNANCE* 347 (2007).

structures, to varying degrees, these actors are given a space to voice their vulnerability.¹⁸⁶

In a transnational space, this expansion leads to the well-known difficulty transnational private regulators have in creating a workable identification of those affected (and thus deserving a voice).¹⁸⁷ Without a clearly defined constituency, virtually everyone can, to some extent, be considered directly or indirectly affected. Other scholars have therefore suggested an “*all-affected principle*,” where “all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it.”¹⁸⁸ However, this approach can also be challenged under the same claims of unworkable breadth.¹⁸⁹ The all-affected principle retains the possibility of comparing varying endowments of institutional trust in different arrangements based on the possibility of participation and its quality.¹⁹⁰ Affectedness can also be construed as a matter of degree, depending on the proximity to the policy problem—which also narrows the affected group.¹⁹¹ Proximity can be understood as having a specific stake in a given decision. For example, under a standard aiming at the preservation of tropical forests, affected actors and their vulnerabilities include specific rights-holders and communities whose livelihood and enjoyment of human rights closely depend on such forests.¹⁹²

186. Tim Büthe, *Beyond Supply and Demand: A Political-Economic Conceptual Model*, in GOVERNANCE BY INDICATORS 29, 33 (Kevin E. Davis et al. eds., 2012).

187. See generally Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40 (2007) (discussing the theoretical underpinnings of the make-up of people included in democracy).

188. NANCY FRASER, SCALES OF JUSTICE 64–65 (2009); see also Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37, 45 (2008) (offering an alternative to the all-affected principle, one that focuses on actors whom a political regime “subjects to [its] coercion”).

189. Robert E. Goodin, *Enfranchising All Subjected, Worldwide*, 8 INT’L THEORY 365, 368 (2016).

190. See Mathias Koenig-Archibugi, *How To Diagnose Democratic Deficits in Global Politics: The Use of the ‘All-Affected Principle,’* 9 INT’L THEORY 171, 173 (2017) (noting one interpretation of the all-affected principle is that a voice should be given to all actors “*possibly . . . affected by any possible decision*”).

191. *Id.* at 182.

192. Cf. Goodin, *supra* note 149, at 51 (explaining which actors are considered to hold “affected interests”).

Consumers and other upstream business entities,¹⁹³ depending on the substance of the regime and the solution it proposes, may be affected, but arguably to a lesser degree than those whose livelihoods depend on the preservation of forest-based ecosystems. Most importantly, rights-holders would not be included in decision making under such an all-subjected-principle threshold, because the only actors subject to the standards (or to corporate HRDD practices) are businesses.

In contrast to trust, reliance captures a relationship between institutions (public authority on the one hand, and VSS and corporations on the other) grounded in a congruence of interests, where normative expectations about the behavior of a trustee vis-à-vis a trustor are lacking. A relation of reliance centers on the competences of the trustee, but disregards how, if at all, it will account for vulnerabilities. As per the third element of the triad, pervasive relations of reliance between public and private authority may nonetheless expose a larger group of actors to vulnerability, and normatively require that trustworthiness of the trustee in relation to these affected actors is guaranteed by public authority establishing an interplay with private regimes. A relation of reliance should therefore be transformed into a trusting relation characterized by the presence of the conditions for trust between a private regulator and those affected.

A number of empirical issues must be unpacked at this juncture. The conditions of trust for private authority with respect to its subjects are worth discussing: How, if at all, do private regulators establish and communicate their trustworthiness with respect to their subjects? Especially important: To what extent can those affected by private authority voice their concerns? These questions will be addressed in Section A and D of Part IV for VSS and multinationals implementing HRDD. Sections B and C of Part IV address the relationship between public and private authority where the former engages with, and activates, the latter in GVC regulation. This relationship is characterized by the concept of reliance. In the context of this relation of reliance, does public authority affect the relations of trust between private regulators and their subjects by attempting to improve the trustworthiness of private regulators

193. Business entities are relevant here insofar as the business entities that directly comply with the standards are targets.

vis-à-vis their subjects and those affected? What is the role of public authority in enhancing the institutional trust of the intermediary?

IV. THE INSTITUTIONAL TRUST OF PRIVATE AUTHORITY AND ITS USE BY PUBLIC AUTHORITY

The procedural guarantees of institutional trust towards broad groups of affected actors cannot always be found where private actors regulate, especially when exercising self-regulatory competences.¹⁹⁴ Where a trustee has the capacity to subject to its actions individuals, companies, or institutions, and necessitates compliance from them, it would have to act with the goal of preserving their trust via the conditions for trust. This holds true for all relationships, but the situation differs for those affected. While public authority attempts to incorporate the interests of those affected (since they are citizens and their trust is generally needed), it cannot always be assumed that all those affected by acts of private regulators (such as workers, holders of human rights, or consumers) consider them trustworthy and have expectations that the trustee will adopt specific efforts and procedures to take their vulnerability into account. In other words, only the trust of a narrower group is a constitutive element of a private regulator's authority. In spite of the ever-expanding grounding of private regulation in constitutionalism,¹⁹⁵ and an expanding role of private regulation affecting broader constituencies than the group that is setting the rules,¹⁹⁶ a private actor generating regulatory effects does not necessarily need to operate with goodwill towards the vulnerability of *all* those affected. Several potential intermediaries, with varying features, possess varying endowments of trustworthiness with respect to specific groups.

In the first place, a self-regulator may only account for the vulnerability of its members or targets, and therefore only act with goodwill towards those subject to its rules. This may occur

194. Carolyn Abbot, *Bridging the Gap: Non-State Actors and the Challenges of Regulating New Technology*, 39 J.L. & SOC'Y 329, 352 (2012).

195. See generally SCHEPEL, *supra* note 35 (discussing whether the legal validity of constitutional instruments can be applied to private transactional governance through law).

196. See generally REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW, *supra* note 91 (discussing regulation in the European Union).

where the targets of a private regulator voluntarily decide whether to comply with a regime.¹⁹⁷ This may lead to cases where private interests coincide with public interests, such as, for example, in the case of professional self-regulation¹⁹⁸ or, conversely, in instances of “greenwashing,” where certification is merely used for reputational purposes.¹⁹⁹ Similarly, private regulators may ground their regulatory legitimacy on economic factors and efficiency-based considerations of the economic actors involved in setting and adopting the rules.²⁰⁰ Mere power dynamics may then make the effects of their rules functionally equivalent to those of public authority, i.e., de facto mandatory. In these “coercive” circumstances, the interest of actors other than those setting the rules (and benefiting from them) may hardly play a role, particularly with regard to non-economic interests.²⁰¹ Finally, other private rule makers—such as some in the regulatory arrangements discussed herein—at least partially attempt to ensure the conditions for trust of affected subjects other than businesses via mechanisms for disinterestedness and other-regardingness accessible to non-business affected subjects. The effectiveness of private standards depends on their ability to gain trust of citizens, affected actors, targets; in this way, civil society trusts the standards to regulate producers, and producers trust the standards to deliver the trust of civil society.²⁰²

However, the relationship between VSS and companies implementing HRDD on the one hand, and public authority on the other, varies considerably. Public authority has arguably come to employ private standards to remedy capacity con-

197. See Lovisa Näslund & Kristina Tamm Hallström, *Being Everybody's Accomplice: Trust and Control in Eco-Labeling*, in TRUST IN REGULATORY REGIMES, *supra* note 106, at 145, 145–46 (explaining the qualities and needs of voluntary private regulatory regimes).

198. For an example from the case law of the European Court of Justice—which held that restrictions on competition could be justified on the grounds of legitimate public policy—see generally Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577.

199. Näslund & Hallström, *supra* note 197, at 153.

200. See *id.* at 145, 151–52 (discussing how regulators gain legitimacy).

201. See *id.* at 157–58 (contrasting “coercive” ways of obtaining compliance with compliance based on trust).

202. *Id.* at 149.

straints.²⁰³ This approach seems to disregard the fact that some of the standards employed may not operate on the basis of the conditions for trust with respect to actors other than economic subjects. As a consequence of the association with schemes that are untrustworthy to the extent that they do not account for the vulnerabilities of different affected actors, the pursuit of goals of the narrow group of economic actors behind the schemes may prevail over public and collective goals. As a result, considerable distributional effects may be generated. Legitimacy and public trust towards the overarching regulatory arrangement may falter. By contrast, the engagement with HRDD, while also partially based on functional grounds, plants the seeds for extension of the conditions for trust to multinational corporations. How precisely that is to be operationalized, and whether corporations will in fact adopt and fully embrace other-regarding procedures, remains to be seen.

A. *The Institutional Trust of Private Standards*

Only producers and consumers can voluntarily expose themselves to VSS regimes. Producers voluntarily expose themselves to vulnerability by choosing to comply with certain rules in addition to those that would otherwise be applicable; consumers purchasing certified products voluntarily exposed to the, arguably lower, vulnerability of consuming products that may not meet their (moral) expectations. The reasons behind the trust of these two groups may well vary. Producers trust that following the standard will generate at least a degree of economic returns while contributing to product differentiation. Without this assurance, producers would never undertake the extra costs resulting from certification and become *subjects* to a scheme. At the same time, consumers trust a scheme to successfully advance sustainability-related goals.²⁰⁴ Trust, therefore, informs and affects the choice to purchase a labeled product; consumers would otherwise not buy products certified by that specific standard, and would instead turn to

203. Partiti, *supra* note 85, at 95.

204. This account is, however, rather theoretical, as often consumers are not well-placed to discern specific goals and effects of a given scheme. See Näslund & Hallström, *supra* note 197, at 167 (acknowledging the importance of sustainability practices, but highlighting ways in which organizations can publicize these practices that consumers likely could not verify).

other schemes on a market for standardization.²⁰⁵ These groups can be further refined geographically. Consumers are mostly limited to those in Western markets where VSS are most popular, and producers can be more narrowly identified as Western retailers often requiring downstream compliance with a scheme.²⁰⁶ Those impacted by a scheme because their rights are protected by the standard (i.e. holders of human rights affected by a social standard, or producers who must comply with that standard) can be considered *affected* by the regulatory effects of a VSS. Their vulnerabilities would consist of the specific threat to their livelihoods and full enjoyment of specific human rights that the scheme attempts to address. Workers are therefore exposed to the vulnerability that the scheme may not be capable of effectively ensuring their labor rights. Smallholder or second- and third-tier producers (and potentially producers further upstream) are exposed to a potential raise in production costs, perhaps unmatched by sufficient economic returns. In spite of their status as economic actors, they are not the immediate targets of the scheme.

An alignment with the conditions for trust, or a search for the trust of non-economic affected actors, is particularly evident in private standards for sustainability. Multi-stakeholder schemes invest a considerable amount of energy and resources into the design and communication of inclusive, effective, and impactful standards and methodologies in setting up meta-regulators,²⁰⁷ and in highlighting their differences with industry-

205. See generally Juliane Reinecke et al., *The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry*, 33 ORG. STUD. 791 (2012) (analyzing the market of standards and their effect on companies and consumers). This assumption, however, may be challenged if account is given to the fact that consumers' trust may relate to private standards *in general* and not to a specific scheme. In this scenario, distrust towards a standard may compromise consumer trust towards other VSS. See Reinecke et al., *supra* at 809 (discussing the "standards market" as a singular entity that requires certain conditions to emerge generally).

206. See U.N. FORUM ON SUSTAINABILITY STANDARDS, VOLUNTARY SUSTAINABILITY STANDARDS, TRADE AND SUSTAINABLE DEVELOPMENT: 3RD FLAGSHIP REPORT OF THE UNITED NATIONS FORUM ON SUSTAINABILITY STANDARDS (UNFSS), at 33–34, U.N. Sales No. UNFSS/3/2018 (2008) (focusing on Western Europe's "long history" of experience with VSS in discussing consumer countries generally).

207. ISEAL—a "global membership association for credible sustainability standards" whose role resembles that of a meta-regulator for VSS—represents an example of this: ISEAL aims at the improvement of the impact,

based certifications.²⁰⁸ The main tool to ensure independence from the targets is the establishment of accredited third-party auditing as a main verification and enforcement tool.²⁰⁹ Moreover, VSS routinely implement internal strategies for legitimation and trust-building centered on proceduralization as a response to demand for inclusiveness and procedural fairness, and to more general criticism of private schemes.²¹⁰ This is consistent with a trust-based account, where trustworthiness is connected not just to technocratic attributes and regulatory outcomes, but also to the responsiveness to the trustor's vulnerability via proceduralization. Procedures for the setting of multi-stakeholder standards attempt to include the interests of certain actors affected by the standards, such as the ultimate beneficiaries.²¹¹ Other-regardingness might appear difficult to impose on private institutions whose very functioning is based on the potential exclusion of certain interests. For example, decision making in standard-setting organizations may be limited to members only.²¹² However, at least formally, certain VSS schemes subscribing to the "ISEAL Code of Good Practice" permit all interested parties to contribute to standard-setting by submitting comments, and require that reasons are given as to how those comments are taken into account.²¹³ Under the same ISEAL code, certain VSS may even allow all

credibility, uptake, and effectiveness of private standards. *Who We Are*, ISEAL, <https://www.isealalliance.org/about-iseal/who-we-are> (last visited Jan. 6, 2020).

208. See *Challenge the Label*, *supra* note 84 (explaining that ISEAL represents multi-stakeholder VSS that comply with ISEAL Codes of Good Practices and are committed to improving the quality and effectiveness of their standards).

209. Näslund & Hallström, *supra* note 197, at 153.

210. Philip Schleifer, *Varieties of Multi-Stakeholder Governance: Selecting Legitimation Strategies in Transnational Sustainability Politics*, 16 *GLOBALIZATIONS* 50, 57 (2019).

211. See Luc Fransen, *Multi-Stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics in the Institutional Design of Corporate Social Responsibility*, 10 *SOCIO-ECON. REV.* 163, 168 (2012) (describing the role of actors in the governance of voluntary programs).

212. See, e.g., ISEAL, *Setting Social and Environmental Standards: Code of Good Practice*, art. 5.6 (2014) https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf (requiring that membership criteria be transparent when "the standard-setting organization limits decision-making to members only").

213. *Id.* art. 5.4.

“directly affected parties” to be given a voice in standard-setting.²¹⁴ These obligations, arguably incorporating procedural requirements deriving from international rules,²¹⁵ ensure that a standardizing body reflects the interests of different groups interests, and puts forward justifications if a different course of action is chosen.²¹⁶

Political science and socio-legal scholarship has tempered the initial enthusiasm about multi-stakeholder organizations, offering a more nuanced perspective about the seemingly inclusive approach to standard-setting. Scholarship has noted how multi-stakeholder structures in fact may hide very light variants of actual interest inclusion,²¹⁷ and instead may be characterized by barriers to deliberation, unequal weight in decision making, and prevalence of business interests.²¹⁸ Even when VSS contemplate open participation rules, they offer more incentives for participation to corporate actors with higher interests, financial availability, and returns from successful capture.²¹⁹ This has been empirically confirmed by socio-legal studies demonstrating how economic interests of influential Western market players remain particularly dominant in standard-setting and standard management, even in those schemes with mechanisms into place to mediate between different economic and non-economic interests.²²⁰ VSS are bound to mediate between stringency in pursuing their goals and uptake by producers. Standards must retain a certain economic viability to be voluntarily employed by producers. Stan-

214. *Id.* art. 5.6.

215. See Agreement on Technical Barriers to Trade annex 3, Apr. 12, 1979, 31 U.S.T. 405, 1186 U.N.T.S. 276 (stating good practice for adoption of standards for the World Trade Organization).

216. Stewart, *supra* note 162, at 228–29.

217. See, e.g., Fransen, *supra* note 211, at 188 (suggesting that “some business-driven programmes are trying to have their cake and eat it too” with regard to maintaining the support of stakeholder groups without granting them influence in governance).

218. See generally Sébastien Mena & Guido Palazzo, *Input and Output Legitimacy of Multi-Stakeholder Initiatives*, 22 BUS. ETHICS Q. 527 (2012) (discussing legitimacy in and characterization of multi-stakeholder initiatives).

219. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 49–50 (1965) (discussing and defining “privileged” groups of actors in market groups).

220. See generally PHILLIP PAIEMENT, *TRANSNATIONAL SUSTAINABILITY LAWS* (2017) (discussing how transnational rulemaking informs global administrative law).

dard-setting may thus not give equal weight to economic considerations and public goals, which may lead a scheme to mediate and compromise more than it would be optimal for the pursuit of sustainability objectives.²²¹

Generally, this is reflected in a range of approaches spanning from mere consultation to actual involvement of affected interests other than those of the creators of, and subjects to, the rules.²²² Multiple stakeholder demands offer strategic opportunities for standard-setting organizations to both identify how to pursue their goal and to address concerns in a highly selective manner.²²³ NGOs and civil society movements have been, and remain, instrumental in creating a societal demand for schemes.²²⁴ They often push VSS towards improving their accountability mechanisms and enhancing participation and inclusiveness in their procedures.²²⁵ However, schemes find ways to limit critical access to environmental and social groups that may advance different, and more challenging, normative goals from those that the industry intends to pursue.²²⁶ In spite of an increase both in extent and in sophistication of proceduralization, such mechanisms do not necessarily contemplate effective tools for other-regardingness and disinterestedness available for affected actors other than businesses.

An empirical claim, further refining a theoretical impression, could thus be made that Western producers—i.e., the actors subject to a scheme—may in fact be the only actors whose

221. See generally Matthew Potoski & Aseem Prakash, *A Club Theory Approach to Voluntary Programs*, in VOLUNTARY PROGRAMS 17 (Matthew Potoski & Aseem Prakash eds., 2009) (discussing the different goals and benefits of different standards, and the impact these differences may have on schemes as a whole).

222. See Luc W. Fransen & Ans Kolk, *Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards*, 14 ORG. 667, 679 (2007) (noting that many standards explicitly mention how stakeholders are intended to be involved for standard setting).

223. See generally Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225 (2005) (discussing how to improve transnational regulatory governance through administrative law).

224. Lars H. Gulbrandsen & Graeme Auld, *Contested Accountability Logics in Evolving Nonstate Certification for Fisheries Sustainability*, 16 GLOBAL ENVTL. POL. 42, 42–43 (2016).

225. *Id.* at 43–44.

226. *Id.* at 56–57.

trust is effectively necessary to exercise regulatory authority, and thus must be sought. Following this line of reasoning, only the trust of producers in a scheme for the purpose of product differentiation or increased profitability can be seen as justifiable. The goodwill of VSS thus seems limited to the interests of certain producers. As such, the concept of institutional trust sheds some light on the possible reasons why certain groups, the trust of which is not essential for the regulatory authority of a regulator, are structurally disregarded in certain structures of global governance. It also casts serious doubt on the possibility that transnational private regulators could regulate domains in a way that is detrimental to economic interests. There are widespread, long-lasting concerns, especially from developing countries, that private regulators in the area of sustainability mainly pursue the narrower economic interest of producers and retailers in the Global North.²²⁷ This perceived association to the industry is demonstrated empirically, as consumers do not immediately trust private regulators. Private standards must earn citizens' trust, for example, by proving their independence from the regulated entities,²²⁸ or by association with public authority.²²⁹

There is thus an almost endemic, simmering risk that the conditions for the trust of affected groups other than industry will ultimately be unmet. This tension can hardly be solved from the internal perspective of the scheme only; instead, it requires intervention from public authority. This finding applies to business-to-business schemes as well, since the trust of other affected actors becomes relevant only indirectly, i.e., if and when it affects the trust of producers. This is consistent with research highlighting how "external" factors, such as NGO campaigns that tarnish producers' reputations, have been key in pressuring business interests and, consequently, VSS to change.²³⁰ With the trustworthiness of schemes limited

227. Samir R. Gandhi, *Regulating the Use of Voluntary Environmental Standards Within the World Trade Organization Level Regime: Making a Case for Developing Countries*, 39 J. WORLD TRADE 855, 855 (2005).

228. Näslund & Hallström, *supra* note 197, at 149.

229. See generally Nicole Darnall et al., *Institutional Design of Ecolabels: Sponsorship Signals Rule Strength*, 11 REG. & GOVERNANCE 438 (2017) (finding that sponsorship may help provide information on whether an ecolabel is effective).

230. See, e.g., *id.* at 440.

to the perspective of producers, and the difficulty in effectively ensuring other-regarding procedures in standard-setting, the tactics for improving the trust of citizens in VSS are limited to the threat of “exit” strategies.²³¹ Consumers and civil society organizations can withdraw their support of untrustworthy schemes. Public authority could devise strategies with respect to this indirect role of consumers in enhancing the trustworthiness of VSS. For example, a special role could be recognized for effectively inclusive standards, and for the products certified under these schemes. The problem is accurate identification of such standards, since relying on the usual procedural proxies would not always be adequate, but would instead require a careful case-by-case empirical assessment. Be that as it may, as the next section will illustrate, public authority does not seem to take into account this structural challenge to the potential employment of private standards in GVC governance. The reasons for this likely concern the limitations of public authority at the transnational stage.

B. *Reinforcing Private Authority: Public Authority’s Use of VSS*

While some of the E.U. measures employing VSS contain basic requirements with which VSS should comply in order to be employed by public authorities, these requirements—especially the procedural obligations for the schemes²³² and their verification by the European Commission²³³—fall short of those contemplated under delegation.²³⁴ Delegation is a use-

231. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 77 (1970).

232. See e.g., Regulation (EU) 1025/2012, of the European Parliament and of the Council of 25 October 2012 on European Standardisation, Amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and Repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, art. 4–5, 2012 O.J. (L 316) 12, 20–21 (regulating transparency and stakeholder participation for European and national technical standardization bodies).

233. See Philip Schleifer, *Orchestrating Sustainability: The Case of European Union Biofuel Governance*, 7 REG. & GOVERNANCE 533, 541 (2013) (noting that the European Commission did not set the bar high in imposing baseline requirements).

234. See generally Case 9/56, *Meroni v. High Authority*, 1958 E.C.R. 133 (discussing whether one particular directive brings about a “true delegation of powers,” and whether that delegation violates treaty requirements).

ful threshold against which to assess a trusting relationship between public and private institutions because it includes mechanisms to bind the agent to the pursuit of public interest *regardless* of whether this pursuit is in the agent's own interest.²³⁵ Public interest requirements include typical mechanisms for other-regardingness and disinterestedness such as an obligation to state reasons, the ability of many actors to participate to rule making, and other participatory and non-participatory accountability mechanisms. As opposed to an assurance about an outcome, delegation contains the assurance that, constrained by specific procedures, the agent will make an effort to meet the expectation of the delegating principal and, simultaneously, will act with trustworthiness with respect to affected actors. Also, the possibility of final review from the principal constitutes a strong mechanism to link the trustee to the trustor.

The employment of VSS in the RED, the public procurement directive, the timber regulation, and the non-financial reporting directive²³⁶ is far from delegation. In particular, the European Union's use of private schemes is not made conditional on the schemes' compliance with procedural obligations of other-regardingness and disinterestedness in order to be employed or recognized. Only in the case of the public procurement directive, more attention is devoted to procedural features of the schemes. Independence from the industry is a precondition, together with the requisites that labelling requirements be based on "objectively verifiable and non-discriminatory criteria," standard-setting occurs by means of an "open and transparent procedure" that is inclusive of all relevant stakeholders, and access to the label of all interested parties is non-discriminatory.²³⁷ These conditions are, however, left to lower-level contracting authorities to assess.²³⁸ The RED and its implementing instruments merely refer to "reliability, transparency and independent auditing" of the schemes as requirements for recognition.²³⁹ In addition, recognized schemes do not fall under the review of E.U. judiciary bod-

235. *See id.* at 152 (describing two kinds of delegation, one of which involves a "transfer of responsibility" by replacing the choices of the delegator with the choices of the delegate)

236. *See supra* notes 59–63 and accompanying text.

237. Directive 2014/24/EU, *supra* note 12, at 122.

238. Partiti, *supra* note 85, at 109.

239. Directive 2009/28/EC, *supra* note 12, at 25.

ies.²⁴⁰ Schemes continue to operate independently from public authority, and the latter's requirements—though they represent the extent of oversight by E.U. bodies—is rather limited, even when they are formally recognized.²⁴¹ Schemes enjoy an almost unfettered latitude in defining the substance and the stringency of their rules in a way that goes well beyond the powers that the European Commission can lawfully delegate outside the E.U. institutions—often without E.U. measures to implement via private standards.²⁴² Granted, at least in theory, public authority could discontinue its relationship with a standard, but this has not happened yet. In other cases, where the selection of the scheme is left to private actors,²⁴³ there are no options for influence or review by public authority.

The interplay between E.U. public authority and VSS, and its influence over those potentially subject to it, cements the legitimacy of the regulatory claim of the private regulators recognized; VSS benefit from the close association with public authority stemming from recognition.²⁴⁴ This interaction also contributes to the emergence of new private schemes that meet public authority's demand for standards.²⁴⁵ It is possible to argue that public authority *relies* on VSS in the regulation of GVCs. Schemes are used to remedy capacity and jurisdictional constraints on the basis of encapsulated interests of public and private authority, while only minimal mechanisms for control

240. Partiti, *supra* note 85, at 104, 116.

241. *Id.* at 107.

242. *Id.* at 114.

243. *See, e.g.*, Directive 2014/95/EU, *supra* note 12, at 4 (allowing private actors to determine the specifics of their scheme, but requiring a non-financial statement with information necessary to understanding its scheme).

244. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 157 (2008); Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REG. & GOVERNANCE 22, 44 (2014); *see* Meidinger, *supra* note 168, at 59 (discussing the benefits of governments' direct involvement with certification programs).

245. Interestingly, this is a goal that the European Union considers per se desirable, highlighting a normative preference for privatization of GVC governance. *See* Directive 2009/28/EC, *supra* note 12, at 24 (noting that the incentives in the direction will “encourage increased production of biofuels and bioliquids worldwide,” and encouraging development of treaties and private schemes to further promote this production “in a sustainable manner”).

are deployed. Different from a trusting relationship, here, there would be no expectation of effort from public authority, but rather an expectation of specific outcomes regardless of the processes employed. From the observation that the means of control are scant, one could be tempted to conclude that public authority seems to consider VSS relatively trustworthy in pursuing the outcome of regulating sustainability features in GVCs, at least for the narrower implementing functions for which they are used. In the presence of several intermediaries with varying features, varying endowments of trustworthiness can, however, be expected, arguably in accordance with their connection to the industry and the role of other affected actors. Schemes created for the industry by the industry have been observed to be less effective and stringent in pursuing their goals,²⁴⁶ and to maintain restricted participation of diverse stakeholder groups.²⁴⁷ The selection of a scheme to complement public authority is therefore crucial, and should be capable of identifying trustworthy schemes for the functional purpose for which they are relied upon.

In practice, public authorities in the European Union do not seem to give great importance to procedural requirements in the selection of private standards, the employment of which is expressly permitted in public measures to demonstrate compliance with sustainability-related regulatory requirements.²⁴⁸ The case of biofuel standards in the RED is illustrative, as it represents one of the first instances where private regimes for sustainability were brought into public regulation.²⁴⁹ Even when basic criteria such as those discussed above are laid

246. For examples in the domain of biofuel standards, see generally Martina Gaebler, *Recognition of Private Sustainability Certification Systems for Public Regulation (Co-Regulation): Lessons Learned from the EU Renewable Energy Directive*, in VOLUNTARY STANDARD SYSTEMS 99 (Carsten Schmitz-Hoffmann et al. eds., 2014) (analyzing the implementation of regulation on biofuels); INGA SCHLAMANN ET AL., WORLD WILDLIFE FUND GER., *SEARCHING FOR SUSTAINABILITY: COMPARATIVE ANALYSIS OF CERTIFICATION SCHEMES FOR BIOMASS USED FOR THE PRODUCTION OF BIOFUELS* (2013) http://awsassets.panda.org/downloads/wwf_searching_for_sustainability_2013_2.pdf (analyzing and comparing standards for biofuels).

247. Agni Kalfagianni & Philipp Pattberg, *Participation and Inclusiveness in Private Rule-Setting Organizations: Does It Matter for Effectiveness?*, 26 INNOVATION 231, 244–45 (2013).

248. Schleifer, *supra* note 233, at 539.

249. *Id.* at 536.

down, their assessment performed by E.U. authority has been rather superficial.²⁵⁰ This has resulted in the selection of very relaxed biofuel schemes, barely capable of identifying sustainable products.²⁵¹ In other cases, the selection of the intermediaries is decentralized to lower-level institutions, such as contracting authorities under the public procurement directive.²⁵² Such institutions may have limited resources and incomplete information over the characteristics of the private schemes that they permit producers to use in procurement.²⁵³ Finally, where the selection of the intermediary is left entirely to the very companies that have to follow the private standard,²⁵⁴ an inherent risk is that companies might choose the least demanding scheme, or a scheme dominated by business interests, thereby frustrating public regulatory goals. This risk is worsened by the complete lack of requirements with which schemes should comply. Demand for less stringent or less inclusive standards has contributed to their emergence and proliferation in the biofuel sector.²⁵⁵ This situation is particularly worrisome in light of the considerable extraterritorial effects typically generated by internal measures, the purpose of which, nonetheless, is to generate external (i.e., outside the European Union) regulatory effects. Such measures have been observed to insufficiently include, if at all, the interests of affected actors in countries outside the European Union.²⁵⁶

All in all, the legal modalities and the *praxis* through which E.U. authorities use and select VSS seem to be based on a functional assumption that VSS are reliable for the purpose of the relationship, i.e., GVC regulation. On the basis of this assumption, the expectations of public authority are met if the outcome of GVC regulation is guaranteed. As long as they are capable of compensating for jurisdictional and capacity short-

250. *Id.* at 541.

251. Gaebler, *supra* note 246, at 109.

252. Directive 2014/24/EU, *supra* note 12, at 77.

253. *See id.* (seemingly recognizing this shortcoming by noting the need for rules to allocate responsibility for observing the directive's obligations).

254. *See, e.g.*, Directive 2014/95/EU, *supra* note 12, at 4–5 (giving affected companies control over selection of schemes).

255. Stefano Ponte & Carsten Daugbjerg, *Biofuel Sustainability and the Formation of Transnational Hybrid Governance*, 24 ENVTL. POL. 96, 107–08 (2015).

256. *See generally* IOANNA HADJIYIANNI, *THE EU AS A GLOBAL REGULATOR FOR ENVIRONMENTAL PROTECTION* (2019) (examining the extension of E.U. environmental legislation beyond E.U. borders).

comings of public authority, VSS are deemed useful complements to public rules. E.U. authorities do not mandate precise other-regarding procedures, nor do they address the issues of affected actors' vulnerability and the dominant role of industry in the standard-setting, even in allegedly inclusive schemes. As the RED case illustrates, the most vulnerable affected actors, such as marginalized communities, are provided even less venues for participation in the business-led schemes established as a response to the distinct E.U. preference for private standards in the biofuels domain.²⁵⁷ The indifference of public authority for the other-regarding procedures of VSS does not improve the basis of the trusting relationship between private regulators and affected actors, thereby spreading the seeds of public distrust. Public authority instead enhances the regulatory claim of VSS and, simultaneously, by spurring the uptake of VSS, the claim's impact on the vulnerability of affected actors. The risk is that the interaction between public and private authority perpetuates the extensive scope of private economic interests within the intermediary. Since only producers' trust towards a scheme seem to be well-placed, and given the difficulty in establishing other-regarding procedures in multi-stakeholder organizations, doubts arise concerning the feasibility of public authority's engagement and orchestration of private standards without strict procedural trust-building requirements and their strict monitoring. This would contrast with sweeping claims of normative desirability of transnational orchestration, and especially with the feasibility of its lighter variants.²⁵⁸

The reasons for this permissive stance of public authority can be traced to the very limitations of public authority at the transnational level, which have resulted in the enrollment of private regulators. States and regional organizations have limited capacity to steer private standards because, as discussed in Section C of Part III, they alone would not be in the position to perform transnationally the monitoring and enforcement functions that VSS perform.²⁵⁹ In addition, the regulation of

257. Phillip Paiement, *Transnational Delegation, Accountability and the Administrative Governance of Biofuel Standards*, in *TRANSNATIONAL BUSINESS GOVERNANCE INTERACTIONS* 227, 246 (Stepan Wood et al. eds., 2019).

258. For a discussion of the desirability of transnational orchestration, see generally Abbott & Snidal, *supra* note 6.

259. See *supra* Section III(C).

sustainability and responsibility, both on the domestic market and extraterritorially, is considerably constrained by WTO law.²⁶⁰ The alternative to the employment of private authority, in several issue areas, remains the lack of public rules. Because of their jurisdictional and capacity constraints, public authority finds itself in a weak bargaining position vis-à-vis VSS. Private schemes indeed benefit from the association from public authority, but there is nonetheless strong demand from corporations to employ VSS to manage their operational risks, which is independent from the preferences of regulators and consumers.²⁶¹ Public authority may be forced to accept that relying on VSS with limited, or no, venues for control is a necessary pill to swallow to assert a partial regulatory presence at the transnational stage, and to overcome limitations imposed by WTO law. Alternative approaches to the mobilization of private authority are, however, possible, as the following sections illustrate.

C. *Conferring on Corporations Regulatory Competences: HRDD and Public Authority*

Similar to the relationship between E.U. public authorities and VSS, the requirement of HRDD stemming from the UNGPs has the effect to create, confer on multinational corporations, and validate specific regulatory tasks connected to human rights impacts in value chains. These tasks deeply affect holders of human rights and other economic entities in GVCs.²⁶² As with VSS, in the interplay between companies implementing HRDD, a triadic relationship is established between public authority at the international, national, and regional levels, and corporations as intermediaries in addressing, removing, and remedying human rights impacts in their value chains, including that of their suppliers. Corporations imple-

260. See *supra* note 1 and accompanying text.

261. See *supra* note 223 and accompanying text.

262. Concerning the other entities in a global value chain, due diligence as implemented in certain particularly risky sectors requires multinational corporations to trade only with entities that have specific management standards in place, thereby making burdensome requirements de facto mandatory upon pressure of certain (Western) companies. See, e.g., *OECD Due Diligence Guidance for Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 78, at 54–60 (describing management standards that factor into upstream company risk assessment).

menting HRDD subject other entities in their value chain to their newly acquired regulatory competence in the domain of human rights; at the same time, they affect holders of human rights and workers. The development of HRDD as a transnational governance mechanism is at a less developed stage than private standards; initial steps in the institutionalization of HRDD as a practice are currently being taken in a number of jurisdictions.²⁶³ States are beginning to legally require that companies implement due diligence processes, and, in the lack of satisfactory results, different forms of liability are being contemplated.²⁶⁴

The European Union has been particularly active, passing a regulation on conflict minerals following the U.S. approach, with proposals to extend that framework to other sectors such as the garment industry.²⁶⁵ At the national level, initiatives like the U.K. Modern Slavery Act simply require companies to have a due diligence system in place,²⁶⁶ whereas measures like the French law on the “Duty of Vigilance” also assess the quality and effectiveness of the processes established.²⁶⁷ This trend of turning HRDD into a mandatory requirement is, however, not supported by precise and binding indications on how to operationalize due diligence in practice, nor by specific forms of control over multinationals’ newly acquired (and far-reaching) regulatory functions, particularly concerning other-regarding procedures for affected actors. Companies are, therefore, left with a considerable latitude of autonomy. Granted, different mechanisms have been established by public authority at different levels to provide guidance on implementation, such as sectoral OECD instruments²⁶⁸ or reporting guidelines by the

263. Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELBOURNE J. INT’L L. 221, 230–32 (2019).

264. *Id.*

265. EUR. PARL. DOC. (A8-0080/2017) 11, 19 (2017).

266. Modern Slavery Act 2015, c. 30, § 54 (UK).

267. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Orders], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, No. 74.

268. For an example of a sectoral OECD instrument, see generally *OECD Due Diligence Guidance in the Garment and Footwear Sector*, *supra* note 78 (providing sectoral guidance on the garment and footwear sector).

European Commission.²⁶⁹ Liability for the lack of due diligence may be a strong mechanism for action incentivizing a stricter approach to the practice. This notwithstanding, it currently remains under-defined—and left for corporations to operationalize—what precise actions should be taken in specific circumstances; what would generally constitute “sufficient” due diligence; how to implement crucial legal constructs in the UNGPs, such as human rights impact “directly linked” to the activities of a company; and, more generally, how to account for the vulnerability of the subjects and other affected actors.²⁷⁰ In other words, HRDD urges companies to make decisions with enormous normative and distributive implications without any public control. The open-ended character of due diligence, therefore, risks exploitation by private interests, which can frustrate and dilute human rights goals.

Additionally, in the case of HRDD, strong asymmetries arise between public authorities enlisting intermediaries on the one hand, and companies on the other. Such asymmetries entail a gap of technical knowledge, practical knowledge about the conditions in a certain environment, and regulatory capacities. The creation of HRDD aims at reinforcing GVC regulation while hinging on the need for coordination by multinational corporations.²⁷¹ Protecting brand and reputation via supply chain governance of social and environmental aspects has become as important as benefiting from low-input costs and other efficiency gains.²⁷² By acknowledgment of John Ruggie, the UNGPs’ mobilization of HRDD aims at aligning public and private interests in the pursuit of human rights.²⁷³ This narrative resonates with an account of reliance, since it appears to be based on a supposed congruence of goals between public and private authority. Distinct from the relationship between E.U. authority and VSS, public authorities seem to acknowledge, in the UNGPs themselves, that cor-

269. For an example of such reporting guidelines, see generally Communication from the Commission, Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information), 2017 O.J. (C 215) 1.

270. *OECD Due Diligence Guidance in the Garment and Footwear Sector*, *supra* note 78, at 67, 139.

271. *See supra* notes 104–05 and accompanying text.

272. *See supra* note 57 and accompanying text.

273. Ruggie, *supra* note 17, at 9.

porations may not be entirely reliable in ensuring the outcome of human rights protection. The problem appears to be depicted in terms of capacity. The UNGPs start from the premise that corporations are often not aware of the negative human rights impacts in their supply chains.²⁷⁴ Companies have imperfect information for regulating GVCs, although their inclusion in GVCs makes them well-placed for regulation. Also, the tools that a single company can deploy to remedy negative human rights impacts are only imperfect, as the reference to the concept of *leverage* (the possibility of exerting forms of economic and moral pressure) with respect to infringing suppliers attests.²⁷⁵

Another remarkable discrepancy with the case of VSS lies in the fact that the creation of private regulators in the domain of human rights is coupled with an attempt to lay down the basis, albeit general, for a trusting relationship between corporations and holders of human rights. The assertion of the moral responsibility to protect human rights attempts to link the legitimacy of corporate activities to the protection of human rights.²⁷⁶ In theory, this should eventually lead to corporations actually binding their business decisions to a specific group of affected actors, i.e., holders of human rights. Businesses' moral responsibility is particularly visible through the emphasis on the differences between HRDD and traditional corporate due diligence in financial matters: While the latter centers on the risks for the corporation, the former centers on the risks for other affected actors.²⁷⁷ Human rights impact assessment constitutes the means by which human rights risks are investigated and appraised.²⁷⁸ Some scholars have raised doubts about whether the discourse of risk would be ideal for ensuring human rights,²⁷⁹ even if it moves beyond its tradi-

274. See John Gerard Ruggie & John F. Sherman, III, *The Concept of Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921, 924 (2017) (discussing misunderstanding of the due diligence requirements in the UNGPs).

275. UNGPs, *supra* note 13, princ. 19.

276. *Id.* princs. 16–17.

277. *Id.* princ. 17.

278. *Id.* princ. 18.

279. See generally Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225

tional transposition to a corporate context in the form of reputational risk.²⁸⁰ In any case, corporations are required to establish processes, impact assessments, and reactive strategies to act with goodwill vis-a-vis the vulnerabilities of holders of human rights. HRDD is, by design, construed as a process involving a multitude of economic and non-economic actors, and has a direct goal of enhancing regard for those affected. The relationship of reliance between public and private authority, therefore, attempts to pave the way for the development of a trusting relationship between corporations and the holders of human rights affected by their economic activities.

D. *An Emerging Institutional Trust for Corporations
Implementing HRDD*

Under a trust account, the UNGPs can be seen as establishing the basis of a trusting relationship between holders of human rights and multinationals, where corporations are to act in goodwill towards holders of human rights in view of protecting their rights. While the overarching purpose of the UNGPs is arguably to ultimately establish institutional trust, corporations do not operate according to the conditions for trusting relations. Even after the adoption of the UNGPs, lacking hard forms of implementation, holders of human rights have suboptimal means to influence and hold corporations accountable for their responsibilities, and to ensure that their vulnerabilities *qua* holders of human rights are taken into account and protected—and not just indirectly through NGO pressure, consumer boycott, or litigation.²⁸¹ The UNGPs con-

(2017) (arguing that due diligence for human rights risk is incompatible with the management of social risk).

280. The reputational risk perspective is dominant in practitioner-oriented publications; for an example, see generally Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78 (2006). This approach is so pervasive that it even found its way into multi-stakeholder instruments implementing the UNGPs at a national level. *See, e.g.*, Agreement on Sustainable Garment and Textile, *supra* note 83, at 7–8 (referring to the avoidance of reputational risk among the benefits to enterprises that sign the declaration).

281. For more information on the challenge of access to remedy, see generally Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237 (2015).

template state-based and non-state-based adjudication and complaint mechanisms, as well as reporting obligations, but their implementation and effectiveness remains an open issue.²⁸² Distinct from the voluntary dynamics behind the establishment of VSS, the regulatory capacity of corporations in the domain of human rights has been “imposed” by public authority as a corollary to the corporate responsibility to respect human rights.²⁸³ This means that corporations implementing HRDD do not have to create and support their regulatory authority as VSS do.

This notwithstanding, the UNGPs and their national and private implementing tools have begun to spur corporations to improve and communicate their trustworthiness for the protection of human rights. Multinationals have to demonstrate how human rights responsibilities are met through human rights reporting, as part of their responsibility in the framework of the UNGPs,²⁸⁴ and other measures require mandatory reporting in a number of issue areas such as corruption and environmental impact.²⁸⁵ Corporations are also embracing a host of different management standards for due diligence and human rights impact assessments.²⁸⁶ While no full-fledged mechanisms for other-regardingness are mandated by the UNGPs, some of their implementing tools require corporations to engage in “meaningful stakeholder engagement” in due diligence processes.²⁸⁷ Broadly defined stakeholder groups, including holders of human rights, are permitted to provide input in decisions affecting them, and at critical junctures of HRDD, such as its design and the implementation of

282. See generally Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* (Harvard Bus. Sch., Working Paper No. 11-100, 2017) (suggesting that there are effectiveness gaps that could be remedied by, for example, efforts to increase transparency).

283. *Id.* at 13.

284. UNGPs, *supra* note 13, princ. 21.

285. For an example of this in the European Union, see, e.g., Directive 2014/95/EU, *supra* note 12, at 6–7.

286. For an example, see generally *OECD Due Diligence Guidance for Minerals from Conflict-Affected and High-Risk Areas*, *supra* note 78 (discussing different strategies for due diligence assessment in supply chains of minerals from conflict-affected and high risk areas).

287. E.g., *OECD Due Diligence Guidance in the Garment and Footwear Sector*, *supra* note 78, at 27–28.

corrective plans where adverse impact is detected.²⁸⁸ The implementation of these provisions, and especially their interpretation, is left to corporations.²⁸⁹ Multinationals will ultimately have to decide whether to simply *permit* stakeholders to comment, or to actually *bind their decisions* to the input of vulnerable stakeholders.²⁹⁰ Empirical evidence on the actual practice of HRDD and its regulatory effects is, for now, virtually non-existent, but practice concerning multi-stakeholder organizations discussed above (and the normative differences between engagement and involvement) seem to warrant a general skepticism.

The actual subjects of corporations implementing HRDD are other companies in the supply chains. With regard to such companies, mechanisms for other-regardingness may be contemplated according to the internal corporate operationalization of HRDD. Engagement with suppliers is prescribed by the recent OECD Guidance for Responsible Business Conduct, and requires corporations to “understand and address barriers arising from the enterprise’s way of doing business that may impede the ability of suppliers and other business relationships to implement RBC [responsible business conduct] policies.”²⁹¹ The Guidance also supports a cooperative approach aimed at providing assistance for the implementation of human rights policies, and even facilitating access to financing.²⁹² While it may not completely account for suppliers’ economic vulnerability, a cooperative approach contemplating commercial disengagement as an option of last resort is in principle positive, since suppliers targeted by HRDD could be small or have very limited capacity to improve their practices. An immediate termination of the contractual relation is also unlikely to bear a positive impact on workers and local communities.

288. *Id.* at 24, 67, 138.

289. *See, e.g., id.* at 138–39 (indicating that the “enterprises” discussed are responsible for identifying harms in their own operations and supply chains).

290. *See id.* at 28 (encouraging enterprises to consult with stakeholders, but acknowledging that there are “a number of ways” in which this is possible).

291. Org. Econ. Co-operation & Dev. [OECD], *Due Diligence Guidance for Responsible Business Conduct*, 24 (2018).

292. *Id.* at 80.

Sui generis structures for other-regardingness and the incorporation of affected actors' vulnerabilities are emerging in certain sectors and national contexts, within frameworks supporting industry's operationalization of HRDD processes in the presence of a varied group of actors such as governments, trade unions, industry associations, and civil society organizations. The multi-party cooperation established by the Dutch Sectoral Agreements on International Responsible Business Conduct (Dutch Agreements) institutionalize the responsibility for businesses to operationalize HRDD within an experimentalist multi-stakeholder framework, wherein parties commit to work together to advance human rights protection.²⁹³ Specifically, all stakeholders commit to support corporate efforts in implementing HRDD. At the same time, civil society actors are able to verify precisely how companies are internally structuring their HRDD processes, and an independent secretariat has the ability to flag unsatisfactory corporate performance.²⁹⁴ Within such a multi-actor architecture, business actors can reflect upon their HRDD practices and scale up their actions using peer pressure, yearly review of performance, and evaluation by an independent secretariat.²⁹⁵ An institutionalized form of cooperation between public authority, companies, and civil society organizations could structurally support and, most importantly, verify and control businesses' implementation of HRDD. Notably, these processes also contribute to the creation of the basis for institutional trust, because the interests of holders of human rights can be advanced by civil society organizations and labor unions involved in the agreements at the moment of operationalization of HRDD. To avoid conflict and litigation under the Dutch Agreements over the quality of their HRDD processes,²⁹⁶ companies must implement their responsibility to respect human rights in line

293. For an overview of the Dutch Agreements, see generally *Home*, IMVO COVENANTS, <https://www.imvoconvenanten.nl> (last visited Jan. 6, 2020).

294. See e.g., Agreement on Sustainable Garment and Textile, *supra* note 83, art. 1.2 (enabling the secretariat to advise, assess, and monitor signatories).

295. Duval & Partiti, *supra* note 179, at 396–97.

296. The Dutch Agreements usually outline the mechanisms for such disputes. See, e.g., Agreement on Sustainable Garment and Textile, *supra* note 83, art. 1.3 (describing two mechanisms for disputes and complaints).

with the expectation and goals of all societal parties signatories to the Agreements.

Other innovative forms of governance structures in the area of corporate responsibility addressing narrow components of HRDD, such as structures for workers' safety, have emerged in recent years.²⁹⁷ Remarkably, such governance structures may also foresee binding procedures for enforcement. The Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord)²⁹⁸ is a prime example of a commitment-based form of cooperation between industry and workers, aimed at improving working practices and labor conditions via a joint, mutuality-based problem solving process.²⁹⁹ The Accord established a system of private workplace audits to guarantee factory safety in the Bangladeshi garment sector in the aftermath of the Rana Plaza collapse.³⁰⁰ Western brands commit to require their suppliers in Bangladesh to submit to rigorous safety inspections; accept the disclosure of inspection reports; require implementation of all necessary factory remediations; and pay the suppliers a sufficient amount to afford all repairs and generally operate safely.³⁰¹ Arbitration is contemplated and can be triggered by trade unions where Western brands fall short of their commitments.³⁰² The Accord is generally considered effective in pursuing its goals and, in particular, advancing the interests of workers in a safe working environment.³⁰³ Institutional trust of workers is guaranteed by the

297. See generally Tao Liu, *Occupational Safety and Health as a Global Challenge: From Transnational Social Movements to a World Social Policy*, 8 *TRANSNAT'L SOC. REV.* 50 (2018) (finding that western European states have played a key role in the development of occupational and health safety standards).

298. Accord on Fire and Building Safety in Bangladesh, May 15, 2013, <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2013-Accord.pdf> [hereinafter Bangladesh Accord].

299. See generally RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER* (2013) (evaluating fair labor standards in global supply chains generally).

300. Juliane Reinecke & Jimmy Donaghey, *The 'Accord for Fire and Building Safety in Bangladesh' in Response to the Rana Plaza Disaster*, in *GLOBAL GOVERNANCE OF LABOR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES* 257, 268 (Axel Marx et al. eds., 2015).

301. Bangladesh Accord, *supra* note 298, arts. 9, 11–12, 22.

302. *Id.* arts. 4–6.

303. See generally Philip James et al., *Regulating Factory Safety in the Bangladeshi Garment Industry*, 13 *REG. & GOVERNANCE* 431 (2019) (examining the positive impact of the Bangladesh Accord).

fact that both global and local trade unions are parties to the agreement, and account for half of the governing board of the Accord.³⁰⁴ The binding character of commitments and their enforceability via arbitration further contribute to institutional trust, insofar as they ensure that the interests of the vulnerable subjects in a safe working environment are not just taken into account, but also effectively operationalized via factory remediation processes.³⁰⁵

Forms of institutionalized multi-actor cooperation affecting corporate design of HRDD are first steps for the creation and increase of institutional trust in the intermediaries in the regulation of human rights. While this occurs in a fragmented manner for HRDD processes (the inclusion of HRDD in institutional frameworks such as the Dutch Agreements constitutes an exception rather than the norm as of now), a trust perspective would suggest even more extensive forms of involvement of the affected actors in the operation of corporations. In line with the idea, reflected in the UNGPs, that corporations shall include human rights considerations in their daily operations, other-regarding procedures should be extended at several junctures in corporations' activities. Ultimately, a strict approach to the spirit of the UNGPs would imply that any business decision affecting holders of human rights should be taken only after the vulnerabilities of affected actors are taken into account. A link here could be drawn to the central role that environmental considerations play in the business models of certain corporations, where decisions about product design and operations are increasingly dependent on, and are even made conditional to, their impact on resources and ecosystems.³⁰⁶

The conditions for trust are thus useful in proceduralizing and publicizing not only actors that are not normally considered typical global administrative bodies, and to which global administrative law principles could apply,³⁰⁷ but also

304. Bangladesh Accord, *supra* note 298, arts. 4–6.

305. *Id.* art. 5.

306. For a popular account of this business approach, see generally YVON CHOUINARD, *LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN* (2005).

307. See generally Kingsbury et al., *supra* note 25 (discussing how transnational bodies can encourage trust and cooperation through use of global administrative law); see also generally Carol Harlow, *Global Administrative Law*:

unconventional regulators, such as single corporate entities to which other-regarding requirements may otherwise be difficult to extend, both practically and normatively. Given the breadth and ambition of HRDD, even business decisions could, in theory, be proceduralized so as to account for their impact on the vulnerabilities of affected actors. The concept of trust also explains the need for, and importance of, the interactive component of HRDD, which aims at creating dialogue between corporations, suppliers, and other affected groups.³⁰⁸ Importantly, discussion would not only encompass the specific factual situations of human rights impacts, but also could (and should) address more broadly business models and practices conducive to possible human rights breaches.³⁰⁹ If implemented fully, this approach could ensure that corporate actors take into account the vulnerability of holders of human rights at every stage of their business operations. Simply making HRDD mandatory, with courts determining whether or not specific business actions are appropriate, would not necessarily ensure that the conditions of trust are met.

V. CONCLUSION

In spite of the enlistment of private actors by public authority, private actors formally disconnected from public authority often remain outside traditional dynamics of control, even when used in public measures. The perspective of trust offers a fresh view on the structuring of public-private interplays in global governance. It allows observers to zoom in on procedural requirements of disinterestedness and regard for others, under which actors exercising regulatory authority affecting different actors must operate. Normatively, these requirements should matter when public authority relies on private authority in a manner that reinforces or establishes private actors' impact on certain actors. Other-regardingness and disinterestedness in the inclusion of diverse groups of subjects

The Quest for Principles and Values, 17 EUR. J. INT'L L. 187 (2006) (discussing the desirability of global administrative law).

308. UNGPs, *supra* note 13, princ. 21.

309. This is also acknowledged in implementing instruments. See, e.g., *OECD Due Diligence Guidance in the Garment and Footwear Sector*, *supra* note 78, at 74 (suggesting enterprises adopt “[c]ontrol measures to prevent contribution to harm”).

on private authority, are the fundamental basis of a relationship that is not coercive, but instead trust-based. An internal need for trust is potentially an important driver to bring a trustee to act with disinterestedness towards certain actors. Many affected groups should have their conditions for trust met. However, often only the conditions for trust of a narrow set of actors are met.³¹⁰ Private standards seek the trust of producers more than the trust of other affected actors, thereby ultimately favoring the interests of the former. Distinct from private actors whose economic activity *is* rule making, companies implementing HRDD do not need trust in their regulatory activity to carry out their economic activity; in other words, their regulatory functions are decoupled from the need for the trust of any actor. To compensate for this limited need for trust, an ideal implementation of HRDD, as established in implementing instruments and initiatives, requires corporations to properly account for the vulnerabilities of the affected actors (i.e., workers, communities that have to bear the impact of production, and other suppliers) connected to any corporate action.

The engagement of public authority with private regulators that either favor their business constituencies, or by definition operate on the basis of private interests, should only occur under clearly spelled-out, closely monitored, and strictly enforced other-regarding procedures. This, however, does not always seem to occur. This article has shown that public authority, when using or creating private intermediaries for GVC regulation, either disregards the limited trustworthiness of private regulators, or attempts, albeit only partially, to influence the conditions for trust. In the case of VSS, by crystallizing the current configuration of the conditions for trust, E.U. authorities enhance the regulatory claims of private standard-setters, but do not contribute to their proceduralization per the requirements of trusting relations for affected actors.³¹¹ Public authority in the European Union has been engaging with VSS in a manner that is incapable of differentiating, even at a formal level, between untrustworthy schemes associated with industry interests and schemes better suited to accounting for the vulnerability of multiple subjects, though not flawless.³¹² This ac-

310. *See supra* note 203 and accompanying text.

311. *See supra* Section IV(B).

312. *Id.*

count is particularly worrisome in light of the tendency of VSS to favor corporate interests over other interests formally represented in standard-setting and management, a tendency that would be hard to detect by simply relying on the procedures employed by a scheme. While public authority seems to enjoy limited bargaining power in influencing and scaling-up the procedures of transnational private regulators, the enrollment of private rule makers outside public control nevertheless perpetuates a limited trustworthiness of VSS in the pursuit of public policy objectives.

In a different scenario, albeit quite far from its complete practical implementation, public authority matches the unconventional conferral of regulatory functions through the UNGPs with the creation of a narrative stimulating the emergence of institutional trust dynamics between corporations and specific affected actors, i.e., holders of human rights. Increasingly, HRDD is operationalized via standards, guidelines, and institutional structures designed to overcome disregard of affected interests. Such procedures, it is hoped, if fully incorporated by corporations, will be better able to account for the interests of vulnerable actors affected by business activities, and should result in the elimination of adverse human rights impacts. Experimentalist structures appear particularly promising to this purpose.

Without a direct intervention from public authority aiming at designing structural forms of trust-building—such as those included in HRDD—a drift toward the prevalence of private interests in global governance structures would be hard to avoid in light of the current interplay between public and private regulatory authority and the internal dynamics of private actors. Public authority should, therefore, create contexts favorable to institutional trust, and expressly provide procedural guarantees to vulnerable actors. Conforming with the coordinating role of public authority described in this article, public authorities should influence procedures of private regulators, and design experimental structures if necessary, to bring together different actors to cooperate in the public interest. This cooperation should not merely align each actor's representation of what is desirable through the provisions of material incentives. Allowing markets and competitive dynamics to put pressure on VSS risks generating race-to-the-bottom competition between schemes. The threat of litigation and reputa-

tional damage could occasionally steer companies towards a stricter implementation of HRDD and account for human rights impacts, but it does not directly bind, in a structural fashion, the interests of vulnerable actors to the actions of the corporations.

Public authority should provide for, and monitor the operation of, tools capable of structurally affecting the sources of trust for private intermediaries by extending them to groups whose trust is disregarded by private regulatory authority. These mechanisms include mandatory requirements for affected actors' participation in private standards; the deep involvement of suppliers (especially those from developing countries) and of holders of human rights, through different means and institutions, in corporate decisions capable of affecting their enjoyment of human rights; and an effective case-by-case verification of the occurrence of human rights impacts. For example, making HRDD mandatory without requiring structural institutional mechanisms for the participation of those subject to HRDD practices misses a chance to introduce fundamental mechanisms for other-regardingness. Compliance with these requirements must become a necessary precondition for public use of private actors in regulating social and environmental sustainability, as well as a structural complement to the moral responsibility of businesses to respect human rights, as spelled forth in the UNGPs. From the perspective of public authority, this entails moving away from almost exclusively functional considerations when relying upon private actors, towards centering novel forms of public action around the inclusion of affected actors.