

## Human Rights Due Diligence and Evolution of Voluntary Sustainability Standards

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### 7.1 INTRODUCTION

Private regulators of social and environmental sustainability such as voluntary sustainability standards (VSS) have proliferated. Private schemes such as the Forest Stewardship Council (FSC), FairTrade, and the Marine Stewardship Council (MSC) define sustainability-related product features and production processes by means of voluntary standards. VSS discipline aspects of production including human rights, labor rights, and environmental impacts ranging from pollution prevention to impact on forests and biodiversity. Like other private governance structures,<sup>1</sup> VSS are characterized by contingency and context-dependency that makes them receptive to critical events<sup>2</sup> including regulatory developments, even prospective ones. Legislative developments at the national level such as the convergence around criteria of timber legality in EU, US, Australian, and South Korean legislation contributed to align VSS requirements. In addition, the goals of VSS were partially refined toward assessing compliance with national provisions and demonstrating due diligence of legality of timber origin as required by those instruments.<sup>3</sup>

Not only events and rules at the national level are capable to affect this form of private authority. Transnational private regulation is a vehicle to “harden” voluntary obligations and make them applicable to individuals.<sup>4</sup> Transnational private

<sup>1</sup> E. J. Balleisen and E. K. Brake, Historical Perspective and Better Regulatory Governance: An Agenda for Institutional Reform (2013) 8:2 *Regulation & Governance* 222.

<sup>2</sup> See Section 1.2.1 in this volume.

<sup>3</sup> T. Bartley, Transnational Governance and the Re-centred State: Sustainability or Legality (2014) 8:1 *Regulation & Governance* 93; C. Overdevest and J. Zeitlin, Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector (2014) 8:1 *Regulation & Governance* 22

<sup>4</sup> F. Cafaggi, New Foundations of Transnational Private Regulation (2011) 38:1 *Journal of Law and Society* 20.

regulators are therefore also affected by relevant international soft law instruments in their field of operation.<sup>5</sup> For standards such as VSS, the emergence of human rights responsibilities of corporations represents a major, albeit understudied, development. The 2011 adoption of the United Nations Guiding Principles on Business and Human Rights (UNGP) affirmed a corporate responsibility to respect human rights throughout business activities, parallel to a State duty to protect human rights and a right for victims to obtain remedies.<sup>6</sup> As an integral part of the responsibility to respect, firms must perform human rights due diligence (HRDD) to identify, assess, avoid, mitigate, remedy, and report about human rights impacts in their value chains, which include both social and environmental aspects.<sup>7</sup> Some countries passed legislation making HRDD mandatory. EU rules currently require HRDD in the supply chains of minerals associated with armed conflict in Central Africa, and a proposal for a general HRDD Directive is expected soon.

VSS, like other transnational private regulators, are characterized by considerable flexibility and organizational resourcefulness,<sup>8</sup> insofar as they are capable to rapidly adapting governance structures, procedures, and content of their standards to better fit their contextual environment. Organizational resourcefulness confers resilience to private regulators, as they can reorganize in the face of change affecting the pursuit of their objectives and withstand discontinuity while adapting to new environments.<sup>9</sup> Given VSS' receptivity to soft law and, especially, to (perspective) national legislation, an alignment of standards in line with the responsibilities, processes, and constructs of HRDD is expected to be visible. With respect to norms of responsible business conduct, voluntary standards defining responsible production and sourcing must be aligned with HRDD and its requirements if they are to support certified firms at different levels in the value chain toward compliance with their HRDD responsibilities and emerging legal obligations. However HRDD also directly affects VSS, as they are private organizations with their own responsibility to conduct HRDD. Responsibility, or even legal liability under future legislation, could result from VSS association to human rights impacts caused by certified entities or members or to that which they contributed. VSS must also implement grievance mechanisms in line with the UNGP and perform their own HRDD toward firms with which they have a business relation such as certified and noncertified members.

<sup>5</sup> L. H. Gulbrandsen, Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs (2014) 8:1 *Regulation & Governance* 82.

<sup>6</sup> Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (March 21, 2011).

<sup>7</sup> UNGP's Principle 17.

<sup>8</sup> See Section 1.2.4.2 in this volume.

<sup>9</sup> C. S. Holling, Resilience and Stability of Ecological Systems (1973) 4:1 *Annual Review of Ecology and Systematics* 1.

Studying the evolution of VSS in light of HRDD allows us to better understand the influence of requirements established by public authority on private standards. Is public authority capable to influence transnational private regulation or is it bound to fail? To what extent does the resilience stemming from the capacity of VSS to adapt to change (in regulatory frameworks) allow them to retain their regulatory prerogatives or bring private regulators to (partially) reorient their goals?<sup>10</sup> This chapter focuses on private standards connected to deforestation, conversion of ecosystems, and human rights concerns that certify forest products and agricultural commodities. While it does not focus on one case study, it adopts a comparative perspective to analyze the effects of HRDD on some of the most relevant multi-stakeholder and industry-driven initiatives in this domain. The analysis takes place on the basis of requirements contained in production standards, codes of conduct for members, other documents and policies, and NGO reports. These sources are complemented by fifteen semi-structured interviews centered on the impact of HRDD on standards held with NGO representatives and certification managers from ISEAL and from six schemes active in the domain of timber, palm oil, soy, sugarcane, cocoa, and coffee certification.

This chapter is structured as follows. Section 7.2 situates emergence and evolution of VSS in connection to regulatory crises and a recently changed climate toward certification that also contributed to the demand for mandatory legislation. Section 7.3 explains how HRDD can be seen as an organizational crisis, which could be both an opportunity for VSS to consolidate their regulatory prerogatives and a potential threat in light of the establishment of other risk management tools and initiatives. Section 7.4 illustrates relevant aspects of HRDD for VSS. Section 7.5 discusses how VSS are aligning their requirements and policies to the value chain dimension of HRDD and its engagement dimension. Section 7.6 concludes by reflecting on the refinement of VSS relation of complementary with public rules generated by HRDD and the capacity of public authority to align transitional private regulators to public rules. It also reflects on the resilience of VSS and their capacity to expand their activities to novel domains intersecting with HRDD.

## 7.2 REGULATORY FAILURES AND TRANSNATIONAL PRIVATE REGULATION

Regulatory crises are a critical moment for private regulators.<sup>11</sup> These crises are events of varying scale and scope resulting from the unintended or unforeseen consequences of the design or operation of a regulatory system and its interactions with other systems.<sup>12</sup> A regulatory crisis may pressure the industry to self-regulate to

<sup>10</sup> See Section 1.3.2 in this volume.

<sup>11</sup> See Section 1.2.4 in this volume.

<sup>12</sup> J. Black, Learning from regulatory disasters (2014) 10:3 *Policy Quarterly* 3.

protect reputation and avoid liability but also to preempt more demanding regimes. In the domain of sustainability, private regimes appeared as a response to a regulatory crisis exposing shortcomings in the regulation of global production. Certifications for forestry products, coffee, and other agricultural commodities were established after the collapse of commodity prices and the worsening of deforestation caused by agricultural production.<sup>13</sup> Labor schemes, such as Social Accountability International and the Fair Labour Association, emerged in the aftermath of extensive campaigns in the mid-nineties exposing sweatshop conditions and incidents in the garment industry.<sup>14</sup> The first wave of biofuel certification (before EU regulatory intervention) was linked to the 2007/2008 food crisis to avoid biofuel production displacing food crops.<sup>15</sup> Many of these VSS appeared in an environment characterized by a lack of binding international frameworks that resulted in the emergence of heterogeneous standards.

Where a crisis is connected to a regulatory failure, it may reverberate on public authority as well, which may expressly support private regimes as a solution. Remarkably, voluntary private regulation in the area of sustainability was often suggested as a possible solution also by the very NGOs that brought up attention to the crisis in question.<sup>16</sup> However, in recent years, the wide acceptance of HRDD and the demands for making it mandatory were accompanied by a growing dissatisfaction from certain civil society organizations about the effectiveness and impact of corporate social responsibility<sup>17</sup> and voluntary initiatives including private standards and certifications. NGOs campaigned for the introduction of mandatory legislation aimed at value chain transparency and mandatory HRDD noting how voluntary private standards failed and that they should only play a very limited function in future instruments.<sup>18</sup> NGOs are also experiencing “certification fatigue” in participating in VSS and offering monitoring functions to ensure that firms comply with the standards – a role that they consider as very resource-intensive and better performed by public authority.<sup>19</sup> In recent years, prominent civil society organizations left the VSS that they contributed to establish. Among several instances, the most visible is arguably that of Greenpeace International leaving the FSC, of which

<sup>13</sup> E. Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry* (2006) 17:1 *European Journal of International Law* 47.

<sup>14</sup> MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (2020), at 37.

<sup>15</sup> P. McMichael, *A Food Regime Analysis of the “World Food Crisis”* (2009) 26:4 *Agriculture and Human Values* 281.

<sup>16</sup> MSI Integrity, *supra*, at 14.

<sup>17</sup> A. Ramasastry, *Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability* (2015) 14:2 *Journal of Human Rights* 237.

<sup>18</sup> D. Brack and S. Ozinga, *Enforcing Due Diligence Legislation “Plus,” Fern*, October 2020, [www.fern.org/fileadmin/uploads/fern/Documents/2020/Enforcing\\_due\\_diligence\\_legislation\\_plus\\_16102020.pdf](http://www.fern.org/fileadmin/uploads/fern/Documents/2020/Enforcing_due_diligence_legislation_plus_16102020.pdf).

<sup>19</sup> Interview with NGO representative.

it was a founding member, in 2018 due to the controversies around the “FSC Mix” certificate.<sup>20</sup>

Some environmental NGOs are also growing frustrated at what they consider as an obstructive attitude of business toward attempts of reform in VSS about transparency, auditing, and stringency of the requirements.<sup>21</sup> NGOs filed complaints against Bonsucro and RSPO for breaches of international standards for responsible business conduct.<sup>22</sup> A recently published report by the Institute for Multi-Stakeholder Initiatives Integrity went as far as concluding that VSS “have peaked” and that they will be replaced by alternative, rights-centered, models of private governance similar to the Bangladesh Accord.<sup>23</sup> While quantifying effectiveness and impact of VSS remains complex and debated,<sup>24</sup> certification managers respond to this alleged lack of impact of VSS by noting how certification was never intended to be a “silver bullet” capable to tackle deeply rooted structural problems that can only be solved with the involvement of all public and private actors and mandatory rules. Part of the disappointment among certain civil society organizations would stem from having put too high expectations on certification,<sup>25</sup> which should be seen as a complement rather than a replacement of public governance.<sup>26</sup> This is also the position of VSS in public consultations and lobbying activities.<sup>27</sup>

Regulatory crises not only brought private actors together in the establishment of voluntary sustainability regimes but also mobilized civil society and governmental support for private solutions instead of more profound public intervention. This establishes competitive dynamics under which private regimes hinder or delay the emergence of more profound and mandatory public rules.<sup>28</sup> Competition arises where private and public regimes fight for legitimacy, uptake, support, the authority to set rules and key terms thereof, or the acceptance of a regulatory regime over the

<sup>20</sup> [www.greenpeace.org/static/planet4-international-stateless/2018/03/6b3d1c70-greenpeace-state-ment-on-forest-certification-and-guidance-for-companies-and-consumers\\_final.pdf](http://www.greenpeace.org/static/planet4-international-stateless/2018/03/6b3d1c70-greenpeace-state-ment-on-forest-certification-and-guidance-for-companies-and-consumers_final.pdf).

<sup>21</sup> Interview with NGO representative.

<sup>22</sup> Swiss NCP: *TuK Indonesia v. Roundtable on Sustainable Palm Oil (RSPO)*; before the UK NCP: *IDI, EC, and LICADHO v. Bonsucro*.

<sup>23</sup> MSI Integrity, *supra* 14, at 46. See also J. Reinecke and J. Donaghey, “The Politics of Collaborative Governance in Global Supply Chains: Power and Pushback in the Bangladesh Accord” in this volume (Chapter 8).

<sup>24</sup> UNFSS Voluntary Sustainability Standards, Trade and Sustainable Development, 3rd Flagship Report of the United Nations Forum on Sustainability Standards (2018).

<sup>25</sup> Interview with certification manager.

<sup>26</sup> *Ibid.*

<sup>27</sup> See the FSC submission to the fitness check for the EUTR: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11630-Illegal-logging-evaluation-of-EU-rules-fitness-check-/F506597>.

<sup>28</sup> N. Malhotra, B. Monin, and M. Tomz, Does Private Regulation Preempt Public Regulation? (2019) 113:1 *American Political Science Review* 19.

other.<sup>29</sup> Competition could result in substitution where public rules are challenged by, or replaced with, private regimes that are less stringent than public regimes or limit their effectiveness, pursue business interests to a larger extent than public goals, or that are ineffective and “symbolic.” The fact that public authorities, at least in the EU, are committed to introduce or have already introduced mandatory legislation on the social and environmental impact of global production therefore stands in contrast to initiatives hitherto enacted on both sides of the Atlantic and grounded on voluntarism and multi-stakeholderism. It arguably testifies to a possible co-optation outcome, where public regulation takes over private regimes, either by turning elements of private regulation into a (mandatory) public regime or by narrowing down the regulatory space for private governance.<sup>30</sup>

### 7.3 HRDD AS THREAT AND OPPORTUNITY FOR VSS

From the internal perspective of transnational private regulators, the perception of critical factors or a change in (regulatory) context as threats to the status quo is linked to the notion of organizational crises. An organizational crisis represents a threat for an organization that prevents it from attaining its goals or reduces its ability to do so. Organizations seek to resolve such crises also because they are an opportunity to achieve their goals even further – and beyond the issue in question.<sup>31</sup> Organizational crises catalyze opportunities to cooperate in new or existing institutions and experiment with alternatives that would not otherwise be considered, resulting in rethinking, reorganization, and new institutional settings.<sup>32</sup> The introduction of HRDD, especially in mandatory legislation, from the perspective of VSS can be seen as an organizational crisis.

The goals of VSS do not just include the regulation of sustainability. VSS also pursue institutional goals such as increasing market uptake and gaining legitimacy from their association to legislation.<sup>33</sup> HRDD and mandatory HRDD constitutes an opportunity for schemes to extend their uptake among firms and consolidate their regulatory prerogatives, possibly even in new regulatory domains and through new regulatory tools. As VSS contribute to social and environmental risk management, HRDD could incentivize their use as part of companies’ responsibilities and

<sup>29</sup> B. Eberlein, K. W. Abbott, J. Black, E. Meidinger, and S. Wood, *Transnational Business Governance Interactions: Conceptualisation and Framework for Analysis* (2014) 8:1 *Regulation & Governance* 11.

<sup>30</sup> B. Cashore, J. S. Knudsen, J. Moon, H. van der Ven, *Private Authority and Public Policy in Global Context: Governance Spheres for Problem Solving* (2021) 15:4 *Regulation & Governance* 1166.

<sup>31</sup> T. W. Milburn, R. S. Schuler, and K. H. Watman, *Organisational Crisis: Definition and Conceptualisation* (1983) 36:12 *Human Relations* 1144.

<sup>32</sup> P. L. Berger and T. Luckmann, *The Social Construction of Reality* (1967), at 107–108.

<sup>33</sup> J. Black, *Constructing and contesting legitimacy and accountability in polycentric regulatory regimes* (2008) 2:1 *Regulation & Governance* 157.

obligations. The UNGP raised awareness and demand for supply chain transparency that VSS are well placed to provide, by giving firms a tool showing that they “do not harm” and to monitor progress and improvements.<sup>34</sup> HRDD also requires firms to engage with their value chains, as further illustrated in Section 5.2, thereby generating a demand for guidance and new institutional forms to that purpose.

In parallel, however, HRDD could push firms to design their own internal due diligence systems for sourcing and tackling social and environmental risks, which could be less stringent and less transparent than private certification, nor based on a multi-stakeholder approach and without third-party assurance mechanisms.<sup>35</sup> Private business programs in the context of sustainability supply chain management<sup>36</sup> proliferated in sectors covered by VSS. There is evidence that they displaced certification especially in the cocoa space.<sup>37</sup> These initiatives cover a company’s entire sourcing and could create fragmentation and ultimately additional burdens for compliance by upstream producers. Scheme managers are concerned with this increased competition by firms’ proprietary systems:

We need to be very clear what is the difference with other [firm-level] schemes. Legal deforestation is not the same as zero deforestation. Third-party certification with accreditation is not the same as one simple, single audit firm certifying every scheme.

In connection to deforestation, alternative forms of private governance have indeed emerged that are not necessarily alternatives to VSS but that could reduce their role in regulating sustainability in value chains. Multiparty pledges such as the Soy Moratorium reduce the relevance of voluntary certification initiatives at least for deforestation-related concerns as they include public enforcement and strong enforcement mechanisms to avoid that noncompliant products are traded. Auditing is also supplanted as a monitoring mechanism by the possibility to use remote sensing and publicly available satellite imageries,<sup>38</sup> which are, however, also integrated in VSS under the awareness of the limits of audit systems.<sup>39</sup> A respondent from a nongovernmental organization summarized the implications of HRDD as follows:

<sup>34</sup> Interview with certification manager.

<sup>35</sup> Ibid.

<sup>36</sup> T. Thorlakson, J. F. de Zegher, and E. F. Lambin, Companies’ Contribution to Sustainability through Global Supply Chains (2018) 115:9 *Proceedings of the National Academy of Sciences* 2072; E. Meidinger, Governance Interactions in Sustainable Supply Chain Management, in *Transnational Business Governance Interactions: Advancing Marginalised Actors and Enhancing Regulatory Quality* (S. Wood, R. Schmidt, E. Meidinger, B. Eberlein, and K. W. Abbott eds., 2019), 52.

<sup>37</sup> S. Subramanian, Is Fair Trade Finished?, *The Guardian*, July 23, 2019.

<sup>38</sup> Interview with NGO representative.

<sup>39</sup> Interview with scheme manager.

If [VSS] look at the mandatory human rights due diligence requirements that are increasing particularly in Europe, and realize that they have to lift their game and this is what they're going to need to do to essentially provide that service for companies so that they can make their human rights due diligence requirements, then that's an opportunity. If they do it, that's an opportunity but on the other hand, if they don't rise to that challenge then companies will decide they're not an effective tool for human rights due diligence and find other ways to do it . . . it will only be a legitimate process for human rights due diligence if the [VSS] and its own process of certification, etcetera, is robust.

As organizations, VSS themselves also bear the responsibility in the UNGP not just to respect human rights but also to avoid associations to human rights violations to which they are directly linked through their commercial relations. Recent dispute resolution before the national contact points (NCP) for the OECD Guidelines confirmed that this can be the case, thereby opening the door to other complaints. In two cases against RPSO and Bonsucro in Switzerland and the United Kingdom, both NCPs confirmed previous practice to expand what they considered as a “multinational corporation” under the OECD Guidelines for Multinational Corporations<sup>40</sup> – an instrument that expressly operationalizes the UNGP. This notion was interpreted to include other transnational private actors such as NGOs and sport bodies such as FIFA. The Swiss NCP's involvement in the RSPO case was rather narrow in light of jurisdictional limitations.<sup>41</sup> In the Bonsucro case, however, the UK NCP held that it could be possible for a multi-stakeholder initiative to breach provisions of the OECD Guidelines such as the presence of a human rights policy and the continuous performance of HRDD including the exercise of leverage and mitigation of adverse human rights impact.<sup>42</sup> Membership was explicitly considered as a business relation directly linking human rights harms committed by a (prospective) member to a VSS.<sup>43</sup> The factual assessment of these claims is currently pending after failure of the parties to reach a mutually agreed solution.

This process was described as:

an important wake-up call [for VSS] in the sense that, “Look, we have to be more reactive to this type of thing and we need to have a system where really what we're asking of our members is broader than just our standard and that certification part of it. It's that broader alignment with human rights over to the UNGP.”<sup>44</sup>

<sup>40</sup> D. Carolei, *Survival International v World Wide Fund for Nature: Using the OECD Guidelines for Multinational Enterprises as a Means of Ensuring NGO Accountability* (2018) 18:2 *Human Rights Law Review* 371.

<sup>41</sup> Before the Swiss NCP: *TuK Indonesia v. Roundtable on Sustainable Palm Oil (RSPO)*.

<sup>42</sup> UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, Decision: Initial assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: complaint from IDI, EC and LICADHO against Bonsucro Ltd, para. 13.

<sup>43</sup> UK NCP, para. 14 and 24.

<sup>44</sup> Interview with scheme manager.

## 7.4 RELEVANT ASPECTS OF HRDD FOR VSS

The type of due diligence legislation currently discussed in the EU,<sup>45</sup> with specific rules for agricultural commodities and ecosystem conversion,<sup>46</sup> will likely require companies to undertake due diligence for all human rights and environmental impacts in the entire value chain. This would reflect the UNGP and sector-specific OECD Guidance documents asking firms to account for the entire adverse social and environmental impact they caused, to which they contributed, or are directly linked through their business relations.<sup>47</sup> Within mandatory HRDD and with respect to the business responsibility to exercise HRDD the function of VSS must be explained. Firms demand supply chain risk-management tools, to manage risks, ensure conformity, and enhance productivity, reputation, and profitability<sup>48</sup> and also to ensure respect of legal requisites. The requirements of a scheme must therefore be aligned to HRDD as provided in the UNGP, OECD Guidelines, and the specifications of future regulatory instruments for a VSS to be of assistance in firms' responsibilities. Where issues and risks covered by a scheme align with those faced by a firm, standards are suitable for integration in that firm's HRDD processes as a non-dispositive evidence of low risk,<sup>49</sup> as also done under the EU Timber Regulation.<sup>50</sup> As a consequence of a possible narrower scope of VSS, compliance with a scheme would not grant a presumption of conformity with legislation but would serve as a rebuttable presumption of "low risk." This approach has been problematic for VSS in the timber legality space, as certified firms were disappointed that the cost of certification did not lead to opening up market access and ensuring legal compliance in the EU.<sup>51</sup>

The limitations of VSS must be clear. Firstly, HRDD responsibilities include all possible human rights affected by business operations,<sup>52</sup> but VSS may have a narrower human rights scope. For example, FSC does not generally refer to all

<sup>45</sup> European Parliament resolution of March 10, 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 INL).

<sup>46</sup> European Parliament resolution of October 22, 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006 INL).

<sup>47</sup> For discussion over these categories of involvement and their interpretation: E. Partiti, Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights (2021) 70:1 *International and Comparative Law Quarterly* 133.

<sup>48</sup> S. Ponte and P. Gibbon, Quality Standards, Conventions, and the Governance of Global Value Shains (2005) 34:1 *Economy & Society* 1.

<sup>49</sup> E. Partiti, The Place of Voluntary Standards in Managing Social and Environmental Risks in Global Value Chains (2022) 13:1 *European Journal of Risk Regulation* 114.

<sup>50</sup> Regulation (EU) No. 995/2010 of the European Parliament and the Council of May 11, 2009, laying down the obligations of operators who place timber and timber products on the market. OJ L 295/13 (EUTR).

<sup>51</sup> Interview with certification manager.

<sup>52</sup> UN Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights. An interpretative guide (2012), at 13.

human rights in its Principles and Criteria but, as its focus lies on forest operations, it covers human rights affected by forest management operations such as workers', customary, community, and Indigenous Peoples' rights.<sup>53</sup> The effectiveness of VSS as risk mitigation tools depends also on the extent to which a given social and environmental concern or harm can be detected. This links to the vexed question of whether certification is an effective mechanism to verify and ensure that the scheme's criteria are implemented properly.

Secondly, HRDD responsibilities apply throughout the entire value chain. From the perspective of a downstream firm marketing in a jurisdiction with (future) HRDD legislation, HRDD must identify, mitigate, and remedy possible risks and harms all the way upstream. Furthermore, a downstream firm could be implicated in adverse impact through a producer from which it sources both certified and noncertified material and in which human rights violations occur in the context of noncertified volumes. Different would be a scenario where harm occurs in a production unit whose products are not traded or marketed by downstream firms. While some NGOs are keen to expand the possible responsibilities of downstream firms,<sup>54</sup> there would not be a "direct link" with adverse impact through business relations. A similar situation would arise where harm is generated by a subsidiary or associated entity of a firm with which the downstream firm does business but with which there is no direct relation. However, from the perspective of the human rights responsibility of that upstream entity, there would be association to human right harm. This situation is particularly challenging for VSS' own HRDD, as they would be certifying entities causing or contributing to human rights violations and also breaching their standards in noncertified operations.

However, most requirements of schemes apply to the level of harvest, plantation, and unit of production. Even where the entire value chain must be certified under forms of chain of custody certification, intermediary entities such as mills, plants, and processing facilities are rarely requested to comply with requirements concerning environmental impacts and human rights. A 2019 comparative study of FSC and PEFC's principles and criteria and chain of custody requirements<sup>55</sup> concluded that the forest management standards are aligned to the ILO Fundamental Conventions, the UNGP, and the OECD Guidelines, and these are assessed by auditors. However, the chain of custody requirements include only compliance with ILO Conventions and are limited to an indirect reference to FSC Policy for Association and a self-declaration of compliance by firms.<sup>56</sup> Scheme holders consider that the purpose of chain of custody standards is to assure credibility of claims, and therefore

<sup>53</sup> FSC, *FSC Support to Respect for Human Rights* (2019), at 3.

<sup>54</sup> Interview with NGO representative.

<sup>55</sup> R. Kusumaningtyas, *Labour Rights and Human Rights in Forest Certification Standards: An Analysis of FSC and PEFC Adherence to the UN Guiding Principles, ILO Fundamental Conventions and OECD Guidelines* (2019).

<sup>56</sup> FSC Chain of Custody Certification FSC-STD-40-004 V3-0, Art 1.3.

human rights issues are not necessary, also because they consider risk to lie at the farm level.<sup>57</sup> Furthermore, requirements for nonproducing members have traditionally been lower than those for producers in order to attract downstream firms to participate.<sup>58</sup> However, as Section 7.5 illustrates, these features of VSS are changing.

## 7.5 IMPACT OF HRDD ON VSS

Some VSS are attempting to build in respect for human rights, including an obligation to perform HRDD, within membership requirements applicable also to downstream actors and retailers, that is, the noncertified members. The emergence of HRDD responsibilities for upstream entities is also visible in the expanded criteria for certification to noncertified volumes and entities. Some schemes are introducing the principle that producers whose only part of their operations is certified cannot breach key requirements in the noncertified areas or production units. For intermediary supply chain actors such as mills, this approach results in extending criteria to all sourced volumes, thereby transmitting upstream a request for certification-compliant production. Additional human rights criteria are also appearing in chain of custody certification. This expands the substantive obligations so that the scheme covers broader supply chain segments for the downstream firms and therefore better aligns with HRDD requirements. Section 7.5.1 discusses these developments concerning VSS regulatory activities. Section 7.5.2 focuses instead on the recent expansion of novel forms of nonregulatory activities centred on value chain collaboration and engagement.

### 7.5.1 *Expanding Requirements*

FSC established in 2011 a Policy for Association that attempts to extend FSC standards beyond certified operations. Certificate holders, certification bodies, partners, or members associated with FSC can be disassociated if responsible – as a company or because of activities of subsidiary companies or subcontractor – for violations of key criteria including illegal logging or trade, destruction of high conservation value forests, significant conversion of forests to plantation, GMO use, violations of traditional rights, human rights, and breaches of ILO Core Conventions.<sup>59</sup> The Policy of Association is enforced by FSC and is part of the due diligence performed by the organization. FSC is attempting to move beyond a self-declaration for prospective members toward actively performing due diligence

<sup>57</sup> Interview with scheme manager.

<sup>58</sup> *Ibid.*

<sup>59</sup> FSC Policy for Association. FSC-POL-01-004 V2-0 EN.

about whether firms are involved in unacceptable activities under the Policy for Association.<sup>60</sup>

Between 2015 and 2017, FSC attempted to reform the Policy for Association by formalizing how it performed due diligence. The proposed policy provided that prospective members will be subject to additional screening in high-risk cases. Data is collected via a self-assessment complemented by stakeholder input.<sup>61</sup> If there is evidence of violations, the matter would be dealt with under the procedure to process complaints against breaches of the Policy for Association, with a Complaint Panel that will make recommendations about association. Disassociation should take place only in the presence of repeated violations, as the organization prefers to address violations through cooperation given that dissociation would not produce positive outcomes for forests.<sup>62</sup> Revision and expansion of the Policy for Association has been complex, and an attempt to strengthen its enforcement by FSC, as well as clarifying when a member may breach the key criteria,<sup>63</sup> produced no result and had to be put on hold.<sup>64</sup> Another attempt for revision started in 2020. Through its Shared Responsibility policy, RPSO included the requirement that all members such as NGOs, banks and investors, retailers, manufacturers, processors, and traders must respect human rights, especially free prior and informed consent, in their entire operations and have grievance mechanisms in place.<sup>65</sup> In this way, RSPO supports respect for human rights and the performance of HRDD within its membership requirements for downstream firms.

Similarly, Bonsucro scaled-up its membership requirements through a Code of Conduct. In March 2020, Bonsucro aligned it to the UNGP and the OECD/FAO Guidance for Responsible Agriculture Value Chains by recognizing human rights responsibilities of members in relation to their suppliers. The Code therefore requires certified and noncertified members (i.e., respectively, mills and all other supply chain actors) to commit to continuous improvement, respect human rights and protect natural ecosystems, embed this commitment in operations, and communicate progress.<sup>66</sup> By incorporating the UNGP's concept of "direct link" to human rights harm that determines the boundaries of companies' responsibility to respect, the Code applies also to products and services linked to sugarcane

<sup>60</sup> FSC, Due diligence evaluation for the association with FSC. FSC-PRO-10-004 V2-0 EN Draft 2 (2016).

<sup>61</sup> *Ibid.*, Art. 2.1 and 2.2.

<sup>62</sup> FSC, Processing Policy for Association Complaints in the FSC certification scheme. FSC-PRO-01-009 (V3-0) EN, Art. 5.21.

<sup>63</sup> FSC, Second Consultation Report on FSC-POL-01-004 V3-0.

<sup>64</sup> <https://fsc.org/en/current-processes/policy-for-the-association-of-organizations-with-fsc-fsc-pol-01-004>

<sup>65</sup> RSPO Shared Responsibility Task Force, Shared Responsibility Requirements and Implementation, at 26.

<sup>66</sup> Bonsucro Code of Conduct, 1.2.

production, processing, and sourcing.<sup>67</sup> The self-assessment performed by members requires them to improve compliance of their production, processing, and sourcing. As under the UNGP,<sup>68</sup> the expected commitment of members varies according to the risks at hand and the nature and size of operations.<sup>69</sup> Members are also expected to provide remedies to adverse impact, including via operational-level grievance mechanisms and remediation in line with UNGP Principle 31.<sup>70</sup>

Bonsucro ensures compliance with its Code of Conduct not by including its requirements in audits but via reporting appraised by the organization. Action plans may be requested in case of noncompliance, with the possibility to refer to Bonsucro's Grievance Mechanism.<sup>71</sup> Bonsucro also acknowledges their own responsibility toward members through risk assessment.<sup>72</sup> An enhanced due diligence of members was introduced, assessing their social and environmental risk. The process entails online searches, consultation of court records in the country of operation and with other organizations that may possess information about relevant social and environmental impacts of the perspective member, and comments by interested parties on the basis of which the level of risk and expected actions are determined.<sup>73</sup> The process may lead to additional requirements imposed on the (candidate) member. In a recent case, Bonsucro engaged in discussion with local stakeholders and used its leverage to require a prospective member to establish corrective plans including disengagement with suppliers breaching human rights.<sup>74</sup> Where allegations were raised about the involvement of another candidate member's with forced evictions of indigenous communities, Bonsucro engaged with different stakeholders and ascertained that, while the candidate was not directly involved, some of its suppliers might have been responsible. Bonsucro thus requested in the action plan the implementation of risk management systems, a requirement of continuous dialogue, and a disengagement strategy.<sup>75</sup> This is in line with the UNGP requirement that leverage should be exercised as much as possible, and disengagement should only take place where leverage failed to achieve results.

Concerning the expansion of certification requirements to noncertified volumes and organizations to account for the human rights responsibility of the firms at hand, some VSS are expanding the human rights requirements applicable in their chain of custody certification. Some schemes "don't want to create a Chain of Custody Standard that is covering human rights issues. The purpose of that standard is to

<sup>67</sup> *Ibid.*, 2.1.

<sup>68</sup> UNGPs Commentary to Principle 12.

<sup>69</sup> Interview with certification manager.

<sup>70</sup> Bonsucro Code of Conduct – Implementation Guidelines, Point H-J.

<sup>71</sup> Bonsucro Code of Conduct – Reporting Guidelines.

<sup>72</sup> Interview with scheme manager.

<sup>73</sup> *Ibid.*; see also Bonsucro – Membership Application Procedure, point 4.

<sup>74</sup> Interview with scheme manager.

<sup>75</sup> *Ibid.*

assure credibility of claims.”<sup>76</sup> Other VSS are instead broadening the applicable requirements under chain of custody standards. FSC recently incorporated core labor standards into auditing requirements in chain of custody.<sup>77</sup> As they become part of the audit criteria, this update strengthened enforcement of human rights provisions that would otherwise only be covered under FSC Policy for Association and its self-assessment. In addition, the expansion of human rights in chain of custody allows downstream entities sourcing FSC-certified products to receive assurance of low risk of at least certain human rights violations in the entire supply chain. In a similar manner, various additional social and environmental requirements have been introduced in Rainforest Alliance’s 2020 version of its supply chain standard.<sup>78</sup>

Bonsucro is introducing additional rules for certification of mills and processors concerning noncertified volumes. In the current standard, the supply area included in the unit of certification comprises the farms supplying cane in conformity with Bonsucro requirements. Where this is less than 100 percent of the supply, a respective percentage of production is considered as certified.<sup>79</sup> In fact, mills on average select an area to certify that represents only 23 percent of the mill supply, and the production standard applies only to that area. Bonsucro is revising its standards to introduce a system where human rights requirements apply to the entire mill supply, including areas neither controlled by the mill nor certified but that are managed by smallholders whose certification is complex and where environmental and social risks lie.<sup>80</sup> These requirements include enacting “sustainability policies” to respect human rights, mapping vulnerable stakeholders, and assessing risks.<sup>81</sup> While auditing is limited to assess whether sustainability policies and other requirements are in place, these new criteria – if implemented successfully by mills – are capable to expand the reach of human rights standards under the HRDD responsibility of the mill. The standard would therefore acknowledge that mills’ responsibility extends beyond certified volumes and includes all entities to which they are directly linked via their sourcing activities.

Also RSPO similarly introduced in the 2018 revision of its Principles and Criteria requirements that mandate the entire unit of certification, in all its business operations and transaction, to have a policy to respect human rights at all value chain levels.<sup>82</sup> Other standards focusing on GMO such as ProTerra require mills and processors employing inputs from noncertified farms to design and implement

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*; <https://fsc.org/en/current-processes/incorporating-the-fsc-core-labour-requirements-into-the-coc-standard>.

<sup>78</sup> Rainforest Alliance, Sustainable Agriculture Standard: Supply Chain Requirements (2020).

<sup>79</sup> Bonsucro/Bonsucro EU RED Production Standard V4.2 2016, at 12.

<sup>80</sup> Interview with certification manager.

<sup>81</sup> Bonsucro Draft Production Standard Version 5, Criteria 1.1, [www.bonsucro.com/wp-content/uploads/2020/05/Bonsucro-Production-Standard-V5.1.pdf](http://www.bonsucro.com/wp-content/uploads/2020/05/Bonsucro-Production-Standard-V5.1.pdf).

<sup>82</sup> RSPO 2018 P&C, Criteria 1.2 and 4.1.

supply chain control systems to ensure that core GMO and social and environmental indicators are met.<sup>83</sup> While these requirements avoid commingling of GMO and non-GMO materials, where human rights requirements are monitored, the standard also covers the entire human rights responsibility of the mills concerning the farms to which it is directly linked. Verification of supply at the farm level is undertaken over a five-year period through third-party audit.<sup>84</sup>

In light of HRDD responsibilities, VSS are spurred to reflect over their own due diligence structures.<sup>85</sup> “Some of these elements were already considered good practices, but now from this lens of mandatory due diligence, these issues are going to become probably more important.”<sup>86</sup> In addition to a more thorough screening of prospective members discussed above, where schemes are not detecting noncompliance with certain criteria in spite of the presence of a high risk, they may be expected to carefully assess whether audits are working properly and whether they should not employ additional venues to have access to information, or establish complaints and grievance tools to accede to it.<sup>87</sup> In the 2020 standards revision, UTZ-RA strengthened mechanisms to collect geospatial data complemented by remote sensing and baseline mapping to supplement auditing in determining whether land conversion occurred. In this way, the scheme already knows which farms present a high risk of past deforestation and will inform auditors about possible concerns.<sup>88</sup>

Generally, VSS also have to tackle the unintended adverse impact stemming from compliance with their standards. While certification may make visible existing conflicts,<sup>89</sup> in other cases, the standard may generate adverse impact or may have to balance between different types of harm. To lessen the negative environmental impact of burning sugar cane by farmers, standards may contemplate requiring increased mechanization. This may however impact on human rights of the workforce. Bonsucro includes this type of risk into its risk management systems. As a form of impact mitigation, the scheme and the certified entities offer retraining programs, and information is shared with other certified firms that aim to increase mechanization and could generate similar harms.<sup>90</sup>

In the context of deforestation-related criteria and their possible human rights implications, a scheme is in the process of implementing enhanced definitions of forests and covered ecosystems for the entire production of farmers and mills located

<sup>83</sup> See, for example, ProTerra Standard for Social Responsibility and Environmental Sustainability Version 4.1 September 25, 2019, point 1.2.

<sup>84</sup> Interview with scheme manager.

<sup>85</sup> ISEAL, *Assuring Compliance with Social and Environmental Standards. Code of Good Practice* (2018).

<sup>86</sup> Interview with scheme manager.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

in the Brazilian Cerrado independently from whether certain areas will be certified or destined to certified processors and mills. Both definitions and elements of verification system will build on those provided by the Accountability Framework initiative (AFi),<sup>91</sup> a global benchmark for deforestation claims across value chains established by NGOs and aligned to the UNGP. Benchmarking criteria therefore affect VSS substantive requirements. The effects of AFi on other definitional elements that scale-up standards' formal requirements are also visible. The 2020 revision of Rainforest Alliance's production standards has explicitly incorporated AFi's approach centered on non-conversion of forests and natural ecosystems and has embedded relevant concepts and definitions.<sup>92</sup> Other standard-setters are in the process of including aspects of AFi relevant to their schemes in their requirements, and others – such as the Responsible Leather Roundtable – already use AFi definitions.<sup>93</sup>

### 7.5.2 *Collaboration in Risk Mitigation and Remediations*

Human rights abuses and social conflicts within value chains are likely to endure without collaboration and engagement among all stakeholders involved.<sup>94</sup> HRDD requires collaboration between downstream firms and upstream entities.<sup>95</sup> Collaboration is also essential with non-business stakeholders and human rights holders to ensure mitigation of impacts and remediation. Collaboration may require investment in value chain mapping and transparency and even supporting upstream producers. Firms should avoid risk-adverse behavior such as disengaging from noncompliant suppliers (which may in fact aggravate the situation for human rights) or stop sourcing from high-risk areas.<sup>96</sup> Finally, HRDD also requires that human rights violations, where they occur, are remedied and the status quo is restored, a requirement that is more easily fulfilled through collaboration.

Engagement can take various forms, such as committing to higher wages or purchase volumes, longer-term contractual relations, as well as investment by downstream firms to improve working, social, and environmental conditions upstream.<sup>97</sup> The provisions of economic incentives and tools to improve

<sup>91</sup> Ibid.

<sup>92</sup> Interview with certification program manager.

<sup>93</sup> Ibid.

<sup>94</sup> J. Rotter, P.-E. Airike, and C. Mark-Herbert, Exploring Political Corporate Social Responsibility in Global Supply Chains (2014) 125:4 *Journal of Business Ethics* 581.

<sup>95</sup> Shift Project, Using Leverage in Business Relationships to Reduce Human Rights Risks (November 2013), [www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/](http://www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/).

<sup>96</sup> UN Office of the High Commissioner for Human Rights, The Corporate Responsibility to Respect Human Rights. An interpretative guide. HR/PUB/12/02 (2012), at 50–51.

<sup>97</sup> Shift Project, Bringing a Human Rights Lens to Stakeholder Engagement, Shift Workshop Report No. 3, August 2013, [https://shiftproject.org/wp-content/uploads/2013/08/Shift\\_stakeholderengagement2013.pdf](https://shiftproject.org/wp-content/uploads/2013/08/Shift_stakeholderengagement2013.pdf).

productivity intend to remove some of the economic drivers of social and environmental harm. At the same time, engagement ensures change on the ground and avoids that certification creates segregated markets where compliant products are sold in Western markets and noncompliant produce is sold elsewhere. However, this principle is complex to operationalize as companies lack the knowledge and incentives to actively engage. Engagement may be burdensome, requiring cost-sharing and direct financing. The allocation of costs and responsibilities remains unclear and contestable unless fairness considerations are incorporated to offset frequent downstream firms' exploitation of their suppliers.<sup>98</sup>

While offering risk mitigation and remediation through collaboration is the responsibility of firms, requiring engagement has proven difficult for standards, but this is an area where VSS are increasing their focus:

That's where you need organizations to take companies by the hand, bring them together, and say, "Look, this is where your investment is going to go." The great thing about a mandatory law would be that then they actually have to put in that investment, they can't just walk away, but you're still going to need that glue between companies to actually do something in a more collective sense. I think standard system to a certain degree, they can be that glue although, again, they are still maybe not active enough in that space to think about what this really comprehensive mitigation or remediation look like. Some of them have developed mechanisms and to a certain degree, just the noncompliances in the standard, you can build investments around it . . . . Anyway, the interesting role or where I definitely hope that standard systems will play a greater role is exactly in that wider remediation and mitigation space where it's not just that they provide some information about which producers are compliant or noncompliant, but they can actually provide an entry point for companies that have to invest in mitigation and remediation because their inspections are linked to those problems.<sup>99</sup>

Beside their traditional multi-stakeholder structures, VSS are introducing or strengthening collaborative features traceable to the UNGP requirement of engagement between upstream and downstream in mitigating and remedying impacts. This pathway confirms the intuition of those suggesting a reframing of VSS functions, one less concerned with authoritative rule-making and more centered on assistance in broader practices concerning sustainable supply chain management.<sup>100</sup> One area where collaboration was enhanced concerns the amount of certified products that entities downstream commit to purchase. Purchase commitments ensure a steady demand for certified products that guarantees price premiums for

<sup>98</sup> M. C. Schleper, C. Blome, and D. A. Wuttke, *The Dark Side of Buyer Power: Supplier Exploitation and the Role of Ethical Climates* (2017) 140 *Journal of Business Ethics* 97.

<sup>99</sup> Interview with scheme manager.

<sup>100</sup> L. Fransen, *Beyond Regulatory Governance? On the Evolutionary Trajectory of Transnational Private Sustainability Governance* (2018) 146 *Ecological Economics* 772.

producers to undertake the necessary investments.<sup>101</sup> Certification managers raised concerns about the “magnificent claims” made by downstream companies joining an initiative while only sourcing a limited amount of certified products and receiving a positive image return.<sup>102</sup> While some schemes tackle this issue by strengthening their rules concerning claims about certified sourcing,<sup>103</sup> some organizations took structural steps to actively engage chain actors and require downstream entities to provide support to farmers in facilitating compliance with the standards. This allocates responsibilities for the costs of sustainability, mitigates the risk of social and environmental harm, and possibly scales up impact to areas and products also not sold in Western markets.

RSPO introduced in 2019 a “Shared Responsibility” policy applicable to all members but is particularly relevant for noncertified members. Similar to the FSC and Bonsucro cases discussed above, RSPO members comply with a Code of Conduct requiring them to implement requirements for their own entire organization that must align with the RSPO standards.<sup>104</sup> This broad requirement was expanded though the notion of Shared Responsibility defining the commitments for collective action, collaboration, and accountability needed to transform palm oil markets toward more responsible outcomes.<sup>105</sup> Members must comply with common principles and policies, support small farmers, raise awareness, and offer training as well as technical and personnel support to RSPO. The most salient aspect concerns the identification of volume targets for buyers. Manufacturers and retailers commit to purchase an extra 15 percent of certified palm oil in the first year of implementation, while traders and processors have a 2 percent target. This commitment from downstream firms matches the commitment from farmers to comply with more stringent standards.<sup>106</sup> Members must report on their purchase commitments, which are independently verified and included in the audit under the Chain of Custody Standards. Systems for sanctions and incentives are currently being discussed, as well as the provision of financial contributions to support smallholders.<sup>107</sup>

A similar approach was introduced by RA-UTZ in the 2020 standards revision to ensure that risks, costs, and benefits of sustainability transformations are evenly distributed between producers and buyers. The new standard introduced a “sustainability differential,” i.e. a price premium to certified producers to recognize farmers’

<sup>101</sup> C. Gallemore, A. Guisinger, M. Kruise, D. Ruysschaert, and K. Jespersen, Escaping the “Teenage” Years: The Politics of Rigor and the Evolution of Private Environmental Standards (2018) 152 *Ecological Economics* 83.

<sup>102</sup> Interview with scheme manager.

<sup>103</sup> RTRS, Use of the Logo & Claims Policy. Version 2.0 (2011).

<sup>104</sup> RSPO, Code of Conduct for Members, Art. 3.2 (2015).

<sup>105</sup> RSPO, Shared Responsibility Task Force. Shared Responsibility Requirements and Implementation (2019), at 7.

<sup>106</sup> <https://rspo.org/news-and-events/news/what-are-the-new-shared-responsibility-rules>.

<sup>107</sup> RSPO, *supra* note 105, at 16.

efforts and to support sustainable production. While a price premium is already present in schemes such as FairTrade, buyers of certified products under RA-UTZ certification are also required to make (and report about “sustainability investments” necessary to enable farmers in their value chains to comply with production requirements or the cost of audit and on the basis of investment plans designed by certificate holders themselves.<sup>108</sup> Both sustainability differential and sustainability investment are paid by the first buyer, included in the sale contract, and recorded in RA’s traceability system.<sup>109</sup> Bonsucro’s Implementation Guidelines of the 2020 Code of Conduct also require continuous commitments and improvements that can be demonstrated by sourcing increasing percentage of certified material or supporting suppliers toward certification.<sup>110</sup>

Remediation for social and environmental harms has also been introduced in recent iterations of RA and RSPO standards. Since 2014–2015, RSPO requires certified members that engaged in noncompliant land clearance for plantation or other facilities after the 2005 cutoff date to use remediation and compensations mechanisms. Members will have to designate protected areas to offset previous conversion.<sup>111</sup> If land-use change impacts on the human rights of affected communities, social remediation and compensation plans must be negotiated with right holders.<sup>112</sup> In the 2020 revision of RA standards, in line with HRDD, a separate protocol was introduced requiring remediation and offering guidance on how to effectively remediate human rights violations.<sup>113</sup> A strong remediation guidance is also included in AFi,<sup>114</sup> which was developed building on the UNGP requirements.<sup>115</sup>

Also VSS’ growing involvement with integrated jurisdiction and landscape management shows an extension beyond individual producers as a unit of analysis, in combination with strong elements of engagement with and among public and private actors. As the eradication of adverse social and environmental impacts requires addressing structural issues with the involvement of all relevant public and private actors,<sup>116</sup> VSS are supporting efforts in specific jurisdictions to identify smallholder lands and establish district-level multi-stakeholder governance structures to monitor, report, and verify land-use change. These approaches are part of

<sup>108</sup> RA, Sustainable Agriculture Standards (2020), at 8.

<sup>109</sup> RA, Annex 6 – Traceability and Shared Responsibility (2020), at 16–17.

<sup>110</sup> Bonsucro (2020) Code of Conduct – Implementation Guidelines, Point B.

<sup>111</sup> Interview with certification manager.

<sup>112</sup> RSPO Remediation and Compensation Procedure (RaCP) Related to Land Clearance without Prior High Conservation Value (HCV) Assessment RSPO-PRO-T02-001 V2.0, at 15.

<sup>113</sup> RA, Annex 4 – Rainforest Alliance Remediation Protocol v. 1 (2020).

<sup>114</sup> AFi, Operational Guidance on Remediation and Access to Remedy (2020).

<sup>115</sup> Interview with certification manager.

<sup>116</sup> P. Pacheco, G. Schoneveld, A. Dermawan, H. Komarudin, and M. Djama, Governing sustainable palm oil supply: Disconnects, complementarities, and antagonisms between state regulations and private standards (2020) 14:3 *Regulation & Governance* 568.

a trend linking private initiatives with REDD+.<sup>117</sup> However, the focus of landscape and jurisdictional initiatives moves beyond certified producers and aims at structurally involving other supply chains actors including the financial industry.

While VSS have already been cooperating within landscape and jurisdictional initiatives for a few years,<sup>118</sup> some are beginning to offer jurisdiction-based certifications. RSPO has finalized a second consultation on a “Jurisdictional Approach to Certification” that aims to establish, in partnership with public authorities, a step-wise process toward granting certification against RSPO standards to an entire jurisdictional organization.<sup>119</sup> ISEAL recently released a code of good practices applying not to standard systems but to both landscape and jurisdictional initiatives that wish to make credible claims about their activities and to other initiatives developing frameworks for landscape and jurisdictional projects.<sup>120</sup> While recognizing the potential of these initiatives, ISEAL stresses that they remain complementary to current supply chain tools like standards systems, which are capable to verify and incentivize specific sustainability improvements at the farm level.<sup>121</sup> Also here, the perceived risk for schemes is that firms may decide to source from certain landscapes or jurisdictions, giving up certifications.<sup>122</sup>

## 7.6 CONCLUSION

As public authority intervenes in the regulation of sustainability and human rights across value chains, both through soft law and via mandatory rules, isomorphic pressures among private certifications generate convergence among VSS requirements and approaches, with VSS increasing also their nonregulatory activities. A visible trend among private schemes is the expanded application of key requirements to noncertified volumes and firms to account for the human rights responsibilities of entities at different levels of the value chain. As a form of transnational private governance applicable to the firms and producers that wish to comply with their standards, VSS are complementary to international and national provisions in the social and environmental domains.<sup>123</sup> This happens by design, so that VSS can be used by firms to demonstrate compliance and manage social and environmental

<sup>117</sup> C. Meyer and D. Miller, *Zero Deforestation Zones: The Case for Linking Deforestation-Free Supply Chain Initiatives and Jurisdictional REDD* (2015) 34 *Journal of Sustainable Forestry* 559.

<sup>118</sup> ISEAL, *How Sustainability Standards Can Contribute to Landscape Approaches and Zero Deforestation Commitments* (2016).

<sup>119</sup> RSPO, *RSPO Jurisdictional Approach to Certification. Second Draft* (2020).

<sup>120</sup> ISAL, *Making Credible Jurisdictional Claims. ISEAL Good Practice Guide Version 1.0* (October 2020).

<sup>121</sup> *Ibid.*, at 2

<sup>122</sup> Interview with scheme manager.

<sup>123</sup> E. Partiti, *Orchestration as a Form of Public Action: The EU Engagement with Voluntary Sustainability Standards* (2019) 251 *European Law Journal* 115.

risks. If VSS want to retain their complementarity, they must adapt to emerging public requirements. This allows schemes to better fit in firms' HRDD systems as they cover risks for a broader number of value chain entities. VSS themselves are enacting enhanced due diligence and risk management procedures to account for their own HRDD responsibilities vis-à-vis possible human rights impacts by members and certified firms.

With emerging obligations of HRDD, schemes are no longer competing with public rules in a transnational space or deterring their emergence. As public regulators step up the regulation of responsible business conduct, it will be public requirements that determine what represents sustainable or responsible conduct across value chains. This process can be seen as a co-optation of VSS where VSS do not anymore independently define sustainable practices but operationalize detailed requirements of what constitutes HRDD that are emanations of public authority both at the international and at the national/regional level. In this context, the implementing functions of VSS in transposing legal obligations in the social and environmental domains are diminished in autonomy. Therefore, public intervention is capable to effectively align transitional private regulators to public rules. This could be seen as an instance where public authority has been capable, if partially, to get a handle on economic private activism.<sup>124</sup> However, HRDD spurs VSS to account for impacts of various entities associated to them, thus further expanding the application of their standards to more firms across value chains. The extension of this form of indirect public control is therefore counterbalanced by an increased relevance of VSS in the supply chain they govern.

The impact of HRDD on VSS is linked to its double nature of opportunity and threat for VSS, in line with the notion of organizational crisis discussed in Section 7.3. HRDD gave VSS the possibility to leverage their organizational resourcefulness to engage in new activities and establish new institutional features. By strengthening their efforts in the area of engagement and collaboration between firms at different levels in the value chain, VSS function is also expanding and partially realigning. By providing standards and associated services, VSS also increasingly engage in non-regulatory activities such as offering fora for engagement for risk mitigation, remediation, and sharing costs of social and environmental compliance required by HRDD. This does not fully shelter VSS from the possible threat stemming from other alternative tools for HRDD. However, it creates a novel goal to which VSS are arguably well placed to contribute. The capacity of VSS to expand their activities to new nonregulatory domains despite the influence of public authority on their regulatory function also testifies to their resilience.

<sup>124</sup> See P. Delimatsis, "The Resilience of Private Authority in Times of Crisis" in this volume (Chapter 1).