

The Emerging Role of Private Social and Environmental International Standards in Economic Globalization¹

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Over the past two decades, a rapidly increasing number of people have sought to align their social and environmental values with their spending habits. This evolution in commerce encompasses the certified organic food people eat, the shoes and clothes they wear, and the financial investments they make for retirement. Partly in response to this new social phenomenon, companies and other institutions are increasingly searching for suppliers and partners with positive social and environmental practices.

In a world where businesses understand the clear benefits of being perceived of as good socio-environmental performers, companies will market themselves thus, even when this means baseless self-promotion and/or outright deception known as “greenwashing”. In this emerging economic paradigm, how does one meaningfully and accurately differentiate the good firms from the bad? A significant part of the answer has been standards and the certification initiatives they underpin. In the globalized economic system, it has meant international standards. Who writes those standards – and monitors performance and compliance with them – is an important yet ignored issue. This article chronicles the rise of private international social and environmental standards in the globalization context, describes how these standards are evolving, and evaluates the strengths and challenges of these stand-

ards from a public interest perspective.

I. HISTORICAL BACKGROUND AND INTRODUCTION

Recent trends in global capital flows and trade suggest the private sector will play an increasingly pivotal role in shaping socially responsible international commerce. In the early 1990s, multinational corporations were responsible for an estimated 75 percent of world trade under all regimes.² During that same period, intra-firm trade alone accounted for approximately one third of U.S. imports and exports, according to U.S. Department of Commerce figures.³ By the 1990s, world “trade” had become essentially a single, integrated economy of corporate supplier networks and their financial relationships.⁴ For example, in the mid-1990s, private capital investments in developing nations represented three times that of public development assistance.⁵ Additionally, from 1990 to 1996, capital moving from private sources into the developing world rose from 50 to 86 percent of total capital flows, dramatically changing the complexion of North-South development finance.⁶

The ascendancy of private, voluntary social and environmental international standards has accompanied this newly integrated globalized economy. As goods move around the world, they are subject to an array of quality, safety, social, and environmental standards. And as national and/or regional standards have proliferated, multinational corporations have pursued harmonized international standards that not only facilitate trade across the globe, but also help to reduce unnecessary costs associated with “multiple registrations, inspections, certifications, labels and conflicting requirements.”⁷ Thus, private and quasi-private

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social and environmental standards are increasingly the basis for supply chain mandates and/or legal contracts with suppliers and business partners.

In addition to drivers internal to private actors, the market pressures noted earlier have also contributed to creation and adoption of private and quasi-private standards. Non-governmental organizations (NGOs) have created multi-stakeholder alliances with expanding concepts of corporate environmental and social responsibility. These groups have established standards as tools that underpin sustainable trade and development in an effort both to drive and respond to the linking of consumers' values with their spending and investing habits.

Private standards differ from public international environmental and social standards in two major respects. First, private standards are aimed directly at organizations – mostly business – not at states. That is, they are market-oriented instruments acting directly on producers. Unlike most of international environmental law, private standards do not originate from an intergovernmental agreement or instrument translated into national law or regulation and enforced against producers. Second, the standards are not primarily (at least initially) regulatory. They seek to change behavior through a complex mix of incentives and do not rely primarily on external, deterrence-based enforcement.

Organizations adopt and implement private and quasi-private standards largely as a result of market or good reputation incentives, although both national regulation and international agreements may also hasten their adoption. These private standards may serve as the technical basis for public law and regulation, may pre-

cede public standards, or may for a time show that industry can solve its own problems so that public regulation is unnecessary. Despite these multiple functions, the distinction between the voluntary versus mandatory nature of private standards is increasingly confounding, as is conceptual and practical differentiation among private, quasi-private, and public standards.

II. WHO DEVELOPS PRIVATE STANDARDS

At present, the International Organization for Standardization (ISO) is the most recognized and well-respected international standards institution. ISO began creating technical standards products like hardware and photo film in the late 1940s. It became more broadly recognized in the 1980s with development of quality management standards (ISO 9000), and later in the 1990s, with development of environmental management standards (ISO 14000). Sales of products manufactured in accordance with these developed standards dwarf those related to all other ISO standards combined. The ISO 9000 and ISO 14000 standards have propelled ISO from the backwaters of arcane technical standard setting to prominence in global environmental policy matters. In full appreciation of its growing influence, as well as of the massive revenue generating potential of products manufactured in accordance with additional sustainable development ISO standards, this little-known organization has deftly positioned itself to become the preeminent international standards body for future international standards. ISO's vast market reach and broad industry acceptance certainly present advantages, but there are some serious disadvantages as well.

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ISO standards in the social or environmental field undoubtedly will continue to have a sizable (and probably increasing) influence on business, governments, and civil society world wide. Yet ISO’s evolution from an institution that promulgates technical engineering standards to one that is producing socially relevant standards has not seen a parallel shift in environmental representation among important stakeholders within ISO. Recent evidence suggests that developing countries and numerous groups remain underrepresented in ISO.⁸ In addition to a lack of civil society and ministerial participation from relevant, additional governments, small businesses and even some major industrial sectors are underrepresented in ISO environmental standards development, while consultants and existing standards bodies appear to have disproportionate influence.

Part of the problem stems from the standards development process, which is accomplished by myriad meetings worldwide, with no consistent funding available for NGO or developing country representation. ISO language is arcane, difficult for environmental or other civil society groups to understand, and rarely translated from English.

Because of the technical complexity and low public profile of ISO, many civil society groups with an important stake in ISO’s new work are unaware of the organization and its impact on environmental and social policy. Until recently, it was difficult to find public interest groups with the interest or budget to follow ISO proceedings consistently. The combination of the shifting content of ISO’s standards (including issues like water management, corporate social responsibility, environmental reporting, and climate change) and the lack of balanced

representation in ISO remains unaddressed. Despite plans and protestations to the contrary, ISO took few substantive steps towards greater inclusivity in its environmental and social standard setting until mid-2000s.

A second concern is substantive. Prescriptive environmental performance levels are not included in ISO 14001, which instead provides a plan-do-check-act continual improvement model for organizations. Standard writers justify this environmental exclusion because of differences in national environmental regulations and the fear that specifying environmental standards could stifle continual improvement and innovation, as well as limit market access for firms in developing countries.

Nonetheless, the absence of prescribed performance levels in Environmental Management Systems like ISO 14001 has damaged the credibility of such standards with individuals and organizations that were outside of the adoption process. Because ISO 14001 is a systems standard, certification, even if credible, demonstrates only that a management system was followed; any linkage between certification and actual environmental change is indirect. Parties external to ISO primarily are interested in the degree to which the actions of organizations impact the environment. Thus, a long-standing and unresolved debate has occurred, which focuses on the relationship between certified Environmental Management Systems (EMS’s), such as ISO 14001, and improved environmental performance, particularly because EMSs are composed of a combination of regulated and non-regulated environmental aspects and impacts.⁹

A. Non-state Environmental and Social Certification and Labeling Programs

The perceived need for consumers to distinguish sustainable from unsustainable and environmentally damaging products, together with mistrust of business-created and enforced schemes, has led NGOs to develop standards beyond ISO. Typically, these initiatives consist of normative performance and/or management standards that facilitate third-party verification and certification/labeling elements. Unlike ISO's "systems" standards, these NGO-driven initiatives generally require performance minimums and site-specific outcome assessment.

Organizations independently assessed as conforming to NGO-initiated standard(s) can include the initiative's trademark/logo on its products, promotional material, and/or facilities. Examples of such non-ISO standards-based initiatives include the Forest Stewardship Council (FSC), the Marine Stewardship Council (MSC), Social Accountability 8000, and Fairtrade Labeling Organizations International, among many others.

Over time, successful NGO-initiated standards may stimulate the formation of more formal standards institutions, albeit without ISO's link to governments and international public law. For example, the Global Reporting Initiative (GRI) started as an NGO-industry collaboration at Ceres. GRI later created a permanent independent governing structure to develop new reporting protocols. Such initiatives may be able to link to public law through national legislation or public international initiatives, and eventually may carve out niches at the intersection of

public and private sectors similar to (or in competition with) ISO.

In addition to NGOs, industry groups often create their own standards. These may range from industry- or company-specific "codes of conduct" specific to their own operations to more wide-reaching standards applicable to suppliers or borrowers. This type of standard-setting is often non-transparent, although the codes borrow heavily from other industry codes, from public sector standards, and from NGO input (especially when codes are developed in response to public/NGO pressure). In certain high-profile sectors like chemicals and banking, industry associations have played a key role in developing sector-specific codes.

B. Cooperation Between the International Public Sector and the Private Sector

Some standards sit astride the line between public and private, created by public international institutions for both public and private use. International financial institutions, for example, can set substantive emissions and design guidelines to reduce the environmental impacts of bank-funded projects. The World Bank's Industrial Pollution Prevention and Abatement guidelines, including sector specific protocols, are used by private financiers and other government agencies, as well as the Bank. Additionally, UNEP's 1994 Code of Ethics on the International Trade in Chemicals, focusing on private producers, is compatible with Responsible Care and other private standards, although it is the product of a UNEP-convened series of consultations with industry, government, and NGO experts.

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Public-private collaborations also result in more general codes of conduct focused on industry. For example, the Organization for Economic Cooperation and Development’s (OECD’s) Guidelines for Multinational Enterprises arose from meetings involving OECD member governments, in consultation with industry and NGOs. The International Labor Organization’s (ILO’s) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy emerged from its government-worker-employer tripartite structure. Both OECD and ILO have established a general set of obligations for private enterprises; environment and health and safety obligations in the OECD Guidelines; and ILO principles on worker health and safety which have significant environmental implications. The U.N. Secretary-General’s Global Compact similarly sets forth broad principles, three of which relate to protection of the environment. Private enterprises voluntarily join the Global Compact, which specifically avoids enforcement machinery and relies instead on creating networks for sharing best practices across industry.

All of these voluntary, private and quasi-private standards have evolved in the dual context of market competition and the international legal framework. From the inception of such standards, government trade officials and some producers have expressed fears about growing confusion in the marketplace, as well as the potential effects on market access and competitiveness of developing countries, particularly where the voluntary standards were developed without appropriate participation from these countries.¹⁰

A growing recognition of the positive impacts of voluntary environmental and social standard-based certification and

labeling systems – such as their potential role in driving market competition and innovation and for opening new markets – has caused many opponents to change their opinions. However, this competition can have detrimental effects. The success, and even potential success, of certain NGO-led initiatives has prompted proliferation of a broad array of competing systems attempting to build on the momentum and credibility of the non-governmental certification movement, while offering cheaper and less stringent alternatives.

Indeed, NGO-led labeling and certification schemes have had significant bottom-line impacts for businesses in targeted sectors, such that some retailer/brand industries have proactively assisted developing countries in adopting competing standards and compliance systems that better suited their needs. This trend is particularly notable in the forest and coffee sectors. Due to poor stakeholder involvement in some of these nascent industry initiatives, they are unlikely to result in standards and/or conformity assessment procedures that are meaningful to many civil society organizations. These industry groups are in a powerful position because they often represent a large percentage of the market and can bring marketing and other resources to influence adoption of their favored country-specific standards. As a result, the pressing question confronting the comparatively smaller NGO-led initiatives is how best to influence these newer, competing initiatives to ensure credibility (and compatibility) with existing NGO systems.

III. PRIVATE VOLUNTARY STANDARDS AND PUBLIC POLICY

The growing role of environmental and

social standards in international commerce is only one effect of private voluntary standards; another is their increasing impact public policy. Private standards have long interacted with and often are developed when public lawmaking and regulatory efforts are deemed insufficient. They have historically filled in for insufficient standards or as the technical foundation for public laws, as portents and precursors of new public law, or as proactive efforts to retard or derail public regulation. However, the role of the privately developed standards is changing, and they are increasingly used as the primary tool to address pressing internal and international environmental and social policy challenges.

One can look to the prelude to the 2002 World Summit on Sustainable Development (WSSD), where a coalition of groups led by Friends of the Earth International offered proposals for a multilateral treaty on corporate accountability. The treaty would have committed states to ensure that corporations doing business in their territory complied with certain minimum international standards. While the proposal failed – largely due to heavy lobbying by industry favoring voluntary approaches – the WSSD’s plan of action includes several references to corporate accountability and voluntary standards, including the exhortation to:

Encourage industry to improve social and environmental performance through voluntary initiatives, including environmental management systems, codes of conduct, certification and public reporting on environmental and social issues, taking into account such initiatives as the International Or-

ganization for Standardization standards and Global Reporting Initiative guidelines on sustainability reporting, bearing in mind Principle 11 of the Rio Declaration on Environment and Development (p. 18).¹¹

The WSSD example is emblematic of the agitation currently impacting the nature and scope of private environmental and social standards, as well as their evolving role in affecting public policy. While private standards once typically played only a technical, supporting role in government policy, they are now becoming the centerpiece of international policy instruments or complete substitutes.

In the context of trade policy, the World Trade Organization (WTO) has long held in high regard international standards, particularly those developed by ISO, and their importance is growing. International trade negotiators, particularly those engaged in regional and bilateral discussions, increasingly reference ISO and/or its standards.¹² In a parallel trend, developing countries are increasingly vocal about the need for agreed-upon international standards to govern both technical and methodological environmental tools in order to avoid trade conflicts. This potentially opens the door for even more international standards, with ISO standards most likely to be accepted.

Many of these private, market-driven systems dominating international standards stem from a general dissatisfaction with government-led “command and control” regulatory approaches, as well as the failure of intergovernmental processes in the 1990s and early 2000s advancing sustain-

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able commercial practices and protecting human rights in the workplace. Consequently, external stakeholders, including investors, watchdog NGOs, social justice advocates, the general public, and sometimes regulatory authorities themselves, have increasingly turned to incentive- and information-based approaches to supplement traditional command-and-control environmental regulation, as well as to differentiate good and bad actors in the market.

Meanwhile, dissatisfaction with the limits of private standard-setting has led to increased calls for public oversight and participation in standards-setting processes, and for transformation into mandatory public standards. Thus, a complex array of standards is emerging that defy easy categorization as private or public, a likely continuing trend given current emphasis on public-private partnerships and the key role of the private sector in sustainable development.

Private standards have played, and will continue to play, a valuable and efficient role in addressing pressing world social and environmental problems. However, such private standards can (and should) be used only to complement and supplement public standards, not as a complete substitute for them.

In the next few years, increased attention is likely to be focused on businesses' environmental management practices. As a result, certification and reporting standards will play an ever more prominent role in the global economic system. Public and private standards will coexist – overlapping and mutually reinforcing one another – resulting in a series of hybrid standard-setting processes.

There will also be a long-term negotiating process before states reach agreement on the appropriate nexus between public and private standards and the precise role private standards should play in advancing sustainable development. Meanwhile, developers of private international standards are moving aggressively into sustainability practices, and the differences in coverage and rigor between different kinds of private standards – especially those generated by NGO coalitions rather than business-led initiatives – likely will become more salient. Consequently, it is imperative that those concerned with international environmental regimes consider private standards organizations and their regulatory schemes an integral part of public environmental policy regimes and factor in their impact.

¹ Excerpts from this article were drawn from a monograph submitted to the Oxford University Press International Environmental Law Handbook (forthcoming).

² Bailey, Norman. 1993. Foreign Direct Investment and Environmental Protection in the Third World. *Trade and the Environment: Law Economics and Policy*. Center for International Environmental Law. Island Press.

³ Moomaw, W., and Unruh, G. 1997. Going Around the GATT: Private Green Trade Regimes. *The Fletcher Journal of Development Studies*, Volume 8, 1997.

⁴ Reinicke, Wolfgang. 1997. "Global Public Policy." *Foreign Affairs*. Vol. 70, No. 6 November/December 1997.

⁵ Moomaw, W., and Unruh, G. 1997. Going Around the GATT: Private Green Trade Regimes. *The Fletcher Journal of Development Studies*, Volume 8, 1997.

⁶ French, Hilary. 1998. Investing in the Future: Harnessing Private Capital Flows for Environmentally Sustainable Development. Worldwatch Paper #139. February 1998.

⁷ J. Cascio, *International Environmental Management Standards: ISO 9000's Less Tractable Siblings*, ASTM Standardization News, April 1994, at 44.

⁸ See M. Morikawa and J. Morrison, "Who Develops ISO Standards? A Survey of Participation

in ISO's International Standards Development Processes," Pacific Institute for Studies in Development, Environment, and Security, Oakland, California, October 2004.

⁹ See ENDS Report, December 2003. "EMS Survey Reveals Widespread Concern Over Certification." Environmental Data Services, Ltd. See also "Joint workshop to examine connections between environmental management systems and permitting, inspection and enforcement in regulation - including the formal launch of the REMAS project" Workshop Report. Prepared by the Foundation for International Environmental Law and Development (FIELD) and Institute for European Environmental Policy June 2003.

¹⁰ Organization for Economic Cooperation and Development, *Private Initiatives for Corporate Responsibility: An Analysis*, Paris, France, 2001 and United Nations Conference on Trade and Development, *Report of the Commission on Trade in Goods and Services, and Commodities on its sixth session*, Geneva 4-8 February 2002, (TD/B/EX(28)/4 - TD/B/COM.1/49), Geneva, Switzerland, 2002.

¹¹ World Summit on Sustainable Development, Plan of Implementation, Section III, Article 17. http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm

¹² The second draft of the Free Trade Agreement of the Americas, for example, named ISO as the international standardization body, while WTO only refers to international standards, without specifying which organizations can develop them. The WTO Technical Barriers to Trade Agreement specifies that states should use international standards when available to avoid their standards being considered trade barriers.

Doing Good Need Not Be Risky

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Modeled on standards adopted by the International Finance Corp. (IFC) and developed by leading U.S., U.K. and European banks in conjunction with the IFC, the Equator Principles attempt to shape lending practices to be more attuned to environmental and social issues that relate to project development, primarily in emerging nations. As banks increasingly adopt these guidelines, questions remain as to whether the principles may expose lenders to potential claims in U.S. courts. Any exposure would, in turn, limit the reach of the principles, notwithstanding their worthy goals. Of particular concern is whether the Alien Tort Statute (ATS), 28 U.S.C. 1350, could be used to hold lenders liable in the United States for failing to adhere to the principles if they lend on projects where it is later alleged there were international law violations.

While some federal district court decisions have interpreted the ATS expansively to allow claims against private corporations for aiding and abetting violations of international law, the stringent standards for stating a claim under the ATS outlined by the Supreme Court in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), should significantly reduce the risk that a lender's adherence to the principles will lead to either viable claims or liability.

Formalized in 2003 following discussions between private banks and the IFC, the private development arm of the World Bank, the Equator Principles have been adopted by at least 35 leading financial institutions. See www.equator-principles.com for the principles and a list of finan-

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