



**PRIVATE STANDARDS, GLOBAL GOVERNANCE AND  
TRANSATLANTIC COOPERATION**

**The Case of Global Food Safety Governance**

**Jan Wouters, Axel Marx, Nicolas Hachez**

# PRIVATE STANDARDS, GLOBAL GOVERNANCE AND TRANSATLANTIC COOPERATION

## The Case of Global Food Safety Governance

Jan Wouters, Axel Marx, Nicolas Hachez<sup>1</sup>

### TABLE OF CONTENTS

<b>1. INTRODUCTION.....</b>	<b>3</b>
<b>2. PRIVATE STANDARDS AND NEW POLICY ARRANGEMENTS.....</b>	<b>5</b>
2.1 THE EMERGENCE OF PRIVATE STANDARDS IN THE FOOD SECTOR IN EUROPE AND THE UNITED STATES .....	5
2.2 THE INSTITUTIONALIZATION OF PRIVATE STANDARDS AND THEIR PLACE IN NEW POLICY ARRANGEMENTS	7
<b>3. THE WORLD TRADE ORGANIZATION AND THE SPS AGREEMENT .....</b>	<b>11</b>
<b>4. ASSUMPTIONS UNDERLYING THE SPS AGREEMENT AND THEIR SUITABILITY FOR GLOBAL FOOD GOVERNANCE .....</b>	<b>13</b>
4.1. INTERNATIONAL LAW NATURE OF THE SPS AGREEMENT .....	13
4.2. TRADE FOCUS OF THE SPS AGREEMENT .....	14
<b>5. ISSUES RELATING TO PRIVATE FOOD SAFETY STANDARDS AND FREE TRADE.....</b>	<b>15</b>
5.1. MARKET ACCESS PROBLEMS .....	15
5.2. DEVELOPMENT IMPACT.....	16
5.3. LEGAL ISSUES .....	16
5.4. LEGITIMACY DEBATE.....	17
<b>6. LEGAL ANALYSIS OF PRIVATE STANDARDS IN LIGHT OF WTO RULES .....</b>	<b>18</b>
<b>7. THE WAY FORWARD: HOW TO RECONCILE PRIVATE FOOD SAFETY STANDARDS AND INTERNATIONAL TRADE LAW? .....</b>	<b>20</b>
7.1. TOWARDS A NEW CONFIGURATION FOR THE GLOBAL REGULATION OF FREE TRADE AND FOOD SAFETY. THE ROLE OF PRIVATE STANDARDS IN GLOBAL GOVERNANCE AND NEW POLICY ARRANGEMENTS.....	21
7.2. ACKNOWLEDGING AND FOSTERING THE POSITIVE CONTRIBUTION OF PRIVATE STANDARDS .....	24
7.3. MITIGATING THE TRADE-RESTRICTIVE EFFECTS OF PRIVATE STANDARDS .....	25
7.4 THE PROLIFERATION OF PRIVATE STANDARD-SETTING SCHEMES AND THE NEED FOR HARMONIZATION AND CO-OPERATION .....	26
7.5. GUARANTEEING THE LEGITIMACY OF PRIVATE STANDARDS.....	27
<b>8. CONCLUSION: THE NEED FOR MULTILATERAL AND PLURALISTIC FOOD SAFETY GOVERNANCE – THE US AND THE EU AS LEADERS IN CHANGE? .....</b>	<b>29</b>

---

<sup>1</sup> Prof. Dr. Jan Wouters is Professor of International Law and International Organizations, Director of the Leuven Centre for Global Governance Studies and Institute for International Law, Leuven University; *Of Counsel*, Linklaters, Brussels; Axel Marx is Research Coordinator, Leuven Centre for Global Governance Studies, Leuven University; Nicolas Hachez is Research Fellow, Leuven Centre for Global Governance Studies and Institute for International Law, Leuven University. This paper was prepared for the project ‘Managing Biosafety and Biodiversity in a Global World’ funded by the European Commission (DG External Relations) within the framework of the pilot-program on Transatlantic Methods for Handling Global Challenges. The authors thank the participants of the Workshop on ‘Managing Biosafety and Biodiversity in a Global World’ organised by the University of California, Berkeley (11-12 December 2008) for comments on a previous draft of this paper.

## 1. Introduction

Products are increasingly produced and traded globally. Developing and newly industrialized countries, often with weak environmental, health and safety regulatory frameworks, are becoming major producers of agricultural and industrial products. This rise in production capacity is affecting the global environment and the safe handling and production of products. As a result, regulatory gaps are occurring with regard to global environmental governance. Many critics have argued that existing multilateral and governmentally driven initiatives are incapable of addressing global environmental challenges, such as biodiversity and biosafety, which result from trade liberalization and increased globalization.

At the same time one can observe the emergence of new non-state market regulatory initiatives which aim to fill these regulatory gaps. These initiatives aim to govern supply chains across the globe according to a set of ‘sustainability’ standards. Academic writings refer in this context to the important rise of private standards in supply chain management<sup>2</sup>, the rise of civil regulation<sup>3</sup>, the certification solution<sup>4</sup>, the certification revolution<sup>5</sup> or the proliferation of the voluntary standards movement.<sup>6</sup> The new regulatory initiatives are developing very quickly and are gaining ground.<sup>7</sup> Internationally traded goods and services and internationally operating economic actors are increasingly subject to privately developed standards and to certification schemes focusing on issues as diverse as technical product specifications (see e.g. the thousands of ISO standards defining technical requirements for as many products), social standards (Social Accountability International), environmental and natural resources management standards (e.g. Forest Stewardship Council, Marine Stewardship Council) and health and consumer safety standards (e.g. GLOBALGAP and other food quality labels).

These private standards, mainly developed in Europe and the United States, are consequently becoming important instruments in the context of global biosafety governance and regulation. Many large retailers are using these private standards and certification schemes worldwide to

---

<sup>2</sup> See for example J. SWINNEN, *Global Supply Chains Standards and the Poor: How the Globalization of Food System and the Standards Affects Rural Development and Poverty*, Oxford & Cambridge, CABInternational, 2007; S. HENSON & J. HUMPHREY, ‘Understanding the Complexities of Private Standards in Global Agri-Food Chains’, presented at the workshop ‘Globalization, Global Governance and Private Standards’ Leuven, 4-5 November 2008, on file with authors.

<sup>3</sup> D. VOGEL, ‘Private Global Business Regulation’, *Annu. Rev. Polit. Sci.*, Vol 11, 2008, 261-282.

<sup>4</sup> G. GEREFFI, R. GARCIA-JOHNSON & E. SASSER, ‘The NGO–Industrial Complex’ *Foreign Policy*, Vol. 125, July-August 2001, pp. 56–65.

<sup>5</sup> M. CONROY, *Branded! How the Certification Revolution is Transforming Global Corporations*, Gabriola Island, BC., New Society Publishers, 2007.

<sup>6</sup> ISEAL ALLIANCE, ‘Strategic plan 2009-2013’, available at <http://www.isealalliance.org/>.

<sup>7</sup> Several international initiatives are being developed in order to make private standards more professional, efficient and effective. The growth figures of many private standards initiatives are constantly high during the last decade. The global market for Marine Stewardship Council-labelled products, for example, grew in 2008 with nearly 100% to reach a retail value of close to 1 Billion USD. The number of companies who were awarded MSC Chain of Custody certification and hence are able to supply MSC material within an audited, traceable, supply chain grew to nearly 600 in total including the major retailers in the United States and Europe. (Marine Stewardship Council Annual Report 2007/2008 available at [www.msc.org](http://www.msc.org)). Major national (GTZ) and multilateral (Worldbank) organizations are supporting the development and professionalization of private standards by establishing for example the Trade Standards Practitioners Network (TSPN). See generally <http://tradestandards.org/en/>

socially and environmentally govern their supply chains. This is often referred to as the “Wal-Mart effect”.<sup>8</sup>

Due to the growth of private standards a debate is emerging which focuses on their relation with international trade law. Private standards may represent barriers to the trading of a number of products and may therefore run counter to international trade rules. This is why in the context of the WTO principles and rules have been agreed to control and reduce the trade-restrictive effects of for example food safety measures. These rules are laid down in the Agreement on the Application of Sanitary and Phytosanitary measures (SPS Agreement). However, at the time the SPS Agreement was negotiated and adopted, private standards had not yet invaded the food chain, and this evolution had admittedly not been envisioned by the drafters of the Agreement. In addition, some authors even claim that private standards are challenging the legitimacy of established multilateral trade institutions such as the World Trade Organization (WTO)<sup>9</sup> As the WTO recognizes itself: ‘a stable and mutually supportive relationship between standards regimes and international trade rules is central to the effective functioning of the trading system. [...] Standards are essential for addressing market failures. [...] But the design and operation of standards must [...] avoid [...] unwarranted obstacles to competition and trade.’<sup>10</sup>

This contribution focuses on the nexus between private standards, as an important global governance tool developed in the United States and Europe, and the multilateral trading system (WTO). The governance of food is taken as a case-study to explore this issue further since private standards in food governance directly relate to the key issues of biosafety and biodiversity<sup>11</sup> and the governance of food, via the SPS Agreement, directly links private standards to the multilateral trading system. In other words, an analysis of food governance links the issues of international trade, biosafety and biodiversity and private standards. In a nutshell, the present contribution argues that private standards are institutionalized market governance instruments which can be used in innovative policy arrangements to address global challenges. In order to fulfill their potential as an integral part of new innovative policy arrangements the relationship with and their place in the multilateral (trade) regime needs to be clarified. This contribution aims to add to this clarification effort. A first section shall be devoted to a description of the emergence of private standards as a governance tool and argues that private standards are becoming an integral part of new policy arrangements for handling global challenges. In this section, the respective views and positions prevalent in the United States and the European Union in relation to private food safety standards shall be presented (*infra*, section 2). Sections 3 to 6 shall address the issue of the interactions of private food safety standards with the multilateral trading system. After a short presentation of the SPS Agreement and of its underlying assumptions (*infra*, sections 3 and 4), this contribution presents the issues posed by private food safety standards in relation to the trade-liberalization agenda pursued by the SPS Agreement (*infra*, section 5). It shall then examine

---

<sup>8</sup> M. VANDENBERGH, “The New Wal-Mart Effect: The Role of Private Contracting in Global Governance”, *UCLA L. Rev.*, Vol. 54, 2007, pp. 913 ff.

<sup>9</sup> S. HENSON & J. HUMPHREY, *op. cit.*

<sup>10</sup> WORLD TRADE ORGANIZATION, *Exploring the Links between Trade, Standards and the WTO*, World Trade Report, 2005, available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report05\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf), pp. 35 ff (hereinafter the “World Trade Report 2005”), pp. iii-iv

<sup>11</sup> Several private food standards aim to implement sustainability measures. For an overview see FOOD AND AGRICULTURE ORGANIZATION, *Private Standards in the United States and European Union Markets for Fruit and Vegetables – Implications for Developing Countries*, FAO Commodity Studies No. 3, 2007, available at <ftp://ftp.fao.org/docrep/fao/010/a1245e/a1245e00.pdf>

the extent to which private standards may or may not be said to fall into the scope of the SPS Agreement, and whether the latter may have any traction on their potential trade-restrictive effects (*infra*, section 6). A final section shall attempt to present a regulatory model under which private food safety standards could find their place within the multilateral trade regime and to formulate recommendations to the relevant actors on ways to put that model into practice (*infra*, section 7). In formulating such recommendations, special attention shall be given to the respective positions of the European Union and the United States in the food safety / free trade nexus.

## 2. Private Standards and New Policy Arrangements

### 2.1 The Emergence of Private Standards in the Food Sector in Europe and the United States

In the 1990's a new kind of non-state governance initiative started to emerge, namely private standard-setting or certification initiatives, which aimed to govern markets and the way in which products are made throughout the supply-chain. These initiatives aim to implement standards, *i.e.* directives suggested or imposed by a rule-setting actor to a rule-abiding actor on how to act in a given context<sup>12</sup>, in production processes. An area in which standards play an increasingly pervasive role these last decades is that of technical, quality, safety, environmental and social specifications for products. These standards guide producers on how to produce their goods, and provide information and assurance to consumers and business partners on what they purchase. Private standards are typically developed and enforced by non-state actors. The development of standards occurs in a standard-setting body while the conformity assessment and enforcement is done by either an independent accredited third-party or by the actors themselves.

Private standard setting initiatives started to emerge in different economic sectors (food production, textiles, forestry) and with regard to the management of different aspects of production ranging from quality control issues to social and environmental issues including the management of biodiversity and biosafety. Private standard setting initiatives were developed by corporations, NGO's or new coalitions of NGO's and multinational corporations. Several types of private standards initiatives exist and they differ on many different parameters, *inter alia*, with regard to how standards are developed, how they are governed and how they are implemented<sup>13</sup>. It is clear that certain private standards initiatives are more effective than others in implementing and enforcing standards. In the literature it is argued that multi-stakeholder third party certification systems with accredited independent certifiers and well developed enforcement mechanisms (monitoring tools and sanctioning systems) are effective governance tools. In contrast first-party certification (self-regulation, *ie* companies regulating themselves) and second party certification (non-independent regulation, *ie* regulation by an industry sector) are considered to be far less effective or even only window-dressing.<sup>14</sup>

---

<sup>12</sup> Ken Abbott and Duncan Snidal argue that standards are ultimately always “rules to guide and to judge behavior”. See K. ABBOTT & D. SNIDAL, “International ‘Standards’ and International Governance”, *Journal of European Public Policy*, Vol. 3, 2001, p. 8.

<sup>13</sup> For an interesting classification of standards see K. W. ABBOTT & D. SNIDAL, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’, in W. MATTLI & N. WOODS (eds.), *The Politics of Global Regulation*, Princeton, Princeton University Press, 2009.

<sup>14</sup> G. GEREFFI *et al.*, *op. cit.*

In the food sector, several single-company (Nature's Choice, Filières Qualité and Field to Fork), corporate (GlobalGAP, Global Food Safety Initiative (GFSI), British Retail Consortium (BRC), International Food Standard (IFS)), NGO (Rainforest Alliance) and joint corporate and NGO (Marine Stewardship Council) private standards have emerged. Most of these private standards initiatives focus on food safety (including biosafety) and sustainable development (including biodiversity) and are either used as a risk management tool (including a brand protection measure) or a product differentiation tool towards consumers<sup>15</sup>. With regard to risk management private standards are geared towards issues of quality control, process verification, traceability and labeling.

The first private standards emerged in Europe<sup>16</sup> in the United Kingdom following different food crises and the new UK Food Safety Act (UKFSA) of 1990, which provides that food retailers can escape liability for non-compliance with food safety laws if they can demonstrate that they have taken all precautions in this regard.<sup>17</sup> Section 21 of the UKFSA states that 'it shall ... be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control'. The possibility of being held liable did prompt a corporate response which resulted in the development of different private standards initiatives. These initiatives were first developed for the UK retail market (BRC-Global Standard). Later they spilled over to Europe via EurepGAP. EurepGAP which transformed itself into GlobalGAP is now one of the leading private standards initiatives in Europe in which several major retailers and food processing companies are involved.

GLOBALG.A.P. membership is open to all relevant food retailers, producers and suppliers which agree to the terms of reference of the organization. Membership is divided into three groups, retailers, producers/suppliers and associates (*i.e.* members engaged in activities related to the food industry or exercising standardization-related activities). GlobalGAP's mission is "[t]o respond to consumer concerns on food safety, environmental protection, worker health, safety and welfare and animal welfare."<sup>18</sup> To achieve its goals, GLOBALG.A.P. develops the "Integrated Farm Assurance Standard", which is product-oriented and contains requirements specific to each concerned agricultural product group. The standard is "a pre-farm gate standard that covers the whole agricultural production process of the certified product from before the plan is in the ground (origin and propagation material control points) or from when the animal enters the production process to non-processed end-product (no processing, manufacturing or slaughtering is covered)."

Another major private initiative in the food sector, mainly aimed at achieving sustainable fisheries and protecting biodiversity, is the Marine Stewardship Council (MSC) which was founded in 1999 out of a partnership between Unilever and WWF. The MSC focuses on sustainable fisheries and has developed an ecological standard with regard to fisheries. The

---

<sup>15</sup> *Id.*

<sup>16</sup> See also WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Private Standards and the SPS Agreement', Note by the Secretariat of 24 January 2007, WTO Doc. No. G/SPS/GEN/746, p. 2. In this Note, the Secretariat of the SPS Committee lists the most pervasive private food safety standards: almost all of them originate in the EU.

<sup>17</sup> See S. HENSON, 'The Role of Public and Private Standards in Regulating International Food Markets', available at [http://www.ilr1.uni-bonn.de/iatrc/iatrc\\_program/Session%204/Henson.pdf](http://www.ilr1.uni-bonn.de/iatrc/iatrc_program/Session%204/Henson.pdf), pp. 14-15; and FOOD AND AGRICULTURE ORGANIZATION, *op. cit.*, p. 142.

<sup>18</sup> GLOBALG.A.P., "General Regulations – Integrated Farm Assurance, Part I – General Information", September 2007, available at [http://www.ikc-um.si/ikc-datoteke/general%20regulations%20-%20splosna%20pravila%20-%20ENG\\_V3\\_0\\_2\\_Sep07.pdf](http://www.ikc-um.si/ikc-datoteke/general%20regulations%20-%20splosna%20pravila%20-%20ENG_V3_0_2_Sep07.pdf), pp. 7-8.

MSC certifies both fisheries and fish producers/retailers and has currently certified more than 600 corporations including many leading retailers such as Lidl, Coop, Wal-Mart, Safeway, Sainsbury, Migros, Metro Cash, Carry and leading business to business suppliers.

In the United States private food standards were until recently less prominent<sup>19</sup>. A recent report of the United Nations Food and Agricultural Organisation stated that private standards are less dominant in the United States since US corporations and consumers seem to generally trust the Food and Drug Administration (FDA) for ensuring a high level of food safety on US markets.<sup>20</sup> This trend is clearly changing. In recent years several initiatives have also emerged in the United States and new initiatives are developing regularly<sup>21</sup>. In addition, several major retailers are also increasingly using private standards initiatives which were developed in Europe such as MSC and GlobalGAP (cf. Wal-Mart effect *supra*). In 2006 Wal-Mart announced that it will only sell Marine Stewardship Council certified fresh and frozen seafood by 2011. Wal-Mart will give its non-certified suppliers a three to five year period to conform to the certification requirements. As a result, on both sides of the Atlantic private standards in the food sector are becoming institutionalized. Many of the major retailers and food processors are working with schemes such as the Marine Stewardship Council or GLOBALGAP.

## 2.2 *The Institutionalization of Private Standards and their Place in New Policy Arrangements*

The emergence of private standard initiatives in general and in the food sector in particular is sparked by the occurrence of many interrelated factors which institutionalize private standards in current governance regimes.

First of all, following many different food crises<sup>22</sup>, consumers have grown ever more conscious of food safety risks and adjust purchasing power as a function of the reliability of food quality. Moreover, general knowledge on foodborne diseases or illnesses<sup>23</sup> is expanding leading food safety to become an increasingly important health issue which receives more media attention. In the United States the Centers for Disease Control and Prevention estimate that yearly 76 million people suffer from foodborne illnesses, accounting for 325,000 hospitalizations and more than 5,000 deaths<sup>24</sup>. As a consequence, supermarket chains and

---

<sup>19</sup> This is somewhat surprising since the private standardization system is the most developed in the United States. Schepel estimates that there are 49.000 private standards in place in the United States developed by over 600 trade associations, professional societies and other organizations. H. SCHEPEL, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford and Portland, Hart Publishing, 2005, p. 145.

<sup>20</sup> FOOD AND AGRICULTURE ORGANIZATION, *op. cit.*

<sup>21</sup> See H. GOW, 'Global Agrifood Industry Development and Private Standards', paper presented at the workshop 'Globalization, Global Governance and Private Standards' Leuven, 4-5 November 2008, on file with authors.

<sup>22</sup> Food products have indeed been the source of numerous high profile health and safety crises in the last decades, which have made durable impressions on consumers: mad cow disease, foot and mouth disease, dioxin in poultry meat, lethal bacteria in US spinach and most recently the presence of melamine in Chinese powdered milk. See for example C. ANSELL & D. VOGEL, *What's the Beef*, Cambridge, MIT Press, 2006.

<sup>23</sup> Foodborne illnesses are defined as diseases, usually either infectious or toxic in nature, caused by agents that enter the body through the ingestion of food. Every person is at risk of foodborne illness. World Health Organisation – Food Safety and Foodborne Illness March 2007 available at: <http://www.who.int/mediacentre/factsheets/fs237/en/>

<sup>24</sup> Reported on the website of the Center for Disease Control and Prevention, available at <http://www.cdc.gov/ncidod/diseases/food/index.htm>

large producer groups have made food safety a key concern and differentiating factor in the marketing of food products.<sup>25</sup> The competition in food products has therefore arguably shifted from prices to quality and safety.<sup>26</sup>

Secondly, and related to the first point, brand protection is becoming a key-issue for many leading companies in the food sector. The proliferation, diversification and internationalization of NGO's, as well as their strategies and tactics, including the use of media-strategies, have forced companies to take their concerns into account.<sup>27</sup> Gereffi, Garcia-Johnson and Sasser note that protests and direct actions against brand-name retailers are only 15 years old, but are regarded as extremely powerful tools to force retailers to take environmental, social and safety issues into concern. They quote an activist who states that using protests against branded retailers was like discovering gunpowder for social activists.<sup>28</sup> Joining a private standards initiative can be an effective and efficient strategy to protect a firm's reputation since independent external parties certify production processes and hence provide external legitimacy to efforts by firms to manage environmental and safety issues.<sup>29</sup>

Thirdly, in line with a general trend, food markets have become increasingly globalized, and food products now circulate much more extensively from one geographic zone to another. This leads to an increased diversity in food products on local markets, and to more difficulties in tracing the origins of such products. It has become much more difficult for single governments to keep track of the range of products present on their markets, and to keep up with the assessment of all the risks associated therewith. In the recent past, public food safety regulations have not been able to prevent some major food crises, such as the mad cow disease, to name only one. States tend to place a kind of default responsibility on the food chain actors in case of food safety problems (cf. due diligence requirement under section 21 of UKSFA - *supra*). Also Article 17(1) of the EU Food Law Regulation of 2002 provides for a quite stringent responsibility threshold for commercial actors involved with food products: 'Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such

---

<sup>25</sup> This is however only true to some extent, as supermarkets are of course not willing to suggest that food products sold in their stores are 'more' or 'less' safe than other products that they sell. The official discourse from supermarkets is therefore that all their products are safe. See T. HAVINGA, 'Private Regulation of Food Safety by Supermarkets', 28 *Law & Policy* 515, 2006, p. 528. This may be why private food safety standards tend to be Business to Business (B2B) standards. See for further elaboration the distinction made by Spencer Henson and John Humphrey between 'risk management standards' (among which food safety standards) and 'product differentiation standards'. S. HENSON & J. HUMPHREY, *op. cit.*

<sup>26</sup> S. HENSON & T. REARDON, 'Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System', 30 *Food Policy* 241, 2005, p. 243.

<sup>27</sup> T. BARTLEY, 'Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields', *Politics and Society*, Vol. 31, 2003, pp. 433-464; B. CASHORE, 'Legitimacy and the Privatization of Environmental Governance: How Non-state Market-driven (NSMD) Governance Systems Gain Rule-making Authority', *Governance – An International Journal of Policy and Administration*, Vol. 15, 2003, pp. 503-529; D. O'ROURKE, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', *Policy Studies Journal*, Vol. 31, 2003, pp. 1-29; A. FUNG, 'Making Social Markets: Dispersed Governance and Corporate Accountability', J. DONAHUE and J. NYE, (eds.), *Market Based Governance*, Washington, D.C.: Brookings Institution Press, 2003; G. GEREFFI, *et al.*, *op. cit.*; MARX, A. 'Limits to non-state market regulation', *Regulation & Governance*, Vol. 2, 2008, pp. 253-273.

<sup>28</sup> G. GEREFFI *et al.*, *op. cit.*, p. 64. T. BARTLEY, *op. cit.*

<sup>29</sup> A. MARX, *op. cit.*

requirements are met.<sup>30</sup> Private standards are becoming one tool to signal that corporations are taking all reasonable precautions and exercise all due diligence to avoid incidents from happening.

Fourthly, the structure of the food markets has changed along with globalization and nowadays hands a premium to large global actors. The number of key actors in the food chain has reduced as their size grew. Major retailer groups have particular influence, as they are the 'gatekeepers' of the food markets: they decide which products they will offer to their clients, and therefore which products will access a defined market. Such concentration and increase of bargaining power allow these retailer groups to impose practically any condition they want on their suppliers and contractors, from payment deadlines to the safety features of the food products they sell.<sup>31</sup> The rapid spread of private standard owes very much to this new market configuration. To be sure, many private standards are developed by large retailer groups and are imposed contractually to their suppliers (See Wal-Mart effect *supra*).

Finally, the institutionalization of private standards is taking place in a context of profound changes on the role of States in the governance and regulation of markets. Since the 1980's many observers have argued that a shift is occurring from public to private or public-private governance. Tatenhove *et al.* identified the following major changes which substantiate this shift: "(a) the traditional divides between state, market and civil society are disappearing, while (b) the interrelations between these spheres increasingly exceed the nation state, (c) resulting in new coalitions between state agencies, market agents and civic parties both on local and global levels".<sup>32</sup> These new forms of governance are considered superior to existing purely public policy making strategies.<sup>33</sup> As a result of this shift one can observe, both nationally and internationally, the emergence of new complex forms of governance in which private standards are taking up a very important role. In this sense the distinction between private and public is becoming increasingly blurred.

---

<sup>30</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, *O.J.* 1 Feb. 2002, L31/1.

<sup>31</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, 'Final Report on Private Standards and the Shaping of the Agro-Food System', 31 July 2006, OECD Doc. No. AGR/CA/APM(2006)9/FINAL, pp. 10-11.

<sup>32</sup> J. VAN TATENHOVE, B. ARTS and P. LEROY, 'Political Modernization', in J. VAN TATENHOVE *et al.*, (eds.), *Political Modernization and the Environment – The Renewal of Environmental Policy Arrangements*, Dordrecht, Kluwer Academic Publishers, 2000, p. 48. For similar assessment with regard to the emergence of new policy arrangements see also: V. HAUFLER, 'New forms of governance: certification regimes as social regulations of the global market', in E. MEIDINGER, C. ELLIOTT & G. OESTEN (eds.) *Social and Political Dimensions of Forest Certification*, Remagen-Oberwinter, Forstbuch, 2003, p. 242; B. CASHORE, G. AULD & D. NEWSOM, *Governing through Markets – Forest Certification and the Emergence of Non-State Authority*, New Haven & London, Yale University Press, 2004, p. 28; I. VISSEREN-HAMAKERS & P. GLASBERGEN, 'Partnerships in forest governance', *Global Environmental Change – Human and Policy Dimensions*, Vol. 17, 2007, p. 409; K. W. ABBOTT & D. SNIDAL, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', *op. cit.*

<sup>33</sup> T. BEIERLE, "Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals", *Resources for the Future*, Discussion paper No. 99-06, 1998, available at <http://www.rff.org/Documents/RFF-DP-99-06.pdf>; B. KARKKAINEN, A. FUNG & C. SABEL, 'After Backyard Environmentalism. Towards a Performance-Based Regime of Environmental Regulation', *American Behavioral Scientist*, Vol. 44, 2000, pp. 692-711; C. COGLIANESE and J. NASH, 'Environmental Management Systems and the New Policy Agenda', in C. COGLIANESE & J. NASH (eds.), *Regulating from the Inside: Can Environmental Management Systems achieve Policy Goals*, Washington D.C., Resources for the Future, 2001.

Understanding the context in which private standards operate is important in order to assess their potential impact and interrelatedness with public policy making. Private standards are increasingly becoming part of larger policy arrangements and may in some instances be said to contribute to achieving aims traditionally addressed exclusively by purely public regulation. The interconnection and interaction between private standards and public policy making is becoming increasingly complex since many public policy arrangements start to make use of private standards. This trend fits within the above outlined redefinition of policy-making and the role the State therein and opens up opportunities for policy innovation on both sides of the Atlantic.<sup>34</sup> As Osborne and Gaebler famously claimed in *Reinventing Government* the State should no longer row but steer.<sup>35</sup> Private standards are an interesting mechanism by which governments can achieve certain policy goals and promote change (steer) without excessive regulatory burden (row). The ways in which governments use private standards can take many forms.<sup>36</sup>

First of all, governments can give delegation to private standard entities. Several governments require exporters to meet the privately developed HACCP – procedure (Hazard Analysis and Critical Control Points), traceability and quality standards using either public or private auditors and laboratories. Secondly governments are increasingly using private standards in their day-to-day activities. Meidinger provides the example of how forest certification is used by US government agencies to certify publicly owned forests.<sup>37</sup> Henson and Humphrey report that the UK Food Standards Agency has instructed enforcement authorities to take into account membership of private standard schemes in determining the frequency of inspection of production facilities.<sup>38</sup> In this way, private initiatives provide continuous quality control. This trend can be observed on both sides of the Atlantic. Thirdly, governments are increasingly using private standards in public procurement. Given the budgets of many governments for public procurement this generates a large impact on the further development and adaptation of private standards. The Netherlands for example has developed an ambitious national sustainable procurement policy with a target of 100% sustainable purchasing by 2010 which ‘*can trigger innovation and sustainable development in producers*’.<sup>39</sup> Thirdly, as we already emphasized, governments can leave the substance of regulation to private actors in certain fields, and encourage the development of private standards in diverse ways, notably by setting responsibility rules (see the UK Food Safety Act responsibility mechanism above), or by creating or supporting labeling schemes for product differentiation.

All of these elements have favored the emergence of, notably, private food safety standards, which major food actors impose on their suppliers, and which often go beyond the

---

<sup>34</sup> D. LIEFFERINK, M. ANDERSEN, & M. ENEVOLDSEN, ‘Interpreting Joint Environmental Policy-Making: Between Deregulation and Political Modernization’, in A. MOL, V. LAUBER & D. LIEFFERINK, *The Voluntary Approach to Environmental Policy*, Oxford, Oxford University Press, 2000, pp. 10-31; M. JÄNICKE, *State Failure – The Impotence of Politics in Industrial Society*, Cambridge, Polity Press, 1990, p. 166.

<sup>35</sup> D. OSBORNE & T. GAEBLER, *Reinventing Government*, New York, Basic Books, 1992.

<sup>36</sup> ISEAL ALLIANCE, ‘Governmental Recognition of International Standards under the TBT and Government Procurement Agreements’, ISEAL – DFID Private Standards and Public Policies Conference, London, October 2007, s.p. available at <http://www.isealalliance.org/index.cfm?fuseaction=page.viewpage&pageid=963>

<sup>37</sup> E. MEIDINGER, ‘Forest Certification as Environmental Law Making’, in E. MEIDINGER, C. ELLIOTT & G. OESTEN (eds.), *op. cit.*, pp. 293-330.

<sup>38</sup> S. HENSON & J. HUMPHREY, *op. cit.*

<sup>39</sup> SenterNovem (2007) *Dutch National Action Plan for Sustainable Procurement*, Dutch Ministry of Economic Affairs cited in ISEALALLIANCE ‘Governmental Use of Voluntary Standards. Case Study 3 Groningen Province (the Netherlands) and Fairtrade (FLO) Standards’, London, September 2008, p. 8.

requirements of public regulation.<sup>40</sup> Such private standards reassure consumers as to the safety of the food they purchase in their stores, position food products into the competition for safety and quality, and shield the major food actors from liability in case of a sanitary crisis. These driving forces, which represent structural changes in the global food market, institutionalize private standards in global food governance. As a result, their interaction with the multilateral trading regime is becoming increasingly relevant. This is discussed in the next section.

### 3. The World Trade Organization and the SPS Agreement

With a number of far-reaching international agreements, an effective adjudicatory body and an active dispute settlement practice, international trade law is one of the most vibrant international legal regimes to date, embodied in a full-fledged international organization, the World Trade Organization (WTO). The purpose of the rules of international trade is to facilitate trade among countries and to reduce as much as possible the barriers that inhibit the circulation of goods and services between ‘national’ markets.<sup>41</sup> A particular type of products that are strongly connected to the international trade agenda are food products. Such products are indeed among the most widely traded goods worldwide, and their export accounts for a very large share of many countries’ gross domestic product. It is therefore important that food products can be traded widely and easily throughout the world taking into account existing or required safety measures. In order to balance food safety with free trade the WTO has laid down principles and rules which attempt to control and reduce the trade-restrictive effects of food safety measures. The main rules as to this are laid down in the Agreement on the Application of Sanitary and Phytosanitary measures (SPS Agreement).

The SPS Agreement was crafted during the GATT’s Uruguay Round (1986-1994) of trade negotiations, and now forms integral part of the WTO agreements composing the international trade regime. It is fully binding on all WTO Members. It recognizes the right of Members to adopt ‘SPS measures’ as a recognition of the legitimate need to regulate food products to ensure that they are safe to consume (Preamble and Art. 2.1.). SPS measures are, in short, measures to protect human, animal or plant health, or a country, against risks which could arise from, as far as food products are concerned, additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs (Art. 1.1 and Annex A).<sup>42</sup> In the wide

---

<sup>40</sup> See L. FULPONI, ‘The Globalization of Private Standards and the Agri-Food System’, in J. SWINNEN (ed.), *op. cit.*, p. 12.

<sup>41</sup> See the Preamble of the Agreement Establishing the World Trade Agreement, signed in Marrakech on April 15, 1994.

<sup>42</sup> The full definition, contained under No. 1 of Annex A of the SPS Agreement, goes:

‘Sanitary or phytosanitary measure — Any measure applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;  
(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;  
(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or  
(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant

range of possible SPS measures, the present contribution focuses on SPS measures which concern food safety.

The adoption of SPS measures by WTO Members is subject to a number of disciplines, aimed at minimizing the negative trade effects entailed by such measures, especially in respect of developing countries. Hereafter, the most relevant provisions of the SPS Agreement are summarized. This will be followed by a discussion of the underlying assumptions of the agreement (*infra*, 3).

First and foremost, SPS measures adopted by WTO Members may only be taken for reasons pertaining to human, animal or plant health or life, and may not be more trade restrictive than necessary. What is more, such measures must be based on scientific evidence, and may not be maintained in the absence of such scientific evidence (Art. 2.2.) This provision seeks to ban SPS measures which, under the appearance of food safety measures, *de facto* pursue protectionist purposes. Second, SPS measures have to abide by the fundamental WTO principles of national treatment and most favored nation, that is, they may not discriminate foreign products against domestic products, or against other like foreign products (Art. 2.3.). Third, the SPS Agreement intends to ‘harmonize’ SPS measures across Members, so as to reduce the market access problems caused by the proliferation of national food safety regulations, which often require that products comply with many different conditions in order to access different national markets. In order to achieve this objective, Members are requested to base their SPS measures on ‘international standards, guidelines and recommendations’ where they exist. If an SPS measure is compliant with such international standards, it is also deemed to comply with the SPS Agreement (Art. 3). Annex A of the SPS Agreement gives an important precision as to what should be understood by ‘international standards’ for the purpose of the Agreement. The international standards on which the SPS measures of Members must be based are, for food safety, those that are developed by the Codex Alimentarius Commission, an international organization jointly dependent upon the Food and Agriculture Organization and of the World Health Organization.<sup>43</sup> International standards under the SPS Agreement may also encompass other standards developed by any other relevant international organization which is open for membership to all WTO Members ‘as identified by the SPS Committee’, i.e. the body in charge of overseeing the functioning of the SPS Agreement. The SPS Committee has to date identified no other relevant organization. Certain authors have analyzed this provision as a delegation, by the WTO, of the power to internationally legislate appropriate food safety standards.<sup>44</sup> This ‘positive integration’ of food safety rules by way of ‘quasi-legislation’<sup>45</sup> or ‘legislation by proxy’ raises a number of concerns which will be addressed further (*infra*, section 4.2). It could be seen as an expression

---

statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.’

<sup>43</sup> SPS measures concerning animal health and zoonoses should be based on the standards developed by the International Office and Epizootics, and SPS measures concerning plant health should be based on the standards developed in the framework of the International Plant Protection Convention.

<sup>44</sup> T. BÜTHE, ‘The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization’, *Law & Contemp. Probs.*, Vol. 71, 2008., p. 219

<sup>45</sup> G. MARCEAU & J. P. TRACHTMAN, ‘The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade – A Map of the World Trade Organization Law of Domestic Regulation of Goods’, *Journal of World Trade*, Vol. 36, 2002, p. 838.

of the tendency of the WTO – which is, again, about facilitating international trade – to encroach on other regulatory fields.<sup>46</sup>

If an SPS measure sets a degree of food safety protection which is higher than that of the relevant international standard, such deviation must be scientifically justified, or be justified by a decision as to the appropriate level of risk that the Member is willing to apply following a scientific assessment of the risk posed by certain products, activities or events (Art. 3.3.). All SPS measures must indeed also be based on a risk assessment carried out in order to determine the level of protection which SPS measures ought to apply. Such risk assessment and determination of the level of protection must take the objective of minimizing negative trade effects of SPS measures into account, as well as the economic costs associated with the measure (Art. 5.1-5.4 and 5.6). In any case, Members must apply, across the board, the same level of protection to the same risks. This is a consistency requirement which tries to reduce discriminatory treatment between products (Art. 5.5). In the absence of or in the case of insufficient scientific evidence on which to base an SPS measure, WTO Members are allowed to adopt such SPS measures provided they base the measure on available pertinent information (such as the SPS measures applied by other WTO Members), and strive to obtain the relevant scientific information so as to revise their measure in a timely fashion (Art. 5.7.).

Members must also meet transparency requirements, as they are under an obligation to publish and notify changes in their SPS measures, and allow a ‘reasonable interval’ between the publication and the entry into force of the measure, in order for producers, in particular developing country producers, and other actors in the food chain, to adapt to the new measure (Art. 7). Members must also provide technical assistance to other Members, either bilaterally or through international organizations, in order to help them comply with their SPS measures (Art. 9). More in particular, Members must, in the preparation and application of SPS measures, take the special needs and capacities of developing countries into account, notably by granting them more time to comply. (Art. 10). Finally, disputes under the Agreement are submitted to the general system of dispute settlement of the WTO (Art. 11).

The SPS Agreement derogates from the Agreement on Technical Barriers to Trade (TBT Agreement), which sets general disciplines for all standards except those which qualify as SPS measures (*infra*, section 6).

#### **4. Assumptions Underlying the SPS Agreement and their Suitability for Global Food Governance**

##### *4.1. International Law Nature of the SPS Agreement*

The SPS Agreement is a treaty and therefore has international legal status. In that sense, it only binds the States and organizations (like the European Community) which have agreed to it. As is clear from the wording of the Agreement itself, it is first and foremost addressed to Members and, insofar as it applies to ‘all SPS measures’, the SPS Agreement was essentially designed to deal with public measures. The cause of this is that private food safety standards did not exist at the time of the inception of the SPS Agreement. Article 1.1 and Annex A of the Agreement, which define SPS measures, do however not explicitly exclude private

---

<sup>46</sup> See S. CHARNOVITZ, ‘The Supervision of Health and Bioafety Regulation by World Trade Rules’, *Tul. Envtl L. J.*, Vol. 13, 1999-2000, p. 271; A. REICH, ‘The WTO as a Law-Harmonizing Institution’, *U. Pa. J. Int’l Econ. L.*, Vol. 25, 2004, p. 321.

standards from the scope of the Agreement, and it is therefore not inconceivable that the disciplines of the SPS Agreement – as well as those of the TBT Agreement – could also be applied to private standards.

However, such application would have to take place through the mediation of WTO Members.<sup>47</sup> Article 13 of the SPS Agreement indeed states that

‘Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.’

As will be discussed below (*infra*, 5.), no authoritative interpretation of Article 13 is yet available, and therefore it is quite difficult to interpret what it entails for governments and private standard-setters.

#### 4.2. Trade Focus of the SPS Agreement

The SPS Agreement is, in conformity with the mission statement of the WTO, a trade agreement, and not a food safety agreement. It seeks to apply the WTO trade rules to the trade in food products, and to harmonize food safety regulations in order to lower trade barriers on food products resulting from those regulations. As such, it seeks to apply the safeguard clause of article XX (b) of GATT 1994.<sup>48</sup>

As a result, the WTO does not decide on any substantive food safety issues. It is only concerned with the scientific justification and ‘harmonization’ of food safety measures in order to reduce barriers to trade. In order to pursue those goals, the SPS Agreement designates the Codex Alimentarius Commission as the relevant standard-setter in the field of food safety, without intervening in its work. Therefore, any food safety regulation which complies with an applicable Codex Alimentarius Standard is deemed compliant with the SPS Agreement. Only when a food safety regulation sets a more stringent level of protection is the SPS Agreement

---

<sup>47</sup> Unless the SPS Agreement were to be recognized as having direct effect. The WTO has however been neutral as to the direct effect of its rules, leaving it to its Members to decide on the effects of the WTO agreements in their national legal orders. In the EU, WTO legal rules are in principle not considered as having direct effect (at least for the purpose of reviewing European Community law measures against WTO rules). See ECJ, 1 March 2005, *Léon Van Parys NV*, Case No. C-377/02, paras. 37 ff. See also WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, ‘Private Voluntary Standards Within the WTO Multilateral Framework’, Submission by the United Kingdom of 9 October 2007, WTO Doc. No. G/SPS/GEN/802, p. 10.

<sup>48</sup> A. F. LOWENFELD, *International Economic Law*, International Economic Law Series, Oxford & New York, Oxford University Press, 2002, p. 324.

liable of being breached (except when scientifically justified). Any food safety regulation which is more lenient than a Codex Alimentarius Standard does not violate the SPS Agreement.<sup>49</sup> In short, the SPS Agreement is not concerned about setting a high level of food safety standards, but leaves, by delegation, that task to the Codex Alimentarius Commission, the standards of which it imposes as upper limits on the level of protection that Members can choose to apply (save, again, scientific justification). It can therefore be submitted that the manner in which the SPS Agreement is configured makes it more concerned about the international trade agenda than about the food safety agenda. Some authors even argue that the SPS Agreement was designed to establish a ‘practical hierarchy’ putting WTO trade rules above non-trade rules.<sup>50</sup> However, as discussed in point 2.1. and 2.2, the dynamics of food markets and food governance have significantly evolved since the inception of the SPS Agreement.

## 5. Issues Relating to Private Food Safety Standards and Free Trade

If private standards are increasingly regarded as strong tools to generally increase safety levels in food products, they also create problems of their own, notably as they have exclusionary effects on certain products, mainly on products originating from developing countries. These exclusionary effects can be divided into three categories: market access, developmental aspects, and legal concerns.<sup>51</sup> Another major concern is the legitimacy of such standards.

### 5.1. Market Access Problems

Since the large retailer groups setting private food safety standards act as ‘gatekeepers’ on (western) food markets, complying with their standards has in many cases become a *de facto* mandatory requirement for accessing such markets. The problem is aggravated when the private standards, as it is often the case, overtake public food safety regulation. Moreover, as per the SPS Agreement, public regulation may not be used for protectionist purposes and must normally be based on science and/or scientific principles, which critics allege may not be the case for private standards.<sup>52</sup>

Other market access problems triggered by private standards emerge from the fact that several standardization schemes may coexist, compete and contradict each other. This would result in situations where, on a same local market, the same product would have to comply with (and possibly be certified under) several different and potentially conflicting standards in order to be sold in different supermarket chains, involving a multiplication of compliance costs. What is more, such lack of harmonization can result in discrimination between products, either inside or outside of a defined standardization scheme, as private actors do not have to be consistent in the stringency of their food safety measures.

---

<sup>49</sup> See generally D. KALDERIMIS, ‘Problems of WTO Harmonization and the Virtues of Shields over Swords’, *Minn. J. Global Trade*, Vol. 13, 2004, pp. 337 ff.

<sup>50</sup> *Id.*, pp. 313-314.

<sup>51</sup> G. STANTON, ‘Private SPS Standards – The WTO Perspective’, Presentation Given at the Workshop ‘Globalization, Global Governance and Private Standards’, Leuven, 4-5 November 2008, slide on file with the authors. See also WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, ‘Private Standards and the SPS Agreement’, Note by the Secretariat of 24 January 2007, WTO Doc. No. G/SPS/GEN/746.

<sup>52</sup> See *Id.*, p. 3.

## 5.2. Development Impact

Developing countries have pointed out that complying with private standards is very burdensome, as such standards often require significant upgrades in production facilities and costly certification procedures, involving several inspections by independent reviewers. These cost implications often mean that small and medium food producers in export markets (especially in developing countries) who are not able to pay the price of compliance, are *de facto* excluded from the potential supply pool of most wholesaling and retailing actors in numerous major markets.<sup>53</sup> This can have a major developmental impact, since many developing countries heavily depend on the export of food products for their development, and since the bulk of their economic fabric is often composed of small farming enterprises.<sup>54</sup>

## 5.3. Legal Issues

The growing pervasiveness of private standards also raises questions of a more legal/procedural nature.<sup>55</sup> For example, a complaint may be that private standard-setters, when they adopt or modify a standard which will apply at a large scale and have substantial market access and development implications, do not have to notify those standards in advance, to publish them or to observe a transition period to allow time for all relevant parties to comply with or switch to the new standard. In other words, the criticism is that these standard-setters do not use a transparent procedure which contains several criteria with which private standards should comply and which is open to independent review as is the case with for example the SPS Agreement (see *supra*).

Also, in case of conflict between several standards, or in case of dispute concerning the application or interpretation of a standard, adjudicatory mechanisms may often be lacking to resolve the conflict or dispute, and the complaining party then has to surrender to the views of the private standard-setters.

---

<sup>53</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, 'Private Standards Schemes and Developing Country Access to Global Value Chains: Challenges and Opportunities Emerging from Four Case Studies', 23-25 October 2006, OECD Doc. No. AGR/CA/APM(2006)20, pp. 16 and 20.

<sup>54</sup> See generally G. CHIA-HUI LEE, 'Private Food Standards and their Impacts on Developing Countries', *European Commission – DG Trade Unit G2 Paper*, 2006, available at [http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc\\_127969.pdf](http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf), notably pp. 25-27. It should be noted that some studies show that producers who are able to participate in the private standards schemes do reap socio-economic benefits from participating in private standards schemes. See M. MAERTENS & J. SWINNEN, 'Private Standards, the Organization of Global Supply Chains, and their Impact on Developing Countries', presented at the workshop 'Globalization, Global Governance and Private Standards' Leuven, 4-5 November 2008, on file with authors.

<sup>55</sup> See G. STANTON, *op. cit.*

#### 5.4. Legitimacy Debate

No one denies that private standards in fields like food safety nowadays play a governing role in global affairs and have an impact, positive or negative, on a number of constituencies, as well as on a number of other policy fields. The fact that they are developed by private actors outside of any legal mandate, following unilateral procedures, and the fact that they may run counter to international or domestic legal rules, raises doubts as to the legitimacy of such private standardization schemes. In this respect, many authors wonder how to ensure that complex private regulatory processes, that do not stem from democratic elections, will duly take the public interest into consideration, and not only self-interested private designs.<sup>56</sup>

Even in multi-stakeholder governance systems the issue of which preferences dominate is crucial. Simple confrontation of interests and points of view does indeed not necessarily produce socially optimal regulation. In her excellent article, Orly Lobel warns that

“[i]n order to be effective, the governance model must not accept a naïve account of the win-win theme. Situations in which multiple interests are mutually enforcing are context-specific. [...] The governance school must therefore develop a richer basis for approaching collaboration in situations of pervasive competition, power imbalances, and limited resources.”<sup>57</sup>

In order to be legitimate private governance systems need to actually reflect the preferences of society at large and be regarded as pursuing the public interest. In order to achieve this, wide participation of the concerned actors in the regulatory process is crucial. Further, questions of institutional design of these private governance systems are also of importance in order to make sure that such participation takes place in a “democratic” way and is not captured by more powerful interests.<sup>58</sup> In this context the issue of accountability mechanisms is of importance.<sup>59</sup> Whereas accountability relationships<sup>60</sup> are well-determined in the traditional administrative hierarchy, they are much less clear in private governance arrangements. First of all, private actors often exercise regulatory activities in the absence of a clear legal mandate<sup>61</sup>, which raises questions about the real responsibilities and possible liability of private actors in the exercise of their regulatory roles.<sup>62</sup> Most importantly, whereas public authorities have to justify their actions before a “public” made of citizens according to a legal framework setting limits to their competences in view of the public interest, it is rather unclear who is entitled to hold private regulators into account for their regulatory activities, what interests the latter really represent and defend, and until where they are allowed to go.

---

<sup>56</sup> J. FREEMAN, ‘The Private Role in Public Governance’, *N.Y.U. L. Rev.*, Vol. 75, 2000, pp. 556 ff.

<sup>57</sup> *Id.*, p. 458.

<sup>58</sup> On the role and importance of institutions in relation to accountability and legitimacy in “polycentric regulatory regimes”, see J. BLACK, “Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes”, *IILJ Working Paper* No. 2007/12, Global Administrative Law Series, 2007, available at <http://iilj.org/publications/documents/2007-12.GAL.Black.web.pdf>, pp. 13-14.

<sup>59</sup> J. FREEMAN, *op. cit.*, p. 557.

<sup>60</sup> “An accountability relationship is one in which an individual, group or other entity makes demands on an agent to report on his or her activities, and has the power to impose costs on the agent”, R. O. KEOHANE, “Accountability in World Politics”, *Scandinavian Political Studies*, Vol. 29, 2006, p. 77.

<sup>61</sup> C. SCOTT, “Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance”, *J. L. & Soc.*, Vol. 29, 2002, p. 74.

<sup>62</sup> See F. CAFAGGI, “Gouvernance et Responsabilité des Régulateurs Privés”, *EUI Working Papers*, Law Paper No. 2005/06, available at <http://cadmus.iue.it/dspace/bitstream/1814/3326/1/law05-06.pdf>., where the question of the *ex-post facto* liability of private regulators and of its different forms is discussed.

The actions of private actors may lack transparency for the public and are not usually controlled by systems of checks and balances as are those of public authorities. In that respect, Julia Black notes for example that courts have been puzzled when it came to judicially review private regulations, as the distinction between private and public law, and hence the scope of action of the court, sits uneasy between the private status of the actor and the public repercussions of its regulatory activities.<sup>63</sup>

In general, the fact that regulatory functions are progressively transferred from the state to a mix of functionally differentiated public and private arrangements also shifts the nature of the accountability relationship between the regulator and the regulatees. Where the accountability of public actors can be regressed to democratic electoral, judicial or disciplinary mechanisms, accountability channels in private governance arrangements may be much more diffuse. For example, whereas electoral processes are circumscribed to a closely delimited body of “citizens”, accountability mechanisms in private regulatory settings tend to apply to a much more elusive group composed of “stakeholders”, *i.e.* the ensemble of people affected by or holding a stake in a (regulatory) activity. Also, while electoral, judicial or disciplinary mechanisms may give rise to well-defined sanctions at the end of a reasoned assessment process, accountability mechanisms in private (and especially market-based) regulatory settings, such as product boycotts or naming and shaming campaigns orchestrated by watchdog NGOs, are also much more difficult to assess.

## 6. Legal Analysis of Private Standards in Light of WTO Rules

In light of the above, certain countries have, as early as 2005, raised the issue of private standards before the SPS Committee<sup>64</sup> and requested that measures be taken in order to reduce the exclusionary and other trade-restrictive effects of private standards. Such submissions notably argued that

‘The SPS Agreement recognizes the role of the International Standard Setting Bodies (OIE, Codex Alimentarius and the IPPC) as the only authorities for establishing SPS standards. However, the proliferation of standards developed by private interest groups without any reference to the SPS Agreement or consultation with national authorities is a matter of concern and presents numerous challenges to small vulnerable economies. These standards are perceived as being in conflict with the letter and spirit of the SPS Agreement, veritable barriers to trade (which the very SPS Agreement discourages) and having the potential to cause confusion, inequity and lack of transparency.’<sup>65</sup>

As many of the private standards in question are more demanding than public regulation abiding by the disciplines of the SPS Agreement, the conflict was supposedly to be solved by granting primacy to public regulation over private standards. Article 13 of the SPS Agreement

---

<sup>63</sup> J. BLACK, “Constitutionalising Self-Regulation”, *Modern Law Rev.*, Vol. 59, 1996, p. 24.

<sup>64</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, ‘Summary of the Meeting Held on 29-30 June 2005’, Note by the Secretariat of 11 August 2005, WTO Doc. No. G/SPS/R/37, pp. 6 ff.

<sup>65</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, ‘Private Industry Standards’, Communication from Saint Vincent and the Grenadines of 28 February 2007, WTO Doc. No. G/SPS/GEN/766, p. 1.

was cited as particularly relevant to that effect, although it needed to be clarified.<sup>66</sup> The latter provision's scope is indeed unclear since the SPS Agreement was drafted in a time when private standards had not yet invaded the market. Arguably, the disconnection between the underlying assumptions of the SPS Agreement and today's realities of the food markets, and the anguish that the issue of private standards causes to countries eager to export their products to the EU is reflected in this account of a statement by the Argentine representative to the SPS Committee:

'The representative of Argentina recalled that the international community had generated international agreements to ensure that trade standards were not unnecessarily stringent so as to act as barriers to international trade and countries had devoted time and financial and human resources to attend all the international meetings where standards were discussed, developed and implemented. If the private sector was going to have unnecessarily restrictive standards affecting trade and countries had no forum where to advocate some rationalization of these standards, twenty years of discussions in international fora would have been wasted. The representative of Argentina was convinced that the rational and legal aspects of these kinds of regulations had to be addressed.'<sup>67</sup>

However, the question of the applicability of the SPS Agreement to private standardization schemes is a thorny issue which has not yet been settled authoritatively, notably by the Dispute Settlement Body. Article 1.1. of the SPS Agreement does not explicitly exclude private standards adopted for health and safety issues from its scope, even though no definite determination has yet been made in this respect. Also, the actual obligations of WTO Members under Article 13 are still unclear, notably as to what the phrase 'reasonable measures ... to ensure that non-governmental entities within their territories ... comply with the relevant provisions of this Agreement' might concretely encompass, and as to what kind of organizations the phrase 'non-governmental entities' refers to.

The vagueness of Articles 1.1. and 13 of the SPS Agreement and their public international law nature has led some authors to consider that the SPS Agreement is not applicable to private standards and can as such not be used as a lever to discipline them.<sup>68</sup> The EU, for instance, has relied on the purely private character of such standards to argue before the SPS Committee that

'Even if these standards, in certain cases, exceeded the requirements of EC SPS standards, the EC could not object to them as they did not conflict with EC legislation. ... The representative of the European Communities encouraged developing countries, particularly LDCs, to discuss this issue with non-governmental organizations since, in many respects, the [private standards'] requirements reflected their concerns. The current accumulation of such standards constituted an opportunity to emphasize the value of official standards, since private standards were often much more demanding.'<sup>69</sup>

---

<sup>66</sup> 'Private sector standards discussed as SPS Committee adopts two reports', WTO news item, 29-30 June 2005, available at [http://www.wto.org/english/news\\_e/news05\\_e/sps\\_june05\\_e.htm](http://www.wto.org/english/news_e/news05_e/sps_june05_e.htm).

<sup>67</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Summary of the Meeting Held on 29-30 June 2005', *op. cit.*, p. 7.

<sup>68</sup> S. HENSON, *op. cit.*, p. 28; G. CHIA-HUI LEE, *op. cit.*, pp. 34-35.

<sup>69</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Summary of the Meeting Held on 29-30 June 2005', *op. cit.*, par. 18.

Other authors have noted that the effectiveness of the SPS Agreement and an analogous interpretation of Article 4 and the Code of Good Practice of the TBT Agreement could command that Article 1.1. and Article 13 of the SPS Agreement be interpreted as applying to the trade effects of private standards when they were relating to health and safety issues in food products.<sup>70 71</sup>

The Secretariat of the SPS Committee accordingly pointed out that another avenue for disciplining private standards would be the TBT Agreement, which covers food standards that relate to issues other than human, animal and plant health and which enjoins Members to take reasonable measures so that non-governmental bodies would comply with its annexed 'Code of Good Practice for the Preparation, Adoption and Application of Standards'. The Secretariat indeed notes that private food safety standards often also contain elements, such as social and environmental requirements, which fall outside the scope of the SPS Agreement, but well within the scope of the TBT Agreement.<sup>72</sup>

Until now, the SPS Committee seems to have taken account of the limits of a purely legal analysis of private standards, and is poised to take on the matter from a more practical standpoint.<sup>73</sup> In 2008 the Secretariat of the SPS Committee has proposed a multi-track approach to solving the private standards issue. It suggested to set up a 'group of interested Members' which would particularly monitor private standards developments, report to the SPS Committee, request the organization of information sessions about private standards, etc.

To date, no WTO Member has decided not to use the 'hard way' of trying to enforce, by way of WTO dispute settlement, the SPS Agreement against private standards directly, or against another member which would be harboring private standard-setters.

## **7. The Way Forward: How to Reconcile Private Food Safety Standards and International Trade Law?**

The discussions concerning the applicability of WTO disciplines to private standards have so far resulted in an empty shell. There is uncertainty as to whether the scope of the SPS Agreement encompasses private standards, and there is uncertainty as to what leverage the SPS disciplines could have in order to reduce the trade-restrictive effects of private standards. The growing pervasiveness of private standards in the face of the repeated assertions that they run counter to the trade and harmonization objectives of the SPS Agreement arguably challenges the suitability and relevance of the latter in addressing the tradeoffs that now exist

---

<sup>70</sup> D. CASEY, 'Private Food Safety and Quality Standards and the WTO', *University College Dublin Law Review*, Vol. 7, 2007, pp. 75 ff.

<sup>71</sup> See also the Reports on 'Private Standards within the WTO Multilateral Framework', rendered by the Brussels law firm O'Connor and Company upon request of the UK, which conclude that 'private standard-setting bodies are non-governmental entities under Article 13 of the SPS Agreement', and that 'WTO Members appear to have positive obligations in relation to making sure that non-governmental actors do not act inconsistently with the SPS Agreement.' See WORLD TRADE ORGANIZATION, 'Private Voluntary Standards within the WTO Multilateral Framework', *op. cit.*, respectively pp. 54 and 55.

<sup>72</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Private Standards and the SPS Agreement', *op. cit.*, p. 5.

<sup>73</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses', Note by the Secretariat of 25 September 2008, WTO Doc. No. G/SPS/W/230, p. 10.

between food safety issues and free trade objectives. The fact that the enforcement of the SPS Agreement against private standards is almost never advocated, and the fact that the SPS Committee seems to address the issue by trying to reduce trade barriers caused by private standards through soft ways also confirm this diagnostic.<sup>74</sup>

### *7.1. Towards a New Configuration for the Global Regulation of Free Trade and Food Safety. The Role of Private Standards in Global Governance and New Policy Arrangements*

At this juncture the question can be raised of what strategy should be put in place in order to facilitate trade in food products while acknowledging the new realities in private food safety standard-setting. The starting point of our reflection is that WTO Members which dominate the current debate on private standards tend to have an overtly negative view of private standards, considering them redundant and restrictive of trade. Responses to the questionnaire that the Secretariat of the SPS Committee circulated among its Members showed that ‘some respondents were categorical that private standards could not facilitate compliance with international standards’, and that ‘[a] number of Members [were of the opinion] that there was no evidence that private standards contributed to the compliance of official SPS requirements, and it was noted that most private standards did not correctly address SPS issues.’<sup>75</sup> The proponents of such views advocate a strictly public approach to food safety, on the basis of the international standards identified in the SPS Agreement. This would imply that any conflict or overlap between applicable public and private standards should result in the former trumping the latter.<sup>76</sup> This view might be misguided for a number of reasons.

First of all, even in the absence of private standards, the SPS Agreement would in any case not be an appropriate instrument for balancing the objectives of free trade and food safety. It could be argued that the focus on scientific justification, and the quasi-legislative status given to Codex Alimentarius standards, allow the free trade agenda to pre-empt food safety objectives and may, in the long run, hamper the progressive development of global food safety rules.<sup>77</sup> The proliferation of private food standards that go beyond the requirements of WTO-vetted Codex Alimentarius standards sharpens this tension and challenges even more the suitability of the SPS model for delivering high/required levels of food safety.

---

<sup>74</sup> *Id.*, p. 4. Members of the SPS Committee were asked the question ‘If the results of [a] study showed that in some specific cases private standards requirements exceed the international standards, what actions could the SPS Committee take?’ The responses were summarized as follows: ‘Several specific actions were proposed in response to this question. It was suggested that such results should be immediately published to ensure that not only the private standard-setting bodies but the public at large was made aware of the conclusions. Other suggestions included: analyzing the rationale and justification for such discrepancies and whether there was any discriminatory element (e.g. if the private standards apply only on the basis of country of origin); determining whether there was any corresponding price compensation or whether the higher standards created an additional market opportunity; developing guidelines to governments regarding vigilance and control over private standards; meetings with the private standard-setting bodies; workshops with competent government authorities, consumer organizations and other relevant stakeholders; assistance to developing countries to comply with private standards; and requesting scientific justification of the private standard-setting bodies.’ Most members however considered that a legal analysis of the relationship between the SPS Agreement and private standards would be ‘useful’ or ‘essential’. *Id.*, p. 9.

<sup>75</sup> *Ibid.*, respectively pp. 8 and 9.

<sup>76</sup> See *supra*, notes 65-66.

<sup>77</sup> See J. WOUTERS, A. MARX, N. HACHEZ, ‘Public and Private Food Safety Standards and International Trade Law. How to build a Balanced Relationship?’, presented at the workshop ‘Globalization, Global Governance and Private Standards’ Leuven, 4-5 November 2008, on file with authors; D. KALDERIMIS, *op. cit.*; S. CHARNOVITZ, *op. cit.*; A. REICH, *op. cit.*; J. EWERS, ‘Dueling Risk Assessments: Why the WTO and Codex Threaten U.S. Food Standards’, *Env’tl L.*, Vol. 30, 2000, p. 387.

Second, as the SPS Committee itself recognizes, private standards also have trade-enhancing effects. It could, for example, be argued that through their *de facto* binding effects and proactive compliance mechanisms private standards generate several advantages. These include a contribution to the modernization of industries in developing countries, fostering foreign direct investment, helping to solve food safety issues in industrialized countries, helping complying products to receive access to higher priced markets and, where price-based competition is reduced, allowing producers to enter into more stable business relationships.<sup>78</sup> The fact that private standards hand a premium to safe and qualitative products should in this connection not be overlooked.

Third, as argued above, private standards schemes offer a response to the growing awareness and demand of consumers for extra precautions in matters of food safety. The fact that such extra precautions had to be taken by the private sector may correspond to a decreasing reliance of consumers (at least in the EU<sup>79</sup>) on public authorities in the field of food safety, after the latter were not able to prevent the various food crises of the 1990s and early 21<sup>st</sup> century. In this regard, private standardization schemes seem to espouse a new generation of food laws which emphasize the duty of the food chain actors to take precautions for the safety of food products rather than focusing on the requirements that such products have to meet.<sup>80</sup>

For all these reasons, private food standards can be said to potentially serve a useful purpose and, in any case, they are viewed as effective in delivering high levels of food safety to consumers.<sup>81</sup> It is now incontestable that private standards are decisively shaping the global regulatory environment for food products.<sup>82</sup> In other words, ‘private standards are here to stay’<sup>83</sup> and, even more, ‘food safety is expected to remain the most important private standard in the future...’.<sup>84</sup>

If one accepts this preliminary conclusion, the logical strategy in addressing private standards would be to try to make them part of the solution by embedding them into new policy arrangements. Of course, the exclusionary effects of private standards, the proliferation of different types of private standards (corporate systems versus independently certified systems), and their legitimacy deficit are worrisome and need to be taken on. Those issues should be squarely addressed, but not at the expense of the level of food safety demanded by consumers, which could be the case if the SPS Agreement were to be applied too strictly.<sup>85</sup>

---

<sup>78</sup> G. STANTON, *op. cit.*, and ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, ‘Private Standards Schemes and Developing Country Access to Global Value Chains: Challenges and Opportunities Emerging from Four Case Studies’, *op. cit.*, pp. 13 ff.

<sup>79</sup> See FOOD AND AGRICULTURE ORGANIZATION, *op. cit.*, p. 143: ‘US food retail companies require that suppliers comply with the law but unlike European retailers they have not developed standards themselves.’

<sup>80</sup> L. FULPONI, ‘The Globalization of Private Standards and the Agri-Food System’, *op. cit.*, p. 8.

<sup>81</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, ‘Final Report on Private Standards and the Shaping of the Agro-Food System’, *op. cit.*, p. 6.

<sup>82</sup> S. HENSON, *op. cit.*, pp. 3-4.

<sup>83</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, ‘Final Report on Private Standards and the Shaping of the Agro-Food System’, *op. cit.*, p. 7.

<sup>84</sup> L. FULPONI, ‘Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries’, *Food Policy*, Vol. 31, 2006, p. 10.

<sup>85</sup> See *supra*, note 49.

Does all of this imply that the SPS Agreement should be modified in order to take account of the private standards phenomenon? This thesis is sometimes brought up, but the practical possibility to do so seems to be very weak at present.<sup>86</sup> The diverging views of different groups of countries make it quite unlikely that a consensual solution will be found. What stance should WTO Members then take? And what recommendations could be given to EU and US public authorities to try to reconcile the different views and issues under consideration?

One could recommend that all actors acknowledge the potential of private standards as a governance tool, while working to address their problematic sides, namely their exclusionary socio-economic effects in specific countries and between producers, the lack of transparency due to the proliferation of different systems and their legitimacy deficits. In other words, major players such as the European Union, the United States and the WTO should not make a case against private standards as such, but should design, in partnership with the other relevant actors, strategies to bring private standards in line with the free trade objective, without jeopardizing the search for optimal levels of food safety. In a way, this is the path that the Secretariat of the SPS Committee seems to be taking in its most recent note (*supra*).<sup>87</sup> This approach draws from the ‘new’ and ‘reflexive’ governance schools<sup>88</sup>, according to which, put briefly, states should not attempt to shape all aspects of life in society through prescriptive legislation, but should rather place itself in a position of ‘catalyst’, ‘facilitator’ or ‘orchestrator’ of regulations which are set by the (public or private) actors which are most effective, representative, competent and knowledgeable in the relevant field. This includes schemes like self-regulation, third party standardization and certification and delegated regulation. This would allegedly provide for more dynamic regulation. In doing so, public authorities should ‘steer’ and ‘channel’ the effects of those decentralized regulatory initiatives toward the public interest, the defense of which is their very mission.<sup>89</sup> (*supra*, 2.2) This implies capitalizing on the positive effects of private standards, while taking measures to correct their shortcomings.

This new governance model can apply to the case of private standards in the food safety and free trade regulatory contexts. Private standards are effective in setting high degrees of food safety and protect the environment, which responds to consumer demands and is arguably in the public interest, while at the same time they create trade problems and raise doubts as to their legitimacy. The relevant public and private actors should thus reflect on (i) how the

---

<sup>86</sup> WORLD TRADE ORGANIZATION, ‘Private Voluntary Standards within the WTO Multilateral Framework’, *op. cit.*, p. 95.

<sup>87</sup> See WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, ‘Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses’, *op. cit.*

<sup>88</sup> See G. TEUBNER, ‘Substantive and Reflexive Elements in Modern Law’, *Law & Society Review*, Vol. 17, 1983, p. 239. For similar arguments from non-legal perspective see *inter alia* J. VAN TATENHOVE, B. ARTS & P. LEROY, *op. cit.*; B. KARKKAINEN, A. FUNG & C. SABEL, *op. cit.*, pp. 692-671; C. SABEL, A. FUNG & D. O’ROURKE, ‘Ratcheting Labor Standards. Regulation for Continuous Improvement in the Global Workplace’, *KSG Working Paper No. 00-010; Columbia Law and Economic Working Paper No. 185; Columbia Law School, Pub. Law Research Paper No. 01-21*, 2000, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833).

<sup>89</sup> For accounts of those theories, see for example K. W. ABBOTT & D. SNIDAL, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’, *op. cit.*; A. C. AMAN, ‘The Limits of Globalization and the Future of Administrative Law: From Government to Governance’, *Ind. J. Global Legal Stud.*, Vol. 8, 2000-2001, p. 379; R. STEWART, ‘Administrative Law in the Twenty-First Century’, *N.Y.U. L. Rev.*, Vol. 78, 2003, p. 437; O. LOBEL, *op. cit.*.

positive contribution of private standards to the food safety agenda can be enhanced, while (ii) tackling the trade distorting effects of private standards, (iii) tackling the proliferation of private standards schemes and (iv) bringing more legitimacy into private standards schemes. These four issues should constitute the axes of the private standards strategy of all relevant actors, be they the WTO, the United States, the European Union, or private actors in the food chain.

## 7.2. Acknowledging and Fostering the Positive Contribution of Private Standards

With regard to point (i) above, it could be argued that ‘WTO rules should not be developed that militate against the adoption of [private food safety standards]. Neither should the WTO let itself be pulled into the political game of overtly deciding which standards are authoritative.’<sup>90</sup> The consequences of such a recommendation for the WTO are multiple.

First, it implies that one ought to revisit the strategy which designates the Codex Alimentarius Commission and other international organizations for setting standards which will be used as global reference points for public food safety regulations across the world. The composition and standard-setting processes of the Codex Alimentarius Commission indeed seem to indicate that the organization is *de facto* skewed in favor of business interests.<sup>91</sup> In the same vein, the focus on science which is at the heart of the SPS Agreement and of the operation of the Codex Alimentarius Commission (which is an expert-based agency of the FAO and WHO) may have to be complemented by other guiding principles. Quite a number of SPS measures, on top of having scientific (or precautionary) foundations, may also be taken for moral or cultural reasons, which should *per se* not be disputable<sup>92</sup>, especially if such measures are adopted following a democratic debate.

In this connection, it would seem appropriate for the EU and the United States, as influential actors in the WTO, to get more involved in the debates on private standards in the SPS Committee. Notably, these actors should consider launching a debate on the role and added value of Codex Alimentarius standards, in relation to the private standards phenomenon, as well as on the well-founded character of the option to base harmonization strategies on scientific justifications. Science, despite its aura of objectivity, has indeed been argued to be a poor guide for judging the appropriateness of food safety measures, which rely on many more factors.<sup>93</sup> This would however imply entirely revisiting the foundations of the SPS Agreement, and such debate might therefore be dead-born, given the entrenched positions of

---

<sup>90</sup> S. BERNSTEIN & E. HANNAH, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’, *J. Int’l Econ. L.*, Vol. 11, 2008, p. 604.

<sup>91</sup> See D. G. VICTOR, ‘The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years’, *N.Y.U. J. Int’l L. & Pol.*, Vol. 32, 1999-2000, pp. 887 ff.; J. BRAITHWAITE & P. DRAHOS, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000, pp. 401 and 408, who argue that the Codex Alimentarius Commission is ‘one of the more industry-dominated international organizations’, in which ‘corporate capture is institutionalized’.

<sup>92</sup> See the very interesting study by Marsha Echols, which analyzes food as a cultural good, triggering culturally-rooted behaviors, which the SPS Agreement tends to disregard by short-sightedly treating food products as objects the regulation of which can be made scientifically. M. A. ECHOLS, *Food Safety and the WTO – The Interplay of Culture, Science and Technology*, London/The Hague/New York, Kluwer Law International, 2001, 180 p.

<sup>93</sup> D. WINICKOFF, S. JASANOFF, L. BUSCH, R. GROVE-WHITE & B. WYNNE, ‘Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law’, *Yale J. Int’l L.*, Vol. 30, 2005, p. 106.

the members of the SPS Committee on such issues, and the insistence of some that the SPS Agreement be applied and enforced as such.

Second, it can be argued that the success and level of trust enjoyed by private standards among consumers and retailers come from the fact that such standard-setting schemes are dynamic and seek to stick to consumer demands as closely as possible. This is notably due to the fact that food safety standards or environmental standards may be one of the elements which differentiate products in the eyes of consumers. A constant emulation between private food safety standards can therefore be deemed to exist, and a ratcheting up of the general level of food safety may be thought to ensue. Also, the liability rules encouraging actors in the food chain to take all possible precautions in matters of food safety oblige the latter to constantly follow evolutions in the field of food safety, in order to make sure that their standardization schemes are as performing and protective as possible.

In sum, this contribution argues, along with other authors, that States should, in terms of the substance of global food governance, leave a ‘transnational regulatory space’<sup>94</sup> to the actors of the food chain and buttress the substantive quality of private standards, for example by means of responsibility rules. The setting of minimal food safety requirements to prevent possible ‘races to the bottom’ is also recommended. It could be argued that this ‘reflexive’ model may have better chances of delivering high levels of food safety than the current public model. It should be noted that such extended leeway conceded to private actors could at times lead to abuses or ill-suited standards. This is why certain safeguards should be put in place in order to monitor the substance of private standards. Such safeguards should allow concerned actors to challenge the relevance of a standard before an independent body. This independent adjudicatory body could be the WTO Dispute Settlement Body, which might run the risk of being suspected to have a trade bias in its decision-making.<sup>95</sup> On the other hand, setting up new multilateral organizations can be costly and ineffective. An EU-US dialogue forum on private standards and their place in the relevant multilateral organizations and national/European food safety agencies might result in specific recommendations on how to deal with private standards.

### *7.3. Mitigating the Trade-Restrictive Effects of Private Standards*

Private standards generate exclusionary effects on producers and certain countries (cf. point (ii) *supra*). The evidence on this is still piecemeal but is nonetheless growing. Exclusionary effects of private standards normally only apply to the producers which are not able to comply, but on the other hand, private standards may have positive effects for compliant producers. Studies have shown that exclusionary effects are therefore more likely to hit smallholders in developing countries, which do not have the resources necessary to pay the cost of compliance, such as the upgrade of their facilities, or product certification fees. A major contributing effort should thus be made by public and private actors to mitigate those exclusionary effects, for example by providing information, financial aid and technical support to those excluded stakeholders.<sup>96</sup>

---

<sup>94</sup> S. BERNSTEIN & E. HANNAH, *op. cit.*

<sup>95</sup> A. REICH, *op. cit.*, p. 365.

<sup>96</sup> See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES, Committee on Agriculture, Working Party on Agricultural Policies and Markets, ‘Private Standards Schemes and Developing Country Access to Global Value Chains: Challenges

This solution has already often been brought forward, and it is beginning to be applied by private standardization schemes themselves. GLOBALG.A.P. has for example developed a 'Smallholder Involvement' program, which notably allows for small producers to obtain 'group certification' of their product in order to spread the costs of the procedure.<sup>97</sup> One could also imagine that private and public actors would provide funding or grant discounts to help small producers in developing countries meet certain compliance requirements.

More in general it can be recommended that a global fund be created which provides financial and technical assistance to producers to comply with different standards. Such an initiative can be initiated by a joint effort from the United States and European Union in co-operation with the major food producing and processing corporations.

Besides providing financial and technical assistance to comply with private standards initiatives should be developed to provide accurate information on private standards which would contain up-to-date information on different private standards and what they aim to achieve, how to apply for certification, the procedure for certification, the costs of certification, etc. The SPS Committee has also emphasized the importance of good information to producers to comply with private standardization schemes. This is why it has proposed in its last note that the group of interested members request, when necessary, that information sessions be organized with private standard-setters.<sup>98</sup> GlobalGAP and other standard-setters have, in this connection, already attended SPS Committee meetings.<sup>99</sup> This information provision and diffusion strategy should be developed more. In a joint effort GTZ and the Worldbank have launched the Trade Standards Practitioners Network (TSPN network) which pools information. This initiative can be expanded into the development of a genuine independent Private Standards Observatory which is controlled by a board of independent experts including academics. Such an Observatory should be able to provide up-to-date and accurate information.

#### *7.4 The Proliferation of Private Standard-Setting Schemes and the Need for Harmonization and Co-operation*

A specific concern expressed in relation with private standards is that several different schemes may exist on a same market, and producers might have to comply with all of them individually in order to sell their products to all retailers on the market, thereby multiplying compliance costs. Also, this multiplication of private standards may be puzzling in the cases when such standards contradict each other or the legislation in force on a market. This proliferation of different schemes is precisely what the SPS Agreement seeks to combat through its harmonization strategy.

---

and Opportunities Emerging from Four Case Studies', *op. cit.*, pp. 16-20, which shows the benefits of financial aid and technical assistance in order to provide access for smallholders to private standards schemes.

<sup>97</sup> See [http://www.globalgap.org/cms/front\\_content.php?idcat=70](http://www.globalgap.org/cms/front_content.php?idcat=70).

<sup>98</sup> WORLD TRADE ORGANIZATION, COMMITTEE ON SANITARY AND PHYTOSANITARY MEASURES, 'Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses', *op. cit.*, p. 11. This also corresponds to the demands of exporting states. *Id.*, p. 5.

<sup>99</sup> See SPS Committee news release of February 28, 2007 and March 1, 2007: 'Private standards are a mixed blessing, committee hears', available at [http://www.wto.org/english/news\\_e/news07\\_e/sps\\_28feb\\_1march07\\_e.htm](http://www.wto.org/english/news_e/news07_e/sps_28feb_1march07_e.htm).

It makes sense that private standards would have to comply with the applicable laws. The fact that such standards can in some cases go beyond the exigencies of local (or international) law should *per se* not be disfavored as this feature is part of the improvement dynamics of the private regulation model. A more difficult issue arises when private standards contradict each other, as there often is no conflict mechanism to determine which standard must prevail over the other. To address the issue of the discrepancies between the standards, private standards setters have already taken action. Some standard-setters are indeed involved in processes to ‘benchmark’ standards against one another, allowing producers which comply with one standard to be deemed compliant with all the other standards against which that standard is benchmarked. Examples include GLOBALG.A.P.<sup>100</sup> and the Global Food Safety Initiative. These benchmarking initiatives are an important step forward to mitigate the negative trade effects of private standards, but they should not be pushed to the point where all standards would be considered as equivalent. This would indeed eliminate the incentive that private standardization schemes have to compete with each other for higher levels of food safety. In the remaining cases of conflict, the adjudicatory body (*supra*) could intervene and apply previously defined conflict rules.

Efforts to generate convergence of different standards or co-operation between different standards might reduce the complexity of private standard-setting initiatives. This might result in more harmonized systems. The United States and European Union can take initiatives to bring private standard setting initiatives together and promote co-operation.

### *7.5. Guaranteeing the Legitimacy of Private Standards*

As to issue (iii) above, one must note that the legitimacy of a regulatory measure is, next to its effectiveness, an important component of the ‘validity’ of such a norm, understood as the recognition, in a certain regulatory regime, that the norm in question may have the regulatory effects that its authors intended to give it.<sup>101</sup> If public authorities are going to co-operate with global private actors in the field of food safety, it is quite natural that they would require these actors to be legitimate and act in a legitimate way. Assessing the legitimacy of domestic public regulation does normally not pose insoluble problems for lawyers. In this regard, the constitutional rules of the concerned legal order are of particular relevance. Pushing the search for legitimacy one step further, democracy is a particularly important factor as it appeals to the preferences of the ‘public’ or ‘demos’ in said legal order.<sup>102</sup>

In global governance settings, where no ‘public’ or ‘demos’ can be precisely identified, and where regulatory functions are the ‘shared responsibility’<sup>103</sup> of national, international, public and private actors alike, the legitimizing framework becomes blurred. It would therefore be useful that all actors concerned with food products reach a consensus on what they understand by ‘legitimacy’ in that context. This contribution does not intend to add to the debate as to what the notion of legitimacy should encompass in global governance settings. The literature

---

<sup>100</sup> See, for GLOBALG.A.P.:

[http://www.globalgap.org/cms/front\\_content.php?idart=44&idcat=29&lang=1&client=1](http://www.globalgap.org/cms/front_content.php?idart=44&idcat=29&lang=1&client=1).

<sup>101</sup> See F. OST & M. VAN DE KERCHOVE, *De la Pyramide au Réseau – Pour une Théorie Dialectique du Droit*, Brussels, Publications des Facultés Universitaires Saint-Louis, 2002, pp. 307 ff.

<sup>102</sup> G. DE BÚRCA, ‘Developing Democracy beyond the State’, *Colum. J. Transnat’l L.*, Vol. 46, 2008, pp. 241-242.

<sup>103</sup> On this concept of ‘shared responsibility’ in the area of labor rights, see I. M. YOUNG, ‘Responsibility and Global Labor Justice’, *Journal of Political Philosophy*, Vol. 12, 2004, p. 380, footnotes omitted.

on the subject is rich<sup>104</sup> and seems to make the concept revolve around certain principles such as the free and open participation of all interested parties, the transparency of the decision-making process, the accountability of the decision-makers, the search for the public interest, or the principle of non-discrimination. Application of the legitimizing principles agreed upon by the relevant actors of food safety regulation could then be promoted amongst, or imposed upon, private standard-setters, for example through the use of a 'Code of Practice' for the development and application of standards, on the model of the Code annexed to the TBT Agreement.

An interesting initiative in this regard is the ISEAL Alliance<sup>105</sup>, which is an independent membership association which contains several leading multi-stakeholder and independent private standardization initiatives, which are committed to strengthening and promoting 'credible standards and conformity assessment by developing capacity building tools to strengthen members' activities and by promoting credible voluntary social and environmental certification as a legitimate policy instrument in global trade and development.'<sup>106</sup> Although the ISEAL Alliance focuses on social and environmental standards, the example is very relevant to our contribution, as food safety standards also often contain social and environmental components<sup>107</sup>, and as social and environmental private standards can also be analyzed as potential barriers to trade. The main instrument in ISEAL's policy is their 'Code of Good Practice for Setting Social and Environmental Standards.'<sup>108</sup> Application of the Code of Good Practice by private standard-setters is thus supposed to result in credible and legitimate standards.<sup>109</sup> The Code of Good Practice is based on the internationally recognized ISO rules for developing standards, on the TBT Code of Good Practice, and on the TBT and SPS Agreements. Harmonization of differing standards and the development of international standards to mitigate trade-restrictive effects of standards is also an important component of the Code.

The initiative of the ISEAL Alliance constitutes a benchmark for private standards initiatives. The Marine Stewardship Council is 'certified' by the ISEAL Alliance while other initiatives such as GlobalGAP are not. The idea of benchmarking systems or even certifying the certifiers is of crucial importance. The United States and the European Union, jointly or separately, can take up a pioneering role in accrediting certifiers. This will also enable them to make private standards a legitimate policy instrument to tackle global challenges. Public

---

<sup>104</sup> See, among many others: A. BUCHANAN & R. KEOHANE, 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs*, Vol. 20, 2006, p. 405; G. DE BÚRCA, *op. cit.*; S. BERNSTEIN & B. CASHORE, 'Can Non-State Global Governance Be Legitimate? An Analytical Framework', *Regulation and Governance*, Vol. 1, 2007, p. 347; S. BERNSTEIN, 'Do Intergovernmental and Non-state Governance Institutions Rest on Different Bases of Legitimacy?', 1 June 2008, available at [http://www.allacademic.com/meta/p254253\\_index.html](http://www.allacademic.com/meta/p254253_index.html).

<sup>105</sup> In full the 'International Social and Environmental Accreditation and Labelling Alliance'. See <http://www.isealalliance.org/>

<sup>106</sup> ISEAL ALLIANCE, 'ISEAL Code of Good Practice for Setting Social and Environmental Standards', January, 2006, available at <http://www.isealalliance.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=212&documentFormatId=1289>, preamble.

<sup>107</sup> Like GLOBALG.A.P. for example.

<sup>108</sup> ISEAL ALLIANCE, 'ISEAL Code of Good Practice for Setting Social and Environmental Standards', *op. cit.*

<sup>109</sup> Still according to the preamble of the code, 'ISEAL does not consider its members to be the only bodies that can legitimately develop environmental and social standards and conformity assessment procedures. Legitimacy in this area of work is determined by the suitability of the processes through which these standards are developed, adopted and implemented. The ISEAL Code of Good Practice for Setting Social and Environmental Standards provides a benchmark to assist standard-setting organisations to improve how they develop social and environmental standards.'

oversight of private standards initiatives could thus enhance the legitimacy of private standards.

## **8. Conclusion: The Need for Multilateral and Pluralistic Food Safety Governance – The US and the EU as Leaders in Change?**

Private standards are increasingly becoming an important policy instrument in order to address global challenges. This contribution focused on private standards in the context of global food governance since these standards directly relate to issues of biosafety and biodiversity and link the issue of private standards to international trade law. Our contribution argued for a multilateral and pluralistic view of global regulation, in which all leading actors such as the United States, the European Union, the World Trade Organization, public and private standard-setters and major actors in the food chain have to bring part of the solution. None of the regulatory actors possesses all the capacities and competences to take on by themselves the challenges posed by the regulation of global issues such as food safety or international trade. At the same time, in a global governance context which is characterized by the absence of institutionalized checks and balances, a conjunction of all regulatory forces allows for a reduction of the risk that a global issue involving the public good be captured by the particular interests encapsulated into intergovernmental horse-trading, business profit-seeking or NGO activism.<sup>110</sup>

We further argued that private standard-setters (most importantly large western retailer groups) have now come to dominate the food safety regulatory environment. As a result, private standards have become the prime determinants of access to most western food markets. In light of these evolutions, the logic behind the SPS Agreement appears somewhat flawed, and the latter is increasingly regarded as having lost its grip on the global food safety regulatory environment, which now largely develops independently from the rules of world trade. This disconnect has many negative consequences, most notably the erratic proliferation of different public and private regulatory schemes and the potential exclusion of the weaker actors of the food chain from the lucrative western markets. Also, the legitimacy of private standards in regulating issues as important as food safety is questioned. In order to re-equilibrate the relationship between the objective of free trade and the food safety regulatory environment, several recommendations addressed to public and private regulators alike were proposed. These recommendations derive from the ‘new’ or ‘reflexive’ governance scholarship, and imply for the public authorities (WTO and Members) to rely on the assets of private food safety standards, and to focus on correcting their downsides.

Concretely, public actors should, in light of the effectiveness of private standard-setters to deliver high levels of food safety, generally leave the substance of food safety regulation to private actors, while buttressing the quality of those regulatory initiatives with liability rules. Second, public and private actors should focus on reducing the exclusionary effects that private food safety standards may have on the weaker actors of the food chain, and reduce the discrepancies and contradictions between private standards. Practically, this may induce the creation of a global fund for technical and financial assistance in order to comply with private standards, information and capacity building programs via a private standards observatory, the design of mechanisms to harmonize and benchmark private standards, and the adoption of

---

<sup>110</sup> See K. W. ABBOTT & D. SNIDAL, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’, *op. cit.* The authors list the competencies needed to adopt and implement appropriate regulation in the governance context as: independence, representativeness, expertise and operational capacity.

rules to solve conflicts between contradictory standards. Finally, public and private actors should ensure the legitimacy of private food standards by identifying the minimal features of legitimate standards and applying them to private standardization schemes, for example through the promotion and implementation of a Code of Good Practice. In all these instances, the European Union and the United States, separately or in a joint effort, can play a pioneering role.

Some of the private standard-setters have demonstrated their willingness to address these concerns in a pro-active and constructive way, by providing information, by setting up smallholder involvement programs, or by issuing codes of good practice for the development of standards. A more elaborate and systematic policy towards private standards from the European and American public authorities might address these issues further and enable private standards to play an important role in new policy arrangements to address global challenges.