Private food standards and the World Trade Organization: some legal considerations

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Abstract: Private standards have increasingly become a contentious issue in the multilateral trading system. The ever increasing number of sector-specific standards developed by businesses, in particular in the food market, may have significant implications for developing countries in terms of market access. Some countries see private food standards as a particular form of non-tariff barriers. The World Trade Organization (WTO) deals with non-tariff barriers in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and in the Agreement on Technical Barriers to Trade (TBT Agreement). This paper examines to what extent these agreements cover private standards, as they were originally intended to regulate standard-setting by public authorities. We find that there is an important difference between the SPS Agreement and the TBT Agreement in that the drafters of the latter realized the importance of the private sector in standard-setting. Finally, we discuss whether a ‘Code of Good Practice for the Preparation, Adoption and Application of Standards’, similar to that under the TBT Agreement, could be adopted under the SPS Agreement.

1. Introduction

Over the past decade, several private standard schemes have emerged in a variety of sectors, in particular in the food sector. Private standards differ from public standards in that they have not been drafted by regulatory authorities, but by non-governmental entities, such as, in the food sector, supermarket chains, retail consortia, manufacturers,1 producers, and trade cooperatives.2 In certain sectors, importers establish Codes of Practice that set out standards which exporters must comply with before importers will buy their products. Self-regulation is another...

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1 S. J. Henson and T. Reardon, ‘Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System’, 30 Food Policy (2005) 2, at 244.

form of private sector standard-setting and is often used to foster consumer confidence.\textsuperscript{3} The contents and aims of private standards vary from sector to sector. Private standards have implications for the market access conditions of exporting countries. The legal status of private standards is subject of debate. The WTO governs public standards under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The question is how wide the scope of application of the SPS Agreement is, and whether and to what extent it covers private standards. The Agreement on Technical Barriers to Trade (TBT Agreement) also covers standards and introduces a Code of Good Practice for the Preparation, Adoption and Application of Private Standards (CGP). This raises the question whether a similar approach could be adopted under the SPS Agreement. Finally, in our conclusion we assess possible ways forward.

2. Private food standards and some concerns they raise

In 2007, UNCTAD estimated the number of private sector standard schemes for the certification of ‘organically’ produced food at 400 and rising.\textsuperscript{4} Taking into account the process of the restructuring of global agricultural and food markets that has taken place over the past few decades, several factors explain the rise in the number of private food standards. First, they constitute a response to the increase in real and/or perceived risks related to food production, transport, and processing caused by a number of high-profile food scandals, such as the BSE-crisis and several dioxin scandals, which have generated a greater distrust in regulatory agencies and stronger consumer anxiety. Second, the increased interest of consumers in food production processes and changes in their conceptions of food safety and quality are reinforced by companies’ competitive strategies around environmental and social impact. Third, the responsibility for ensuring food safety has in many cases been transferred from the public to the private sector.\textsuperscript{5} Furthermore, the ‘globalisation’ of supply chains and a trend towards vertical integration through the use of direct contracts between suppliers and retailers can be observed.\textsuperscript{6} Competition among retailers, firm reputation in terms of safety and quality, and the use of private standards as a defence of due diligence with respect to mandatory legislation were all reasons for the increase in the use of these private standards.\textsuperscript{7}

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Last, but equally important, private standards serve to differentiate between products. The United Nations Industrial Development Organization (UNIDO) divides private standards in three categories: (i) consortia standards, such as GLOBALG.A.P., which are often developed by a sector-specific consortium; (ii) civil society standards, such as ‘Max Havelaar’ and other fair-trade standards, which are usually established on the initiative of a non-profit organization in response to certain social or environmental concerns; and (iii) company-specific standards, which are developed internally and apply to the whole supply chain of a company (e.g., Tesco’s Nature’s Choice, Marks & Spencer’s Field-to-Fork).

Private standards are in and of themselves not mandatory as a matter of law. There is, as such, no legal obligation for suppliers to comply with these schemes. Nevertheless, the fact that a particular set of standards is used across the board in a certain sector may render the choice of individual producers or suppliers rather limited. Other trade-related concerns with private standards deal with the content of these standards or the compliance therewith. Issues relating to the content of standards are for example the multiplication of private standard schemes, both within and between markets, the side-lining of public standards by private standards, the relationship of private standards with the international standard-setting bodies referred to by the SPS Agreement, and the scientific justification that is required for SPS measures. Compliance-related issues are the cost of third-party certification (in particular for small- and medium-sized enterprises), the requirement by some private schemes to use only specified certification bodies, the lack of equivalence between schemes leading to a multiplication of certification processes in order to comply with all schemes in use in a defined market, and the lack of recognition of certificates issued. Other issues include the difficulties in adapting to the often more detailed and complex private standards. Legal issues surrounding private standards revolve in the first place around transparency. Some argue that private standard-setters, when they adopt or modify a standard which will apply at a large scale and may have substantial market access and development implications, do not have to notify these 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.

8 Henson and Humphrey, supra note 5, at 14.
Nevertheless, the argument has been made that, under certain conditions, private standards can have trade-enhancing effects. From this perspective, such standards are not seen as barriers to trade, but rather as catalysts that increase trade as well as development. Arguably, compliance with private standards can have positive effects, where it acts as a catalyst driving infrastructure improvements and investment in developing countries. In any event, the exact impact of private standards on global value chains is difficult to ascertain. The question remains what their status is under the law of the WTO.

3. SPS Agreement

The preamble and Art. 2.1 of the SPS Agreement recognize the right of WTO Members to adopt ‘measures necessary to protect human, animal or plant life or health’. The agreement sets out a number of disciplines to reduce the negative effects on trade that might arise as a result of such measures. Measures must be non-discriminatory and consistent (Art. 2.3 and 5.5), may only be applied to the extent that they are necessary (Art. 2.2 and 5.6), and must be based on scientific principles and may not be maintained without sufficient scientific evidence (Article 2.2). The SPS Agreement further requires measures to be based on a proper risk assessment in order to ensure that they are based on science, take into account the objective of minimizing trade effects, as well as the economic costs associated with the measure.

Article 3 SPS Agreement sets out the goal of ‘the harmonization of sanitary and phytosanitary measures on as wide a basis as possible’. To this end, ‘Members shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations’. The drafters of the SPS Agreement recognized that diverging international standards can cause market-access-related problems, as it becomes difficult to enter multiple markets when compliance with differing national regulations and standards is required. Annex A of the SPS Agreement


14 Hobbs, supra note 12, at 147.


states that standards for food safety are ‘the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling and codes and guidelines of hygienic practice’. The drafters of the SPS Agreement acknowledged the importance of harmonizing international standards: hence the Agreement’s reference to public (international) standards set by the Codex Alimentarius Commission (Codex), the World Organisation for Animal Health (OIE), and the International Plant Protection Convention (IPPC). However, they clearly did not foresee the recent proliferation of sector-specific standards elaborated by private actors, such as retailers or supermarket chains. The SPS Agreement remains largely silent on this matter. In Section 4, we explore whether private standards fall within the scope of the Agreement.

In 2005, St. Vincent and the Grenadines launched a – still on-going – debate in the SPS Committee regarding the issue of private standards within the WTO SPS context, after supermarket chains had imposed quality standards for bananas which St. Vincent and the Grenadines claimed were higher than the international standards, thus causing problems for small-scale farmers. The countries asked for support facilities for small-scale farmers, more flexible standards that take into account country specific crops and circumstances, more producer-involvement in the standard-setting process, and a better relation with the SPS Agreement.17 In 2009, the SPS Committee asked the WTO Secretariat to prepare an analytical report in which possible actions regarding private standards would be set out. The report contains 12 possible actions, ranging from the development of a working definition of private standards to an examination of the scope SPS Agreement and the possibility of a Code of Good Practice under the SPS Agreement.18 These two actions will be discussed below.

4. Scope of application of the SPS Agreement

Pursuant to its Article 1.1, the SPS Agreement ‘applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement’ (emphasis added). There is no explicit limitation that only measures adopted by governmental authorities fall within the scope of the Agreement. Furthermore, in none of the Annexes to the SPS Agreement can any such explicit limitation be found. Nevertheless, other provisions explicitly refer to the rights and obligations of ‘Members’. Article 3 SPS Agreement, for example, was interpreted by the Appellate Body as follows in the EC–Hormones case: ‘the object

17 WTO, G/SPS/GEN/766, supra note 11, at 2.
and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people’ (emphasis added). Members can base their SPS measures on these international standards (Article 3.1), they can conform to these standards (Article 3.2), or they may impose SPS measures resulting in a higher level of protection than would be achieved by the relevant international standard in terms of Article 3.3. Article 8 provides: ‘Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.’ The question is whether certain certification requirements, necessary to show compliance with private standards, would fall within the scope of this provision. Article 13 states, in relevant part:

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. (emphasis added)

Most likely, the drafters of the SPS Agreement intended a narrow meaning of non-governmental and regional bodies. Some authors and WTO Members therefore argue that the question arises whether a ‘good faith’ interpretation of these terms, as required by the Vienna Convention on the Law of Treaties, would today require consideration of the changed circumstances in SPS governance. It is clear from Article 13 that WTO Members must promote the compliance by these bodies with the disciplines of the SPS Agreement. It is not clear, though, how far their responsibility to do so stretches. On the other hand, some authors argue that standards set by ‘non-state market driven governance systems’ should be kept out

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of the ambit of WTO disciplines altogether. In their view, a ‘transnational regulatory space’ should be preserved for such systems from WTO disciplines.\textsuperscript{21} To this date, there is still no authoritative interpretation of Article 13, rendering it difficult to foresee what the provision entails for governments and private standard-setters. If anything, the discussions in the SPS Committee have highlighted the disagreement among WTO Members concerning the applicability of the SPS Agreement to private standards.\textsuperscript{22} Some authors argue that private standards do not fall within the scope of the SPS Agreement, and as such cannot be disciplined under it, as ‘it is hard to conceive of a situation where an international agreement or treaty can be brought to bear on the private commercial transactions of buyers within agricultural and food supply chains’.\textsuperscript{23} Others, however, submit that the question is not whether private actors can be bound directly by the SPS Agreement but rather in ‘which cases a Member can be held responsible for the actions of private parties in its territory, or of regional bodies in which entities in its territory are members’.\textsuperscript{24} The latter question concerns the attribution of private action to a WTO Member. The WTO Secretariat in its 2007 paper on private standards under the SPS Agreement mentioned two situations in which this question might arise. First, a government authority might decide to incorporate a standard developed by a private body into its SPS regulations. Second, a government might decide to permit the entry of imports that are certified to comply with a private standard that incorporates and exceeds the official requirements.\textsuperscript{25} Analogically, in Japan–Film the Panel noted the risk that if this would be allowed, ‘WTO obligations could be evaded through a Member’s delegation of quasi-governmental authority to private bodies’.\textsuperscript{26} Although the case dealt with a possible violation of the General Agreement on Tariffs and Trade 1994 (GATT) rather than an SPS measure, the Panel noted that ‘what may appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions’.\textsuperscript{27} Private party action may be deemed governmental in the view of the Panel ‘if there is sufficient government involvement with it’. Nevertheless, it added that this will always have to be


\textsuperscript{24} Prevost, \textit{supra} note 20, at 16.

\textsuperscript{25} WTO, G/SPS/GEN/746, \textit{supra} note 6, para. 17.


\textsuperscript{27} Ibid., para. 10.52.
examined on a case-by-case basis as ‘it is difficult to establish bright-line rules in this regard’.28

Even if private action cannot be directly attributed to a government, as will often be the case, Article 13 SPS Agreement may still play a role, in that it requires Members to ‘take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories ... comply with the relevant provisions of this Agreement’ (emphasis added). Given the use of the term ‘reasonable’, it is necessary to look at the limits of the obligations Members bear in this respect. In the first place, it should be noted that this is an obligation of means (a ‘best-endeavours’ obligation) rather than an obligation of result. Members are not required actually to ensure compliance by non-governmental entities and regional bodies, but only to take such reasonable measures as may be available to them to ensure compliance. Therefore, if a non-governmental body does not comply with the rules of the SPS Agreement, this will not necessarily mean that a Member can be held responsible under Article 13. Reasonable measures that governments could take might include the dissemination of information about the SPS Agreement, entering into memoranda of understanding, and the provision of financial incentives to encourage private actors to comply. It has been observed that there would be considerable difficulty in defining the limit of the reasonable measures that national governments might take.29 As the drafters of the SPS Agreement did not have private standards in mind, an interpretation of Article 13 that would entail that national governments must ensure compliance by all private actors does not seem warranted.30

5. Inspiration from the TBT Agreement?

If application of the SPS Agreement is not possible, are there other ways to discipline private standards? One option that has been coined is the adoption of an approach similar to that to private standards under the WTO’s TBT Agreement. The WTO Secretariat notes, ‘one difference with respect to the “reasonable measures to ensure compliance” required of Members under the TBT and SPS Agreements is the reference under the TBT Agreement to Members ensuring acceptance and compliance with the Code of Good Practice by non-governmental bodies.’31 The TBT Agreement was negotiated in full awareness of the importance

28 Ibid., para. 10.56.
31 WTO, G/SPS/GEN/746, supra note 6, para. 27.
of the private sector in setting, applying, and assessing conformity with technical standards.\textsuperscript{32} Annex 3 to the TBT Agreement establishes a ‘Code of Good Practice for the Preparation, Adoption and Application of Standards’ (CGP) (see Table 1).

Article 4.1 TBT Agreement obliges WTO Members to take reasonable measures to ensure that non-governmental and regional bodies accept and comply with the CGP. Regardless of whether the standardising body has accepted the CGP, it is upon the Member to take reasonable measures to ensure compliance with the CGP. The question is whether a similar approach, a separate CGP, for the SPS Agreement is viable. It has been suggested that there is merit in such a separate code as ‘these

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\caption{Code of Good Practice for the Preparation, Adoption and Application of Standards (CGP)}
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\textbf{General provisions} & \\
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Scope & (B) any standardizing body \ldots whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to \ldots ‘as standardizing bodies’ and individually as ‘the standardizing body’); \\
Notification procedure & (C) Notification to the ISO/IEC Information Centre in Geneva \ldots \\
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\textbf{Substantive provisions} & \\
Non-discrimination and reduction of negative effects on trade & (D) no less favourable treatment ; (E) no unnecessary obstacles to international trade; \\
International standards & (F) international standards shall be used as a basis, except where they would be ineffective or inappropriate; \\
Harmonization and avoiding overlap & (G) standardizing bodies shall contribute to the harmonization of standards; (H) every effort shall be made to avoid duplication or overlap; \\
Transparency & (L) 60 day comment period; (M) availability of draft standards; (N) due consideration of comments received; (O) prompt publication of the standard after adoption; (P) availability of work programmes and standards; \\
Disputes & (Q) The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints. \\
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disciplines could target those practices of private bodies that developing-country Members have identified as particularly problematic, such as lack of transparency, absence of prior consultation to allow for input from producers, undue burden from costly and complex conformity assessment procedures, and non-recognition of equivalence. Another benefit of creating a CGP for the SPS Agreement would be that the positive effects of private standards would not be neglected. Many authors have argued that the current solution of harmonization through designated (public) international standards is problematic in itself as the legitimacy of the adopted standards is often placed in doubt. At the same time, it should be noted that the adoption of such a code is subject to the approval of all WTO Members. A CGP could be adopted in two different ways: first, by the SPS Committee, through its competence under Article 12.7 SPS Agreement; or, alternatively, by way of an amendment to the SPS Agreement that could be agreed upon by a Ministerial Conference under Article X of the WTO Agreement. Given the criticism that they have faced, a number of private standard setters now claim to voluntarily follow the CGP as established under the TBT Agreement, or at least be in a constructive dialogue with the WTO.

6. Conclusion and way forward

Private standards have come to the forefront of the multilateral trading system. The impact of private standards on, in particular, developing country producers and exporters is not undisputed and can vary between products or sectors. Some argue that private standards restrict market access and, although not legally binding, are de facto mandatory, as some standards are used across the board in certain sectors. Others maintain that private standards are better suited to adapt to consumer demands, and hence increase trading opportunities for developing country producers. Whatever the truth may be, the status of private standards under the law of the WTO, in particular the SPS Agreement, remains unclear as of yet. The modest aim of this paper was to shed some light on the question whether the SPS Agreement, originally intended to only deal with public standards, also covers private standards. Particular attention has been paid to the role of Article 13 of the SPS Agreement, which deals with, first, the extent to which non-governmental action can be attributed to a WTO Member, and, second, the extent of the

33 Prevost, supra note 20, at 29.
35 Gascoigne, supra note 29, para. 48–49.
obligation that it places upon Members ‘to ensure that non-governmental entities within their territories … comply with the relevant provisions of this Agreement’. Although there is some effort required from governments, the fact that the SPS Agreement was negotiated at a point in time when the drafters were not aware of the emergence of private standards, renders it difficult, and even undesirable, to interpret the provision in a way that would impose strict obligations on governments to ensure that private standards do not violate the SPS Agreement. Nevertheless, private standards warrant attention, as they can have a large impact on small-scale producers. A CGP for the SPS Agreement, akin to the one incorporated under the TBT Agreement, might have merit. However, the adoption of such a code is subject to the approval of all WTO Members, and is likely to face opposition.37 Other proposals have focused on the mitigation of the trade-restrictive effects of private standards, which would include the provision of financial and technical assistance to developing countries.38 One of the mechanisms suggested in this respect is the Standards and Trade Development Facility (STDF), which coordinates the activities of donors who provide SPS-related technical assistance.39 In any event, the discussion of these proposals in the SPS Committee requires an active role of developed countries.40 The second-best option of addressing private standards per analogy under the existing TBT CGP does not seem feasible at this stage.41 Only a well-informed dialogue between public and private standard setters could successfully address the challenges posed by private standards without having to resort to long technical debates in the context of the WTO’s SPS Committee.

37 WTO, G/SPS/W/256, supra note 30, at 10; For the EU submission see: WTO, Committee on Sanitary and Phytosanitary Measures, ‘Summary of the Meeting of 30–31 March 2011, Note by the Secretariat’, G/SPS/R/62, 27 May 2011, at 23, para. 139.
40 Wouters et al., supra note 38, at 24.
41 WTO, G/SPS/W/247/Rev. 3, supra note 18, at 14; WTO, G/SPS/R/62, supra note 37, at 23.