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The Regulation of Private Standards in the World Trade Organization

MICHAEL M. DU*

Following the proliferation of private standards in global supply chain trade, it has become clear that private standards can have adverse effects on international commerce and world welfare in the same way as government-imposed mandatory regulations. However, the scope of World Trade Organization (WTO) Members' obligation in relation to the regulation of private standards under WTO law remains vague and open to divergent interpretations. This article is premised on the observation that the debate should move beyond the search for the most reasonable interpretation of relevant WTO disciplines, and start to engage normative questions concerning the potential role of the WTO in regulating transnational private authority in global governance. In particular, what justifies the role for the WTO, a multilateral intergovernmental organization, in regulating transnational private standards? If such a role is justifiable, how can the regulatory mechanism be designed and implemented in practice?

I. INTRODUCTION

Since private standards were raised for the first time as a trade concern in 2005 by Saint Vincent and the Grenadines regarding EurepGAP (now GlobalGAP¹) standards for bananas destined for sale in the UK supermarkets, they have been a recurrent issue of discussion at the Committee on Sanitary and Phytosanitary Measures (SPS Committee) and the Committee on Technical Barriers to Trade (TBT Committee).² Private standards are set by non-governmental entities without regulatory authority. Private standards, which are voluntary by definition, include individual firm schemes (e.g., Tesco Nature's Choice, Carrefour Filière Qualité), collective national schemes (e.g., British Retail Consortium (BRC) Global Standard, Assured Food Standards), and collective international schemes (e.g., GlobalGAP, ISO 22000, Global Food

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¹ Global GAP is one of the leading private standards initiatives in Europe whose membership is open to all relevant food retailers, producers and suppliers which agree to the terms of reference of the organization. It sets voluntary standards for the certification of production processes of agricultural products around the globe. *GLOBALG.A.P History*, http://www.globalgap.org/uk_en/who-we-are/about-us/history/index.html (last visited June 2, 2018).

² Committee on Sanitary and Phytosanitary Measures, *Note by the Secretariat: Possible Actions For the SPS Committee Regarding SPS-Related Private Standards*, ¶ 1, WTO Doc. G/SPS/W/247/Rev.3, (Oct. 11, 2010); Committee on Technical Barriers to Trade, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, ¶ 26, WTO Doc. G/TBT/26 (Nov. 13, 2009).

Safety Initiative).³ Private standards may cover all stages of production, from processing to distribution including packaging, certification and/or labeling. They may address all sorts of consumer interests including quality assurance, food safety, environment, social or labor conditions, corporate responsibility and carbon footprint.⁴ Being market driven, private standards are more economically efficient, take less time to develop and offer more flexibility in implementation. It is widely acknowledged that private standards play a key role in determining the nature and terms of international trade.⁵ In 2007, UNCTAD estimated that there are 400 private schemes with that number increasing.⁶

In principle, WTO Agreements, as an international treaty, only apply to its member states, and not directly to private bodies.⁷ Thus, at first sight, it seems odd to discuss the role of the WTO in addressing private standards that are developed and implemented independent of government intervention. Indeed, the traditional view is that private voluntary schemes and purchaser requirements can be regarded as market instruments used by economic actors to ensure that product standards meet the consumer demand in a way that maximizes profits. They are simply a reflection of market forces and therefore do not fall within the scope of current WTO regulation.⁸ Following the proliferation of private standards in international commerce in the last decade, however, it has become clear that private standards can have adverse effects on international trade and world welfare in the same way as government-imposed mandatory standards.⁹ Although by definition voluntary, in many instances private standards are *de facto* mandatory because they have become an industry norm, or compliance with them is required for suppliers to access the proprietary value chain of transnational corporations and large retailers.¹⁰ As most of the initiatives to adopt private standards have emerged in developed countries and have considerably affected developing countries' exports, a large number of developing country governments criticize private standards as new trade barriers that reduce their export opportunities and undermine their rights to development.¹¹

³ Committee on Sanitary and Phytosanitary Measures, *Note by the Secretariat: Private Standards and the SPS Agreement*, ¶ 5–6, G/SPS/GEN/746 (Jan. 24, 2007).

⁴ Gretchen H. Stanton, Private (Commercial) Standards and the SPS Agreement, Remarks at the Round Table on The Role of Standards in International Food Trade, Washington, D. C. (Sept. 24, 2007); Linda Fulponi, *Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries*, 31 (1) Food Policy 1, 6–8 (2006).

⁵ Committee on Sanitary and Phytosanitary Measures, *Submission by Switzerland: Voluntary Standards*, ¶ 3 G/SPS/GEN/967 (Oct. 20, 2009).

⁶ The Secretariat, *supra* note 3, ¶ 3.

⁷ Committee on Technical Barriers to Trade, Communication from Canada on Eco- Labeling, 2, WTO Doc. G/TBT/W/9 (July 5, 1995); Rex J. Zadalis, *When Do the Activities of Private Parties Trigger WTO Rules?* 10(2) J. INT'L ECON. L. 335, 337–338 (2007).

⁸ Switzerland, *supra* note 5, ¶ 7–8; Denise Prevost, *Private Sector Food- Safety Standards and the SPS Agreement: Challenges and Possibilities*, 33 SOUTH AFR. Y.B. OF INT'L L. 1, 6 (2008).

⁹ World Trade Organization, *World Trade Report 2012: Trade and Public Policies: A Close Look at Non-Tariff Measures in the 21st Century*, at 167.

¹⁰ Garry Smith, *Interaction of Public and Private Standards in the Food Chain*, OECD Food, Agriculture and Fisheries 15 (OECD Publishing, Working Paper No. 15, 2009).

¹¹ Miet Maertens & Johan Swinnen, *Private Standards, Global Food Supply Chains and the Implications for Developing Countries* in (Axel Marx et al. eds., *Private Standards and Global Governance: Economic, Legal and Political Perspectives* 153 (Edward Elgar, 2012), at 153–154.

Both the TBT and SPS Agreements make some inroads into regulating private standards. Article 13 of the SPS Agreement obliges WTO Members to take “such reasonable measures” as may be available to them to ensure that non-governmental bodies within their territories comply with the relevant provisions of the SPS Agreement. There is a similar provision in Article 4.1 of the TBT Agreement. However, the scope of WTO Members’ obligation in relation to the regulation of private standards under both the TBT and SPS Agreements has long been criticized for being vague and open to divergent interpretations.¹² In order to deal with the adverse effects of private standards on international trade, developing countries have repeatedly called for the WTO to put private standards within its normative regulatory framework.¹³ Despite intense negotiations on the issue at the WTO SPS committee, little progress has been made so far.¹⁴

This article is premised on the observation that the debate on the proper role of the WTO in regulating private standards should move beyond the search for the most reasonable interpretation of Article 13 of the SPS Agreement, and start to engage some fundamental normative questions concerning the role of the WTO in regulating private behavior. In particular, what justifies the role for the WTO, a multilateral intergovernmental organization, in regulating transnational private regulation? If such a role is justifiable, how could the regulatory mechanism be designed and implemented in practice? The rest of the paper proceeds as follows. Part II clarifies several definitional puzzles of private standards in the WTO discourse. Part III explains the drivers behind the rise of private standards as well as the pros and cons of private standards from the international trade perspective. Part IV provides a detailed legal analysis of Article 13 of the SPS Agreement and Article 4.1 of the TBT Agreement and introduces the recent developments on private standards at TBT and SPS committees. Part V examines whether the WTO is normatively justified to adopt an aggressive interpretation of existing WTO disciplines or impose additional disciplines on private standards. Part VI concludes.

II. THE DEFINITIONAL CHALLENGE OF “PRIVATE STANDARDS”

Defining SPS-Related Private Standards in the SPS Committee

Despite its common employment at WTO negotiation forums, in policy discourse and academic literature, there remains no consensus on the definition of “private standards” in the WTO context. In response to concerns raised by WTO Members regarding the function of private standards in international trade, the SPS Committee adopted a decision to develop a working definition of SPS-related private standards in

¹² Tomasz Wlostowski, *Selected Observations on the Regulation of Private Standards by the WTO*, 30 POLISH Y.B. OF INT’L L. 205, 209 (2010).

¹³ See, e.g., Committee on Sanitary and Phytosanitary Measures, *Communication from Nigeria: Private Standards*, WTO Doc. G/SPS/GEN/1398 (Mar. 16, 2015); Committee on Sanitary and Phytosanitary Measures, *Communication from Belize: Belize’s Comments on Private Standards*, WTO Doc. G/SPS/W/288 (July 14, 2015).

¹⁴ Committee on Sanitary and Phytosanitary Measures, *Note by the WTO Secretariat: Summary of the SPS Committee Meeting of 22-23 March 2017*, at 33, WTO Doc. G/SPS/R/86 (June 1, 2017).

March 2011.¹⁵ Since then, the SPS Committee's work on private standards has focused on reaching a consensus on a definition of SPS-related private standards.¹⁶

The SPS Committee initially discussed a working definition based on draft definitions prepared by the WTO Secretariat in October 2012.¹⁷ The proposed working definition was:

SPS-related private standards are [voluntary, market] requirements which are [developed and/or] applied by [private] [non-governmental] entities in order to protect human, animal or plant life or health.¹⁸

OR

SPS-related private standards are [voluntary, market] requirements which are [developed and/or] applied by [private] [non-governmental] entities, which may [directly or indirectly] affect international trade, and which relate to one of the objectives of the SPS Agreement [within the territory of the Member].¹⁹

The working definition also made a number of important clarifications:

- SPS-related private standards include technical requirements, guidelines and recommendations.
- SPS-related private standards can be developed by non-governmental entities themselves, or may be derived from existing private, official or international standards, and are applied for non-governmental entities' commercial objectives as part of a private, commercial and contractual relationship.
- A non-governmental entity is any entity that does not possess, exercise, or is not vested with governmental authority. Non-governmental entities are private entities, including private sector bodies, companies, industrial organizations, enterprises and private standard-setting bodies.
- International standards developed by the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC) and the World Organization for Animal Health (OIE), three designated international standardizing organizations in the SPS Agreement, are not SPS-related private standards.
- Official SPS measures implemented by a Member (including SPS measures implemented by governments other than the national government, or by non-governmental entities on behalf of a Member) are not SPS-related private standards.

¹⁵ See generally Committee on Sanitary and Phytosanitary Measures, *Decision of the Committee: Actions Regarding SPS-Related Private Standards*, WTO Doc. G/SPS/55 (Apr. 6, 2011).

¹⁶ Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the SPS Committee- Draft Report of the Committee*, ¶ 14.2, WTO Doc. G/SPS/W/280/Rev.2 (Nov. 6, 2014).

¹⁷ Committee on Sanitary and Phytosanitary Measures, *Note by the Secretariat: Proposed Working Definition of SPS-Related Private Standards*, WTO Doc. G/SPS/W/265/Rev.2 (Sept. 28, 2012).

¹⁸ *Id.*

¹⁹ *Id.*

- Where an SPS-related private standard becomes an official SPS measure, it is no longer considered to be an SPS-related private standard.²⁰

As no consensus emerged from the discussions over the draft definition, WTO Members agreed to set up an “electronic working group” (e-WG) to move the consultation process forward. China and New Zealand, the Co-stewards of the e-WG, tabled a revised working definition in March 2014, namely:

An SPS-related private standard is *a written requirement* or a set of written requirements of a non-governmental entity which are related to food safety, animal or plant life or health and *for common and repeated use*.²¹

The new definition has the effect of aligning the definition of SPS-related private standards with the definition of “standard” contained in Annex 1 of the TBT Agreement.²²

After a number of rounds of consultation, the e-WG proposed a compromise working definition in September 2014 as follows:

An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is *applied by a non-governmental entity that is not exercising governmental authority*.²³

The proposal also included a footnote stating that the working definition did not prejudice the rights and obligations of members under the SPS Agreement or the views of members on the scope of this agreement.

There has been general agreement among WTO Members on the co-Stewards’ proposed text for a working definition with the exception of the European Union and the United States, who remain concerned with the use of the terms “non-governmental entity” and “requirement” in the working definition.²⁴ The EU suggested replacing “non-governmental entity” with “private entity” and deleting the term “requirement.” However, the co-Stewards considered it necessary and appropriate to maintain these two terms in the working definition, pointing out that they were used in the SPS Committee Decision from which the mandate of the SPS Committee to develop a working definition of SPS-related private products originates and also that these two terms are not specific to the SPS Agreement. Consequently, the SPS Committee could not reach a consensus on a working definition of SPS-related private standards and agreed to a proposal from the co-stewards of the e-WG for a “cooling off” period to reflect on how to overcome the impasse. The failure to build a consensus on the

²⁰ *Id.*

²¹ Committee on Sanitary and Phytosanitary Measures, *Report of the Co-Stewards of the Private Standards E-Working Group on Action 1 (G/SPS/55)*, ¶ 8, WTO Doc. G/SPS/W/276 (Mar. 18, 2014).

²² *Id.* ¶ 9.

²³ Committee on Sanitary and Phytosanitary Measures, *Second Report of the Co-Stewards of the Private Standards E-Working Group on Action 1 (G/SPS/55)*, ¶ 15, WTO Doc. G/SPS/W/281 (Sept. 30, 2014).

²⁴ Committee on Sanitary and Phytosanitary Measures, *Report of the Co-Stewards of the Private Standards E-Working Group to the March 2015 Meeting of the SPS Committee on Action 1 (G/SPS/55)*, ¶ 22, WTO Doc. G/SPS/W/283 (Mar. 17, 2015).

definition led to an impasse in the SPS Committee in its adoption of the Fourth Review Report the SPS Agreement since October 2014. WTO Members finally reached a compromise in July 2017 by introducing wording suggesting that WTO members were unable to agree on a working definition of SPS-related private standards.²⁵

Resolution of the standoff in negotiation in the SPS Committee seems implausible. The terms “non-governmental entity” and “requirements” are the elements of the definition where most diverse views were expressed. However, as China and New Zealand pointed out, these two terms are widely used by international standardizing bodies such as the OIE and Codex in their definitions of private standards and they had never met any objections. As the chairman of the SPS Committee correctly stated, the disagreement on the definition was not a drafting issue but reflected fundamental divergence of views regarding private standards. Developed countries have held the strong view that private standards fall outside the scope of the SPS Agreement, and hence should have no definition at all, or have an innocuous definition that would not be perceived as acceptance that they come under the aegis of the WTO.²⁶ This position at least partly reflects the fact that most private standards originate from and are applied in developed countries. Overall producers and retailers in developed countries benefit from the wide adoption of private standards whilst the cost of complying with private standards mainly falls on exporters from developing countries.²⁷ Moreover, the adoption of private standards is a normal market behavior of private economic actors that a government has little control of in domestic law. Therefore developed countries do not have much incentive to impose additional disciplines on private standards. However, the use of the term “non-governmental entities” in the draft definition echoes the language of Article 13 of the SPS Agreement. To accept that term would imply that the private standards fall within the regulatory scope of the SPS Agreement.

In considering a working definition of SPS-related private standards, the WTO Secretariat prepared a useful summary of existing definitions of “private standards” that are used by various international organizations.²⁸ Based on the existing definitions, it is possible to summarize the core features defining “private standards.” First, private standards are established by non-governmental/private entities, i.e., any entity that is not vested with governmental authority. These entities include companies such as transnational corporations and big supermarkets, sectoral trade associations, non-governmental standardizing bodies and other non-governmental organizations. There are myriad differences among categories of private standards schemes in terms of scope, objective, content, and characteristics.

Second, private standards are by definition voluntary in nature, in the sense that exporters are not legally required to comply with private standards. Compliance is a

²⁵ *WTO Members Adopt Report on Food Safety Agreement*, WTO, https://www.wto.org/english/news_e/news17_e/sps_13jul17_e.htm, (last visited June 3, 2018).

²⁶ Petros C. Mavroidis & Robert Wolfe, *Private Standards and the WTO: Reclusive No More*, 16 (1) *WORLD TRADE REV.* 1, 13 (2017).

²⁷ Pascal Liu, *Private Standards in International Trade: Issues and Opportunities*, Presented at the WTO’s Workshop on Environment-related Private Standards, Certification and Labeling Requirements (July 9, 2009) (transcript available in the Food and Agriculture Organization of the United Nations website), at 16–17.

²⁸ See Committee on Sanitary and Phytosanitary Measures, *Note by the Secretariat: Existing Definitions of Private Standards in other International Organizations*, at 5–6, WTO Doc. G/SPS/GEN/1334/Rev.1 (Aug. 5, 2014).

choice on the part of the exporter. However, some private standards may be *de facto* mandatory for access to important markets because of the market power of the non-governmental entities adopting them. On the other hand, some national non-governmental standardizing bodies may enjoy a government franchise/mandate to coordinate standards in their respective countries. The standards adopted by these national non-governmental bodies are not private standards. For example, the private sector American National Standards Institute (ANSI) has the responsibility of coordinating national standardization activities and representing the United States at the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). American National Standards accredited by ANSI are not private standards.

Third, private standards may address any aspects of product characteristics, but they predominantly focus on production and process methods. Indeed, one of the defining characteristics of private standards is an increasing focus on the processes by which products are produced.²⁹ Fourth, private standards pursue a wide range of objectives, such as environmental conservation, ensuring food safety, protecting of social and human rights, promoting good agricultural and manufacturing practices, ensuring sanitary safety, and protecting animal welfare. Finally, unlike international standards such as Codex and ISO standards, private standards are not primarily aimed at harmonizing national standards.³⁰ Non-governmental entities tend to prefer to keep their own brands original. This is because one important objective of private standards is to provide product differentiation, mainly to support claims about credence characteristics.³¹

Private Standards and “International Standards”

One particularly confusing element in the definition of private standards is the term “non-governmental entities.” As a generic term, it makes no distinction between non-governmental standardizing bodies *recognized* by WTO Members at either national or international levels and other non-governmental/private organizations not so recognized. This conceptual differentiation is not an issue in the context of the SPS Agreement because the SPS Agreement explicitly names Codex, OIE and IPPC as organizations that generate “international standards” regarding food safety, animal health and plant health respectively. Even if the SPS Agreement leaves open the possibility that appropriate standards from other relevant international organizations may also be considered as international standards, the SPS Committee has yet to identify any such organization. In other words, *all* SPS-related standards that are developed and implemented by non-governmental entities are private standards.

However, this conceptual differentiation is of utmost importance in the TBT Agreement because not all technical standards created by non-governmental entities are equal. In the TBT Agreement, for example, “international standard” is defined as a standard adopted by an international standardizing body. In order to qualify as an international standardizing body, the entity in question must have *recognized* activities

²⁹ Spencer Henson & John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, 14 (May 2009).

³⁰ Yuka Fukunaga, *Private Standards and Global Governance: Prospects and Challenges* (Dec. 12, 2016), ISS RESEARCH SERIES NO. 62, 8 (Feb. 2017).

³¹ Credence characteristics are attributes of a product that neither the retailer nor the consumer can verify through direct examination of the product, such as fair trade, eco-friendly, etc.

in standardization and whose membership is open to the relevant bodies of at least all WTO Members.³² Significantly, standards developed by non-governmental bodies, one sub-category of private standards, *may* be recognized as “international standards” in the TBT Agreement if certain conditions are fulfilled.³³ ISO, for instance, is a non-governmental standardizing body whose standards are most likely to be recognized as international standards.³⁴ In *US – Tuna II*, the United States argued that certain non-governmental standard-setting organizations, such as IEEE (Institute of Electrical and Electronics Engineers) and SAC International (Society of Automotive Engineers), could qualify as an international standardizing body for the purpose of the TBT Agreement.³⁵ These recognized international non-governmental standardizing bodies follow the TBT principles for developing international standards and comply with the disciplines of Code of Practice in the TBT Agreement.

International standards have assumed special legal significance under both the TBT and the SPS Agreement. WTO Members are obliged to use relevant international standards as a basis for their domestic technical regulations/standards, and domestic standards based on international standards are effectively immunized from challenges in the WTO dispute settlement system.³⁶ If standards developed by non-governmental entities are endorsed as “international standards,” they should no longer be regarded as private standards in view of their special legal status in the WTO law. By contrast, some non-governmental entities either do not follow the TBT principles of developing international standards and the Code of Practice in developing voluntary standards, or they are not recognized international standardizing bodies in the TBT Agreement. In either case, standards adopted are properly considered private standards.

Are Private Standards and Public Standards Two Separate Worlds?

It must be emphasized that the distinction between private and public standards has been increasingly blurred due to changes in the role of states in market regulation. As a good governance strategy, modern governments have actively engaged the private sector to achieve certain policy goals and product standardization is no exception.³⁷ Public and private standards interact in a variety of ways. For example, many private standards originate from national or international legislation and get refined through private decision-making. In this way, government or intergovernmental regulation forms the framework in which the private standard-setting process takes place. Firms

³² Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter *US – Tuna II*), ¶ 359, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

³³ Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They may Outperform WTO Treaties*, 17 J. INT’L ECON. L. 739, 749 (2014); Han-Wei Liu, *International Standards in Flux: A Balkanized ICT Standard-Setting Paradigm and its Implications for the WTO*, 17 J. INT’L ECON. L. 551, 586 (2014).

³⁴ International Organization for Standardization, *International Standards and “Private Standards”* (Feb. 2010).

³⁵ See Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.655, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011).

³⁶ Technical Barriers to Trade Agreement Art. 2. 4 and Art. 2.5, (Jan. 1, 1995).

³⁷ Spencer Henson & John Humphrey, *Understanding the Complexity of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, 46 (9) J. DEV. STUD. 1628, 1641 (2010).

are able to undertake conformity assessment of their own to comply with public regulations. What emerges is a process in which private actors further operationalize and refine public standards.³⁸

Relatedly, many public standards are based on technical specifications and initiatives by private standard-setting organizations. Governments may delegate certain tasks to non-governmental entities, and public standards may incorporate, by reference or verbatim, the contents of a private standard for all, or some, of the details thereby making compliance with the private standard a part of, or a presumption of, compliance with a public standard.³⁹ For example, EU directives covering CE marking for telecommunications and electronic products refer to ISO 9000 as a benchmark.⁴⁰ The UK Food Standards Agency has instructed enforcement authorities to take account of membership of a “recognized” private farm assurance schemes, such as Assured Food Standards and the Global Food Safety Initiative (GFSI), in determining the frequency of inspection of product facilities.⁴¹ More recently, private standards are increasingly integrated in sustainable public procurement policies.⁴² In *European Commission v Kingdom of Netherlands*, the province of Noord Holland in the Netherlands internalized private standards EKO label (on organic agricultural production) and the Max Havelaar label (on fair trade) in a public tender and the compliance with these two private standards is regarded as a proof of compliance in the public tender. The European Court of Justice’s ruling confirmed that fair-trade principles, and a reference to labels developed by private entities, can be included in public tenders as an award criteria.⁴³ In short, the boundary between “public” and “private” is increasingly blurred and it is better to view the sharp dichotomy as ends on a continuum.⁴⁴ At any rate, public standards and private standards are not two separate worlds.

III. THE PROLIFERATION OF PRIVATE STANDARDS AND THEIR TRADE IMPLICATIONS

Explaining the Rise of Private Standards in International Trade

While private standards initially emerged in the area of food safety, they now encompass environmental protection, ethical trading, animal welfare, organic production and so on. It has also become a standard practice for an individual food

³⁸ Axel Marx, *The Public-Private Distinction in Global Governance: How Relevant is it in the Case of Voluntary Sustainability Standards?* 3 THE CHINESE J OF GLOBAL GOVERNANCE 1, 14 (2017).

³⁹ ISO, *supra* note 34, at 2.

⁴⁰ CE Marking on a product is a manufacturer’s declaration that the product complies with the essential requirements of the relevant European health, safety and environmental product directives. *CE Mark FAQs*, EXPORT.GOV, http://2016.export.gov/cemark/eg_main_017292.asp.

⁴¹ Enforcing Compliance with Food Regulation: Modalities in the Relationship between Public Enforcement Agencies and Private Parties, Eur. Consortium for Pol. Res., Public and Private Food Governance: Politics of Labelling and Food Certification Standards (Sept. 4–7, 2013), <https://ecpr.eu/Filestore/PaperProposal/2269ab36-ba69-4965-b9fc-3f1f1f46de56.pdf>.

⁴² Maria Anna Corvaglia, *Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement*, 19 JIEL 607, 608 (2016).

⁴³ Case C-368/10, *European Comm’n v. Netherlands*, ECLI:EU:C:2012:284.

⁴⁴ David Vogel, *Private Global Business Regulation*, 11 ANN. REV. OF POL. SCI. 261, 265 (2008).

safety standard to govern a wide array of product attributes. For example, the GlobalGAP standard for fresh fruit and vegetables covers not only food safety but also specifications relating to environmental impact and employment practices. It is therefore increasingly difficult to make a distinction between food safety standards, environmental standards and social or ethical standards.⁴⁵ Since food standards are predominantly private standards and formal negotiations on private standard have mainly taken place in the SPS Committee, this article will take private food standards as an example. The same logic, however, applies to private standards in other areas as well.

The proliferation of private food standards in international trade is closely linked to the economic environment as well as institutional and legal frameworks in which the firms operate in the global markets. The first factor is the structural and institutional transformation of global agricultural and food markets. Thanks to rapid progress in information and communication technology and a favorable policy environment encouraging more liberal international trade, the supply chain for agricultural and food products has extended beyond national borders. Global sourcing reduces the cost of food and supplies new food to consumers, but also creates new risks as food is increasingly subject to greater transformation, and transportation and supply chains are fragmented across multiple enterprises. Private standards are therefore a useful tool for multinational enterprises to coordinate their supply chain through standardization of product and process requirements on an international level.⁴⁶ Relatedly, the expansion of supermarkets in food retailing, both nationally and internationally, has increased retailer market concentration and market power. The Organization for Economic Co-operation and Development (OECD) estimates that in Europe, the five largest retailers account for more than half of all food sales.⁴⁷ This structural shift has increased food retailer's bargaining power vis-à-vis other businesses in the supply chain, enabling them to impose private standards onto their suppliers.

Second, high profile food scares, such as the infamous bovine spongiform encephalopathy (BSE) incident in a number of developed countries, have fueled consumer concerns of food safety risks and eroded consumer confidence in prevailing mechanisms of food safety control which focus predominantly on public regulation.⁴⁸ Some advances in food technology, such as genetically modified food, have generated further concerns among consumers in the form of so-called "technological risks."⁴⁹ To counter food scares and to offer confidence when there is a loss of faith in public regulatory systems, firms sign up to voluntary private standards or develop their own. The private standards help differentiate their products and protect or even enhance

⁴⁵ Henson & Humphrey, *supra* note 37, at 1633.

⁴⁶ Fabrizio Meliado, *Private Standards, Trade and Sustainable Development: Policy Options for Collective Action*, International Centre for Trade and Sustainable Development (ICTSD) Issue Paper 1, 10-11 (2017).

⁴⁷ Linda Fulponi, *Final Report on Private Standards and the Shaping of the Agro-Food System*, 1 ORG. FOR ECON. COOP. & DEV., 10-11.

⁴⁸ Grace Chia-Hui Lee Stagiaire, *Private Food Standards and Their Impacts on Developing Countries*, 1 EUR. COMM'N 9 (2006).

⁴⁹ Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, 4 J. AGRIC. DEV. 63, 67 (2008).

their market share in national and international markets, which are increasingly driven by quality-based competition.⁵⁰

Third, broader demographic and social trends have altered the expectations and demands of consumers with respect to food safety and quality. Nowadays many of the quality attributes expected by consumers go beyond the physical traits of food, and include process and production aspects such as animal welfare, environmental impact, labor conditions, and health.⁵¹ Civil society and consumer advocacy groups have also influenced the agendas of private companies by targeting their procurement policies through a variety of media strategies, including media campaigns, organized boycotts or protests against certain retailers, or league tables announcing the most ethical supermarkets.⁵² By implementing private standards in this context, firms can supply blends of product and process attributes and communicate them to consumers, which sets them apart from their competitors. Hence, the adoption of private standards could be an important mechanism to minimise reputation risks, to earn and maintain customer loyalty, and to enhance the overall quality image of firm brand.

Next, the legal requirements on companies to demonstrate “due diligence” in the prevention of food safety risks are also a driving force behind the adoption of private standards. For example, in the wake of food scares, the UK passed the Food Safety Act in 1990 under which *any supplier* of a branded product is responsible for the safety of that product. Accordingly, enforcement action could be taken against a wholesaler or a retailer even if the offense is committed by other parties in the food chain (e.g., overseas exporters and food importers), unless the retailer can provide for “due diligence” demonstrating that he has been proactive in ensuring that food from suppliers conforms to legal food safety standards. Both reputation and financial resources are at stake if firms fail to prove due diligence in detecting and preventing problems in the food supply chain.⁵³ Major food retailers in the UK responded to the new law by developing private food safety protocols for their suppliers that were enforced through third-party audits. This “due diligence” requirement was later adopted in the EU Food Law Regulation of 2002 and mostly recently in the U.S. Food Safety Modernization Act in 2011.⁵⁴ More broadly, recognizing the limits of the traditional command-and-control approach in the global food supply era, governments in OECD countries have been increasingly engaging the private sector in the implementation of good practices to ensure product safety and quality. This partial and progressive shift of responsibility from the public authority to private sector prompts business to develop internal food safety management systems, and reduced the reliance on government inspection services. In this context, private standards might be seen as a reflection of private firms assuming and extending this responsibility.⁵⁵

⁵⁰ Fulponi, *supra* note 47, at 9.

⁵¹ *Id.* at 10.

⁵² Sally Washington & Lahsen Ababouch, *Private Standards and Certification in Fisheries and Aquaculture: Current Practice and Emerging Issues*, 1 FOOD & AGRIC. ORG. OF THE UNITED NATIONS 19 (2011).

⁵³ Colin Scott, *Continuity and Change in British Food Law*, 56 MOD. L. REV. 785, 794 (1990).

⁵⁴ John Humphrey, “Food Safety, Private Standards Schemes and Trade: The Implications of the FDA Food Safety Modernization Act”, IDS Working Paper No. 403, 23, 39 (2012).

⁵⁵ Washington & Ababouch, *supra* note 52, at 18.

In summary, private food standards are institutionalised market instruments to address food chain governance challenges. They appear to be simultaneously a useful tool for the private sector to regulate supply chains, a substitute for inadequate public regulation, a response to increasingly stringent government regulation and potential litigation, and a means of exceeding public regulations to provide credible cases for product differentiation.

The Effects of Private Standards on International Trade

Negative Effects of Private Standards on International Trade

Private standards can be significant trade barriers. They pose a myriad of challenges, arising from financial, technical and institutional constraints, to exporters, especially small-scale producers or exporters in developing countries.⁵⁶ A survey carried out by the WTO Secretariat in 2009 found that most SPS-related private standards were related to food safety. Those cited most often are Hazard Analysis and Critical Control Point (HACCP)⁵⁷ requirements, maximum residue limits for pesticides, hygiene practices for meat and fresh fruits, testing laboratories as well as commodity specific standards such as those on bananas, olive oil, etc. The main entities imposing private standards were large retailers such as supermarkets and hypermarkets and products identified as being most affected were fresh produce including fresh fruit and vegetables and fresh, chilled or frozen meat.⁵⁸

The trade-impeding effects of private standards may arise from either the content of private standards or the ability of exporters to comply with them. In this regard, it is not surprising that the same type of trade-distorting effects that follow the use of public mandatory standards may arise for private standards as well. To begin with, some private standards are *de facto* compulsory in the international market. This is especially the case where a few supermarket chains control the greatest share of the market, making the compliance with their private standards a prerequisite for exporting to a large number of developed country markets.⁵⁹ The choice of whether or not to comply with a voluntary private standard becomes a choice between compliance or be driven out of the market. Those who cannot achieve compliance with private standards will lose market access opportunities and will have to switch to alternative markets.

Furthermore, some private standards exceed not only those of the relevant international standards, but also official national regulations of importing members which are themselves at times more restrictive than the relevant international standards for the same products.⁶⁰ For example, many retailers require significantly lower maximum residue limits (MRLs) for pesticides than those of Codex. Some major

⁵⁶ WORLD TRADE ORG., Effects of SPS- Related Private Standards- Compilation of Replies, G/SPS/GEN/932/Rev.1 (2009).

⁵⁷ HACCP is a system that helps food business operators look at how they handle food and introduces procedures to make sure food produced is safe to eat. See *Hazard Analysis and Critical Control Point (HACCP): How to Manage the Food Hygiene and Safety Procedures in your Food Business*, FOOD.GOV.UK (Dec. 20, 2017), <https://www.food.gov.uk/business-industry/food-hygiene/haccp>.

⁵⁸ WORLD TRADE ORG., *supra* note 56.

⁵⁹ Tetty Havinga, *Private Regulation of Food Safety by Supermarkets*, 28(4) L. & POL'Y 515, 522–23 (2006).

⁶⁰ Thijs Vandemoortele & Koen Deconinck, *When are Private Standards More Stringent than Public Standards?*, 96(1) AM. J. AGRIC. ECON. 154, 154–55 (2014).

German retailers insisted that it would require MRLs to be limited to no more than one third of the EU official requirement.⁶¹ This results in the exclusion of certain producers from the market even though they could meet official national standards or international standards.⁶² In practice, some producers are simply not even aware of relevant international standards and only focus on meeting private standards in their export markets.⁶³ However, such restrictive private standards may have neither scientific justification nor enhanced food safety outcomes for consumers.⁶⁴ Private standards are also usually much more specific about how to achieve certain regulatory goals than is the case with public regulations. Contrary to the “equivalence of risk outcome” approach as laid out in the SPS Agreement, most private standards are management systems characterized by requiring “equivalence of systems,” in the sense that tight controls are required over the *processes* in which products are produced or processed.⁶⁵

The highly restrictive private standards lead to high compliance costs, including both the implementation cost and the cost of certification, which are *additional to* what would be incurred to comply with official regulations. Some of these costs occur only initially while others occur on a regular basis. It is estimated that the average annual certification fee may vary between US\$2,000 to US\$8,000 for a private standard.⁶⁶ As the costs of compliance are always entirely borne by suppliers (farmers, processors and exporters), large numbers of small suppliers who cannot afford such costs are excluded from high value market segments.⁶⁷ To make the situation worse, despite investments needed to obtain certification, compliance with the private standards does not necessarily deliver a price premium. Even if there is a price premium, only a small percentage accrues to producers and most of it is captured by downstream operators in particular retailers.⁶⁸ For example, case studies of certified banana exports from the Dominican Republic and Peru found that less than 20% of the premium accrued to the producing country.⁶⁹

Next, the development process of many private standards is neither participatory nor transparent. Exporters and other stakeholders who are potentially affected by the private standard are either excluded from the standard-setting process entirely or only

⁶¹ GRACE CHIA- HUI LEE Stagiaire, EUR. COMM’N, PRIVATE FOOD STANDARDS AND THEIR IMPACTS ON DEVELOPING COUNTRIES 1, 27 (2006).

⁶² WORLD TRADE ORG., Actions Regarding SPS-Related Private Standards: Communication from Belize, G/SPS/GEN/1374 (Oct. 23, 2014).

⁶³ WORLD TRADE ORG., *supra* note 56.

⁶⁴ Comm. on Sanitary and Phytosanitary Measures, *Submission by the World Health Organization for Animal Health (OIE): Considerations Relevant to Private Standards in the Field of Animal, Health, Food Safety and Animal Welfare*, WTO Doc. G/SPS/GEN/822 (February 25, 2008).

⁶⁵ *Id.*, at 17 – 18; *see also* Fulponi, *supra* note 47, at 7.

⁶⁶ Vera Thorstensen, Reinhard Weissinger and Xinhua Sun, *Private Standards – Implications for Trade, Development, and Governance*, International Centre for Trade and Sustainable Development (ICTSD) E15 Task Force on Regulatory Systems Coherence Think Piece 1, 3 (2015).

⁶⁷ Liu, *supra* note 27, at 6.

⁶⁸ *Id.* at 17.

⁶⁹ Pascal Liu, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, *Certification in the Value Chain for Fresh Fruits: The Example of Banana Industry* 1, 71–85 (2009).

given a consultative role.⁷⁰ The standard-setting process is opaque and information relating to the development and monitoring of standards is rarely available to the public. Overall, information provision is voluntary, selective and based on self-reports. There are no appeal procedures to correct any defects.⁷¹ Clearly, the requirements of private standards would be more relevant if standards developers involve other stakeholders such as suppliers and independent experts when developing a standard. An inclusive and transparent process would make the compliance with private standards less costly and less complicated.⁷²

Finally, and in sharp contrast to the use of harmonised international standards as foreseen in the SPS and TBT Agreement, producers and exporters have to comply with different and potentially conflicting private standards in order to sell to different supply chains. The multiplicity of private standards and the lack of harmonization among them increases the complexity of requirements applicable in a certain sector as well as the compliance and certification costs.⁷³ Recently, the harmonization and mutual recognition of private standards has been occurring at a much faster rate than before. For example, eight international retailers accepted the GFSI benchmarking of seven major food safety schemes. If a supplier has been certified under one of these food safety schemes, it does not have to be certified under the others to be able to supply any of the eight retailers (“one certified, accepted everywhere”).⁷⁴

Positive Effects of Private Standards on International Trade

Despite the fact that the predominant discourse on the trade effects of private standards has focused on how they may act as trade barriers, it is also widely recognised that private standards, alongside the regulatory requirements of export markets, can facilitate international trade.⁷⁵ Similar to public regulations, private standards are viewed, at least in part, as a necessary bridge between increasingly demanding consumer requirements and the participation of international suppliers. Private standards provide a common language in supply chains, reducing transaction costs, satisfying evolving consumer demands and promoting consumer confidence in the safety and quality of traded products even if there is no price premium, without which the market for certain products could not be enhanced.⁷⁶

Moreover, compared to government programmes, private standards can be more effective in improving hygiene and safety for farmers and processors in developing countries. Private standards normally provide detailed requirements for every step of the production and processing chain, and a direct incentive to meet these requirements. They reach down to the level of each individual producer or processing plant, avoiding

⁷⁰ Doris Fuchs et al., *Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation*, 28 AGRIC. & HUM. VALUES 353, 362 (2011).

⁷¹ WORLD TRADE ORG., *supra* note 56, para 37.

⁷² Liu, *supra* note 69, at 15.

⁷³ Gretchen H. Stanton, *Food Safety-related Private Standards: The WTO Perspective*, in Axel Marx et al (eds), *supra* note 11, at 242.

⁷⁴ WORLD TRADE ORG., *supra* note 56, para 46.

⁷⁵ Steven Jaffe, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, WORLD BANK, Report No. 31207 xi–xii (2005).

⁷⁶ Spencer Henson & Steven Jaffee, *Understanding Developing Country Strategic Responses to the Enhancement of Food Safety Standards*, 31(4) THE WORLD ECON. 548, 552 (2008).

some of the delays and problems of more general national or regional programmes.⁷⁷ As a result, private standards lead to more standardized farming, processing, and packaging activities, promoting productivity and predictability, and facilitating compliance with international standards.⁷⁸

Most significantly, some developing countries could utilize potential opportunities offered by the rise of private standards to their competitive advantage. In the real world, where private standards predominate, the key issue for any exporter is to gain access to a buyer's supply chain. If exporters do gain access to these supply chains, the benefits in terms of long-term trade relations through systems of "preferred suppliers" can be significant.⁷⁹ From this perspective, the challenges associated with compliance with strict private standards can be fundamental catalysts for developing countries to upgrade infrastructure and facilities, build capacity and modernize export supply chains, which in turn provide opportunities to position themselves strategically in key export markets. Empirical evidence confirms that farmers/producers who manage to comply with private standards maintain a stable presence in a number of major export markets and possibly expand their market share, while those who cannot are displaced.⁸⁰ For example, it is well documented in the literature how Kenya has positioned itself as a globally competitive exporter of fresh and processed vegetables through concerted efforts to upgrade food safety capacity in line with GlobalGAP.⁸¹ Moreover, empirical studies show that through increased attention to the spread and adoption of good practices in the supply of products to export markets, there may be spillover effects into domestic market, including better wages and employment opportunities in the agro-industry, to the benefit of the local population and domestic producers.⁸² Thus, the associated costs of compliance with private standards may be at least partially offset by an array of benefits.

IV. THE STATUS OF PRIVATE STANDARDS UNDER THE WTO LAW: A LEGAL ANALYSIS

Possible Attribution of Private or Hybrid Standards to Government

As an international treaty, the WTO Agreements primarily regulate government conduct, not conduct of private parties. Consequently, only actions (or omissions) by WTO Members can be challenged in the WTO dispute settlement system. Nevertheless, it is well established in WTO jurisprudence that private actions may nevertheless be attributable to a government because of some governmental

⁷⁷ Stanton, *supra* note 73, at 242.

⁷⁸ World Trade Org., *supra* note 56.

⁷⁹ Catherine Dolan & John Humphrey, *Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticulture Industry*, 37(2) J. DEV. STUD. 147, 169 (2000).

⁸⁰ Steven Jaffee & Spencer Henson, *Standards and Agri-food Exports from Developing Countries: Rebalancing the Debate*, WORLD BANK, Policy Research Working Paper 3348 1, 37–38 (2004).

⁸¹ Steven Jaffee, *From Challenges to Opportunities: Transforming Kenya's Fresh Vegetables Trade in the Context of Emerging Food Safety and Other Standards in Europe, Agriculture and Rural Development*, WORLD BANK, Discussion Paper No.2 at 59 (2003).

⁸² Maertens and Swinnen, *supra* note 11, 153–169.

connections to or endorsement of those actions.⁸³ If a private standard is deemed to be a governmental (public) standard, then the WTO Member in question will be fully responsible for its compliance with the WTO disciplines. In *Japan – Film*, the panel commented:

. . . the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental *if there is sufficient government involvement with it*. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.⁸⁴

The main concern in this respect is that a WTO Member, faced with stringent disciplines under the WTO Agreements, may choose to circumvent them by instructing or simply allowing private entities to carry out activities normally prohibited.⁸⁵ As noted by the WTO Secretariat, possible examples in which attribution may occur include where a government authority decides to incorporate a standard developed by a private body into its SPS regulation, or a government permits the entry of imports that are certified to comply with a private standard that incorporates or even exceeds the official SPS requirements.⁸⁶

In light of *Japan – Film*, if private standards are rendered mandatory by government support or the government's role in the development and application of the standards then they may be attributable to the government. This possibility of ascribing what appear on their face to be private standards to the government is of particular significance since the boundary of public and private standards has increasingly blurred.⁸⁷ It should also be noted that the rule of attribution is independent of any specific obligations that a WTO Member or a non-governmental entity might bear under the WTO Agreements, such as Article 13 of the SPS Agreement to be discussed below.

Precisely under what circumstances will private conduct, such as the application of a private standard by a non-governmental entity, trigger the application of WTO rules and render a WTO Member liable to its trading partners? In *Japan – Semiconductors*, a GATT panel held that two criteria are key to the attribution analysis: whether there were reasonable grounds to believe that sufficient incentives or disincentives by the government existed for the measures to take effect and whether the operation of the measures was essentially dependent on government action or intervention.⁸⁸ The first inquiry is understood as a refined version of the effectiveness test first outlined in *Japan – Agricultural Restrictions*, in which the panel held that the term “the enforcement of *governmental measures*” should be understood as requiring that the

⁸³ World Trade Org., *United States: Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R para. 81 (Jan. 9, 2004); WORLD TRADE ORG., *Japan: Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.52, WTO Doc. WT/DS44/R, para. 10.51 (Apr. 22, 1998) [hereinafter *Japan-Film Panel Report*] ¶ 81, WTO Doc.

⁸⁴ *Japan-Film Panel Report*, *supra* note 83, ¶ 10.56.

⁸⁵ Santiago M. Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied within the WTO Dispute Settlement System*, 5 J. INT'L ECON. L. 393, 408 (2002).

⁸⁶ Note by the Secretariat, *supra* note 3, ¶ 17.

⁸⁷ Henson & Humphrey, *supra* note 37, at 1641.

⁸⁸ Report of the Panel, *Japan-Trade in Semiconductors*, ¶ 109, L/6309, (May 4, 1988), GATT BISD 116 (35th Supp.) at 29 (1988).

measures have to be governmental and that the drafters were primarily concerned with the effectiveness of the measures.⁸⁹ Arguably, the effectiveness could be discerned from an examination of the incentives or disincentives offered by the government associated with the compliance of a private measure.⁹⁰ In addition, societal structure, cultural expectations and other circumstances, which help shape incentives or disincentives in a particular society, play an important role when evaluating the effectiveness of the private measure. For instance, given the deferential disposition of the private sector to the wishes of governmental authorities in Japan, the panel in *Japan – Agricultural Restrictions* found that the measures at issue proved as effective as legally mandatory directives.⁹¹

The second inquiry focuses on the level of government involvement in the private action. The panel in *Japan – Film* required *sufficient* government involvement to render a private action a governmental action. However, it remains unclear how “sufficient” ought to be determined in practice. As the panel highlighted, it could only be determined on a case-specific basis. The panel held in *Japan – Film* that the conditions were met when it found that the Japanese government collaborated with the photographic film and paper industry in formulating the practices at issue and then endorsed such practices once developed.⁹² The panel also stated that it would be insufficient to merely prove the government provision of some organizational assistance, including the provision of initial start-up funds, or simple government expression of hope that a private measure be respected and observed by those to whom they were made applicable.⁹³ From the panel’s approach in *Japan – Film*, to render an otherwise private standard governmental, it would seem essential that the government plays a role in developing and then providing its stamp of approval on the standard under scrutiny, or evidence of some other sort of involvement showing actual contribution to the creation of the standard, accompanied by expressions of government support.⁹⁴

Other than the general attribution principle articulated in the GATT/WTO jurisprudence discussed above, the SPS Agreement and the TBT Agreement contain far more specific provisions addressing standards developed and implemented by non-governmental entities. The next two parts will turn to explore the applicability of these provisions to private standards.

Private Standards in the SPS Agreement

Do Private Standards fall within the Scope of the SPS Agreement?

When the adverse trade impact of GlobalGAP (then EurepGAP) was first raised in the SPS Committee in 2005, the EC simply responded that GlobalGAP was not an official EC body, and that any GlobalGAP standards should not be viewed as EC

⁸⁹ Report of the Panel, *Japan–Restrictions on Imports of Certain Agricultural Products*, ¶ 5.4.1.4, L/6253, (Nov. 18, 1987), GATT. BISD 163 (35th Supp.), at 61–62 (1988) [hereinafter GATT Panel Report, *Japan–Agricultural Restrictions*].

⁹⁰ Zadalis, *supra* note 7, at 343.

⁹¹ GATT Panel Report, *Japan–Agricultural Restrictions*, *supra* note 89, ¶ 5.4.1.1.

⁹² *Japan–Film Panel Report*, *supra* note 83, ¶ 10.176–10.180.

⁹³ *Id.* ¶ 10.190–10.194.

⁹⁴ See Zadalis, *supra* note 7, at 346.

requirements.⁹⁵ The EC's position simply reflects a long-held view that exclusive private actions independent of government intervention are not regulated by WTO rules.⁹⁶ Indeed, most provisions of the SPS Agreement, including the preamble and the basic rights and obligations in Article 2, explicitly refer to the rights and obligations of WTO Members, suggesting that the SPS Agreement deals exclusively with WTO Members' actions. Moreover, in *EC – Biotech Products*, the panel held that the form of an SPS measure can only be “laws, decrees or regulations”, i.e., governmental acts.⁹⁷

As China argued, the major difficulty with this position is that it is not unambiguously supported by a textual reading of the relevant SPS texts.⁹⁸ It appears that Article 1.1 of the SPS Agreement “applies to all SPS measures directly or indirectly affecting international trade, without explicitly limiting this application to SPS measures taken by governmental authorities.”⁹⁹ Annex A (1) of the SPS Agreement further defines SPS measures as including all relevant laws, decrees, regulations, requirements and procedures applied to protect human, animal or plant life or health from specified risks. Likewise, neither the definition nor illustrative list of SPS measures excludes measures imposed by private entities. Furthermore, it is not clear on what basis the panel in *EC – Biotech Products* considered that an SPS measure could only take the *form* of a governmental act. A textual reading of the second paragraph of Annex A (1) does not explicitly lead to such a distinction between the form element and the nature element.¹⁰⁰

Nevertheless there is additional circumstantial evidence supporting the argument that SPS-related private standards with no governmental links do not fall under the legal definition of SPS measures. First, Annex A (1) of the SPS Agreement refers to SPS measures as “all relevant laws, decrees, regulations, requirements and procedures.” Though there is no relevant case law under the SPS Agreement, all past GATT/WTO panel reports interpreted these terms, including the term “requirement,” under Article III:4 of the GATT as demanding some degree of government involvement.¹⁰¹ Second, the emergence of private standards largely postdates the negotiation of SPS Agreements in 1980s. Thus the trade law issues related to private standards were simply unforeseen by the drafters of the SPS Agreement.¹⁰²

Finally, the regulatory scope of the SPS Agreement may also be considered in light of the objective and purpose of the SPS Agreement. If we understand the objective of

⁹⁵ Christiane Wolff and Michael Scannell, Implication of Private Standards in International Trade of Animals and Animal Products” Paper for 76th General Session of World Organization for Animal Health, at 2., 76 SG/10 (May 25–30, 2018).

⁹⁶ Switzerland, *supra* note 5, ¶ 7–8.

⁹⁷ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Biotech)*, WT/DS291/R, ¶ 7.149, 7.162. (adopted Nov. 21 2006).

⁹⁸ Summary of the SPS Committee Meeting of 30 June – 1 July 2016, ¶ 13.7, Note by the Secretariat, WTO Doc. G/SPS/R/83 (Aug. 9 2016).

⁹⁹ Note by the Secretariat, *supra* note 3, ¶ 15.

¹⁰⁰ Alessandra Arcuri, *The TBT Agreement and Private Standards*, in (eds), RES. HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 485,516 (Tracey Epps and Michael J. Trebilcock eds., 2013).

¹⁰¹ WTO Analytical Index, GATT 1994 – Article III (Jurisprudence), at 56–57, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art3_jur.pdf.

¹⁰² Submission by the United Kingdom, Private Voluntary Standards within the WTO Multilateral Framework, ¶ 25, G/SPS/GEN/802 (Oct. 2007).

the SPS Agreement as to achieve a balance between the sovereign right of WTO Members to protect health in their territories, and the need to prevent protectionism under the guise of SPS regulation, the application of its disciplines to private sector bodies would not seem to further this objective. There is no evidence showing that private standards are motivated by protectionism. Their actions may raise concerns in the area of anticompetitive practices such as abuse of dominant position, but SPS Agreement is not designed to address such a problem.¹⁰³ On the other hand, if we understand the objective of the SPS Agreement as to eliminate all unnecessary barriers to trade, then a strong argument may be made that private standards fall within the ambit of the SPS Agreement. On this point, it is frequently argued that this is not the object and purpose of the SPS Agreement.¹⁰⁴

Article 13 of the SPS Agreement

Even if private SPS standards fall within the definition of SPS measures, the application of the SPS Agreement would have to take place through the mediation of WTO Members because the WTO law generally does not have direct legal effect in a Member's domestic legal order. A key provision in the SPS Agreement directly relevant to private standards is Article 13, which provides:

Members shall formulate and implement *positive measures* and mechanisms in support of the observance of . . . the 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 . . . 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.

Three key terms in Article 13 need to be clarified. First, do the terms “*other than central government bodies*” and “*non-governmental entities*” cover private standards-setting bodies and private standards-applying economic actors such as retailers and supermarkets? If they are covered, then WTO Members have a legal obligation to take positive or reasonable measures to ensure that they comply with the SPS Agreement. It is important to note here that the SPS Agreement does not impose obligations directly on entities other than central government bodies or non-governmental entities *themselves* but on WTO Members. The obligations contained therein apply irrespective of whether private standards setters and users have accepted the SPS Agreement.

With regard to “*other than central government bodies*”, three types of organizations could potentially be included: regional bodies, non-governmental entities and local

¹⁰³*Id.* at 91–92.

¹⁰⁴Boris Rigod, *The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*, 24 EUROPEAN J. OF INT'L L. 503 (2013), at 529–530.

government bodies.¹⁰⁵ Given that Article 13 contains a more specific obligation directly relating to non-governmental entities, “other than central government bodies” should be narrowly interpreted as including only the other two categories. In *Australia – Salmon* 21.5 panel report, the panel held that sanitary measures taken by the state government of Tasmania, being an “other than central government” body as recognized by Australia, are subject to the SPS Agreement.¹⁰⁶

The meaning of “non-governmental entities” in Article 13 is not defined in the SPS Agreement, nor is there any WTO case law offering much guidance. Some suggested that useful reference might be made to a similar definition contained in the sister TBT Agreement.¹⁰⁷ Annex 1.8 of the TBT Agreement defines “non-government body” as “Body other than a central government body or a local government body, *including* a nongovernmental body which has legal power to enforce a technical regulation”. One commentator commented:

Although this definition is rather vague and open-ended, it is possible to argue that, in the light of the context and purpose of the SPS and TBT Agreements, “non- governmental entities” are not individual economic operators (or their associations) but rather private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special status as regards the development and implementation of SPS/TBT rules.¹⁰⁸

This narrow reading of “non-governmental entity” not only echoes the traditional view that the WTO law does not regulate private market behaviors with no governmental interference, but also seems to be congruent with the negotiation history of the SPS Agreement. Private standards were quite rare in the 1980s and the WTO negotiators never anticipated the application of the SPS Agreement to private standards during the Uruguay Round.¹⁰⁹ They were more concerned with WTO Members’ evasion of the SPS disciplines by developing SPS requirements through independent agencies or regional networks of regulators with government links. Since these agencies and networks operate independently of government in many WTO Members, they may be regarded as non-governmental entities.¹¹⁰ However, these standards play a pivotal role in the market place and in some areas such as food safety they are frequently incorporated in national regulation.

This narrow reading of “non-governmental entities” dovetails well with a systemic and harmonious interpretation of the relationship between Annex A (1) and Article 13 of the SPS Agreement. Arcuri argues that the prerequisite of the application of Article 13 is that the measure at issue falls within the purview of the SPS Agreement because Article 13 only applies to SPS measures as defined in Annex A (1). If one takes the view that private SPS standards fall outside the scope of the SPS Agreement, then it

¹⁰⁵ *Submission by the United Kingdom*, *supra* note 102, at 54.

¹⁰⁶ *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, ¶ 7.13 (adopted 20 March 2000) [hereinafter *Australia - Salmon*].

¹⁰⁷ Stagiaire, *supra* note 48, at 34-35; Henson, *supra* note 49, at 76.

¹⁰⁸ Joost Pauwelyn, *Non- Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOC. REG. 199, 210 (Christian Joerges and Ernst U Petersmann ed., 2006).

¹⁰⁹ *Submission by the United Kingdom*, *supra* note 102, at 78.

¹¹⁰ Prevost, *supra* note 8, at 19–20.

becomes unnecessary to discuss the application of Article 13 to them.¹¹¹ If this reading is correct, then it only makes sense if the scope of “non-governmental entities” is restricted to those private entities which have been delegated with certain governmental functions since only then the private SPS standards approved or implemented by non-governmental entities could meet the criteria of SPS measure defined in Annex A (1).

However, a narrow interpretation of “non-governmental entities” is not well supported by a textual reading of the relevant provisions. It is clear that the use of the word “including” in Annex 1.8 of the TBT must be taken to mean that the provision is only providing an example of what may constitute a “non-governmental body”. By implication, it acknowledges the existence of non-governmental bodies which do not have the legal power to enforce a product standard. Therefore, it could be argued that “non-governmental entity” under the SPS Agreement also includes other private bodies that have not been trusted by government with certain tasks, but which operate or are established within the territories of a Member, including both standard- setting and standard- applying organizations.¹¹²

In summary, though the argument that Article 1.1, Annex A (1) and Article 13 only cover governmental and quasi-governmental SPS measures is highly plausible, it is not conclusive. An alternative interpretation could be that Article 13 is independent of Annex A(1) of the SPS Agreement. Whereas Annex Article 1.1 and Annex A (1) *may* refer only to government acts, Article 13 may well extend WTO Members’ obligation to monitor private SPS standards from all non-governmental entities. In *Australia – Salmon*, the panel held that the term “measure” contained in Article 1.1 SPS must be construed in light of the obligation contained within Article 13.¹¹³ It could at least be argued that a narrow reading of non-governmental entities is not completely justified by a textual analysis of the SPS Agreement.

The second question is, *assuming* that all private standards-setters are “non-governmental entities” covered by Article 13, what are “reasonable measures” that WTO Members are obliged to take? In the first place, it should be noted that this is a best-endeavor obligation rather than an obligation of outcome, in the sense that the limits of the obligations a WTO Member bears must take into account various factors which may be member-specific.¹¹⁴ For example, such a determination must take into account the legal and constitutional arrangements of a particular WTO Member. What is reasonable for one WTO Member, for example, because the central government has legal authority to coerce private standards setters, may not be reasonable for another member that has different legal and constitutional arrangements.¹¹⁵

Some suggested that inspiration may be drawn from Article XXIV:12 of the GATT 1994, which imposes a similar obligation on WTO Members to “take such reasonable measures as may be available” to ensure compliance with the GATT by regional and

¹¹¹Arcuri, *supra* note 100, at 518.

¹¹²Donal Casey, *Private Food Safety and Quality Standards and the WTO*, 7 U. C. DUBLIN L. REV. 65 (2007), at 81-82; Samir R Gandhi, *Regulating the Use of Voluntary Environmental Standards within the World Trade Organization’s Legal Regime: Making a Case for Developing Countries*, 39 J. OF WORLD TRADE 855 (2005), at 867-68.

¹¹³Panel Report, *Australia – Salmon*, *supra* note 106, ¶ 7.13.

¹¹⁴Jan Wouters and Dylan Geraets, *Private Food Standards and the World Trade Organization: Some Legal Considerations*, 11 WORLD TRADE REV. 479, 486 (2012).

¹¹⁵*Submission by the United Kingdom*, *supra* note 102, at 33.

local governments and other authorities within its territories. In *Canada – Gold Coins* (1985), the GATT panel held that, first, it would be for the Contracting Parties, not the defendant Canadian government, to decide whether Canada had met its obligations to take “reasonable measures”; and second, the basic principle in determining which measures are “reasonable” for purposes of this article, the consequences of the non-observance of the provisions of the GATT by local government for trade relations with other contracting parties “are to be weighed against the domestic difficulties of securing compliance.”¹¹⁶ The GATT Panel in *Canada – Alcoholic drinks* (1992) further held that to examine whether Canada had demonstrated that it had taken all reasonable measures available, Canada would have to show that “it had made a *serious, persistent and convincing effort* to ensure compliance . . . with the provisions of the GATT Agreement.”¹¹⁷

It is not clear to what extent the GATT panels’ findings on “reasonable measures” as embodying an onerous positive duty in Article XXIV:12 GATT are relevant in the context of Article 13 of the SPS Agreement. The key difference between these two provisions is clear: while GATT Article XXIV:12 addresses a Contracting Party’s obligation regarding regional and local governments which exercise governmental authority, Article 13 deals with non-governmental entities. It seems logical that while a higher level of central government intervention may be regarded as “reasonable” in the case of regional and local governments, or with respect to some non-governmental entities with substantial government links, it may be inappropriate in the case of non-government organizations or private economic actors without such links.¹¹⁸ Otherwise it would put SPS measures adopted by non-governmental entities with no government links in the same position as governmental SPS measures. This will be contrary to the requirement of WTO Members taking only “reasonable measures” to ensure compliance. At any rate, it would appear inappropriate to require that WTO Members enact legislation obliging all private bodies to comply with the SPS Agreement.

Finally, *assuming* that private standards are covered by the SPS Agreement and that WTO Members have a positive obligation to ensure that all non-governmental entities, including retailers and industry consortium, comply with “relevant provisions” of SPS Agreement, what are these relevant provisions? For the TBT Agreement, Article 4.1 makes it clear that all recognized non-governmental standardizing bodies should follow the CGP. However, there is no corresponding part of CGP in the SPS Agreement. It may be argued that “relevant provisions” do not refer to all provisions of SPS Agreement. Otherwise it would result in a set of absurd and disproportionate requirements on non-government bodies.¹¹⁹

Private Standards in the TBT Agreement

Are Private Standards Covered by the TBT Agreement?

The SPS Agreement only applies to SPS measures as defined in Annex A (1). Given that many private standards pursue objectives not covered by the SPS Agreement such

¹¹⁶Report of the Panel, *Canada–Measures Affecting the Sale of Gold Coins*, ¶ 68–69, L/5863 (Sept. 17, 1985) (unadopted).

¹¹⁷Report of the Panel, *Canada–Import Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, ¶ 5–37, DS17/R (Feb. 18 1992), GATT.

¹¹⁸Prevost, *supra* note 8, at 23.

¹¹⁹*Submission by the United Kingdom*, *supra* note 102, at 57.

as environmental protection, ethical issues and labor standards, elements of these standards would potentially fall within the TBT Agreement.¹²⁰ To apply the TBT Agreement, a threshold question is whether private standards fall within the definition of “standard”. If not, whatever trade effects of these schemes would not be of concern to the WTO. Annex 1 (2) of the TBT Agreement defines ‘standard’ as:

Document approved by a *recognized body*, that provides, for common and repeated use, rules, guidelines or *characteristics for products or related process and production methods*, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

To meet the definition of “standard”, three elements must be met. First, the standard must be approved by a “recognized body”. Second, it must provide rules, guidelines or characteristics for product or related PPMs. Third, the compliance with a standard is not mandatory.

From the definition above, the most important element is whether the non-governmental body that approved a private standard is a *recognized body*. There should be no doubt that both a government body (be it central, local or regional) and a non-governmental body could be a “recognized body” for the purpose of Annex 1 (2). Furthermore, some “classical” non-governmental standardizing bodies at both international level, such as ISO and IEC, and national level, such as the ANSI and the European Standards Organizations are “recognized bodies”.¹²¹ However, given that there is no definition of “recognized body”, or any features that a “recognized body” should possess, whether a particular non-governmental body other than the classical non-governmental standardizing bodies is a “recognized body” for the purpose of the TBT Agreement is anyone’s guess.

It was suggested that useful reference might be drawn from the WTO Appellate Body’s interpretation of “recognized activities” in *US – Tuna II*.¹²² For the purpose of the TBT Agreement, the AB held that the evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant.¹²³ Contrarily, some argued,¹²⁴ evidence of recognition by the market and industry would not suffice. The meaning of the term “recognize,” as the Appellate Body reasoned, ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something). The factual and normative dimension of the concept of “recognition” constitute cumulative requirements.¹²⁵ The factual dimension of “recognition” would appear to require, at a minimum, that a WTO Member is aware, or has reason to expect,

¹²⁰Technical Barriers to Trade Agreement Art. 1. 5, Jan. 1, 1995.

¹²¹Arcuri, *supra* note 100, at 502; Panagiotis Delimatsis, “*Relevant International Standards*” and “*Recognized Standardization Bodies*” under the TBT Agreement, THE LAW, ECON. & POL. INT’L STANDARDIZATION 104, 127 (2015).

¹²²Delimatsis, *supra* note 121, at 128.

¹²³*US – Tuna II*, *supra* note 32, ¶ 363.

¹²⁴CIEL & ISEAL, “International Standards and Technical Barriers to Trade”, R053- Legal Opinion Summary (July 2006), https://www.ciel.org/wp-content/uploads/2015/03/ISEALCIEL_Legal_Opinion_TBTR053_Jul06.pdf.

¹²⁵*US – Tuna II*, *supra* note 32, ¶ 361.

that the body in question is engaged in standardization activities.¹²⁶ For the normative dimension of the concept, a WTO Member's participation in the standardizing body's standardizing activities or the recognition of the resulting standard could suggest that the body's activities are recognized.¹²⁷ It is not necessary that the preparation and adoption of standards is a principal function of a recognized body. Finally, it would be easier for a standardizing body to be recognized if it has complied with the TBT Committee Decision on Principles for the Development of International Standards.

If the AB's interpretation of "recognised activities" offers any useful guidance to the interpretation of "recognised bodies," it is that for a private standard to meet the definition of "standard" in the TBT Agreement, the non-governmental entity that approves the standard must be *recognised* by WTO Members. The link of WTO Members' official recognition is critical in the determination of whether the TBT Agreement is applicable to a specific private standard. It further leads to the conclusion that such a determination must be made on a case-by-case basis as non-governmental entities differ and WTO Members view them differently. It also appears that there is a clear distinction between a WTO Member recognizing the existence of a non-governmental entity and standards it develops and the attribution of the standard to a WTO Member. The latter demands a much higher level of government involvement as discussed in part IV.1 above.

Applying this analytical framework to private standards, it is unlikely that private standards with little or no governmental involvement or endorsement fall within the definition of "standard" in the TBT Agreement. A "recognized body" cannot be interpreted as any body that is legally registered and operates its business in a lawful manner, as this overly broad interpretation will deprive the meaning of "recognised body". In this regard, it is interesting to note that in the Annex 1 of the final text of Standards Code after the Tokyo Round, an Explanatory Note provides that the definition of "standard" does not cover technical specifications prepared by an individual company for its own production or consumption requirements. The note, however, was dropped from the TBT draft in the Uruguay Round and was not included in the final TBT text.¹²⁸ It was not clear why this important clarification was dropped. Nevertheless, it is not convincing to argue that such an omission may indicate that the Members wanted to leave the concept of "standard" more open-ended to include standards developed or implemented by retailers or distributors as explained above.

Article 4.1 of the TBT Agreement

Under Article 4.1 of the TBT Agreement, WTO Members are obliged to take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with the Code of Good Practice (CGP) for the Preparation, Adoption and Application of Standards. Moreover, WTO Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the CGP. Similar to Article 13 of the SPS Agreement, what constitutes "non-

¹²⁶*Id.* at 362.

¹²⁷*Id.* at 392.

¹²⁸Comm. on Trade and Environment & Comm. on Technical Barriers to Trade, *Note by the Secretariat: Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WTO Doc. WT/CTE/W/10 (Aug. 29, 1995).

governmental standardizing bodies” and “reasonable measures” is undefined. All the complexities that were explored with regard to Article 13 of the SPS Agreement in section IV.2.2 above are relevant to the interpretation of Article 4.1 of the TBT Agreement as well.

Nevertheless, there is one crucial difference between the TBT and the SPS Agreement. WTO Members are specifically required under the TBT Agreement to ensure acceptance and compliance with the CGP by non-governmental bodies. By contrast, there is no such special annex addressing standards by non-governmental entities in the SPS Agreement.¹²⁹ It should also be noted that the CGP does not impose obligations directly on non-governmental standardizing bodies themselves but on WTO Members. The obligations contained therein apply to a WTO Member irrespective of whether or not non-governmental standardizing bodies within its territory have accepted the CGP.

The CGP is designed to regulate all voluntary standards. It is open to acceptance by all standardizing bodies within a WTO member, whether at the central, local or non-governmental level. Standardizing bodies that accept the CGP assume many obligations that also apply to mandatory technical regulations, including transparency and stakeholder participation, non-discrimination, least-trade restrictiveness, use of international standards as benchmarks, avoidance of duplication or overlap with the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies, and performance-based standards instead of design-based standards. There are proven good practices in standard setting that are particularly useful and relevant to private standards developed at the national and regional levels. For those private standards claiming to be international standards or to have international influence, the Decision adopted by the TBT Committee on principles for the preparation of international standards in November 2000 is particularly relevant. This decision clearly stipulates that when international standards are elaborated, the principles of transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and development dimension (“Six Principles”) should be observed.¹³⁰

In practice, WTO Members have been reluctant to pressure private bodies to comply with the CGP.¹³¹ Nevertheless, many non-governmental standard-setting bodies that aspire to make their standards recognized by the WTO are engaged in increasingly proactive efforts to show that they developed their standards through open, transparent and accountable processes. They voluntarily comply with, or even go beyond, the specific requirements of the CGP and Six Principles where appropriate. For example, the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance’s Code of Good Practice, which defines effective standards-setting processes for social and environmental standards, is based on the CGP and Six Principles.¹³²

¹²⁹Erik P. Bartenhagen, *The Intersection of Trade and the Environment: An Examination of the Impact of the Technical Barriers to Trade Agreement on Ecolabeling Programs*, 17 VA. ENVTL. L.J. 51, 72 (1991).

¹³⁰Comm. on Sanitary and Phytosanitary Measures, *Communication from China: Actions Regarding SPS-related Private Standards*, WTO Doc. G/SPS/GEN/1261 (July 8, 2013).

¹³¹Steven Bernstein and Erin Hannah, *Non-state Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT’L ECON. L. 575 (2008), at 588.

¹³²ISEAL Alliance, *Setting Social and Environmental Standards: ISEAL Code of Good Practice* (Dec. 2014).

In summary, a legal analysis of the relevant WTO law yields few definitive answers. Though it is unequivocal that standards developed by certain national and international non-governmental entities that are recognized by WTO Members or enjoy a special link with a WTO Member's government are covered by the TBT and SPS Agreement, it is less clear to what extent they are applicable to standards developed by non-governmental entities that do not enjoy such special links governments. The discussions at the SPS and the TBT Committees demonstrate that WTO Members hold divergent views on these issues and it is unlikely that a consensus will be reached any time soon.

V. THE NORMATIVE DIMENSION OF PRIVATE STANDARDS IN THE MULTILATERAL TRADING SYSTEM

Is there a normative case for WTO Oversight of Private Standards?

As could be seen from the discussions above, the legal analysis could not take us very far in delineating the role of the WTO in regulating private standards. A more fundamental question thus emerges: is there a normative case for the WTO to regulate private standards? Why isn't it a desirable option to leave private standards unregulated as they are simply normal commercial practices in a free market? The starting point to answer this question is to appreciate the growing concerns of developing countries over the profound impact of private standards on international trade and international standardization harmonization. As detailed in part II of this paper, private standards play an important governance role in international trade and their far-reaching consequences affect a wide range of actors, in particular small producers from developing countries. Despite their trade restrictive effects, the multilateral trade regime does not govern them effectively. Moreover, the proliferation of private standards has undermined the process of international harmonization of standards, introducing a new layer of governance that further fragments national markets with which exporters must comply. As Argentina forcefully pointed out in the SPS Committee:

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 in which to advocate some rationalization of these standards, twenty years of discussions in international fora would have been wasted.¹³³

Argentina's concerns are fully shared by the OIE, an intergovernmental organization officially recognized in the SPS Agreement as an international reference point of relevant international standards on animal health and safety. The OIE warned that private standards may undermine the science-based and democratically adopted

¹³³Comm. on Sanitary and Phytosanitary Measures, *Note by the Secretariat: Summary of the Meeting Held on 29-30 June 2005*, G/SPS/R/37/Rev.1 (Aug. 18, 2005).

standards of public international organizations and there is reason to believe that “many private standards are not consistent with SPS obligations.”¹³⁴

These concerns have triggered a heated debate over the legitimacy of private standards as a governance tool in international trade. If compliance with a private standard has become a precondition for access to important markets, the private standard in question has direct effects on actors who are obliged to adopt it. Naturally there will be concerns about the private standard along the same lines as government regulations, such as is it proportionate to the risk, is it scientifically-based, is it adopted through a democratic and open process and is the burden of compliance distributed fairly?¹³⁵ In the case of public regulations, it could be argued that there exists a “double accountability” guarantee. Governments are accountable to both their citizens and to the WTO.¹³⁶ There are multilateral rules governing standard setting, obligation of notification, provision of information and mechanisms for dispute settlement. By contrast, applying various indicators including participation, transparency, responsiveness and accountability in evaluating a range of private standards, researchers found that they are either lacking or in need of major improvement.¹³⁷ The case study of GLOBALG.A.P., for example, confirms that it still views itself as a private actor essentially accountable only to its direct constituencies, and not necessarily to the general public such as representatives of consumers, producers and exporters from developing countries, environmental and labor organizations.¹³⁸

Admittedly, many of the accusations leveled against private standards are debatable. For instance, despite their negative trade effects on some producers, it is also uncontroversial that private standards have made positive contribution to enhanced food safety and quality in the food supply chain. A systemic review of the relevant literature shows that overall producers tend to be better off financially when participating in private standards schemes. Indirect positive effects, including better relationships with buyers, marketing guarantees, enhanced quality and increased yields, technical support and training as well as increased access to credit, can even outweigh direct financial impact of private standards.¹³⁹ As existing empirical studies have applied different theoretical approaches and diverse methodologies to very different commodities and geographic contexts, great caution has to be taken when drawing any macro-level conclusions.¹⁴⁰ Nevertheless, there is ample evidence supporting the argument that private standards do indeed result in a positive social, economic and environmental impact and a better livelihood for producers and their surrounding community. The positive impact of private standards may actually

¹³⁴Comm. on Sanitary and Phytosanitary Measures, *supra* note 64.

¹³⁵Fuchs et al., *supra* n 70, at 353–367; Nicolas Hachez & Jan Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GLOBALG.A.P.*, 14 J. INT’L. ECON. L. 677, 677–710 (2011).

¹³⁶Liu, *supra* note 27, at 15.

¹³⁷Fuchs et al., *supra* note 70, at 364–365.

¹³⁸Hachez & Wouters, *supra* note 135, at 710.

¹³⁹International Trade Centre [ITC], *The Impact of Private Standards on Producers in Developing Countries: Literature Review Series on the Impacts of Private Standards – Part II*, at 23–24, ITC Doc. MAR-11-201.E (2011).

¹⁴⁰ISEAL, *State of the Art in Measuring the Impacts of Social and Environmental Standards* (2008), at 5.

outweigh the costs to comply with them.¹⁴¹ Therefore, observing the issue merely from a trade and development perspective may lead to an incomplete conclusion on the costs and benefits of private standards as a mode of governance.¹⁴²

Moreover, it is far from a foregone conclusion that the rise of private standards has necessarily undermined the public regulation, including international standards adopted by intergovernmental standardizing organizations. In this regard, it is important to ascertain whether the relation between governmental and private schemes is competitive or complementary.¹⁴³ On the one hand, public and private governance mechanisms may overlap as potentially competing regulatory spheres at the transnational level. On the other hand, the existing research suggests that by and large private standards are considered to be complementary to, rather than a substitute for, public standards. In many cases private standards build on the existing public standard infrastructure. The public standards or norms usually establish the minimum requirements for food products and the results to be achieved, while private standards translate public standards into specific tools and operationalizing processes, laying out a road map followed by private firms in order to meet and often exceed these regulatory obligations and international standards.¹⁴⁴ The higher requirements of private standards not only provide additional security against non-compliance with regulatory requirements and the erosion of brand capital, but also act as an important strategy for private firms to differentiate their products, achieve market segmentation, signal such changes to consumers and maintain a competitive positioning in the market.¹⁴⁵

Of course, private standards do not confine themselves to areas where public regulations have defined the requirements, they can also “fill a void” as a substitute for missing or ineffective public regulations. For example, private standards may extend to ethical trade, environmental impact and social accountability that are not covered or not effectively governed by public regulation. In addition, it has been reported that private standards developed by some multinational food retailers for their home markets have been applied in less developed countries where public regulations are ineffective to the advantage of local consumers. In this way, private and public standards are less antagonistic and can be mutually reinforcing, contributing to total system efficacy and resulting in higher quality food being available in national and global markets.¹⁴⁶

¹⁴¹However, a number of studies found mixed to negative evidence on the impact of private standards on the net income for producers, where the increased earnings did not compensate for the additional costs and increased labour involved in complying with private standards. See, e.g., Nicolien M. Van Der Grijp et al., *European Retailers as Agents of Change towards Sustainability: The Case of Fruit Protection in Brazil*, 2 ENVTL. SCI. 31, 31–46 (2005).

¹⁴²Ching-Fu Lin, *Public-Private Interaction in Global Food Safety Governance*, 69 FOOD & DRUG L.J. 143, 159 (2014).

¹⁴³Yoshiko Naiki, *The Dynamics of Private Food Safety Standards: A Case Study on the Regulatory Diffusion of GLOBALG.A.P.*, 63 I.C.L.Q. 137, 146 (2014).

¹⁴⁴Spencer Henson & John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS [FAO] & WORLD HEALTH ORGANIZATION [WHO] 1, 12–13 (2009), <http://www.fao.org/3/a-i1132e.pdf>.

¹⁴⁵Smith, *supra* note 10, at 23.

¹⁴⁶Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*, 310 (1st ed, 2007).

Lastly, on the legitimacy of private standards debate, it should be noted at the beginning that legitimacy has a plurality of meanings and it has been deployed by actors at all levels of the international system to refer to different meanings.¹⁴⁷ The existing research often explicitly or tacitly understood legitimacy in global governance as democratic legitimacy, and that the democratic character of a norm makes it legitimate. Since private standards' narrow pursuit of corporate profits rather than public goods and their lack of electoral mandate or democratic representativeness, it is widely claimed that they suffer from a "legitimacy deficit."¹⁴⁸ However, for reasons of limited resources and efficient operations, it will never be realistic to ensure a fully open and participatory process for all potential stakeholders in setting standards, public or private.¹⁴⁹ Moreover, even intergovernmental standardizing organizations do not meet the requirements used to assess the legitimacy of private standard-setters.¹⁵⁰ Take Codex as an example. The lack of speed and complexity of the standards-setting process within Codex has long been a cause of concern.¹⁵¹ It has also long been questioned to what extent Codex is truly representative of stakeholder interests, particularly within developing countries. Due to lack of resources and lack of expertise, developing countries are less able to participate in Codex decision-making process effectively. An independent evaluation of the Codex found that 96% of low-income countries and 87% of middle-income countries participate less than they would like.¹⁵² While the Codex does allow significant participation from nongovernmental organizations as observers, various procedural and power-allocating practices at the Codex skew the decision-making in favor of state interests. Within the non-state groups present at the Codex, there is a heavy bias towards industry interests, with many fewer active consumer and public interest groups.¹⁵³ The elevation of Codex standards as quasi-binding in an effort to harmonize heterogeneous product standards in international trade in the SPS and TBT Agreements has further exacerbated the existing deficiencies in Codex decision-making.¹⁵⁴

By contrast, with the limited membership, narrower focus and more common interests of the firms and organizations involved, private standards are often developed more rapidly and more agile in responding to a wide range of continually evolving

¹⁴⁷Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729, 733 (2014).

¹⁴⁸Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 351 (2007); Hachez & Wouters, *supra* note 137, at 683.

¹⁴⁹Jason Potts et al., *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy*, International Institute of Sustainable Development (2014), at 59.

¹⁵⁰Sam F. Halabi & Ching-Fu Lin, *Assessing the Relative Influence and Efficacy of Public and Private Food Safety Regulation Regimes: Comparing Codex and Global G.A.P. Standards*, 72 FOOD & DRUG L.J. 262, 288–289 (2017).

¹⁵¹Henson & Humphrey, *supra* note 144, at 40.

¹⁵²W. Bruce Traill et al., *Report of the Evaluation of the Codex Alimentarius and Other FAO and WHO Food Standards Work*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS [FAO] & WORLD HEALTH ORGANIZATION [WHO] 1, 14, http://www.who.int/foodsafety/codex/en/codex_eval_report_en.pdf.

¹⁵³Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius*, 81 N.Y.U. L.R. 766, 783–86 (2006).

¹⁵⁴Ming Du & Fei Deng, *International Standards as Global Public Goods in the World Trading System*, 43 LEGAL ISSUES ECON. INTEGRATION 113, 115 (2016).

consumer preferences than Codex. Moreover, some private organizations such as GlobalG.A.P., GFSI and ISEAL have become significantly more open over time and come to incorporate a wider range of stakeholders, to the extent that some argue that the interests of developing country producers are heard more loudly in GlobalGAP than in Codex.¹⁵⁵ These paradoxes clearly call for a reconceptualization of legitimacy of non-state actors in global governance.

The Prospect of Private Standards Regulation in the WTO Framework

In view of the market-driven nature of most private standards and their complex, and many would argue positive, economic welfare effects, one view holds that WTO Members should ensure that the trade regime leaves “transnational policy space” for private standards setting rather than try to create additional rules on what standards to accept. It is further argued that this is essential to make progress in areas where states have been unwilling, or found it difficult, to negotiate in the WTO and other forums.¹⁵⁶ By contrast, the opposing view holds that private standards may distort trade as much as government conduct and the governance role of such private standards is too great to allow them to remain reclusive.¹⁵⁷ Traditional international law offers very limited possibilities to discipline or control soft norms created by non-state actors. In failing to explicitly address the increasingly important non-traditional patterns of regulation, such as those reflected in soft norms created by non-state actors, there is a risk that WTO law has become “under-inclusive”.¹⁵⁸

In response to widespread concerns raised by WTO Members regarding private standards in agri-food trade sector, an *ad hoc* working group was established in 2008 to identify possible actions for the SPS Committee regarding SPS-related private standards. Twelve possible actions, ranging from the development of a working definition of private standards to an examination of the regulatory scope of the SPS Agreement were set out in 2010.¹⁵⁹ The SPS Committee later agreed in March 2011 to pursue five practical actions recommended whilst no consensus could be reached on seven other possible actions.¹⁶⁰ Except Action 1 relating to the development of a working definition of SPS-related private standards, other four adopted actions are exclusively about information exchange between the SPS Committee and other entities that are relevant to the development of SPS-related private standards. Since then, the SPS Committee’s discussions on private standards have focused on the five actions and, in particular, on Action 1. The SPS Committee also discussed how to address the seven outstanding proposed actions on which consensus had not been reached. Some Members were keen to move forward on outstanding Actions 6 to 12 through a

¹⁵⁵Henson & Humphrey, *supra* note 144, at 40; Allison Loconto & Eve Fouileux, *Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance*, 8 REG. & GOVERNANCE 166, 168–170 (2014).

¹⁵⁶Bernstein & Hannah, *supra* note 131, at 604–05.

¹⁵⁷Mavroidis & Wolfe, *supra* note 26, at 2.

¹⁵⁸Pauwelyn, *supra* note 108, at 219.

¹⁵⁹Comm. on Sanitary and Phytosanitary Measures, Note by the Secretariat: Possible Actions for the SPS Committee Regarding *SPS-Related Private Standards*, WTO Doc. G/SPS/W/247/Rev.3 (Oct. 11, 2010).

¹⁶⁰Comm. on Sanitary and Phytosanitary Measures, *Decision of the Committee: Actions Regarding SPS-Related Private Standards*, WTO Doc. G/SPS/55 (Apr. 6, 2011).

voluntary working group.¹⁶¹ However, other Members indicated that they were not prepared to work on those actions where there had been no consensus.

Action 8 recommended for the SPS Committee suggested that the SPS Committee develop guidelines on the implementation of Article 13 of the SPS Agreement, particularly, the terms “non-governmental entities” and “reasonable measures as may be available to Members.” Action 10 encourages WTO Members to explore the prospect of introducing a Code of Good Practice, similar to the CGP of the TBT Agreement, for all private SPS standards to enable Members to better implement SPS provisions and improve market access.¹⁶² The proposal further suggested that, procedurally, if the proposal were approved by all WTO Members, it could be adopted either by the SPS Committee through its competence under Article 12.7 of the SPS Agreement or through an amendment to the SPS Agreement under Article X of the WTO Agreement.¹⁶³

It is hard to disagree that these are sensible proposals. The proponents for WTO intervention in private standards have strong evidence demonstrating the significant role that private standards have been playing in global governance. Simply put, they are too significant to be left unregulated. Concurrently, this proposal will leave sufficient transnational regulatory space for private standards without suppressing their development and operation. The essence of the proposal is to replicate widely accepted minimum criteria and best practices that standards-setters are expected to follow and to make the WTO play the role of a “meta-regulator.”¹⁶⁴ Indeed, this is also the role that international standardizing organizations expect the WTO to play in curbing the adverse effects of private standards. The OIE, for example, suggested that the SPS Committee should be used as a forum for countries to identify and discuss specific problems that they have experienced relating to private standards. On the basis of discussion, the SPS Committee may develop recommendations on future action for Members’ consideration.¹⁶⁵ Moreover, following these criteria will enhance the legitimacy of private standards and facilitates exercise of authority and improve compliance in global governance.

Still, there seems to be little chance for this proposal to be accepted by all WTO Members. During the Third Review of the SPS Agreement, China reported that it was in the process of drafting a paper on “Best Practice Guidelines regarding Private Standards” and argued that its application by private standard-setters and members hosting them would help private standards make positive contributions while avoiding the creation of unnecessary barriers to trade.¹⁶⁶ However, the EU, US and Canada indicated that they were not prepared to support the initiative, citing fundamental divergences among WTO members on private standards.¹⁶⁷

¹⁶¹Comm. on Sanitary and Phytosanitary Measures, *Communication from Belize: Actions Regarding SPS-Related Private Standards*, WTO Doc. G/SPS/GEN/1291 (Oct. 16, 2013).

¹⁶²Comm. on Sanitary and Phytosanitary Measures, *Proposal by India: Third Review of the WTO SPS Agreement*, WTO Doc. G/SPS/W/236 (April 17, 2009).

¹⁶³*Submission by the United Kingdom*, *supra* note 102, at 48–49.

¹⁶⁴Jacco Bomhoff & Anne Meuwese, *The Meta-Regulation of Transnational Private Regulation*, 38 JOURNAL OF LAW AND SOCIETY 138, 141 (2011).

¹⁶⁵OIE Submission, *supra* note 64, para.15.

¹⁶⁶Note by the Secretariat, *supra* note 3, para.13.1.

¹⁶⁷*Id.* paras. 13.4–13.6.

More recently, Mavroidis and Wolfe suggested a similar proposal that WTO Members interested in regulating private standards draft a standards “Reference Paper” on the model of the Telecom Reference Paper that can be inscribed in the services Schedules of participating members. These additional commitments are binding on countries that made them and are enforceable through WTO dispute settlement.¹⁶⁸ However, applying this approach to private standards in practice will meet the same practical hurdles discussed above. Under Article XVIII of GATS, parties are allowed to schedule commitments in addition to market access and national treatment commitments. The issue is only to find a legal mechanism that allows new regulatory principles in the reference paper to be legally binding. Rather than amending the WTO text, the choice of treating the regulatory principles as additional commitments under Article XVIII that members can include in their schedule was a good approach with the advantage of containing a built in-flexibility, which allows countries to pick and choose from a common set of rules.¹⁶⁹ By contrast, the SPS Agreement does not contain a similar provision of XVIII and it is even controversial among WTO Members whether, without a proper mandate, the SPS Committee is the proper venue to discuss potential regulatory approaches.

Looking forward, given the challenge of reconciling divergent views on private standards, it might be more practical to take a plurilateral approach, bringing together only the like-minded WTO Members to draft a Code of Good Practice or reference paper for private standards, based on the CGP of the TBT Agreement and the Six Principles of international standards.¹⁷⁰ These additional commitments could then be built into bilateral or regional free trade agreements. Similar to the Telecommunication Reference Paper approach, states should be allowed flexibility in picking and choosing from the best practices contained in the Code of Good Practice, but if states agree to be bound, the relevant provisions are enforceable through the dispute settlement mechanisms. It is further hoped that the inclusion and voluntary compliance may serve as a lever to achieve a snowball effect, leading it debated and followed with other international instruments and at other international fora. Another potential pathway is for a developing country to identify a specific private standard which is arguably not consistent with the SPS disciplines such as not based on science and excessively restrictive on international trade and bring the dispute before the WTO dispute settlement body.¹⁷¹ The dispute will create an opportunity for the WTO Appellate Body to shed more light on the ambiguous provisions and uncertain boundary of WTO Members’ obligations regarding private standards.

VI. CONCLUSION

Though private standards came into existence in the early 1990s, the phenomenon did not gather momentum until the early 2000s. This development away from

¹⁶⁸Mavroidis & Wolfe, *supra* note 26, at 17–19.

¹⁶⁹Bouthaina Guermazi, *Exploring the Reference Paper on Regulatory Principles* (2000), https://webcache.googleusercontent.com/search?q=cache:dKxnytTrGpMJ:https://www.wto.org/english/tra_top_e/serv_e/telecom_e/workshop_dec04_e/guermazi_referencepaper.doc+&cd=1&hl=en&ct=clnk&gl=us.

¹⁷⁰Bernard Hoekman & Petros C. Mavroidis, *Embracing Diversity: Plural Agreements and the Trading System*, 14 *WORLD TRADE REVIEW* 101 (2015).

¹⁷¹*Submission by the United Kingdom*, *supra* note 102, at 94.

mandatory government regulation towards voluntary, non-governmental standards should be seen in the context of the broader contemporary shifts in the locus of governance from the public to the private. As it came much later than the formal establishment of the WTO, the proliferation of private standards has posed novel questions to the role of the WTO, in particular the SPS and TBT Agreements, in addressing soft law norms created by different non-state actors and the utility of government-to-government diplomacy.¹⁷²

This paper provides a comprehensive review of concerns expressed by some WTO Members regarding the effects of private standards on international trade. The paper shows that WTO Members are deeply divided on a number of fundamental issues ranging from whether private standards are covered by the TBT and SPS Agreements in the first place, the legitimacy and accountability of private standards in global governance, to possible pathways to move the issue forward within the WTO legal framework. Despite the complexity in debating the pros and cons of private standards in international trade and the current deadlock in the SPS committee, this paper argues that private standards should not be permitted to operate entirely outside the purview of WTO disciplines. It is possible to reduce the adverse effects of private standards on international trade while maintaining effective transnational regulatory space for them. Indeed, it could even be argued that proper WTO oversight will enhance, rather than undermine, the legitimacy of private standards as a market-based mechanism of transnational private regulation.

¹⁷²Scott, *supra* note 146, at 302.