

**ON RECONCILING RULES, MARKETS AND POWER:  
RESPONDING TO PRIVATE VOLUNTARY STANDARDS THROUGH  
SAFEGUARDING THE RULE OF LAW IN INTERNATIONAL FOOD TRADE**

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## *MESSAGE*

To my daughter, Simpiwe Chrissa Chikura – thank you for your patience and understanding.

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## *DECLARATION*

I, Cynthia C. Chikura declare that:

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## ABSTRACT

The proliferation of private voluntary standards (private standards) in international food trade has precipitated a surge of inter-disciplinary discourse on the topic. Conceptual premises have been diverse, but a common thread through the discourse has been their practical impact on developing-country producers (particularly small to medium scale ones). The present paper contributes to legal analyses of private standards. It builds upon existing discourse on rules-based responses to private standards, from the conceptual premise of the rule of law. The perspective of the paper is that private standards are creating conditions wherein the rule of law in international food trade is being placed under strain. With that, the utility of the rules-based system of international food governance has begun to diminish. The viewpoint in this paper is that, from the perspective of the WTO, responses to private standards should be underlain by considerations of safeguarding the rule of law. Underscoring this is that a rule of law approach is the most ideal, in the long-term, for the WTO system and for low income Members themselves. The paper concludes that this will entail a necessarily multipronged strategy towards the challenges presented by private standards – one which incorporates rules-based responses, other interventions from within the WTO, and responses from outside of the WTO.

## ***ABBREVIATIONS AND ACRONYMS***

AB	Appellate Body of the World Trade Organisation
Contracting Parties	Signatories to the 1947 General Agreement on Tariffs and Trade
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (or Dispute Settlement Understanding)
EU	European Union (also “European Communities” in the WTO)
EurepGAP	European Retailers Protocol for Good Agricultural Practice (now known as GlobalGAP)
GAP	Good Agricultural Practices
GATT	General Agreement on Tariffs and Trade
ILC Draft Articles	International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts
LDC	Least Developed Country
MFN	Most Favoured Nation
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organisation (also known as the WTO Agreement)

Member(s)	Member(s) of the World Trade Organisation
PPM(s)	Process and Production Method(s)
Private Standards	Private Voluntary Standards
SPS	Sanitary and Phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
Small-scale Farmers	Small-scale Growers and Smallholders
TBT	Technical Barriers to Trade
TBT Agreement	Agreement on Technical Barriers to Trade
Code of Good Practice	Code of Good Practice for the Preparation, Adoption and Application of Standards (in the TBT Agreement)
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Programme
Vienna Convention / VLCT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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## PART 1: INTRODUCTION

*“Recognising that [Members’] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”*

- Paragraph 1, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### 1.1 BACKGROUND

The place of food standards in the multilateral trading system has evolved tremendously over the last four decades. This evolution has involved a number of successive, and some parallel, developments. These have seen food standards evolve from a relatively innocuous mechanism for protecting consumers, to a hotly contentious issue in international food trade. The inspiration for this paper is a recent development in the landscape of international food trade - the proliferation of private voluntary standards<sup>1</sup>. The increased use of private standards as a means to protect consumers, to promote environmental and ethical concerns - or as (concealed or inadvertent) trade barriers - is rapidly transforming the architecture of international food trade.

The issue of private standards first gained official prominence in the World Trade Organisation (WTO) when it was raised as a specific trade concern by developing-country Members, the Grenadines and Saint Vincent<sup>2</sup>, at a meeting of the Committee on Sanitary and Phytosanitary Measures (the SPS Committee) in 2005. The two Members expressed concern about, in particular, the fact that private standards were more stringent than governmental (official) standards but were, at the same time, operating as market imperatives.<sup>3</sup> The practical

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<sup>1</sup> Hereinafter, private standards.

<sup>2</sup> Supported by Jamaica, Peru, Ecuador, and Argentina.

<sup>3</sup> See WTO Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 29 - 30 June 2005* (Revision), Note by the Secretariat, (circulated 18 August 2005) G/SPS/R/37/Rev.1, 6 - 7 (paras 16 - 20);

consequence of this was that private standards were difficult for developing-country producers to meet, yet failure to meet them threatened exclusion from traditional developed-country markets. At the time, market-exclusion of banana exports from the two Members had already begun to take place in the European Union (EU).<sup>4</sup> Today, it is widely recognised that private standards are resulting in, and continue to threaten, exclusion of certain categories of developing-country supply-chain participants from developed-country markets.<sup>5</sup> As they become more entrenched in international food markets, private standards have created a noticeable balance shift between the respective roles of governments and private entities in the area of food standards. In global markets for high-value fresh-fruit and vegetables, the balance of predominance is tipping in favour of private standards.<sup>6</sup> The dual upshot of this is that food standards are beginning to be more trade-distorting, and becoming more remote from the rules-based system of international food trade.

The issue of private standards has, in the last few years, elicited a considerable amount of debate (both from within and outside of the WTO). Much of that discourse has had, as a common thread, the impact of private standards on exports from developing countries. This paper makes a thoroughgoing and decidedly systemic contribution to this discourse. It takes forward the legal analysis of private standards, from the conceptual premise of the rule of law. The paper takes the view that, from the perspective of the WTO, an approach to private standards whose emphasis is on the preservation of the rule of law, is the most ideal in the long term.

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WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005) *Private Sector Standards Discussed as SPS Committee Adopts Two Reports* (available at [http://www.wto.org/english/news\\_e/news05\\_e/sps\\_june05\\_e.htm](http://www.wto.org/english/news_e/news05_e/sps_june05_e.htm) ; last accessed on 31 August, 2011).

<sup>4</sup> *Ibid.*

<sup>5</sup> In 2007, "Private Standards" became a standing agenda item in the SPS Committee. As it graduated to a standing agenda item, the Committee embarked on a comprehensive work programme, a large part of whose focus it has been to understand these effects. Also in 2007, in the Committee on Technical Barriers to Trade (the TBT Committee), Egypt (supported by Kenya and Chile) requested that the issue of private standards be placed on the agenda of that committee. See WTO Committee on Technical Barriers to Trade (6 August 2007) *Minutes of The Meeting of 5 July 2007*, G/TBT/M/42, 30 - 31. In general, however, TBT Committee discussions on the effects of private and voluntary standards date back to the 1990s. See, for example, WTO Committee on Trade and Environment / Committee on Technical Barriers to Trade (29 August 1995), *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, Note by the Secretariat, WT/CTE/W/10 / G/TBT/W/11.

<sup>6</sup> See Henson S, "The Role of Public and Private Standards in Regulating International Food Markets", *Paper Prepared for the IATRC Summer Symposium - Food Regulation and Trade: Institutional Framework, Concepts of Analysis and Empirical Evidence* (28 - 30 May, 2006), available at [http://www.ilr1.uni-bonn.de/iatrc2006/iatrc\\_program/Session%204/Henson.pdf](http://www.ilr1.uni-bonn.de/iatrc2006/iatrc_program/Session%204/Henson.pdf) (last accessed on 31 August, 2011).

## 1.2 PROBLEM STATEMENT

Legal analyses of private standards have focussed around considering what options exist, from within the rules of the WTO, for dealing with the challenges posed by private standards. Various rules-based options have entered the debate around possibilities for responding to private standards.<sup>7</sup> But the discourse has not matured to the point where it can be said that there is a conclusive pronouncement regarding the available options or their ambit. This paper takes forward that legal analysis, from a systemic perspective. The core question in the paper is twofold: firstly, what options there are, from within the rules of the WTO, for responding to the challenges posed by private standards; and, secondly, whether, and to what extent, they safeguard the rule of law in international food trade. The viewpoint underscoring the analysis in the paper is that private standards threaten the rule of law in international food trade. To support this standpoint, the paper argues that the rules-based system plays a central organising function in international food trade. The paper takes the view that private standards disrupt this organising function and, by implication, compromise the rule of law.

As discourse on the rules-based approaches to private standards is itself inchoate, the paper also builds on that discussion. The paper considers the applicability to private standards, and scopes of application, of options from: classical international law<sup>8</sup>; from the text of the Agreement on the Application of Sanitary and Phytosanitary Measures<sup>9</sup>; and from the text of the Agreement on Technical Barriers to Trade<sup>10, 11</sup>. In the process, the paper critically analyses existing legal

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<sup>7</sup> These are discussed in part 4, below.

<sup>8</sup> Primarily, the public international law theory of “attribution of conduct to the state”. As codified in the United Nations International Law Commission (ILC), *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, with Commentaries, 2 Yb. Int’l L. Comm., n Pt. 2 (2001), adopted in UN Gen. Assembly Resolution 56/83, Responsibility of States for Internationally Wrongful Acts, Annex, UN Doc. A/RES/56/83 (28 January 2002).

<sup>9</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, *Legal Instruments - Results of the Uruguay Round*, Volume 1, 1867 U.N.T.S. 493 (hereinafter, SPS Agreement).

<sup>10</sup> Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, Volume 1, 1868 U.N.T.S. 120 (hereinafter, TBT Agreement).

<sup>11</sup> The text-based options which are discussed in the paper are: Article 13 of the SPS Agreement; Articles 4 and 8 of the TBT Agreement; and Annex 3 (the “Code of Good Practice for the Preparation, Adoption and Application of Standards”) of the TBT Agreement.

analyses on rules-based responses to private standards.

### 1.3 BACKGROUND TO RESEARCH QUESTION: CURRENT DISCOURSE ON PRIVATE STANDARDS

The negotiators of the Uruguay Round of multilateral trade negotiations<sup>12</sup> designed a system of rules to govern conduct and interrelations in international trade. It is a system which the negotiators - both developed- and developing-country - agreed was superior to the power-based one which preceded it.<sup>13</sup> Today, the rule of law is the quintessence of the WTO system of multilateral trade. It is also safe to assert that it is the single most valuable systemic asset for developing-country Members.<sup>14</sup>

The degree of strain that the rule of law in international food trade is apparently taking - as a consequence of private standards - is disquieting. As will emerge during the progression of the paper, the rise of private standards has become synonymous with an extraction of international food trade from the disciplines of the rules-based system. The rules-based system is the embodiment of the rule of law in international food trade. And, as it becomes increasingly marginalised, conditions have become fertile for fragmentation in international food markets - the primary threat which the Uruguay Round negotiators sought to eradicate through the rules.<sup>15</sup> Owing, in part, to a developed-country bias, low-income Members have suffered especial harm as a consequence of the rise of private standards. Case studies conducted in several countries reveal that private standards have been accompanied by wholesale market elimination, from

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<sup>12</sup> The Uruguay Round, the eighth round of multilateral trade negotiations, took place between 1986 and 1994.

<sup>13</sup> The WTO system has been described as a “triumph of rules over power”. See Mosoti V, “Africa in the First Decade of WTO Dispute Settlement”, (2006) 9(2) *JIEL* 427, 433 - 434.

<sup>14</sup> See Bacchus J, “Groping Toward Grotius: The WTO and the International Rule of Law”, *Address at Harvard Law School* (1 October 2002), available at <http://www.worldtradelaw.net/articles/bacchusgrotius.pdf> (last accessed on 31 August, 2011).

<sup>15</sup> On this, see Appellate Body Report in *Brazil – Desiccated Coconut*, where the Appellate Body (AB) stated that the authors of the “new WTO regime intended to put an end to the fragmentation that had characterized the previous system”. Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, p 17.

global supply-chains, of small to medium scale farmers. Fresh-fruit and vegetable trade has been particularly hit, with profound economic and socio-economic effects in affected countries.<sup>16</sup>

The impact of private standards on low-income Members is particularly disconcerting at a time when multilateral trade negotiations had been underlain by an undertaking to place “the needs and interests of developing countries ... at the heart” of their work programme.<sup>17</sup> The focus of many discussions and interventions, both within and without the WTO, has been on the practical elements of responses to private standards. In the SPS Committee and the Committee on Technical Barriers to Trade (the TBT Committee), there was an original push by some Members for consideration to be given to how the rules of the WTO could be utilised to respond to private standards.<sup>18</sup> Notwithstanding this, over the course of nearly five years, the discussion has oscillated more towards how best to, practically, mitigate their effects on low income Members (and vulnerable groups within them) and/or facilitate these groups meeting the strictures of these standards.<sup>19</sup> This approach is commonsensical, considering the particular impact of private standards on low income Members. However, as established above, this paper takes the view that from a systemic and long-term perspective, the fundamental issue with private standards is not their practical effects (for their own sake), but rather, their implications for the rule of law. In that regard, the approach which is best for the system, and particularly for low income Members themselves, is one which deals with their systemic ramifications rather than their symptomatic ones. It is the same low income Members that are harmed the most by a non-functional rules-based system. For these Members, rules are their only currency, as they do not have power to fall back on if the system’s integrity is compromised.

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<sup>16</sup> Numerous case studies conducted across several developing countries have revealed that, in the fresh-fruit and vegetable sector, the rise of private standards has come with deleterious economic, socio-economic and sustainable development impacts. The findings of some of the African case studies are discussed in 3.4, below.

<sup>17</sup> Paragraph 2, WTO Ministerial Conference (20 November 2001), Fourth Session, *Doha Ministerial Declaration*, adopted on 14 November, 2001, WT/MIN(01)/DEC/1.

<sup>18</sup> See discussion at 3.1.4, below.

<sup>19</sup> In the case of the SPS Committee, one could concede that this pronounced focus on the practical elements of private standards was a necessary upshot of the comprehensive information gathering which the Committee, at the onset of the discussion, agreed to undertake as part of its work programme. However, after four years of work, the Committee has agreed on six actions – all of which are practical in character. See WTO Committee on Sanitary and Phytosanitary Measures: (3 March 2011), *Report of the Ad Hoc Working Group on SPS-related Private Standards to the SPS Committee*, G/SPS/W/256; (6 April 2011), *Actions Regarding SPS-related Private Standards*, Decision of the Committee, G/SPS/55; (20 June 2011), *Proposed Revisions to Action Six of the Report of the Ad Hoc Working Group on SPS-related Private Standards* (G/SPS/W/256), G/SPS/W/261.

## 1.4 AIMS AND OBJECTIVES

It is the place of rules in contemporary international trade which makes the rule of law the focal point for the analysis in this paper. Against the above background, the paper takes a panoramic outlook on the challenges represented by the rise of private standards. The ultimate objective of the paper is to recommend an approach to private standards which both reaffirms the primacy of the rules, and aims at preserving the sanctity of the rule of law in international food trade. To that end, the analysis aims to:

- reveal that, for the WTO system, the substance of the issue of private standards is its implications for the rule of law;
- argue, in that regard, that the ideal strategy for dealing with private standards is one which responds to them from the point of view of their rule of law implications; and
- synthesise the discussion into recommendations for a multipronged strategy for dealing with private standards.

As a core component in discharging the above, the paper considers the options, from within the rules, for responding to private standards, and appraises these for their efficacy in safeguarding the rule of law.

As noted in the problem statement, rules-based options have generally been the focal point, and a common point of departure, of legal analyses of private standards. While the rules-based options are a core component of any legal analysis of private standards, this paper does not consider them an end (or even, starting) point of the consideration. A clinically rules-based approach risks being one-dimensional and could actually lead to inferior outcomes for the rule of law. From a systemic WTO perspective, the outcomes of such an approach might also turn out to be academic. As will emerge later in the paper, the rules-based options are also constrained - because of *inter alia*, institutional and political reasons, and market realities - from operating optimally.

The view taken here is that a rule of law approach is automatically comprehensive. It necessarily incorporates the rules-based options, while also being sensitive to institutional and political



realities, and the operational realities of private standards. By adopting this approach, the paper also aims to deconstruct the analysis into all its constituent parts. One of the contextual realities of private standards is that the international food trading environment is constantly evolving. Tied to that is the fact that the WTO rules-system is interconnected with processes which take place outside of it. Private standards are a particular manifestation of the increasingly contested terrain between multilateral trade rules and market forces. On the one hand, they represent the foray of private trade-distorting conduct in global food trade sectors, and the increasing privatisation of protectionism in those sectors. As far back as 2000, Hudec predicted the upsurge of private trade barriers, and made the related observation the point was to be arrived at when rules-based action, within the WTO, would need to be taken to deal with them.<sup>20</sup> To some observers, however, private standards merely reflect a demand-driven response to the evolving tastes and habits of developed-country consumers.<sup>21</sup> To others, they are a market response to deficiencies in public regulatory systems of food safety.<sup>22</sup> To others still, they are indicative of the intensifying battle by large supermarkets for global market dominance in food trade.<sup>23</sup> In this paper, they are taken to contain elements of all of these.

The analysis in the paper emerges from the premise that, in dealing with private standards, what is best for the rule of law is what is best for low-income Members. All the same, the African perspective (in particular) is embedded throughout the discussion. African Members have been profoundly affected by private standards. The main terrain of private standards - the fresh-fruit and vegetable sector - is a sector of huge significance to African countries. Half of the countries in sub-Saharan Africa participate in global fresh-fruit and vegetable trade, with almost half of

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<sup>20</sup> Hudec's view is that, because private trade-distorting conduct is anticompetitive in nature, it is best handled through a precise set of anti-competition disciplines. In the continued absence of such disciplines, however, the author writes, the next two best options would be resort to non-violation complaints, under article XXIII of the GATT, or collaboration with national competition authorities. Hudec R E, "A WTO Perspective on Private Anti-Competitive Behaviour in World Markets", (2000) *34(1) New England Law Review* 79, 79 - 101.

<sup>21</sup> For comments on the evolving tastes and habits of developed-country consumers, see Stanton G H, "Private (Commercial) Standards and the SPS Agreement", *Remarks at the Roundtable on The Role of Standards in International Food Trade*, (24 September 2007), available at <http://www.asil.org/pdfs/speechevent070924.pdf> (last accessed on 31 August, 2011). The author observes, however, that the shift in consumer expectations is not isolated from (or is correlated to) the growth in market concentration of large supermarkets in Europe. At 1 - 2.

<sup>22</sup> For a discussion on the evolution of private standards as a response to deficiencies in public regulatory systems, see Henson S, Humphrey J, "The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes", *Paper Prepared for FAO/WHO* (May 2009), FAO / WHO, 11 - 15, available at <ftp://ftp.fao.org/codex/CAC/CAC32/al329Dbe.pdf> (last accessed on 31 August, 2011).

<sup>23</sup> Brown O, "Supermarket Buying Power, Global Commodity Chains and Smallholder, Farmers in the Developing World", (2005) *Human Development Report*, UNDP, 1. See, also, discussion at 36 - 38, below.

these exporting significant volumes to the EU.<sup>24</sup> The effects of private standards have been especially ravaging in African countries - economically, socioeconomically, and on sustainable livelihoods.<sup>25</sup> For that reason alone, the situation of African countries warrants special attention.

However, there are further reasons why the situation of African Members deserves special attention. The chronic marginalisation of African countries in the WTO has been a vexing matter for several years. The Africa Group remains a marginalised bloc in the WTO - both politically and economically. This is so despite the WTO system's undertaking to ensure that "developing and least developed countries (LDCs), secure a share in the growth of international trade"<sup>26</sup> through, *inter alia*, the "eliminations of discriminatory treatment in international trade relations"<sup>27</sup>. The current evidence is that, as a consequence of private standards, African Members are experiencing *increased* discriminatory treatment and witnessing a *diminishment* of their share in global trade in the fresh-fruit and vegetable sector. Paradoxically, this is the one sector where African countries had successfully integrated into, and secured a share in the growth of, international trade.<sup>28</sup>

## 1.5 OVERVIEW OF METHODOLOGY

The research underpinning the analysis in this paper is a combination of:

- primary legal sources;

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<sup>24</sup> See Graffham A, Karehu E, MacGregor J, "Impact of EurepGAP on Small-scale Vegetable Growers in Kenya" (2007) *Fresh Insights* 6, 1 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html) ; last accessed on 31 August, 2011).

<sup>25</sup> Developmentally, the fresh-fruit and vegetable export sector holds crucial significance in Africa. Through the small-scale model of farming, in particular, the fresh-fruit and vegetable export sector has been instrumental in reducing poverty, promoting development, sustaining livelihoods, and the creation of supporting industries in rural Africa. Small-scale farmers account for an estimated 90 per cent of sub-Saharan Africa's agricultural production. Brown O, Sander C, *Supermarket Buying Power: Global Supply Chains and Smallholder Farmers* (2007), pp iii, 2.

<sup>26</sup> Paragraph 2, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *Legal Instruments - Results of the Uruguay Round*, 33 I.L.M. (1994) 1144 (hereinafter, Marrakesh Agreement).

<sup>27</sup> Paragraph 3, Preamble to the Marrakesh Agreement, *supra*.

<sup>28</sup> Export horticulture has been described as a "bright spot" of African development, and dubbed an "African success story". See, respectively, Dolan C, Humphrey J, "Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticultural Industry", (2001) 37(2) *Journal of Development Studies* 147, 159; UNCTAD, *Private Standards and National Schemes for Good Agricultural Practices: Implications for Exports of Fresh Fruit and Vegetables from Sub-Saharan Africa. Experiences of Ghana, Kenya and Uganda* (2008), pp 1, 86.

- secondary sources, across various disciplines;
- a review of empirical projections and case studies on the effects of private standards;
- a study of reports of, and submissions made in, WTO Committees; and
- a consideration of WTO SPS Committee questionnaires on private standards.

The base argument in the paper is that the rules-based system plays a central organising function, which epitomises the rule of law in international food trade. The General Agreement on Tariffs and Trade (GATT)<sup>29</sup>, the SPS Agreement, the TBT Agreement, the Dispute Settlement Understanding (DSU)<sup>30</sup>, and reports of the panels and Appellate Body (AB) are the sources used to develop this argument. They are complemented by analytical secondary legal texts. The base argument informs the rest of the paper, and is used to analyse private standards in terms of their rule of law implications. The analysis of private standards is further guided by WTO Committee reports and documents, legal and non-legal secondary sources, and the findings of case and empirical studies. The paper then carries forward the analysis by considering what can be done, from within the rules of the WTO, to respond to private standards. The primary legal sources for that consideration are: the SPS and TBT Agreements, public international law sources, the DSU, and panel and AB reports. The discussion will be complemented by the views of various commentators who have considered the options available from within the rules. The penultimate parts of the paper, respectively, appraise the rules-based approach and make recommendations for a holistic strategy for dealing with private standards. These two parts draw from across all the sources used in the paper.

Legal discourse on rules-based approaches to private conduct is still embryonic. There is still no jurisprudential guidance on the text-based options, for example.<sup>31</sup> Some pre-2005 WTO

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<sup>29</sup> General Agreement on Tariffs and Trade 1947, amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, 33 I.L.M. (1994) 1153 (hereinafter, the GATT).

<sup>30</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 33 I.L.M. (1994) 1226 (hereinafter, Dispute Settlement Understanding or DSU).

<sup>31</sup> *Australia – Salmon (Article 21.5 – Canada)*, is a case in which a panel did deal with Article 13 of the SPS Agreement. However, it only dealt with the article in the context of its sentences one and two, which deal (respectively) with measures taken by Members (central government), and measures taken by non-central government bodies. The sentences which make reference to the conduct of “non-governmental” bodies - sentences three, four, and five - have not yet been considered in a WTO case. See Panel Report, *Australia – Measures Affecting*

jurisprudence which appears to endorse the applicability, in the WTO context, of the classic international law theory of “attribution of (private) conduct to the state” does exist.<sup>32</sup> This is complemented by scattered commentary on the application of the theory to private conduct *vis-à-vis* WTO Members.<sup>33</sup> In the period since 2005, there has been a growth in the body of commentary on the use of WTO disciplines to deal with private conduct - in relation to both classical international law options and text-based options.<sup>34</sup> One of the points which will, however, emerge during the course of the discussion on the rules-based options is the fact that the views of commentators are especially disparate. Necessarily, the paper critically engages on this.

The last few years have also seen a growing (and now considerable) body of economic analyses, and outputs from empirical and field research on the practical effects of private standards. The analysis in the paper has benefitted significantly from these developments considering that when the issue was first raised in the WTO, information on the effects of private standards remained largely anecdotal. The paper draws on findings from fieldwork not merely for the sake of illustrating the practical effects of private standards. As will emerge later, the Africa case studies, in particular, will be useful for showing the link between the rules effects of private standards and their practical effects.

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*Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031, par 7.13.

<sup>32</sup> See, for example: Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179; Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, DSR 2000:VII, 3043; Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779.

<sup>33</sup> For example: Tietje C, “Voluntary Eco-labelling Programs and Questions of State Responsibility in the WTO/GATT Legal System”, (1995) 29(5) *JWT*, 123; Villalpando S M, “Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System”, (2002) 5(2) *JIEL*, 393.

<sup>34</sup> See Gandhi S R, “Regulating the Use of Voluntary Environmental Standards Within the World Trade Organisation Legal Regime: Making a Case for Developing Countries”, (2005) 39(5) *JWT*, 855; Gandhi S R, “Disciplining Voluntary Environmental Standards at the WTO: An Indian Legal Viewpoint”, *ICRIER Working Paper 181* (June 2006), available at [www.icrier.org/pdf/WP\\_181.pdf](http://www.icrier.org/pdf/WP_181.pdf) (last accessed on 31 August, 2011); Zedalis R J, “When do the Activities of Private Parties Trigger WTO Rules?”, (2007) 10(2) *JIEL*, 335; Koebele M, LaFortune G, “Agreement on Technical Barriers to Trade: Article 4 and Annex 3”, in Wolfrum R, Stoll P-T, Seibert-Fohr A, (eds.), *WTO: Technical Barriers and SPS Measures* (2007), 243; Roben V, “Agreement on the Application of Sanitary and Phytosanitary Measures: Article 13”, in Wolfrum et al., (eds.), *supra*, 538; Prévost D, “Private Sector Food-safety Standards and the SPS Agreement: Challenges and Possibilities”, (2008) 33 *SAYIL*, 1; Bohanes J, Sandford I, “The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct”, *Paper Presented at the Inaugural Conference of the Society of International Economic Law*, Geneva, July 15 - 17, available at <http://www.ssm.com/link/SIEL-Inaugural-Conference.html> (last accessed on 31 August, 2011).

## 1.6 ORGANISATION OF THE PAPER

Following this introduction, the paper breaks into six parts. The preliminary component – comprising parts 2 and 3 – presents the organising function of the rules-based system, and builds the argument that private standards disturb this function. The two parts reveal that in disturbing the organising function, private standards threaten the rule of law in international food trade. Following the conclusions from parts 2 and 3, the intermediate part of the paper – part 4 – discusses what options are available, from within the rules of the WTO, for responding to private standards. The part identifies areas, within the rules of the WTO, from which the potential exists to deal with the challenges presented by private standards. It presents these rules-based options, and discusses their applicability to private standards and respective scopes of operation. It also discusses their interplay and practical application. The part critically engages on how the rules-based options could work to preserve the rule of law in the face of the trade-distorting, and increasingly pervasive, effects of private standards. The penultimate component of the paper comprises parts 5 and 6. Part 5 appraises the rules-based options for their efficacy and pragmatism. In the final analysis, the rules-based options can only be successful if they do, in reality, succeed in safeguarding the rule of law. The discussion shows that there are elements of the rules-based *approach* which make the rules-based options more good in theory than they are in practice. The part concludes that what is needed, in dealing with private standards, is a multipronged strategy. Part 6 carries this forward by; recommending various actions, and propositioning a symbiosis across such actions. Part 7 concludes the paper.

## PART 2: THE ORGANISING FUNCTION OF RULES-BASED SYSTEM

*“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations”*

- Paragraph 3, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### 2.1 THE PLACE OF RULES IN CONTEMPORARY INTERNATIONAL FOOD TRADE

The rule of law is a valuable public good in international trading relations. Lauded for being a truly legalised and efficient system of international governance, the WTO system also prides itself with being the international governance system with what is considered the most functioning enforcement system.<sup>35</sup> The rules of the WTO are sturdy, and have shown themselves relatively immune from politics and international power dynamics.<sup>36</sup> In international food trade, the conduct and interrelations of WTO Members are organised by the rules-based system - a collective of the GATT, the SPS and TBT Agreements, and the DSU. The organising function of the rules-based system is an essential point of departure for the analysis in this paper. From the perspective of the paper, the core issue with private standards is that they disturb this organising function and, in the process, compromise the rule of law in international food trade.

<sup>35</sup> Former WTO Director-General, Renato Ruggiero, writes of the dispute settlement system, that it is “the most fundamental feature of the WTO”. He adds: “[n]o other international institution has such a rules-based system, with the same enforcing capacity”. Ruggiero R, “The World Trade Organisation: Three Priorities”, (2005) 4(3) *WTR* 355, 356.

<sup>36</sup> Indeed, a recurring discussion which has accompanied fears relating to a potential surge in protectionism and unilateral climate-related measures, following the global economic crisis and the failed Copenhagen climate change talks, respectively, is on the risk of the WTO dispute settlement system becoming overloaded with cases. These are two events which took place at the height of the Doha Round negotiations impasse. See, for example, Bacchus J, “Questions in Search of Answers: Trade, Climate Change, and the Rule of Law” *Keynote Address (with floor discussion), Second Thinking Ahead on International Trade Conference: Climate Change, Trade and Competitiveness - Issues for the WTO* (16 - 18 June, 2010), Geneva, available at [http://graduateinstitute.ch/webdav/site/ctei/shared/CTEI/events/TAIT%202/Keynote\\_Bacchus\\_Final\\_Plus\\_Discussions.pdf](http://graduateinstitute.ch/webdav/site/ctei/shared/CTEI/events/TAIT%202/Keynote_Bacchus_Final_Plus_Discussions.pdf) (last accessed on 31 August, 2011). See, also Bown C P, “The WTO Dispute Settlement System Would Survive Without Doha”, *Vox Commentary* (19 June 2010), available at <http://www.voxeu.org/index.php?q=node/5207> (last accessed on 31 August, 2011).

Drawing from the evolution of the rules-based system, this part identifies five distinct operational prongs that make up the organising function of the rules-based system. These are presented as:

- 1) the non-discrimination prong;
- 2) the norm-creating prong;
- 3) the non-protectionism prong;
- 4) the dispute-settlement prong; and
- 5) the developing-country interests prong.

All the prongs are essential for the smooth functioning of the rules-based system. A disturbance to any one of them engenders disequilibrium in the multilateral food trading system.

As a backdrop, the part begins with an account of the evolution of the rules-based system, and a discussion of the place of the rules for African Members of the WTO.

### **2.1.1 The Evolution of Rules-based System of International Food Trade**

In the 1970s, the Tokyo Round of multilateral trade negotiations<sup>37</sup> saw the beginnings of a specific system of rules to manage the use of standards in international food trade.<sup>38</sup> The Tokyo Round Agreement on Technical Barriers to Trade (the Tokyo TBT Code) was a plurilateral agreement which dealt with technical regulations and standards. In addition to being only plurilateral, the Tokyo TBT Code did not readily cover sanitary or phytosanitary (SPS) measures, and was located within a system of hollow mechanisms for dispute settlement. However, at the time, food standards were relatively noncontroversial and there were no major concerns regarding disruptions to trade resulting from them. Moreover the non-discrimination rules of the GATT, together with the public policy exceptions in article XX could, with some adequacy, manage the use of food standards. But by the commencement of the Uruguay Round, it had become apparent that, as traditional tariff barriers continued to fall, non-tariff barriers (in

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<sup>37</sup> The Tokyo Round was the seventh round of multilateral trade negotiations. It took place between 1973 and 1979.

<sup>38</sup> See Marceau G, Trachtman J P, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organisation Law of Domestic Regulation of Goods", (2002) 36(5) *JWT* 811, 813 - 815.

particular, food standards) were set to take a central place in the multilateral trading system.<sup>39</sup> GATT Contracting Parties had developed an increased propensity (often under pressure from domestic industry) to use food standards illicitly, to recompense reductions in tariff barriers.<sup>40</sup> In fact, it was clear to Contracting Parties that food standards were set to become the “primary” cause of fragmentation of world markets.<sup>41</sup> There became an inevitability to the establishment of a set of clear rules, specific to the use of food standards. At the same time, with the transition from the GATT to the WTO, membership of the organisation was growing. This increase in the number of countries participating in regulated international trade was accompanied by an increased volume of trade in perishable and agricultural products.<sup>42</sup> This engendered the increased potential of the spread of a variety of risks to humans, plants and animals, and ecosystems, and the consequent necessity for an increased number and variety of food safety standards.<sup>43</sup>

While these processes unfolded, a parallel process began – one which intensified in the 1990s after the two *Tuna/Dolphin* cases<sup>44</sup> catapulted non-trade concerns into public controversy.<sup>45</sup> This process saw food standards issues become among the most hotly contested components of the multilateral trading system. Allied to this was some deterioration in the public’s perception of the GATT.<sup>46</sup> To effectively manage the use of food standards in international trade, the Uruguay

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<sup>39</sup> See Kennedy K, “GATT 1994”, in Macrory P F J, Appleton A E, Plummer M G, (eds.), *The World Trade Organisation: Legal, Economic and Political Analysis* (2005) 89, 157 - 159; Marceau, Trachtman, *supra*, 813 - 815.

<sup>40</sup> See Prévost D, Van den Bossche P, “The Agreement on the Application of Sanitary and Phytosanitary Measures”, in Macrory et al., (eds.), *supra* 231, pp 233, 234.

<sup>41</sup> Koebele, M., “Agreement on Technical Barriers to Trade: Preamble”, in Wolfrum et al., (eds.), *supra* 167, 170. See also, Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, p 17; Kennedy, *supra*, 157 - 159.

<sup>42</sup> See Prévost, Van den Bossche, *supra*, pp 233, 234.

<sup>43</sup> On the reasons for the rise in the use of food standards, and the exigency for rules to manage their use, see Prévost D, “The Japan-Apples Dispute: Implications for African Agricultural Trade”, *Paper Presented at the Tralac Conference: “Critical Issues in Agricultural Trade in the African Context”* (30 September 2004), 1 - 3, available at [http://www.ecolomics-international.org/biosa\\_denise\\_prevost\\_japan\\_apples\\_africa\\_implic\\_tralac\\_0904.pdf](http://www.ecolomics-international.org/biosa_denise_prevost_japan_apples_africa_implic_tralac_0904.pdf) (last accessed on 31 August, 2011). See also Prévost, Van den Bossche, *supra*, 233 - 236.

<sup>44</sup> GATT Dispute Panel Reports: *United States - Restrictions on Imports of Tuna (Tuna/Dolphin I)*, circulated on 3 September 1991 (not adopted), DS21/R – 39S/155; *United States - Restrictions on Imports of Tuna (Tuna/Dolphin II)*, circulated on 16 June 1994 (not adopted), DS29/R.

<sup>45</sup> See Gaines S, “The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures”, (2001) 22:4 *U. Pa. J. Int’l Econ. L.* 739, 751 - 753.

<sup>46</sup> In the aftermath of the *Tuna/Dolphin* cases, the GATT/WTO began to be increasingly perceived as a sinister omnipresence, which not only suffered from a democratic deficit, but also threatened public health and the environment (or, at least promoted free trade over them). This climaxed with the derailing of the Seattle Ministerial Conference in 1999. For an appraisal of these issues, see Jones K, *Who’s Afraid of the WTO* (2004), at “Introduction: The Fear Factor”, and “Chapter 1: Flashpoint - The WTO Under Fire”.



Round negotiations generated the SPS and TBT Agreements. The SPS and TBT agreements contain specific rules relating, respectively, to the use of SPS standards<sup>47</sup>, and technical regulations and standards<sup>48</sup>. Together with the GATT, and the WTO's dispute settlement system, they represent the rules-based system of international food trade.

## 2.1.2 The Dichotomy between Food Standards and Market Access

### The GATT: Articles I and III, and the Article XX Exceptions

There is a natural dichotomy between food standards and market access. Food standards are by nature potentially restrictive to trade, and almost invariably offend the WTO's non-discrimination principles – articulated in the GATT's most-favoured nation (MFN) and national treatment rules.<sup>49</sup> The MFN and national treatment rules are the quintessence of the WTO system of multilateral trade. They are emblematic of market access (non-discrimination) and reflect the concomitant non-protectionism tradition of the WTO. Encapsulated in articles I and III of the GATT, they, respectively, proscribe discrimination (by Members): among “like” imported products originating from different WTO Members<sup>50</sup>; and between imported products and domestic “like” products<sup>51</sup>. Like products, in WTO parlance, are products which (under

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<sup>47</sup> The SPS Agreement applies to “all sanitary and phytosanitary [SPS] measures which may, directly or indirectly, affect international trade”. An SPS measure is, in turn, defined in Annex A.1 as “any measure” applied to protect human, animal, and plant life and health, and the territories of Members, from a variety of risks which are listed in Annex A.1 (a) to (d). Article 1.1 (read with Annex A.1) of the SPS Agreement, *supra*.

<sup>48</sup> The TBT Agreement applies to technical regulations, technical standards, and conformity assessment procedures, which are defined in Annexes 1.1, 1.2, and 1.3, respectively. A technical regulation is defined as: “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, *with which compliance is mandatory*”. A technical standard is defined as: “[d]ocument approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not mandatory*”. [Own emphasis] See Articles 1.1 - 1.6, and Annex 1 of the TBT Agreement, *supra*.

<sup>49</sup> Referring to articles III.2 and III.4, article I.1 states that, “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country *shall be accorded immediately and unconditionally* to the like product originating in or destined for the territories of all other contracting parties”. Article III.4 states that, “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favourable* than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale”. Articles I.1 and III.4 of the GATT, *supra*.

<sup>50</sup> See n 49, above. On the object and purpose of the MFN clause, see Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985, par 84.

<sup>51</sup> See n 49, above. The broad purpose of Article III (the national treatment clause) is to prevent protectionism in the application of internal measures, and to ensure the equality of competitive conditions for imported products in relation to domestic products. See: Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R,

legal criteria accumulated from case law<sup>52</sup>) are alike in product characteristics. In general, the products' production processes and methods (PPMs), unless physically incorporated into the product, were (historically) considered to not affect the determination of likeness.<sup>53</sup> The PPM issue has been the subject of disputation for some years and continues to be so.<sup>54</sup> The complexities of the matter are beyond the scope of this paper. Suffice to say for now, measures which discriminate between physically identical products, on the basis of non product-related PPMs, would face some scrutiny on account of the proscription of less favourable treatment of like products.<sup>55</sup>

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WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p 16; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, p 18; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, par 190; Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3, par 120; Panel Report, *Argentina – Hides*, WT/DS155/R, *supra*, par 11.182.

<sup>52</sup> The four general criteria, whose original formulation was in the 1970 GATT Working Party on Border Tax Adjustments, have been refined over the years in the case law, and synthesised as follows in *EC – Asbestos*: “(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.”. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, par 101.

<sup>53</sup> The matter comes down to the assertion that physically identical products are like products, and that any measures which seek to create distinctions between such products, based on harvesting or production methods which are not incorporated into the product, can amount to artificial differentiation. Specific concerns, in that regard, are that this then translates to: *inter alia*, subjectively determined (and sometimes unscientific) product differentiation; disguised restrictions to trade; extra-territorial application of domestic preferences; and inconsideration of the circumstances prevailing in, or the preferences of other countries. For a comprehensive discussion on the evolution of the “like products and PPMs” matter in GATT/WTO law, see Read R, “Like Products, Health and Environmental Exceptions: The Interpretation of PPMs in recent WTO Trade Dispute Cases”, (2004) 5(2) *Estey Centre Journal of International Law & Trade Policy*, 123, generally. See also, McDonald J, “Domestic Regulation, International Standards, and Technical Barriers to Trade” (2005) 4:2 *WTR* 249, 255; United Nations Environment Programme, International Institute for Sustainable Development, *Environment and Trade: A Handbook* (2005), 53 - 57.

<sup>54</sup> The issue of non product-related PPMs reflects a number of standing controversies in the WTO which have taken the form of a developing- / developed-country divide. In addition to the issue of like products, it presents itself in another ongoing debate in relation to the TBT Agreement. That debate is over whether or not non product-related PPMs are covered by the disciplines of the TBT Agreement. Developing-country Members generally contend that they are not. The negotiating history of the agreement suggests that this viewpoint did prevail when the agreement was concluded, and this is apparently supported by the text. According to Annex 1.1 of the agreement, technical regulations and standards lay down product characteristics and guidelines, or their “related processes and production methods”. For background, see: WTO Committee on Trade and Environment / Committee on Technical Barriers to Trade (29 August 1995), WT/CTE/W/10 / G/TBT/W/11, *supra*; UNEP, IISD, *supra*; Koebele M, “Agreement on Technical Barriers to Trade: Article 1 and Annex 1”, in Wolfrum et al., (eds.), *supra* 178, 196 - 198.

<sup>55</sup> The following preeminent academics, all challenge the legal validity of claims that product distinctions based on non product-related PPMs should, by that fact, be considered impermissible under the (article III) the GATT, in: Howse R, Regan D, “The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy”, (2000) 11(2) *EJIL*, 249; Charnovitz S, “The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality”, (2002) 27(1) *Yale Journal of International Law*, 59.

Proscribing origin-based discrimination between like products is central to the WTO system. At the same time, every WTO Member (and GATT Contracting Parties before them) retains a sovereign right to regulate autonomously with respect to food standards issues within its jurisdiction.<sup>56</sup> Regulating in relation to food standards can make it necessary for Members to take measures which restrict trade (and offend articles I and III).<sup>57</sup> The GATT article XX exceptions represented the original vehicle for the taking of such measures. Subject to certain stipulations, article XX makes it clear that “*nothing* in [the GATT] shall be construed to prevent” Members from taking measures in connection with certain listed non-trade values (the public policy exceptions).<sup>58</sup> For present purposes, the relevant public policy exceptions are those relating to measures which are “necessary for the [protection] of human, animal or plant life or health”<sup>59</sup>, and which relate “the conservation of exhaustible natural resources”<sup>60</sup>.

The public policy values listed in article XX are inviolable. They represent permissible discrimination. At the same time, it is known that food standards are commonly used as instruments of protectionism, and represent effortless excuses for restricting trade.<sup>61</sup> To manage the dichotomy, the *chapeau* of article XX injects balance by requiring that article XX measures not be applied in a manner which constitutes: “arbitrary discrimination between countries where the same conditions prevail”; or “unjustifiable discrimination between countries where the same

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<sup>56</sup> See Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, par 177. It is also a duty of governments to regulate with respect to food standards for the purpose of protecting consumers and other legitimate national interests. See, in this regard: Prévost, “The Japan - Apples Dispute”, *supra*, 1; Prévost, Van den Bossche, *supra*, pp 233, 237.

<sup>57</sup> As the AB in *US – Shrimp* explains, such measures are those which relate to domestic policies which are “recognised as *important* and *legitimate*”. [Own emphasis] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, par 121.

<sup>58</sup> Own emphasis.

<sup>59</sup> Art XX (b) of the GATT, *supra*.

<sup>60</sup> Art XX (g) of the GATT, *supra*.

<sup>61</sup> They are an especially potent weapon of protectionism, both because of their sheer effect and on account of their convincingness as an excuse for restricting trade. As noted by Kennedy, “[i]n the arsenal of weapons at a country’s disposal to block the free flow of goods across national borders, one of the most insidious and potentially effective is product standards”. The author continues, “[o]nce tariffs reductions were progressively implemented and market access began to significantly improve with trade flows substantially increasing ... suspicion grew that national standards and certification procedures were being used as a gossamer-thin disguise to restrict trade”. Kennedy, *supra*, pp 157, 158.

conditions prevail”; or a “disguised restriction on international trade”.<sup>62</sup> The function of the *chapeau* could be interpreted as: firstly, to balance the right of a Member to invoke the article XX exceptions, with that same Member’s GATT obligations<sup>63</sup>; secondly, to balance that Member’s right with the treaty rights of other Members<sup>64</sup>; and, lastly, to prevent abuses and unnecessary trade restrictions from being committed under the guise of permissible GATT exceptions<sup>65</sup>.

### The SPS and TBT Agreements

With the introduction of the SPS and TBT agreements, came a more thorough, substantive and procedural, rules-based regime to buttress the GATT infrastructure in the management of food standards. The SPS and TBT agreements adopted the foundational balance between market access and measures taken in relation to food standards, but synthesised it into the situation where Members’ market access rights now exist contemporaneously with an autonomous *right* to take SPS measures, and technical regulations and standards.<sup>66</sup> The introduction of the SPS and TBT agreements also held promise for developing-country Members. Pervasive agricultural protection in developed countries had continually been adversative to liberalisation efforts. And when they were introduced, the two agreements were seen as having the potential to counter some of the effects of this and be catalysts for improving market access for developing countries in agricultural markets.<sup>67</sup>

The procedural and substantive concepts, introduced by the two agreements, were responses to some of the well documented concerns of the negotiators of the Uruguay Round. The increasing

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<sup>62</sup> The *chapeau* (heart) of Article XX is the preamble of the Article. Any measures which a Member takes, under the Article XX, must be informed by the *chapeau*. See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p 22.

<sup>63</sup> As stated by the AB in *US – Shrimp*, the *chapeau* operates to maintain the balance between the “*right* of a Member to invoke an exception”, and the “*duty* of that same Member to respect” market access rights of other Members. Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 156.

<sup>64</sup> The AB in *US – Shrimp* explains, in that regard, the task of interpreting and applying the *chapeau* as essentially one of marking out the line of “equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions”. Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 159.

<sup>65</sup> The AB has emphasised that the use of measures justified under article XX should not, in their application, constitute abuse of the exception under which they are justified. Appellate Body Report, *US – Gasoline*, *supra*, WT/DS2/AB/R, p 22.

<sup>66</sup> The autonomous right is manifested in, *inter alia*: paragraph 1 of the preamble to, and article 2.1 of the SPS Agreement; and paragraph 1 of the preamble to the TBT Agreement.

<sup>67</sup> For background, Prévost, Van den Bossche, *supra*, pp 235 - 236, n 7, n 8.

multiplicity and heterogeneity of standards<sup>68</sup>; opacity in the setting and application of food standards<sup>69</sup>; rigidity in their application<sup>70</sup>; and the use of unscientific and non-verifiable methods for setting food standards<sup>71</sup> had all become causes for concern when negotiations began. These were creating considerable unpredictability in international markets, facilitating discriminatory and protectionist conduct, and the conditions for consequent market fragmentation. Rules relating to international standards (harmonisation of standards)<sup>72</sup>; transparency<sup>73</sup>; equivalence and mutual recognition<sup>74</sup>; and science and risk assessment<sup>75</sup>, were among the direct responses to these challenges. The negotiators had also begun to have a sense of foreboding over the impact of private standardisation activities. There was some recognition that private standardisation activities were capable of constituting *de facto* market access barriers. This factor is noted as one of the reasons why the TBT Agreement, notably, introduced rules for private parties.<sup>76</sup>

#### 2.1.2.1 Food Standards and Consumer Protection

Since the introduction of the SPS and TBT Agreements, WTO Members have an out and out right to take measures in relation to food standards. Despite this, food standards issues continue to be contentious. They owe much of their contentiousness to their consumer protection aspect. It is for this reason that, for most practical purposes, the dichotomy between food standards and market access manifests as a dichotomy between consumer protection and market access. Straightforward consumer protection is, on its own, an issue plagued by public sensitivities. As the expectations of developed-country consumers progressively synthesise into broader concerns, the situation has become magnified. This has coincided with an increasing market bias in the

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<sup>68</sup> For background, see Marceau, Trachtman, *supra*, 814. See also Tamiotti L, “Agreement on Technical Barriers to Trade: Article 2”, in Wolfrum et al., (eds.), *supra* 210, 228.

<sup>69</sup> For background, see Prévost, Van den Bossche, *supra*, pp 336 - 342, 363 - 364; Tamiotti, *supra*.

<sup>70</sup> For background, see Landwehr O, “Agreement on the Application of Sanitary and Phytosanitary Measures: Article 4”, in Wolfrum et al., (eds.), *supra* 428, 428 - 434; Prévost, Van den Bossche, *supra*, 355, and n 615; Tamiotti, *supra*.

<sup>71</sup> For background, see Prévost, Van den Bossche, *supra*, 240 - 243.

<sup>72</sup> Articles: 3 of the SPS Agreement, *supra*; and 2.4 and 2.6 of the TBT Agreement, *supra*.

<sup>73</sup> Articles: 7 and Annex B of the SPS Agreement, *supra*; and 2.9 - 2.12 of the TBT Agreement, *supra*.

<sup>74</sup> Articles: 4 of the SPS Agreement, *supra*; and 2.7 and 6 of the TBT Agreement, *supra*.

<sup>75</sup> Articles: 2.2 and 5.1 of the SPS Agreement, *supra*; and 2.2 of the TBT Agreement, *supra*.

<sup>76</sup> Annex 3 of the TBT Agreement (the Code of Good Practice) is a rules-based regime governing the formulation and application of technical standards, which is open to voluntary acceptance by (*inter alia*) private parties and is, upon acceptance, directly binding upon them. For background on the introduction of rules for private parties under the TBT Agreement, see, Koebele, *supra*, 246.

food standards arena. In the market, the continuum has steadily widened - to the extent that what is considered consumer protection often far transcends food safety and quality assurance, environmental protection, the prevention of deceptive practices, technical requirements and product information, or any other policy objectives recognised as legitimate under the rules of the WTO.<sup>77</sup> Many of the issues inherent in market-based food standards relate to non product-related PPMs, issues extraneous to food safety, or matters which typically represent impermissible bases for product distinctions under the rules of the WTO. Certain components of private standards, as will emerge below, reflect an escalation of a trend which is seeing the preparation and application of food standards being extracted from the rules-based system, making way these issues to become mainstream considerations in standard-setting.<sup>78</sup>

Generally speaking, any suggestion that the WTO proscribes the autonomy of governments to protect consumers is fallacious. The very existence of the article XX exceptions and the rights to take measures in relation to food standards (as espoused in the SPS and TBT Agreements) is testament to this. Part of the *raison d'être* of the SPS and TBT Agreements is precisely that governments regularly *must* take trade-restrictive SPS measures, and technical regulations and standards, when these are necessary to protect consumers. The key issue lies in the maintenance of the balance of rights and obligations intended by the rules, and in whether measures taken by Members are in fact measures to protect consumers.<sup>79</sup> The more remote they are from, or unrelated to, food safety and other legitimate objectives, the less legitimate they are as bases for

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<sup>77</sup> Developed-country consumers have high purchasing power, and increasingly high expectations regarding the food which they buy. In that process, they have begun to challenge orthodoxy. As they become increasingly sensitive to the environmental and social impacts of their individual purchasing habits, a myriad of (extrinsic) environmental and ethical matters, social and cultural factors, and consumer preferences, have become as intrinsic a part of food quality assurance expectations as any of the traditional considerations. In certain developed-country societies, unsubstantiated public fears, however, are also a heavy influencer of consumer preferences. On changing food quality expectations, see Gandhi, (2005) 39(5) *JWT*, *supra*, 856 - 857; Stanton, *supra*, 1 - 2. On the latter, see, Button C, *The Power to Protect: Trade, Health and Uncertainty in the WTO* (2004), pp 93 - 95, 111 - 113.

<sup>78</sup> Discussed in part 3, below.

<sup>79</sup> As stated by the AB, of the *chapeau* of article XX: its “fundamental theme ... is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules [of the GATT]”. Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, p 25. See also *US – Shrimp*, where the AB states the issue as underpinned by the need to ensure that “neither of the ... rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves”. Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 159.

product distinctions.<sup>80</sup> Similarly, the more they relate to non product-related PPMs, the more WTO experience has shown they are prone to becoming discriminatory.<sup>81</sup>

If Member governments were to deal with food standards in an uninhibited fashion, there would come a point along the continuum where this would disturb the equilibrium in the system. It would also advance the conditions for discrimination and protectionist capture to thrive. Food standards can be the single most potent of trade barriers, even outdoing tariffs and other traditional barriers such as quantitative restrictions.<sup>82</sup> And when they present in their most insidious forms, the biggest casualties are poor countries.

### 2.1.3 The Rules-based System and African Countries in International Food Trade

The rules of the WTO are a public good, utilisable by any Member. But their value to developing-country Members is comparatively greater. For developing-country Members, the rules are both equalising and empowering. James Bacchus, former Chairman of the WTO Appellate Body, has observed that, “without the rule of law, developing countries that are Members of the WTO cannot remain the equals of the developed countries within the WTO”.<sup>83</sup> Also defining their value, to developing countries, Van der Bossche and Prévost state that rules in international food trade “enhance trade opportunities in an area of crucial interest to developing countries” and “[provide] tools for developing countries to use in securing market access for their export products”.<sup>84</sup>

For African countries, in particular, a system of international trade which is predicated on rules represents a central ingredient in facilitating their integration into the multilateral trading system.

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<sup>80</sup> It is known that “other factors”, such as cultural preferences, and even public fears, do often have an influence on regulators in their designing of food standards. It is also a fact that consumer perceptions, particularly in relation to substitutability are an accepted factor in the determination of like products. However, these so-called other factors can be the source of controversy, particularly when they appear to overwhelm the science-based or other established justifications for measures. For discussions on “other factors”, see, *inter alia*, Epps T, “Reconciling Public Opinion and WTO Rules under the SPS Agreement”, (2008) 7:2 *WTR*, 359 - 392; Prévost, Van den Bossche, *supra*, 235; Button, *supra*, 102 - 113.

<sup>81</sup> See p 15 - 16, and n 53, above.

<sup>82</sup> They have been known to even counteract the duty-free and quota free (DFQF) access that is granted to LDC Members. See Prévost, “The Japan - Apples Dispute”, *supra*, 1.

<sup>83</sup> Bacchus, “The WTO and the International Rule of Law”, *supra*, 14.

<sup>84</sup> Prévost, Van den Bossche, *supra*, 236.

Over and above the promise of formal equality, the rules of the WTO contain mechanisms which are aimed at guaranteeing substantive outcomes for low income Members. The GATT, and the SPS and TBT Agreements all contain positive and enforceable provisions, most notably the special and differential treatment and technical assistance provisions, which extend beyond formal non-discrimination and the basic rules-infrastructure.<sup>85</sup> Even within the more universal provisions in the covered agreements, evidence of the accommodation of developing countries is also very apparent.<sup>86</sup>

Admittedly, food standards are a generally vexing area for African Members. Supply-side constraints, a developed-country bias, and the relative importance of agriculture to their economies are all contributors to the challenges faced by African Members.<sup>87 88</sup> It is also trite that, despite the existence of a system of rules, general integration into the multilateral trading system has proved elusive for African countries. Nevertheless, the framework of rules has enhanced the degree to which African countries are accommodated in international food trade. And within the rules, there is infrastructure for the continual facilitation of their full integration. Outside of the rules, on the other hand, a pronounced developed-country bias, as well as a power-based dynamic, would subsist.

For present purposes, however, it warrants mention that the general supply-side constraints rhetoric should not be overstated. African countries have been phenomenally successful in global fresh-fruit and vegetable trade, and their participation was both established and growing

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<sup>85</sup> Articles 10 and 12, of the SPS and TBT Agreements, respectively, provide for the provision of ‘special and differential treatment’ to developing-country Members. And articles 9 and 11 of the respective agreements provide for the provision of technical assistance for developing-country Members.

<sup>86</sup> Many of the substantive and procedural rules of the WTO contain flexibilities which recognise differences in the circumstances prevailing in different countries. Such flexibilities carry a particular value for developing-country Members. For discussions on some of these, see Landwehr, *supra*, 428 - 434; Prévost, Van den Bossche, *supra*, 355, and n 615.

<sup>87</sup> See Prévost, “The Japan - Apples Dispute”, *supra*, 1.

<sup>88</sup> It has been observed that, where they do accommodate developing countries, food standards tend to reflect the interests of large (capital rich or multinational) firms. However, in many African economies, export agriculture is led by participants of the small-scale variety. A 2007 International Institute of Sustainable Development study records that small-scale farmers account for 90 per cent of Sub-Saharan Africa’s agricultural production, and 73 per cent of Africa’s rural poor. Effectively, therefore, even where the interests of developing countries are ostensibly taken into consideration, certain biases against them subsist. See Rotherham T, *Labelling for Environmental Purposes: A Review of the State of the Debate in the World Trade Organisation* (2003), IISD, 17 (available at [http://www.tradeknowledgenetwork.net/pdf/tkn\\_labelling.pdf](http://www.tradeknowledgenetwork.net/pdf/tkn_labelling.pdf) , last accessed on 31 August, 2011); Brown, Sander, *supra*, pp iii, 2.



when private standards began to decimate African farmers' participation in supply-chains.<sup>89</sup> A matter which has, admittedly, overshadowed the benefits, for African Members, of the rules-based system is their underuse of dispute settlement. Their underuse of dispute settlement, in fact, represents a serious systemic defect.<sup>90</sup> Dispute settlement is a key emblem of the rule of law. The continued failure by African countries to fully utilise it compromises the efficacy of the rules-based system. Indeed, this paper argues that dispute settlement is one of the essential organising prongs of the rules-based system.<sup>91</sup> The dispute settlement mechanism (DSM) stands for security and predictability in the multilateral trading system, and the preservation of the rights and obligations of WTO Members.<sup>92</sup> It also represents the formal equality between developed- and developing-country disputants in WTO dispute settlement.<sup>93 94</sup>

Nevertheless, the reality of developing-country Members' underuse of the DSM (in some ways) makes more significant the existence of a concrete rules framework within which food standards must operate. The very existence of a clear and comprehensible system of rules means that every WTO Member is legally obligated to operate within the strictures of those rules. It is safe to assume that WTO members do not comply with the rules of the WTO Agreements merely when there exists the real possibility of recourse to dispute settlement - or that they simply flout them when there is not. But recourse to dispute settlement cannot be underestimated, and there is systemic acknowledgment that the matter requires urgent and concerted attention. A

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<sup>89</sup> A full discussion of the issues is contained in part 3.

<sup>90</sup> Mosoti expresses the view that the under-participation, by African Members, undermines the usefulness of the entire dispute settlement process. In a paper appraising the participation of African Members in dispute settlement, the author identifies dispute settlement as a "public good". He concludes that under-participation by African countries is a systemic defect that imperils all Members, and represents a long-term danger to the function of the WTO itself. Mosoti, *supra*, 10 - 11.

<sup>91</sup> Discussed in the next subsection.

<sup>92</sup> Article 3.2 of the Dispute Settlement Understanding, *supra*.

<sup>93</sup> Bacchus states, of this equality, that it is "one of the greatest achievements of the WTO". Bacchus, "The WTO and the International Rule of Law", *supra*, 14.

<sup>94</sup> The creation of the rules-based system (and the DSM) represented at least two powerful messages from powerful countries. The specific one was that they were willing to submit themselves to a system of enforceable legal disciplines in their international trading relations. The broader one was that they had conceded that the power-based system, although ostensibly favourable to powerful nations, had diminishing utility for, and adversative effects on, liberalisation and multilateralism in international trade. On the significance of the DSM to the regulation of international trade, see Perdakis N, Read R, "The Political Economy of Protection and the Regulation of International Trade: Recent Trade Disputes between the EU and the United States" 1, 20 - 22; Read R, "The Trade Dispute Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT" 29, 40 - 41; Perdakis N, Read R, "Critical Issues in WTO Dispute Settlement and Recent Trade Disputes between the EU and the United States: Some Conclusions" 267, 267 - 269, all in Perdakis N, Read R, (eds.), *The WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States* (2005).

substantive review of the DSM is currently underway under the auspices of the Doha Round Mandate.<sup>95</sup> Under the process, the Africa Group has submitted a number of proposals for reform actions which could facilitate their improved participation in dispute settlement.<sup>96 97</sup>

## 2.2 THE ORGANISING FUNCTION OF THE RULES-BASED SYSTEM

The preceding section has given an overview of the place of rules in contemporary international food trade. When this role is deconstructed, one can see that the rules-based system is not simply a collection of rules which govern the conduct of WTO Members. It is a sophisticated system which *organises* international food trade. Within each of the organising prongs, which are synthesised into five in this paper, is reflected the foundational balance between food standards and market access. The organising prongs also replicate the now contemporaneous existence of the right of Members to take measures relating to food standards, and their market access rights. The five prongs are explained below.

### The Non-discrimination Prong

Non-discrimination is sacrosanct in the WTO.<sup>98</sup> The MFN and national treatment principles, on their own, represent two of the five pillars of the GATT.<sup>99</sup> The essence of the non-discrimination obligations (in articles I and III of the GATT) is to ensure that products do not face prejudice on

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<sup>95</sup> Under paragraph 30 of the *Doha Ministerial Declaration*, *supra*.

<sup>96</sup> For details, see Alavi A, “African Countries and the WTO’s Dispute Settlement Mechanism” (2007) 25(1) *Development Policy Review* 25, 25 - 42.

<sup>97</sup> Parallel initiatives are also contributing to the attainment of satisfactory outcomes for African Members. The Advisory Centre for WTO Law (ACWL) is a body autonomous from the WTO, but which has received acclamation for its contribution towards dispute settlement reform. It offers free (or subsidised) legal services and legal technical assistance to LDCs, and to developing-countries who are its members. The ACWL played a role in facilitating the participation of West African LDCs, Benin and Chad, as third parties in the *US-Upland Cotton* case. A private law firm and industry experts also provided *pro bono* assistance to Benin and Chad in the case. For commentary, see Zunckel H E, “The African Awakening in United States-Upland Cotton”, (2005) 39(6) *JWT*, 1071.

<sup>98</sup> Even the public policy exceptions, which permit derogation from Articles I or III of the GATT, operate within a non-discrimination *milieu*. In *US – Gasoline*, the AB explained that part of the *raison d’être* of the *chapeau* of article XX was to ensure that the article XX exceptions, would not be “read so expansively as seriously to subvert the purpose and object” of the GATT non-discrimination provisions. Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, p 18.

<sup>99</sup> The GATT 1994 is founded upon the following five pillars: the unconditional *most-favoured-nation* obligation; tariff bindings; the *national treatment* obligation; the elimination of quantitative restrictions; and transparency of government regulations affecting trade. For a discussion, see Kennedy, *supra*, 99 - 100.

account of their origin. This includes origin-neutral measures which have discriminatory effect.<sup>100</sup> In the practice of international trade, the proscription of origin-based discrimination between like products seeks to eradicate the according of advantages to the products of some Members, at the expense of like products from other Members.<sup>101</sup> It also seeks to encourage the equality of competitive conditions by eradicating the discriminatory protection, by Members, of domestic industry.<sup>102</sup> Non-discrimination is also taken forward into the SPS and TBT Agreements, being specifically entrenched in both agreements.<sup>103</sup>

### The Norm-creating Prong

As noted previously, the rules-based system (through the SPS and TBT Agreements) introduced a collection of substantive and procedural concepts to the practice of international food trade. Concepts such as science, international standards, risk assessment, transparency, equivalence, and mutual recognition, have become norms in international food trade. These norms represent how the rules organise, in a daily operations sense, conduct in international trade relations. Individually, each concept represents a specific response to each of the various characteristics of food standards which were contributing to disequilibrium in world food markets.<sup>104</sup> As a collective, they have become the operational manifestation of the rules-based system, and a central component of the food standards- making and application process. The concepts

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<sup>100</sup> It is established in WTO jurisprudence that *de jure* origin-neutrality does not preclude a finding of discrimination where *de facto* discrimination is apparent. See: Appellate Body Report, *Canada – Autos*, WT/DS139/AB/R, WT/DS142/AB/R, *supra*, par 78; Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201, paras 14.145 - 14.147; Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, *supra*, paras 231 - 234; Panel Report, *Japan – Film*, WT/DS44/R, *supra*, paras 10.85 - 10.86. Hestermeyer explains the reason for this as follows: “the determination of when a measure which is origin-neutral on its face is in violation of Article III ... effectively strikes a balance between the regulatory autonomy of the Members and the trade objectives of the GATT”. Hestermeyer H, “Article III GATT”, in Wolfrum et al., (eds.), *supra* 2, 7.

<sup>101</sup> See Appellate Body Report, *Canada – Autos*, WT/DS139/AB/R, WT/DS142/AB/R, *supra*, par 84. See also, Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, *supra*, par 190.

<sup>102</sup> See Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *supra*, p 16. The AB adds, on the same page, that the broad purpose of Article III is the avoidance of protectionism. See also: Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, par 135; Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, par 100; Panel Report, *Japan – Film*, WT/DS44/R, *supra*, par 10.379.

<sup>103</sup> In the SPS Agreement, see: paragraph 1 of the preamble; and articles 2.3 and 5.5. In the TBT Agreement, see: paragraph 6 of the preamble; and references in articles 2 and 5.

<sup>104</sup> See 18 - 19, above.

encapsulated in the rules-based norms are by no means all absolute in every case.<sup>105</sup> Where deviations are deemed necessary by Member governments, the system of rules ensures that specified criteria are observed.<sup>106</sup>

### The Non-Protectionism Prong

Protectionism is the antithesis of a functioning system of international trade. Multilateral efforts to contain its welfare-eroding effects date back to before the establishment of the GATT in 1947.<sup>107</sup> In the context of food standards, protectionist conduct skews equilibrium in the system, while adding marginal value (or none at all) to the interests in aid of which the trade is being restricted. When used with protectionist effect, measures which are taken putatively to protect consumers, segment markets - favouring domestic producers, while harming producers in other Members.<sup>108</sup> It has also been observed that protectionist measures can also turn out to be detrimental to domestic consumers.<sup>109</sup>

Outright protectionism, in the form of calculated restrictions to trade, can find no justification and is clearly proscribed under the rules of the WTO. This type of protectionism is captured by the proscriptions on “arbitrary and unjustifiable discrimination” and “disguised restriction[s] to trade”.<sup>110</sup> With food standards, however, there is the perpetual risk of unnecessary or inadvertent restrictions. This is why Members are directed to use measures relating to food standards “only

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<sup>105</sup> While each of the norms is the operational ideal, it is axiomatic that there could be specific situations or circumstances under which rigid adherence to a particular norm would not be appropriate for achieving a Members’ objectives. Because the system designed for maintenance of equilibrium there are, therefore, inbuilt flexibilities within each of the norms.

<sup>106</sup> The presumptions in favour of science and international standards, for example, are rebuttable. In the SPS Agreement, Article 5.7 provides an exemption to the article 2.2 scientific justification requirement, providing that Members can provisionally adopt SPS measures where relevant scientific justification is insufficient. Scientific justification or a risk assessment, conducted in accordance with article 5, also allow deviation from the article 3.1 international standards requirement. In the TBT Agreement, scientific justification is only one from a list of relevant considerations contained in article 2.2 for assessing the risks of non-fulfillment of legitimate objectives. And deviation from international standards is permitted under article 2.4 if Members deem them to be inappropriate or ineffective for the fulfillment of legitimate objectives.

<sup>107</sup> As noted in the 2005 World Trade Report, when “the design of a standard reflects protectionist interests, it [reduces] trade flows as well as domestic and global welfare”. World Trade Organisation, *World Trade Report: Exploring the Links Between Trade, Standards, and the WTO* (2005), p xxix.

<sup>108</sup> World Trade Organisation, *World Trade Report: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (2011), pp “Foreword by the WTO Director-General”, 3.

<sup>109</sup> See World Trade Organisation (2005), *World Trade Report*, *supra*, 129 - 130. This is not only from a welfare perspective but, also, from the point of view of possibly misleading consumers.

<sup>110</sup> The *chapeau* of Art XX of the GATT, *supra*; Paragraph 1 of the Preamble, and Art 2.3 of the SPS Agreement, *supra*; and Paragraph 6 of the Preamble of the TBT Agreement, *supra*.

to the extent necessary”<sup>111</sup>, and to ensure that they are “not more trade-restrictive than required”<sup>112</sup> to achieve their intended objectives. They are also directed to ensure that measures are *not* prepared or applied in a manner which would result in “unnecessary” barriers to trade, or be “more trade restrictive than necessary” to fulfil legitimate objectives.<sup>113</sup> Put differently, Members are expected to utilise the least trade restrictive means for achieving their chosen regulatory objectives.<sup>114</sup> It is, in this regard, also worth noting that many prescriptions of WTO rules go not necessarily towards the substance of food standards measures, but more the manner in which they are designed and/or applied.<sup>115</sup>

### The Dispute Settlement Prong

As it represents the enforcement component of the rules, the DSM is one of the emblems of the rule of law in the WTO. The dispute settlement system represents more than simple enforcement, however. Dispute settlement is a critical element in providing the security and predictability which the WTO system seeks to guarantee to the multilateral trading system.<sup>116</sup> It also serves to preserve the rights and obligations of WTO Members.<sup>117</sup> As already noted, dispute settlement is also empowering – particularly for developing-country Members.<sup>118</sup> In the course of interpreting and clarifying the provisions of the covered agreements, the panels and AB also

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<sup>111</sup> Article 2.2 of the SPS Agreement states that, SPS measures are to be applied: “*only to the extent necessary to protect human, animal or plant life or health*”. [Own emphasis]

<sup>112</sup> Article 5.6 of the SPS Agreement states that, Members should ensure that SPS measures “are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility”.

<sup>113</sup> Article 2.2 of the TBT Agreement states that Members shall ensure that: “technical regulations are not prepared, adopted or applied *with a view to or with the effect of creating unnecessary obstacles to international trade*”, adding that, “technical regulations shall *not be more trade-restrictive than necessary to fulfil a legitimate objective*”. [Own emphasis] See also paragraph 5 of the Preamble to the TBT Agreement, *supra*.

<sup>114</sup> See Mosoti V, Gobena A, “International Trade Rules and the Agriculture Sector: Selected Implementation Issues” (2007) *FAO Legislative Study* 98, 26 (available at <http://ftp.fao.org/docrep/fao/010/a1477e/a1477e01.pdf> , last accessed 31 August, 2011). Marceau and Trachtman opine, however, that the “least trade restrictive” test is not the end of the analysis, but constitutes a component of a broader proportionality analysis. Marceau, Trachtman, *supra*, 824 - 825.

<sup>115</sup> Commenting on the role of the *chapeau* in preventing the abuse of article XX exceptions, the AB in *US – Gasoline* observed that it addressed “*not so much the questioned measure or its specific contents but, rather, the manner in which that measure is applied*”. [Own emphasis] Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, p 22.

<sup>116</sup> Article 3.2 of the *Dispute Settlement Understanding, supra*. It has been stated that the DSU is one of the “most important instruments” for protecting the security and predictability of the multilateral trading system and for “the market-place and its different operators”. Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, par 7.75.

<sup>117</sup> Article 3.2 of the *Dispute Settlement Understanding, supra*.

<sup>118</sup> At 2.1.3, above.

have a particular role to play in giving effect to the interests of developing-country Members, being required to pay these particular attention when considering any case before them.<sup>119</sup>

### The Developing-country Interests Prong

The key to a cohesive multilateral trading system lies in the reduction of fragmentation in world markets and in all WTO Members being able to substantively benefit from the rules. The negotiators of the Uruguay Round came to a decision that, even following the move from a power-based to a rules-based system, developing countries (especially LDCs) would still require additional support for facilitating their integration into the multilateral trading system. The WTO system, as previously noted, has a rules foundation and institutional culture which inherently recognise the special situation of developing countries.<sup>120</sup> In addition to that, there is particular value to be drawn, by developing-country Members, from the existence of flexibilities within several of the rules of the WTO. Measures taken within the parameters of the basic substantive and procedural rules can still have a propensity to be insensitive to differences in the circumstances which prevail in different Members. The existence of flexibilities, such as those inherent in equivalence<sup>121</sup>, mutual recognition<sup>122</sup>, and regionalism<sup>123</sup> provisions, and other requirements<sup>124</sup>, allow for accommodation of disparities in the conditions prevailing in different countries, while the substance of measures is still maintained.

All of this is absent outside of the rules. In the case of private standards, it is not merely the fact that these mechanisms are absent which is the cause for concern. As will emerge in the next part, private standards are innately discriminatory towards developing countries. And the challenges posed to developing-country Members are not simply about their harm to the

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<sup>119</sup> Article 21.2 of the *Dispute Settlement Understanding*, *supra*.

<sup>120</sup> Reiterating the centrality of flexibility in WTO interrelations (in respect of developing-country Members, especially), the panel in *US – Shrimp* stated that discrimination qualified as “arbitrary discrimination” when measures were applied “without any regard for the difference in conditions between countries and ... [were] applied in a rigid and inflexible manner”. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, DSR 1998:VII, 2821, par 177.

<sup>121</sup> Article 4.1 of the SPS Agreement, *supra*, and articles 2.7 and 6.1 of the TBT Agreement, *supra*. On the value of the equivalence provisions to developing-country Members, see, Landwehr, *supra*, 431.

<sup>122</sup> Article 4.2 of the SPS Agreement, *supra*, and article 6.3 of the TBT Agreement, *supra*.

<sup>123</sup> Article 6 of the SPS Agreement, *supra*.

<sup>124</sup> For other examples, see Prévost, Van den Bossche, *supra*, 355, and n 615. It is also an inherent legal obligation upon Members to accommodate differences prevailing in developing countries. See: Panel Report, *US – Shrimp*, WT/DS58/R, *supra*, par 177; Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 165.

developing-country prong. The premise in this paper is that it is harm to the system, owing to a disturbance to all the organising prongs, which harms developing-country Members. As the next part of the paper will show, private standards disturb the organising function of the rules-based system, to the extent that there could now be a subordination of the rules. Any system of international trade governance within which the rules are increasingly subordinated represents a comparatively more considerable threat to low-income Members.

## **PART 3: PRIVATE VOLUNTARY STANDARDS - THE CHALLENGES TO THE RULE OF LAW IN INTERNATIONAL FOOD TRADE**

*“Recognising further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development”*

- Paragraph 2, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### **3.1 UNDERSTANDING PRIVATE STANDARDS**

Simply by juxtaposing the salient characteristics of private standards with the organising prongs of the rules-based system, one can observe, straight away, that private standards cause a disturbance to every one of the prongs. This part of the paper emerges from the groundwork set in the previous part. By using the place of the rules to understand the nature of private standards, the part discusses the challenges posed by private standards in terms of their systemic implications. The thesis in the part is three-fold, namely that: private standards threaten the organising function of the rules-based system, and by implication, the rule of law in international food trade; the related practical effects of the disturbance to the organising function are most profound on low income Members; and, it is these low income Members that are, in the long-term, harmed the most by a system of trade which takes place outside of the rules.

Private standards have been operating primarily in the fresh-fruit and vegetable sector - more specifically, high-value fresh-fruit and vegetable markets in developed countries. The confines of this sector, it is submitted, have not restrained the severity of their systemic ramifications. As will also emerge below, because of the sheer scale of the operation of private standards in global value-chains *vis-à-vis* the global scale of high-value fresh-fruit and vegetable trade<sup>125</sup>, there is

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<sup>125</sup> By about 2005, the volume and value of international trade in fresh-fruit and vegetables was, respectively, 73 million tonnes and US\$45 billion. In 2003, the EU - the world's biggest importer of fresh-fruit and vegetables, and



enough of an extraction of international food trade from the rules to warrant extreme concern. The rally across different spheres of academia, and the level of engagement on the matter in the WTO, only affirms the seriousness of the situation. Given the manner in which they are operating, and their rules-implications, private standards have begun to noticeably fragment world food markets. Information which has emerged from several studies conducted in developing countries reveals how the various features of private standards have led to the wide scale market marginalisation of certain supply-chain participants.<sup>126</sup> There is also strong evidence that if current trends continue the situation could only escalate - to the extent that rules-based system may soon no longer be the dominant form of governance in global fresh-fruit and vegetable markets.<sup>127</sup>

In order to contextualise the issue of private standards, an initial overview of what private standards signify in contemporary discourse follows below.

### 3.1.1 The Context behind the Proliferation of Private Standards

“Private standards” is the umbrella term which connotes voluntary food standards which are formulated and applied by private parties (non-governmental entities) - independently from governments.<sup>128</sup> Private standards are not a new phenomenon in international food trade. Non-governmental entities have long played a significant (and complementary) role in the formulation and implementation of food standards in international food trade – either in collaboration with, or parallel to, governments.<sup>129</sup> Popular discourse reveals that there are two broad categories of

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central to the private standards matter – consumed 55 million tonnes. Legge A, et al., “Mapping Different Supply Chains of Fresh Produce Exports from Africa to the United Kingdom”, (2007) *Fresh Insights* 7, pp 3, 5 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html) ; last accessed on 31 August, 2011).

<sup>126</sup> In this paper, the focus is on studies conducted in respect of African countries.

<sup>127</sup> See Henson, *supra*, generally.

<sup>128</sup> For the purposes of this paper, independence from governments is significant. It signifies that private standards represent purely private conduct – a relevant consideration in the analysis (in part 4) on rules-based responses to private standards. Examples of instances where standards are formulated or applied by private parties, but *not* independently from governments, include when: governments delegate or outsource standardising services to private parties; or standards formulated by private parties are adopted by governments, as their own.

<sup>129</sup> Under normal circumstances, they should operate complementarily. Private standards can also operate to cover some of the perceived shortcomings of governmental standards. See WTO Committee on Sanitary and Phytosanitary Measures (26 February 2007) *Private Sector Standards and Developing Country Exports of Fresh Fruit and Vegetables*, Communication from UNCTAD, G/SPS/GEN/761, 3; Andrew D, Dahou K, Steenblik R, “Addressing Market-Access Concerns of Developing Countries arising from Environmental and Health

private standards operating in international food markets - those formulated and applied by supermarkets and retailers; and those formulated and administered by various non-governmental organisations (NGOs)<sup>130</sup>. Within the supermarket and retail category, private standards can further be subdivided into: collective international schemes<sup>131</sup>; collective national schemes<sup>132</sup>; and individual supermarket schemes<sup>133 134</sup>.

Recent trends relating to, and certain emerging characteristics of, private standards began to elicit concern among some WTO Members. During the first few years of the 2000s, private standards began to become more pervasive, numerous, and noticeably more trade restricting.<sup>135</sup> Member concern began to increase when they began to operate as market imperatives. The discussion on private standards entered (mainstream) WTO discussions in 2005, when the issue of their proliferation was raised as a specific trade concern in the SPS Committee.<sup>136</sup> Independent studies which had begun to take place parallel to the discussions in the WTO Committees were already beginning to discern trends which confirmed that private standards were becoming the *dominant* form of governance in global agricultural and food supply-chains.<sup>137</sup> In the high-value fresh-fruit and vegetable sector, particularly in EU markets, private standards already predominate over governmental standards.<sup>138 139</sup>

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Requirements: Lessons from National Experiences”, (2004) 5 *OECD Trade Policy Working Papers*, 28, available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/env/td\(2003\)33/final&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=com/env/td(2003)33/final&doclanguage=en) (last accessed on 31 August, 2011); WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 3.

<sup>130</sup> Organisations such as Green Peace, the Marine Stewardship Council (MSC), World Wildlife Fund (WWF), Oxfam, Forest Stewardship Council (FSC) have a commanding global presence in the area of food standards.

<sup>131</sup> Examples of these are: GlobalGAP (formerly EurepGAP); ISO 22000; and Global Food Safety Initiative.

<sup>132</sup> Examples of these are: British Retail Consortium (BRC); Global Standard; and Assured Food Standard.

<sup>133</sup> Examples of these are: Tesco’s Nature’s Choice; and Carrefour Filière Qualité.

<sup>134</sup> It is worth noting that, as standards from the NGO category are typically adopted by retailers and supermarkets, or by manufacturers, all private standards are invariably linked to supermarkets and retailers. And even where they are not so adopted, food products certified under NGO schemes are typically sold by supermarkets and other retailers. It has also been observed that, NGO sometimes design and implement their standards in conjunction with their domestic producers (manufacturers and supermarkets). In a paper discussing, among other things, the discriminatory elements of voluntary, private ecolabelling schemes, and their environmental inefficacy, Vitalis reveals how the freezing out of foreign shrimp (from developing countries) from United States supermarkets was the result of collusion between United States NGOs and the entire domestic shrimp value-chain (including supermarkets). Vitalis V, *Private Voluntary Eco-labels: Trade Distorting, Discriminatory and Environmentally Disappointing*, Background Paper for OECD Roundtable on Sustainable Development (6 December 2002) Paris, France, pp 2, 4.

<sup>135</sup> See discussion in 3.5, below.

<sup>136</sup> WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005), *supra*.

<sup>137</sup> See, for example, Henson, *supra*, 3 - 4. The author does point out, however, that governmental standards are likely to continue to predominate in broad commodity markets such as those for bulk grains and vegetables and fruit

Within that backdrop, private standards are more stringent than governmental ones – both substantively and procedurally. They are rigid and complex in their certification requirements, lacking the kind of flexibilities which are typical in rules-based standards.<sup>140</sup> Increasingly, private standards schemes are also vastly comprehensive. A single scheme can incorporate a myriad of issues relating to SPS elements; TBT elements; product-related PPMs; non product-related PPMs; and (increasingly exacting) value-chain requirements.<sup>141</sup>

### 3.1.2 Private Standards and Consumer Concerns

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for processing. At 12 and 24. It should also be pointed out that markets for fresh-fruit and vegetables in the (low value) wholesale and food service sectors still rely quite heavily on governmental standards. At the time of writing, however, a trend had begun to be observed which pointed to the beginnings of an importation of private standards trends into the wholesale and food service sectors. On this, see Kleih U, et al., “Impact of EurepGAP on Small-scale Vegetable Growers in Uganda”, (2007) *Fresh Perspectives* 4, 2 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_perspectives.html](http://www.agrifoodstandards.net/en/global/fresh_perspectives.html) , last accessed on 31 August, 2011); Legge et al., *supra*, p iii; Bureau J-C, et al., “The Consequences of Agricultural Trade Liberalisation for Developing Countries: Distinguishing Between Genuine Benefits and False Hopes”, (2006) 5:2 *WTR* 225, 244.

<sup>138</sup> In most discussions and literature on them, the term “private standards” has been associated with private retailer standards in the EU and individual EU countries (especially, the United Kingdom). This is not surprising. The EU is the world’s largest importer of fresh-fruit and vegetables, and an important market destination for developing-country fresh-fruit and vegetable exports. It is also a market in which private food governance systems are highly sophisticated, and have represented the most obvious contest against governmental governance systems. The United States market has, however, also received some mention. See WTO Committee on Sanitary and Phytosanitary Measures: (15 June 2009), *Effects of SPS-Related Private Standards – Descriptive Report*, Note by the Secretariat, G/SPS/GEN/932, 2.

<sup>139</sup> Figures provide an indication of the scale of extraction of standard- setting and application from the governmental realm. See n 125 above, and p 36 and n 153, below. See, also, discussion at 3.4, below.

<sup>140</sup> In a note by the WTO Secretariat it is noted that, in addition to being highly prescriptive and very detailed in their requirements, private standards are non-amenable to “alternative, but equivalent” ways of achieving the same food standards outcomes. See WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 4. See also, Vitalis, *supra*, 4; Gandhi, (2005) 39(5) *JWT*, *supra*, 859 - 860.

<sup>141</sup> Noting this development, some studies by UNCTAD make the observation that the remit of private standards has expanded (from basic food safety and environmental issues) to cover, among others, issues such as: non product-related environmental concerns; labour issues; a variety of social issues; and fair-trade issues. See: UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, 25; UNCTAD, “Environmental Requirements and Market Access for Developing Countries”, Note by the UNCTAD Secretariat, *Prepared for Eleventh Session* (20 April 2004), 6 - 8 (available at [http://www.unctad.org/en/docs/tdxibpd1\\_en.pdf](http://www.unctad.org/en/docs/tdxibpd1_en.pdf) ; last accessed on 31 August, 2011); UNCTAD (20 April 2004), *supra*, 6 - 8; Hoffmann U, Rotherham T, “Environmental Requirements and Market Access for Developing Countries: Promoting Environmental - not Trade – Protection” (2006) *UNCTAD Trade and Environment Review*, 5 - 7 (available at [http://www.unctad.org/en/docs/tdxibpd1\\_en.pdf](http://www.unctad.org/en/docs/tdxibpd1_en.pdf) , last accessed on 31 August, 2011).

Private standards have been commonly presented as, or perceived to be, consumer-driven.<sup>142</sup> There is some truth to that perception. In 2007, the WTO Secretariat listed the factors behind the proliferation of private standards as: general lack of confidence in regulatory agencies; high profile food safety scares; legal “due diligence” requirements on companies in matters involving food risks<sup>143</sup>; an increase in corporate social responsibility; concerns over company reputation; the globalisation of supply chains, and growing use of direct contracts between suppliers and retailers; the general expansion of supermarkets in food retailing; and a global expansion of food service companies.<sup>144</sup> The first five of the eight factors identified in the list reflect direct consumer concerns, or retailer concerns which relate to consumers.

It is quite apparent that despite the WTO system’s endeavour to give contemporaneous effect to consumer protection and market access, there is still a lack of faith in the efficacy or sincerity of WTO rules in preserving the autonomy of governments to protect consumers. However, the “consumer-driven” label, which has been accepted in certain elements of mainstream discourse, does mask the reciprocity of influence in the market between demand and supply. Domestic industry commonly influences demand and, sometimes even creates it. Behind the facade of consumer protection, is a high of risk of protectionist capture.<sup>145</sup> It has been observed that

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<sup>142</sup> Gandhi describes them as initiatives which are often “*perceived to be*” consumer-driven. Gandhi, (2005) 39(5) *JWT*, *supra*, 865. In WTO discussions, some Members have used the consumer-driven argument to purge the discussion from the SPS Committee. See, for example, WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005), *supra*.

<sup>143</sup> In the EU there is, contained in EU-wide and in some domestic (such as the UK’s Food Safety Act) food safety and consumer protection laws, a requirement upon retailers to show that they have taken reasonable precautions and exercised due diligence in complying with these laws. The due diligence requirement, which operates both as a prescription and a legal defence, is not a measure upon exports. Its addressees are retailers (domestic private parties), and their actions in relation to food safety. The matter of whether private conduct could qualify as WTO “measures”, where governmental conduct has sufficiently directed, restrained, encouraged, or influenced that private conduct, has been considered in a number of WTO cases – although its validity in the context of the theory of attribution is challenged in this paper. However, in so far as this regulatory requirement influences the actions of the private parties, this warrants it some consideration in the discussion on rules-based options. See part 4, below.

<sup>144</sup> WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 1 - 2.

<sup>145</sup> Although “protectionism by domestic industry” is absent from the SPS Committee’s list, it is quietly accepted as a factor. In WTO discussions, there is silence on it as a factor, but commentators do acknowledge it as a significant factor. See, *inter alia*, Gandhi, (2005) 39(5) *JWT*, *supra*, 857; Vitalis, *supra*, 6; Kasterine A, “The Environmental Impact of Private Standards – Discussion”, *Paper Prepared for WTO Private Standards Workshop* (9 July 2009), Geneva, 1 (available at [http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Sectors/Fair\\_trade\\_and\\_environmental\\_exports/Climate\\_change/Kasterine\\_WTO\\_The\\_Environmental\\_Impact\\_Private\\_Standards.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Sectors/Fair_trade_and_environmental_exports/Climate_change/Kasterine_WTO_The_Environmental_Impact_Private_Standards.pdf) , last accessed on 31 August, 2011). It is not unusual that it would be a factor. Governmental protectionism, itself, is commonly known to be the imperative of domestic industry (and the more powerful lobbyists among them). See Perdakis, Read, “Political Economy of Protection”, *supra*, 18; Koebele, *supra*, 170.

supermarkets sometimes “harness” consumer concerns and their fears regarding food safety, to ratchet-up regulatory requirements, *not for the objective of protecting consumers* but, rather, “as a means to differentiate their products” from those of competitors.<sup>146</sup> It is, in fact, a reality that differentiating products from those of competitors is often core to the objectives of private standards.<sup>147</sup> This need by supermarkets (and some NGOs) to distinguish their products is manifested, in part, by rapid changes to the substantive and procedural requirements for certification under private standards-schemes.<sup>148</sup> There is also an observed increased propensity to “gold-plate” product standards.<sup>149</sup> With the rapid changes, and the increasing heterogeneity of private standards, it often becomes the case that product differentiation is artificial. Indeed, certification can in itself be the source of artificial product differentiation owing to the correlation between certification under private standards schemes and the ability to pay.

There are, in fact, many nuances of private standards which have less to do with the demands of consumers or their protection - and more to do with the modification of competitive conditions. In addition to the ones just noted, a number of more manifestly protectionist patterns have emerged. It has, for example, been found that increasingly, under the pretext of food safety, outright bans are being imposed on imports from developing countries - purely on the basis of origin.<sup>150</sup> There is also growing evidence of many less than altruistic motivations (or, at least, outcomes) behind those private standards that expressly purport to promote certain ethical ideals. It would appear that an alarming number environmentally- and ethically-based private standards do not, in reality, promote the ideals which they purport to.<sup>151</sup> In some instances, it has been

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<sup>146</sup> Henson, *supra*, pp 10, 10 - 16.

<sup>147</sup> Brown and Sander observe that part of the *raison d'être* of private standards is to operate as “strategic tools” by the supermarkets to differentiate themselves from their competitors. Brown, Sander, *supra*, 8.

<sup>148</sup> These are the upshot of both the need to differentiate their products and the related increased competition among private standards dealing with the same problem. See Andrew et al., *supra*, 9.

<sup>149</sup> Gold plating of products is not only problematic simply on account of the fact that its fixation with aesthetics, or processes which are superfluous, often leads to the substantial rejection of produce from developing countries. It also comes with *additional costs* for producers, which, it has been observed, retailers simply pass on to producers. See Brown, Sander, *supra*, 9.

<sup>150</sup> There are instances in which it has been reported that importers (habitually) refuse food products from developing countries, despite satisfactory bills of health. See, for example: Bureau et al., *supra*, 244; Legge et al., *supra*, 1. When imposed by Members, such refusals to deal would resemble product bans which, under the rules of the WTO, violate the prohibition on quantitative restrictions contained in article IX of the GATT.

<sup>151</sup> In what has been dubbed by some as “double standards”, supermarkets can sometimes use food standards to capitalise on ethical and environmental imperatives, while concealing some less than ethical elements in those standards. It has also been observed that, owing to pressures relating to the need to be self-sustaining, income-creating private label schemes increasingly suffer under a conflict of interest. Also observed, are conflicts and

found that the purportedly protected environmental, social and ethical ideals are *less* protected in certain certified products than in uncertified like ones.<sup>152</sup>

### 3.1.3 Supermarkets and Private Standard-Setting

It is necessary to isolate the place of supermarkets in this discussion. The sheer scale of their influence in the private standards milieu, within the (backdrop) of the focal role they are playing in transforming the architecture of contemporary global food markets warrants this. The biggest supermarkets wield tremendous global market power - and their sway is growing.<sup>153</sup> In the United Kingdom (UK), the food retailing industry is dominated by Tesco, Walmart-Asda, Sainsbury's and Safeway-Morrison, who alone account for almost three-quarters of food sales.<sup>154</sup> Tesco alone accounts for, at least, an eighth of *all consumer retail spending in the UK*.<sup>155</sup> In Europe, GlobalGAP, a consortium of 30 retailers, controls an estimated eighty-five per cent of all fresh produce sales in the EU.<sup>156</sup> The influence of supermarkets in the current evolution of food standards has seen the discussion on private standards becoming almost synonymous with supermarket private standards.<sup>157</sup> <sup>158</sup> Even within the (reportedly) consumer-driven elements of

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competition between schemes, when several schemes address the same issue. For examples, see Vitalis, *supra*, 4 - 6; Brown, Sander, *supra*, 8; Kasterine, *supra*, 1.

<sup>152</sup> For discussions on the misuse, by industry, of ecolabels and technical standards, see Vitalis, *supra*, 4; Baldwin R E, "Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System", (2000) *Brookings Trade Forum* 237, 273 - 274 (available at [http://muse.jhu.edu/journals/brookings\\_trade\\_forum/v2000/2000.1baldwin.pdf](http://muse.jhu.edu/journals/brookings_trade_forum/v2000/2000.1baldwin.pdf) , last accessed on 31 August, 2011).

<sup>153</sup> In about 2004, it had been predicted that global food markets would be controlled by four or five global firms, with a small number of regionally dominant players. Brown, *supra*, 1. In another analysis in 2005, it was reported that thirty supermarket chains controlled almost a third of global grocery sales - and growing. Commission for Africa, "More Trade and Fairer Trade", in *Commission for Africa Report* (2005), 265 - 266. Such predictions are apparently bearing out.

<sup>154</sup> Legge et al., *supra*, 5.

<sup>155</sup> Brown, Sander, *supra*, 1; Rotherham T, UNEP, *The Trade and Environmental Effects of Ecolabels: Assessment and Response* (2005), 38 (available at <http://www.unep.ch/etb/publications/Ecolabelpap141005f.pdf> , last accessed on 31 August, 2011); 'Is Tesco Taking Over?', *BBC News*, 21 January 2005, available at [http://news.bbc.co.uk/2/hi/talking\\_point/4183965.stm](http://news.bbc.co.uk/2/hi/talking_point/4183965.stm) (last accessed on 31 August, 2011).

<sup>156</sup> Graffham et al., (2007) *Fresh Insights* 6, *supra*, 1.

<sup>157</sup> The WTO Secretariat has, itself, observed that the primary entities imposing private standards appear to be individual retailers such supermarkets and hypermarkets. WTO Committee on Sanitary and Phytosanitary Measures (15 June 2009), G/SPS/GEN/932, *supra*, 2. See also, WTO Committee on Sanitary and Phytosanitary Measures (10 December 2009), *Effects of SPS-related Private Standards - Compilation of Replies (Revision)*, Note by the Secretariat, G/SPS/GEN/932/Rev.1, 2.

<sup>158</sup> While Tesco (and its Nature's Choice brand) and collective international scheme, GlobalGAP, are the undeniable frontrunners in WTO discussions and in literature on private standards, in its collations of responses from the SPS Committee's information gathering exercise, the WTO Secretariat also makes specific mention of individual supermarkets: Marks and Spencer's; Wal-Mart; Primus Labs; Carrefour Filière Qualité; Heinz; McDonalds; Aldi;

private standards - the first five elements on the SPS Committee list - the ubiquity of supermarket influence as the drivers of private standards trends is quite apparent.

The expansion of supermarkets in food retailing has been accompanied by significant changes in their operations. The remaining set of factors on the SPS Committee list, capture practices which (in the main) relate specifically to these supermarket activities, and reflect their growing control of food standards trends. It is also necessary to separate this group of factors from the preceding five because they are not they are not, strictly speaking, food standards matters. In fact, the decisions and processes underlying them are not principally related to food safety, or with environmental, ethical or related objectives. They, rather, reflect certain contemporary trends of supermarket business practices.

This makes these factors more alarming than the former category, as surmounting them is largely outside of producers' control. Even where producers can meet the core requirements of the food standards, they are still facing elimination on account of these business practices. It can be argued that strict control over entire supply chains, a component of the globalisation of supply-chains, is a risk control measure. Risk is managed through not sourcing too widely and wielding control over entire supply chains.<sup>159</sup> Be that as it may, and risk control component accepted, it should be remembered that risk control is a factor already inherent in the first group of factors on the WTO Secretariat's list. As a component of the globalisation of supply chains, risk control is not the equivalent of the former - it is unconnected to scientific evidence of risk.<sup>160</sup>

With the expansion of supermarkets in food retailing, and competition for market control, the fresh-fruit and vegetable arena has also become part of the turf for cost- and profit competition. With many supermarkets also now also listed companies, the quest is often also linked to the

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Edeka/Netto; Lidl; Norma; Plus; Rewe; Tegut; Tengelmann; and Metro Cash and Carry. See WTO Committee on Sanitary and Phytosanitary Measures: (15 June 2009) G/SPS/GEN/932, *supra*, 2; (10 December 2009), G/SPS/GEN/932/Rev.1, *supra*, 2 - 3.

<sup>159</sup> See Brown, Sander, *supra*, 6.

<sup>160</sup> Within the rules-based system, risk assessment and scientific evidence are central to the process of standards-setting and application. The AB has stated that the two are “essential for the maintenance of the ... carefully negotiated balance ... between the ... interests of promoting international trade and of protecting the life and health of human beings”. Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, *supra*, par 177.

pressures of shareholder expectations.<sup>161</sup> Supermarkets are increasingly demanding lower prices from producers, while making producers absorb the adjustment costs associated with their food standards and these sourcing trends.<sup>162</sup> There has been, in the process, an intensification of anti-competitive and unfair business practices.<sup>163</sup> Increasingly described as “aggressive”, the practices of contemporary supermarkets have even manifested in some quite deliberate culling of developing-country small-scale farmers from supply chains.<sup>164</sup>

But even aside from the obviously unfair practices, supermarket standards are simply indisposed to developing countries. Vertical integration of value chains, and a preference for direct contracts with suppliers - reflected in factor six in the WTO Secretariat’s list - are practices whose propensity to exclude developing-country small-scale farmers is now well documented.<sup>165</sup>

### 3.1.4 The Private Standards Debate

The discussion on private standards earned itself the designation “the private standards debate” following the original push by some developing-country Members to have the rules of the WTO made applicable to private standards.<sup>166</sup> When discussions began in both the SPS and TBT Committees, these developing-country Members requested clarification of certain provisions, in

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<sup>161</sup> See Brown, Sander, *supra*, 2 - 3.

<sup>162</sup> WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 3. Brown and Sander, quoting Susanne Freidberg, write that the “fetishism” of green and ethical trade, masks the contradiction of poor farmers being forced to absorb *all* the costs of adjustments in relation to, *inter alia*: crèches and clinics; chemical storage facilities; of protective clothing; medical check-ups for pesticide sprayers; labour records and worker monitoring. Brown, Sander, *supra*, 8.

<sup>163</sup> These include market consolidation and concentration, collusive or cartel pricing, aggressive price competition, and predatory pricing. Market concentration is the highest in the United Kingdom, where Tesco, Walmart-Asda, Sainsbury’s and Safeway-Morrison, now account for nearly three-quarters of food sales. In 2000, the UK Competition Commission found that the market power of five supermarkets - Asda, Safeway, Sainsbury, Somerfield and Tesco – was now such that it “adversely affected supplier competitiveness and distorted competition”. See Brown, Sander, *supra*, 10. Citing Vorley and Fox, Brown and Sander write of a 2002 - 3 price war triggered by Asda-Walmart, that in demanding deep price cuts from producers and suppliers, UK supermarkets effectively led “a transfer of wealth from poor producers in the south to rich consumers in the north”. At 10.

<sup>164</sup> See Brown, Sander, *supra*, pp 9, 9 - 10.

<sup>165</sup> See discussion in 3.5, below.

<sup>166</sup> The original proponents in the SPS Committee were the Grenadines and Saint Vincent. They were supported in their bid by Jamaica, Peru, Ecuador, and Argentina. See n 3, above. Proponents in ensuing discussions included; the Bahamas, Egypt, Cuba and Brazil. See WTO Committee on Sanitary and Phytosanitary Measures: News Items (28 February and 1 March, 2007) *Private Standards Are a Mixed Blessing, Committee Hears*, available at [http://www.wto.org/english/news\\_e/news07\\_e/sps\\_28feb\\_1march07\\_e.htm#ps](http://www.wto.org/english/news_e/news07_e/sps_28feb_1march07_e.htm#ps) (last accessed on 31 August, 2011). In the TBT Committee, the original proponent was Egypt (supported by Kenya and Chile). See n 5, above.



the two agreements, which suggested WTO Members could be found responsible for certain SPS- and TBT-Agreement-inconsistent private conduct within their jurisdictions. In the SPS Committee discussion, some among them even asserted that WTO rules should apply in the circumstances.<sup>167</sup> At the time, the push was matched by resistance from some developed-country Members, who argued that the rules had no (or had limited) application to private standards. The EU, in particular, was notable in its rebuffs in both the SPS and TBT Committees. The EU's assertion was that private standards were business-to-business arrangements, and that they reflected private conduct which fell outside of the scope of the WTO.<sup>168</sup> They further asserted that private standards were a reflection of consumer demand.<sup>169</sup> A more moderate group, which included Mexico, cautioned against taking hasty positions. Mexico identified the issue of private standards as a "systemic" one which did require interrogation in the committees.<sup>170</sup> Eventually, on the basis of the original demands for the clarification of the identified provisions moves began, mostly driven by individual Members, to develop a common understanding on the interpretation and scope of article 13 of the SPS Agreement.<sup>171</sup>

Discussions in the WTO Committees have progressed significantly, and the work broadened in scope. In the SPS Committee, the issue of private standards evolved into a standing agenda item, and a significant amount of work has been generated within that Committee. The Committee's endeavour to develop a common understanding on the interpretation and scope of article 13 of the SPS Agreement has been resistant to reaching fruition, however. There is still opposition from developed-country Members. As a consequence, the most recent SPS Committee report on private standards, records it on a list of "possible" areas for further work.<sup>172 173</sup>

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<sup>167</sup> WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005), *supra*.

<sup>168</sup> WTO Committee on Technical Barriers to Trade (6 August 2007), G/TBT/M/42, *supra*, 30 - 31.

<sup>169</sup> WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005), *supra*.

<sup>170</sup> *Ibid.*

<sup>171</sup> See WTO Committee on Sanitary and Phytosanitary Measures: (11 October 2010) *Possible Actions for the SPS Committee Regarding SPS-related Private Standards (Revision)*, Note by the Secretariat, G/SPS/W/247/Rev.3, 12 - 13; (30 September 2009) *Legal Framework for Private Standards in the WTO*, Communication from Mercosur (Argentina, Brazil, Paraguay, and Uruguay), G/SPS/W/246, 4.

<sup>172</sup> Due to apparent (developed-country) alacrity to fully officialise it, combined with an inclination towards the practical elements of responses to private standards, the endeavour has not - even after over four years of official work - advanced to the stage of being an agreed-to action. See WTO Committee on Sanitary and Phytosanitary Measures (3 March 2011), G/SPS/W/256, 7 - 8. The article 13 endeavour is recorded in Annex 1 of the report - a list of actions in respect of which the working group could not reach consensus.

<sup>173</sup> However, in 2007, the EU presented its own legal analysis, commissioned by the United Kingdom Department for International Development, of the relationship between WTO rules and private standards. The study, conducted

The article 13 endeavour has attained the status of being, at the same time, a proverbial hot potato and the white elephant in the room. In the TBT Committee, the discussion on private standards has been comparatively less contentious and less conspicuous. The original discussion in the TBT Committee did precede the SPS Committee discussion.<sup>174</sup> However, as the SPS Committee discussion flourished, the TBT Committee one apparently tapered. The reasons for this are not necessarily clear. Early in the discussion in the SPS Committee, some of the Members who attempted to purge it from the SPS Committee, had expressed a preference to have it confined to the TBT Committee.<sup>175</sup> What is clear, however, is that there are fewer sensitivities relating to the TBT components of the debate. There *is* the appearance that the TBT Agreement offers more legal certainty *vis-à-vis* private conduct.<sup>176</sup> This is not necessarily the reality. The Agreement does create a rules-based mechanism for technical standards formulated by (*inter alia*) private parties, but the Code of Good Practice is not *a priori* legally or practically straightforward. It is also important to note that there are Member obligations (in article 4 of the

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by Gascoine, and O'Connor and Company, has become an important reference document for the discussion on SPS-related private standards. Its source (and, with that, its contents) has, however, been met with some cynicism from developing-country Members. See WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), *Private Standards – Identifying Practical Actions for the SPS Committee: Summary of Responses*, Note by the Secretariat, G/SPS/W/230, 10.

<sup>174</sup> See WTO Committee on Sanitary and Phytosanitary Measures: News Items (29 - 30 June, 2005), *supra*. The TBT Committee has, in fact, a long history of work on non-governmental and voluntary standards. Its discussions on ecolabelling, for example, began right near the time of inception of the WTO. See WTO Committee on Trade and Environment / Committee on Technical Barriers to Trade (29 August 1995), WT/CTE/W/10 / G/TBT/W/11, *supra*. According to an UNCTAD/FIELD briefing paper, the work on “labelling for environmental purposes”, which the Committee on Trade and Environment has already been undertaking, under paragraph 32(iii) of the 2001 Doha Ministerial Declaration, also extends to private schemes. See Foundation for International Environmental Law and Development, “Legal and Policy Issues in the Market Access Implications of Labelling for Environmental Purposes”, *Briefing Paper presented at (Asia) Workshop on Specific Trade and Environment Issues in Paragraphs 31 and 32 of the Doha Ministerial Declaration* (30 July – 01 August, 2003), Bangkok, available at [http://www.unctad.org/trade\\_env/meeting.asp?MeetingID=92](http://www.unctad.org/trade_env/meeting.asp?MeetingID=92) (last accessed on 31 August, 2011).

<sup>175</sup> The EU, in particular, was quite vocal in its attempts to purge, from the SPS Committee, any consideration of legal obligations upon Members arising from private standards. Paradoxically, they apparently attempted to quash it in the TBT Committee as well, reminding Members that the issue of private standards was already under discussion in the SPS Committee. See: WTO Committee on Technical Barriers to Trade (6 August 2007), G/TBT/M/42, *supra*, 30; WTO Committee on Technical Barriers to Trade: News Items (25 - 26 June, 2009) *TBT Experts Discuss Proposals for Fifth Triennial Review, Debate 48 Trade Concerns*, available at [http://www.wto.org/english/news\\_e/news09\\_e/tbt\\_25jun09\\_e.htm](http://www.wto.org/english/news_e/news09_e/tbt_25jun09_e.htm) (last accessed on 31 August, 2011).

<sup>176</sup> In the SPS Committee discussions, some Members have even suggested that it could be useful to look to the TBT Agreement, and the Code of Good Practice in particular, to address some of the concerns relating to the SPS-related private standards. See WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), G/SPS/W/230, 6.

TBT Agreement) which relate to the code, whose interpretation and scope are as undetermined as those of article 13 of the SPS Agreement.

### 3.2 KEY CHALLENGES POSED BY PRIVATE STANDARDS TO THE RULE OF LAW

When the issue of private standards was first raised as a specific trade concern in the SPS Committee, the petitioners' top concerns were around the stringency of private standards, and the fact that they were increasingly operating as *de facto* mandatory. Early discussions revealed that private standards had a disproportionate effect on developing-country exports.<sup>177</sup> As discourse on private standards has developed, and more of the salient features emerge, it is becoming clear that private standards pose a threat to the entire organising function of the rules-based system. The following subsections discuss the inconsistency of private standards with the rules, principles and objectives of the rules-based system. Many of the aspects of private standards which disturb the organising function have emerged in the discourse and in the literature. However, it has generally been in an inadvertent manner. The present discussion aims for a systemic consideration of the challenges presented by private standards.

#### 3.2.1 Discussion of Challenges: Disruption to the Organising Function of the Rules-based System

Regarding the place of private voluntary standards in the marketplace, it has been noted that many categories are “far more numerous”; “evolve faster”; and “include more stringent specifications” than those “mandated by law”.<sup>178</sup> It has also been observed that non-governmental entities are “influential, but opaque” participants in the formulation of private standards.<sup>179</sup> These observations largely summarise the key features of private standards which

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<sup>177</sup> See WTO Committee on Sanitary and Phytosanitary Measures: (28 February 2007) *Private Industry Standards*, Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766; (26 February 2007), G/SPS/GEN/761, *supra*, 3 -5; (27 February 2007) *Private Voluntary Standards and Developing Country Market Access: Preliminary Results*, Communication from OECD, G/SPS/GEN/763; (28 February 2007) *Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement: The Bahamas Experience*, Communication from the Bahamas, G/SPS/GEN/764.

<sup>178</sup> Hoffmann, Rotherham, *supra*, 6 - 7. See also, in WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 3 - 4.

<sup>179</sup> Gandhi, “Indian Viewpoint”, *supra*, 2; Gandhi, (2005) 39(5) *JWT*, *supra*, 856.

have been outlined in 3.1.1 to 3.1.3. Together, they capture the essence of the discussion which follows. The discussion is organised under each of the organising prongs.

### 3.2.1.1 The Non-discrimination Prong

In general, private standards are disposed to both types of discrimination proscribed by the rules of the WTO – specifically against products from developing countries. It has been observed that they are more stringent than governmental standards in two areas where poor countries are known to be especially challenged – certification, and PPMs.<sup>180</sup> It has become apparent that the manner in which both the certification and PPM components of private standards have been operating has often purely modified the conditions of competition between domestic and other developed-country products, and imports from developing-country Members. Under the rules of the WTO law different treatment does not, in itself, constitute a violation of articles I and III of the GATT. But where such treatment results (even indirectly) in the modification of conditions of competition between imported and domestic products, or between imports from different countries, the underlying measures fall within the scope of the provisions.<sup>181</sup> It is essentially about the *effective* equality of treatment – so much so that, it is inconsequential that those measures did not actively seek to discriminate against or between imported products.<sup>182</sup>

#### Certification

Certification under private standards schemes is one of the noted areas of comparative disadvantage for low-income countries due to, in part, prohibitive costs. As is to be expected, producers (small-scale ones, in particular) from low-income countries are at a comparative financial or economic disadvantage, relative to developed-country counterparts. To compound this, there are number of issues around certification that have specific discriminatory import. As

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<sup>180</sup> See Bureau et al., *supra*, 244. According to the authors, these are areas “where the poorest countries are especially handicapped by the lack of capital, infrastructure, and skilled workers”.

<sup>181</sup> In the context of article III:2, see Appellate Body Report, *Canada – Periodicals*, WT/DS31/AB/R, *supra*, p 19. In the context of article III:4, see Panel Report, *Canada - Autos*, WT/DS139/R, WT/DS142/R, *supra*, par 10.80.

<sup>182</sup> The AB in *Korea - Beef* reiterated the fact that it was established that, as long as the conditions of competition in the market were modified, origin-neutrality could not, in itself, preclude a finding of discrimination, stating:

A formal difference in treatment between imported and like domestic products is ... neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated ‘less favourably’ than like domestic products [is] assessed ... by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.

Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R, WT/DS169/AB/R, par 137.

already noted, the content of private standards' certification requirements and their conditionalities are rigid and generally inconsiderate of conditions prevailing in developing countries.<sup>183</sup> As a corollary, their prototypes are naturally disposed to creating *de facto* market advantages for developed-country or larger producers.<sup>184</sup> Moreover, the tendency to accept certification only by agencies based in the countries of import or some other developed country (or so-called, third party certification), further increases the relative costs for developing-country producers.<sup>185</sup> Analyses of these factors indicate that it is, in fact, not uncommon for uncertified and certified products to be alike.<sup>186</sup>

### Process and Production Methods (PPMs)

It has been observed, of private standards, that they focus centrally (and sometimes inordinately) on processes.<sup>187</sup> And owing to the widespread inclusion of non product-related PPM prescriptions, the PPM issue has shown itself to be dominant in private standards discourse.<sup>188</sup> A non product-related PPM criteria for differentiating products can be an onerous one for developing countries. The non product-related PPM prescriptions of developed-countries are commonly believed to be exportations or transplantations, or to represent impositions, of standards unsuited to many exporting countries.<sup>189</sup> The issue of non product-related PPMs also,

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<sup>183</sup> An additional upshot of this, it is observed, is that the unwillingness to accept equivalence within and between schemes leads to repetitions of certification audits. WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 4.

<sup>184</sup> See Brown, Sander, *supra*, 5. See also, generally: Gandhi, "Indian Viewpoint", *supra*; Gandhi, (2005) 39(5) *JWT*, *supra*; Vitalis, *supra*.

<sup>185</sup> The costs of certifying products in developed countries are extremely high for developing country producers, - absolutely, and relative to developed-country producers. Certificates from certification bodies in countries of export are generally not accepted, even when these are recognised certification bodies. See Hoffmann, Rotherham, *supra*, 11, and n 31; Brown, Sander, *supra*, 15; UNCTAD (20 April 2004), *supra*, 11.

<sup>186</sup> In some cases, uncertified products are of superior pedigree to certified ones with respect to environmental or food safety ideals. See Vitalis, *supra*, generally.

<sup>187</sup> This contrasts them from governmental standards - which focus on substance (outcomes). Even benchmarking, the purported private sector rendition of equivalence, recognises equivalence of processes, rather than that of outcomes. See WTO Committee on Sanitary and Phytosanitary Measures (26 February 2007), G/SPS/GEN/761, *supra*, pp 3, 10; WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 3. See also Vitalis, *supra*, generally.

<sup>188</sup> See, *inter alia*: WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 4; UNEP, IISD, *supra*, pp 32 - 33, 53 - 62; Vitalis, *supra*, 3 - 4; Smith G, "Interaction of Public and Private Standards in the Food Chain", (2009) 15 *OECD Food, Agriculture and Fisheries Working Papers*, 28 (available at <http://www.oecd.org/dataoecd/6/31/45013504.pdf> , last accessed on 31 August, 2011); Gandhi S R, "Voluntary Environmental Standards: The Interplay Between Private Initiatives, Trade Rules and the Global Decision-Making Processes", *Paper presented at the Third Global Administrative Law Seminar* (15 - 16 June, 2007), Viterbo, 19 - 20 (available at <http://www.iilj.org/GAL/documents/Ghandienvironment.pdf> , last accessed on 31 August, 2011).

<sup>189</sup> See n 53, above. See, also, Vitalis, *supra*, 4 - 6.

of course, provokes a discussion on discrimination between like products. Certainly, there are several unresolved elements to the PPM matter.<sup>190</sup> However, even if a non product-related PPM standard for product differentiation were non-contentious, the PPM prescriptions of private standards are known to be especially stringent.<sup>191</sup>

### 3.2.1.2 The Norm-creating Prong

It is now widely accepted that private standards are *de facto* mandatory and have become *de facto* market norms. In spite of being officially voluntary, the reality with many schemes is that they operate as market imperatives.<sup>192</sup> Inability to comply with them can, and frequently does, result in exclusion from existing (and potential) markets.<sup>193</sup> Mandatory standards (which are invariably governmental) have traditionally been understood as having a greater impact on exports. If an exporter cannot comply with them, they are prohibited from the market – absolutely.<sup>194</sup> Nevertheless, - and this is particularly pronounced in sectors where private standards predominate - the degree of compulsion of private standards has become analogous to that of mandatory measures. And in those sectors where they have become market imperatives, their trade-restrictiveness *exceeds* that of mandatory standards. It is they, and not mandatory governmental standards, that are resulting in market exclusion. A practical case, which illustrates the point, is that many of the small-scale farmers who have been excluded from high-value fresh-fruit and vegetable markets as a consequence of private standards, but have managed

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<sup>190</sup> See discussion at p 15 - 16, and n 52 - 55, above.

<sup>191</sup> Concerns relating to the impacts of an inordinate focus on processes, non-scientific criteria, and process prescriptions which ignore the impact of differing domestic conditions show that fears associated with discrimination between like products are warranted. For some examples, see Vitalis, *supra*, 4 - 6.

<sup>192</sup> The WTO Secretariat captures this succinctly when it states that the choice of whether or not to comply with a private standards has become “a choice between compliance or exit from the market”. It continues: “[i]n this way, the distinction between private voluntary standards and mandatory “official” or “public” requirements can blur. WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 3. See, also, WTO Committee on Sanitary and Phytosanitary Measures (26 February 2007), *Typology of Global Standards*, Communication from the United Nations Conference on Trade and Development, G/SPS/GEN/760, 6.

<sup>193</sup> See discussion in 3.5 below.

<sup>194</sup> Appleton remarks that, along the spectrum of standards, mandatory standards have the greatest potential to restrict international trade. Appleton A E, “The Agreement on Technical Barriers to Trade”, in Macrory et al. (eds.), *supra* 371, 377. In a similar observation, a report published by UNCTAD states that the general perception is that mandatory standards (SPS measures and technical regulations) have a “greater effect on exporters”. Hoffmann, Rotherham, *supra*, 6. See also, Rotherham, “Labelling for Environmental Purposes”, *supra*, 24.

to stay in global markets, are relocating to wholesale and food service sectors.<sup>195</sup> These sectors are generally governed by governmental standards.<sup>196</sup>

The core problem with these developments is that private standards are effectively displacing the rules-based norms. They represent a system of governance which is developing parallel to the rules, and within which the rules-based norms are having diminished relevance.<sup>197</sup> <sup>198</sup> From an organising function point of view, this is problematic when one considers the value of the norm-creating prong to the practice of international food trade. On a singular level too, the parallel regime is problematic because each individual rule-created norm has a particular role to play in the conduct of international food trade. And more than displacing them, the market-based norms have shown themselves to be, in their character, in opposition to what is embodied by the rules-based norms.<sup>199</sup>

### 3.2.1.3 The Non-protectionism Prong

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<sup>195</sup> See Kleih et al., (2007) *Fresh Perspectives 4*, *supra*, 1 - 2.

<sup>196</sup> *Ibid.*

<sup>197</sup> It is already clear that private standards are so influential in the market to the extent of being norm-creating. And there are a number of predictions that this will only escalate. As noted previously (at p 32), private standards and, by implication the norms which characterise them, are becoming the dominant form of governance in global markets for fresh-fruit and vegetables. In another projection, it is believed that the standards in a dozen companies are likely to be responsible for setting the global norm for the next 20 years. See Earley J, Anderson L K, "Developing-Country Access to Developed-Country Markets under Selected Eco-Labeling Programmes" (24 December 2003), *OECD Joint Working Party on Trade and Environment*, 13, and n 26, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/ENV/TD\(2003\)30/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/ENV/TD(2003)30/FINAL&docLanguage=En), (last accessed on 31 August, 2011).

<sup>198</sup> Even though they represent soft governance systems, it is increasingly apparent that these parallel regimes can challenge the territory (even the legitimacy) of official regimes. For commentary on this, and on how non-state or non-governmental governance systems for standards gain rule-authority, see: Cashore B, "Legitimacy and the Privatisation of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rulemaking Authority", (2002) *15(4) Governance: An International Journal of Policy, Administration, and Institutions*, 503; Pauwelyn J, "Non-traditional Patterns of Global Regulation: Is the WTO "Missing the Boat"?", *Paper Presented at Conference on Legal Patterns of Transnational Social Regulations and Trade* (24 - 25 September 2004), European University Institute, available at <http://eprints.law.duke.edu/1311/1/6Sept04.pdf> (last accessed on 31 August, 2011); Bernstein S, Cashore B, "Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?", in Kirton J J, Trebilcock M J, (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade* (2004), 33; Bernstein S, Cashore B, "Can Non-State Global Governance be Legitimate? An Analytical Framework", (2007) *1 Regulation & Governance*, 1; Bernstein S, Hannah E, "Non-State Global Standard Setting and the WTO", (2008) *11(3) JIEL*, 575. See also, Grossman and Bradlow, who write (in 1993) about the increasing need to acknowledge and accommodate the changing roles of private and public actors - both individually and *vis-à-vis* each other - in internationalised relationships. Grossman C, Bradlow D D, "Are We Being Propelled Towards a People-Centered Transnational Legal Order?", (1993) *9:1 Am. U. J. Int'l L.*, 1.

<sup>199</sup> Their characteristics - stringency, multiplicity and heterogeneity, rapid evolution, opacity, exceeding international standards, non-science based prescriptions – resonantly mirror the characteristics of food standards which WTO negotiators had attempted to, by creating a system of rules, contain.

Private standards operate under fertile conditions for non-governmental protectionism. With the amount of influence they wield, private actors have a high degree of control over international food markets, but act with impunity and under little scrutiny. A number of commentators have, in fact, cautioned that private standards schemes are sometimes used to further industry-driven protectionist strategies.<sup>200</sup> In view of the examples, cited above, of: artificial product differentiation; illicit exploitation of environmental and ethical imperatives; origin-based prejudice; and gratuitous refusals to deal and product bans, there is some veracity to these claims.<sup>201</sup>

But even outside of these instances of blatant protectionism, the infrastructure of private standards is simply not designed to advance the minimisation of trade effects. Due to a combination of their characteristics, their opacity<sup>202</sup>, and their disengagement from the rules, private standards are naturally ripe for protectionist outcomes. They stand in stark contrast to the situation under the rules, which cannot countenance gratuitous trade restrictions. Private standards also substantiate the fears of the negotiators regarding protectionist outcomes arising from the *manner of application* of measures.<sup>203</sup> In the process of all of this, they have become a principal vehicle for sowing the seeds of segmentation in international food markets.<sup>204</sup>

#### 3.2.1.4 The Dispute-settlement Prong

Article 3.2 of the DSU states that the dispute settlement system is a “central element” in providing security and predictability to the multilateral trading system.<sup>205</sup> That security and predictability are hallmarks of a functioning multilateral trading system, has been repeatedly

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<sup>200</sup> See n 134 and 145, above.

<sup>201</sup> In those instances in which certified products are not superior to uncertified products, private standards (particularly the label-based ones) also mislead consumers, as they could formulate their purchasing decisions on the basis of possibly fallacious information.

<sup>202</sup> They are doubly opaque in that they are both insulated from the rules in general, and are void of the transparency infrastructure which exists within the rules-based standards.

<sup>203</sup> See *US – Gasoline*, where the AB, after reviewing the negotiating history of the article XX of the GATT, explained that the *chapeau* of article XX was aimed at preventing, in the manner of application of measures permitted by them, the abuse of the public policy exceptions. The AB further noted that the objective underlying that was the object of balancing the legal duties of Members claiming exceptions and those of other Members. Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, pp 22, 25.

<sup>204</sup> See discussion in 3.3 and 3.4, below.

<sup>205</sup> Article 3.2 of the *Dispute Settlement Understanding*, *supra*.



reinforced in the case law.<sup>206</sup> Security and predictability are essential to the operations of the individual (predominantly private) participants in the system.<sup>207</sup> The panel in *US – Section 301 Trade Act*<sup>208</sup> observed that security and predictability are also “instrumental to achieving the broad objectives of the WTO [Marrakesh] Agreement preamble”.<sup>209</sup> Private standards introduce significant unpredictability into the multilateral trading system and, in line with the reasoning of the Panel, compromise the objectives of the Marrakesh Agreement’s preamble. The existence of a clear set of rules has been one of the means to ensuring that security and predictability in the multilateral trading system does not capitulate to measures relating to product standards. The increasing operation of food standards outside of such rules, and outside of the reach of dispute settlement, represents a threat to that enterprise.

Dispute settlement also serves to “preserve the rights and obligations” of Members under the WTO agreements.<sup>210</sup> As noted in part 2, the architects of the rules-based system, cognisant of the need for equilibrium in international food trade, negotiated a careful balance between the rights and obligations of Members. Stressing the importance of this balance of rights and obligations, the AB in *EC – Bananas III* (quoting from the panel report in the same case) made the following statement:

... with the increased interdependence of the global economy, ... *Members have a greater stake in enforcing WTO rules* than in the past... since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.”<sup>211</sup> [Own emphasis]

This statement is germane to the present circumstances. Private standards represent a skewing of the balance of rights and obligations which could, along the continuum, arrive at a point where the nullification and impairment of the rights of some Members could ensue.<sup>212</sup> At that same

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<sup>206</sup> See, mainly, Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*, par 7.75; Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p 31.

<sup>207</sup> The panel in *US – Section 301 Trade Act* explains the critical importance of security and predictability to the individual private participants in the multilateral trading system when it states: “the multilateral trading system is, *per force*, composed not only of states but also, *indeed mostly*, of individual economic operators. The lack of security and predictability affects mostly these individual operators”. [Own emphasis] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*, par 7.75. See, also, Kessie E, “Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO”, (2000) 34(6) *JWT*, 1.

<sup>208</sup> Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*.

<sup>209</sup> At par 7.75.

<sup>210</sup> Article 3.2 of the Dispute Settlement Understanding, *supra*.

<sup>211</sup> Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, *supra*, par 136.

<sup>212</sup> On the potency of food standards to distort, nullify, and impair the balance of rights and obligations contained in the GATT, see Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 159.

point, certain other Members begin to escape their obligations. All of this upsets equilibrium in the multilateral trading system.

### 3.2.1.5 The Developing-country Interests Prong

Since the beginning of the Uruguay Round, the WTO system has been making progressive headway (in design, aspiration, and in practice) towards the realisation of the full integration of developing-country and LDC Members into the multilateral trading system. Private standards lack analogous mechanisms for accommodating the circumstances of developing countries. Even in their origin-neutral state, private standards operate in a one-size-fits-all manner which manifests in the use rigid and inflexible prototypes that are inconsiderate of circumstances prevailing in developing countries.<sup>213</sup> The AB has stated that, under the rules of the WTO, the circumstances of developing countries must be taken account of in the design of any measures which affect them. It stressed a duty upon Members when it stated that discrimination exists (*notwithstanding origin-neutrality*) when:

the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in ... exporting countries.<sup>214</sup>

The panel in the same case had already pronounced that discrimination qualified as “arbitrary discrimination” when measures were applied “without any regard for the difference in conditions between countries and ... [were] applied in a rigid and inflexible manner”.<sup>215</sup> Previously in the paper, it was noted that intrinsic flexibilities are one of the most valuable systemic features of the WTO rules.<sup>216</sup> In the same vein, rigidity and inflexibility can be among the more potent aspects of food standards.

But private standards are worse than neutral. More than being simply inflexible or inconsiderate of the circumstances prevailing in developing countries, it is manifest that they are, in parts, actively discriminatory against developing-country producers. This is incongruent with the WTO’s endeavour to ensure that developing countries secure a share in the growth of

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<sup>213</sup> It has been noted that even when international standards do accommodate developing countries, they largely reflect the interests of large firms. This still reflects their discriminatory character, as a large cross-section of export participation in many developing countries is by small-scale farmers. See UNCTAD (20 April 2004), *supra*, 11. See also, n 88, above.

<sup>214</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 165.

<sup>215</sup> Panel Report, *US – Shrimp*, WT/DS58/R, *supra*, par 177.

<sup>216</sup> See 28, above.

international trade, including through the elimination of discriminatory treatment in trade relations.<sup>217</sup>

These observations are not made without regard to the supply-side constraints of developing-country Members. Supply-side constraints accepted, it is clear, from the foregoing discussion and from the findings of case studies, that developing-country producers are disproportionately prejudiced by private standards under every one of the organising prongs. As one commentator observes; in many instances, producers from developing countries could comply with “genuine consumer demand-driven” initiatives, but are prevented from doing so because of the propensity of private standards to be “discriminatory and more trade restrictive than are [*sic*] necessary”.<sup>218</sup>

### 3.2.2 Discussion of Challenges: The Circumvention of WTO Obligations

The right to take measures in respect of food standards, and market access rights, are rights in balance in the WTO. Indeed, they exist contemporaneously, “so that neither ... will cancel out the other”.<sup>219</sup> If the one were to cancel out the other, the AB has cautioned, this would “distort and nullify or impair the balance of rights and obligations constructed by the Members ... in [the GATT]”.<sup>220</sup> In view of the discussion in the preceding subsection, it is safe to assert that this is precisely what is beginning to take place. Private standards are distorting the balance of rights and obligations created by the rules of the WTO and are, in the process, creating *de facto* market advantages in favour of producers in certain Members. But private standards are a manifestation of the autonomous and independent conduct of private parties – parties that are not the subjects of WTO obligations. In this paper, private standards are expressly taken to represent purely private conduct, with no necessary elements of collusion between the private parties and Member governments. Nevertheless, having the effects that they do, private standards represent effective circumvention, by some Members, of their obligations.

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<sup>217</sup> Paragraphs 2 and 3, Preamble to the Marrakesh Agreement, *supra*.

<sup>218</sup> Gandhi, (2005) 39(5) *JWT*, *supra*, 857.

<sup>219</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 159.

<sup>220</sup> *Ibid.*

The issue of circumvention, through private conduct, of WTO obligations is a serious systemic concern in the WTO.<sup>221</sup> The fact that private parties – the primary participants in international trade – are not the subjects of WTO rules means that there is considerable scope for Members to circumvent their obligations through relying on private conduct. In explaining how private standards represent a circumvention of their obligations, by some Members, Ghandi writes that; through them Members can instruct, or simply *allow*, private entities to conduct activities that would be WTO-inconsistent.<sup>222</sup> But circumvention need not be limited to deliberate acts, and the subjective element should not be overstated. The escaping of WTO obligations, and attendant WTO-inconsistent outcomes, can exist along a spectrum of circumstances.<sup>223 224</sup>

### 3.2.3 Discussion of Challenges: Extraction of International Food Trade from the Rules-based System

Private standards disrupt the organising function of the rules-based system, and facilitate the effective circumvention of WTO rules. When the two are taken together, on a global (systemic) level, it can be seen that private standards represent a systematic extraction of food standard-making and application from the remit of the rules of the WTO. The gravity of this cannot be overstated. The marginalisation of the rules is a serious systemic issue for the WTO. It could progressively upset the balance of the concessions which have negotiated in the WTO, and weaken the principles and objectives underlying multilateral cooperation in international trade.

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<sup>221</sup> The SPS and TBT Agreements, in introducing clearer rules for the use of standards, were also intended to curb the circumvention of GATT rules. Some examples of recognised individual rules that are specifically designed to capture instances of the circumvention of core WTO rules include, articles: XXVII of the GATT; 10 of the Agreement on Agriculture; 5 of the Agreement on Textiles and Clothing; XXIV of the Anti-Dumping Agreement; and 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures.

<sup>222</sup> Ghandi, (2005) 39(5) *JWT*, *supra*, 866, 868. See also, Villalpando, *supra*, 408.

<sup>223</sup> According to Roben, article 13 of the SPS Agreement - one of the provisions which form a core component of the discussion in the next part of the paper - can be viewed as falling within a broader category of rules aimed at the prevention of WTO-inconsistent outcomes. The author writes, of sentence three, that its object is to “ensure effective application of the SPS agreement”, and “prevent its being *circumvented* by private action”. Similarly, of sentence four, the author writes that it, “[i]n essence, [sentence four] prohibits Members from *circumventing* the agreement by relying on private action”. [Own emphasis] Roben, *supra*, pp 542, 543.

<sup>224</sup> Regarding rules aimed at the broader avoidance of WTO-inconsistent outcomes, Bohanes and Sandford, however, argue that the less pronounced the subjective element, the less pronounced the direct policy goal of anti-circumvention is. The authors distinguish, in that regard, between WTO rules which attribute the conduct of private parties to Members (describing these as targeted at circumvention), and those which censure Members for failing to discipline WTO-inconsistent conduct within their jurisdictions. Bohanes, Sandford, *supra*, pp 5 - 6, 64.

And if allowed to play itself out, the situation is likely to only escalate. It has already been predicted that private standards “will continue to increase in scope and stringency over time”.<sup>225</sup>

In a statement to Members during an SPS Committee meeting, Argentina reveals the gravity of the systemic effects of private standards when it states:

‘ ... If the private sector was going to have unnecessarily restrictive standards affecting trade and countries had no forum where to advocate some rationalisation of these standards, twenty years of discussions in the international fora *would have been wasted*. [Own emphasis]<sup>226 227</sup>

Even several years prior to the private standards debate, Hudec had made a similar observation, writing, of the spread of private trade barriers, that they would “undermine the present trading system”, by undermining the “effectiveness, and political acceptability” of the trade agreements upon which it is built.<sup>228</sup> It is for this reason that the collective of WTO Members must retain momentum in dealing with private standards conclusively, and remain circumspect about suggestions that they are purely “consumer-driven” or “business to business” practices, which are not of concern to the WTO.

Part 4 considers what can be done, from within the rules themselves, to respond to the challenges posed by private standards, and safeguard the rule of law in international food trade. Before that, the next two sections conclude this part by highlighting some practical manifestations of private standards, which relate to the rules-effects discussed above.

### 3.3 PRIVATE STANDARDS AND REDISTRIBUTION OF MARKET OPPORTUNITIES

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<sup>225</sup> WTO Committee on Sanitary and Phytosanitary Measures (27 February 2007), G/SPS/GEN/763, *supra*, 5.

<sup>226</sup> WTO Committee on Sanitary and Phytosanitary Measures (circulated 18 August 2005), G/SPS/R/37/Rev.1, 6 - 7 (par 20).

<sup>227</sup> The Mercosur (Mercado Común del Sur) bloc, which comprises Argentina, Brazil, Paraguay, and Uruguay, makes a similar observation, stating:

... Members should ... fulfil the international undertakings to which they freely agreed ... [and] ... address the problem ..., since *failure to do so would create the impression that years of work in the GATT/WTO framework have been in vain*. [Own emphasis]

WTO Committee on Sanitary and Phytosanitary Measures (30 September 2009), G/SPS/W/246, *supra*, 4.

<sup>228</sup> Hudec, *supra*, 80.

In their skewing of the organising function of the rules, private standards engender disequilibrium in the practice of international food trade. As they are universally more onerous on, and discriminatory against, low income Members, they are also setting in motion a process which exacerbates asymmetries between developed and developing countries in the multilateral trading system. In the process, private standards also threaten to entrench discriminatory patterns of trade. Their disparate effects, along income lines, is a pattern which has been confirmed in field research.<sup>229</sup> It has also been a salient element in many of the same studies which have found that private standards are playing a significant role in influencing future trade flows.<sup>230</sup>

One of the original fears of the Contracting Parties (during the Tokyo Round) and the negotiators (during the Uruguay Round) was that if international food trade continued unorganised by rules, fragmentation of world markets would ensue as a consequence of food standards.<sup>231</sup> Private standards represent threats whose resemblance to those detected by the architects of the rules-based system is stark. Findings from case studies reveal that private standards are creating polarisation in international fresh-fruit and vegetable markets. African producers, particularly small to medium scale farmers, are being continually eliminated from existing or potential markets. Even in those instances where elimination is eluded, many small scale farmers are finding themselves the casualties of a redistribution of market opportunities.<sup>232</sup> With a systematic redistribution of market opportunities away from low income Members, private standards could be sowing the ingredients for a (at best<sup>233</sup>) two-tier multilateral trading system.<sup>234</sup>

Of course, low income Members, and African ones especially, suffer from several challenges of a structural nature on the supply-side. It cannot be denied that these already inhibit their ability

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<sup>229</sup> See case studies discussion in 3.6, below.

<sup>230</sup> See Henson, *supra*, generally. In discussing the long-term influence of private standards, the author states (in the abstract to the paper) that they play a “contrasting role in both reducing and enhancing trade in agricultural and food products”, and notes that this is along income lines.

<sup>231</sup> See part 2, above.

<sup>232</sup> See 3.4, below.

<sup>233</sup> The natural progression is worse than that. There are some who have predicted that production for export by small-scale farmers may eventually cease to be viable. See Legge et al., *supra*, pp 1, 43, and generally.

<sup>234</sup> Baldwin, writing of (TBT) standards in general, cautions that the emergence of preferential arrangements among rich nations, premised on product standards, is creating a two-tier multilateral trading system, in which developing countries occupy the second tier. Baldwin, *supra*, generally.

to manage food standards. But as noted in part 2, it is because of, rather than in spite of, this that they need a functioning and efficacious rules-based system. The rules-infrastructure, in conjunction with concerted systemic efforts aimed at fully integrating developing countries and LDCs into the multilateral trading system, has allowed the situation of African countries to improve incrementally. The argument that the situation of African countries has not improved meaningfully under the WTO does still linger - and is not completely without foundation.<sup>235</sup> However, any prospect of future gains is rendered improbable if international food trade continues to be extracted from the rules. Furthermore, if there is to be any confidence in the WTO enterprise, then there ought to be faith in the idea that the project of fully integrating African Members into the multilateral trading system is one which is progressive and ongoing.

The rise in private standards is not only antithetical to these further efforts. It represents a reversal of some obvious gains which had been made. The fresh-fruit and vegetable sector, through the participation of small-scale farmers, had become a beacon for the successful integration of African countries into the multilateral trading system. These small-scale farmers are now being culled from global markets, with some studies forecasting that private standards could soon result in production for export by small-scale farmers in Africa *completely ceasing to be viable*.<sup>236</sup>

### 3.4 PRIVATE STANDARDS AND THE FUTURE OF AFRICAN COUNTRIES IN INTERNATIONAL FOOD TRADE: INDICATIONS FROM CASE STUDIES<sup>237</sup>

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<sup>235</sup> See, for example: Rodrik D, “The Global Governance of Trade: As if Development Really Mattered”, *Background Paper to the UNDP Project on Trade and Sustainable Human Development* (2001); Hunter J, “Broken Promises: Trade, Agriculture and Development in the WTO”, (2003) 4 *Melbourne Journal of International Law*, 299; Hoekman B, “Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment”, (2005) 8(2) *JIEL*, 405; Ismail F, “A Development Perspective on the WTO July 2004 General Council Decision”, (2005) 8(2) *JIEL*, 377.

<sup>236</sup> Legge et al., *supra*, pp 1, 43, and generally. This conclusion becomes even more disquieting when one notes that the authors record, at 43, that some major procurers in developed-country markets (category managers in the United Kingdom) themselves affirm that they have little intention of procuring from sub-Saharan Africa beyond the next 3 to 5 years. See also: p iii, “Executive Summary”, and “Introduction”.

<sup>237</sup> Overwhelmingly, the most cited in the Committee discussions, the cases studies, and the literature reviewed, are supermarket schemes – with GlobalGAP and Tesco Natures Choice apparently presenting the greatest challenges for farmers and exporters. In the collective national scheme category, the British Retail Consortium is frequently cited. The primary focus has undoubtedly been European markets. See WTO Committee on Sanitary and Phytosanitary Measures, (15 June 2009), G/SPS/GEN/932, *supra*, 2. See also, n 158, above.

The genesis of private standards, as they are used in contemporary literature on their effects, dates back to the late 1990s.<sup>238</sup> At the time, African small-scale farmers had successfully established themselves as key players in global value chains for high-value fresh-fruit and vegetables. They participated through contract and outgrower schemes (typically collectively), transacting with exporters who were the intermediaries between them and importers in export markets.<sup>239</sup> Under this model of participation, small-scale farmers had become a source of broad economic benefits. Significantly, they had also become to be seen as the “backbone of the African rural economy”<sup>240</sup>, having become a focal unit for (directly and indirectly) sustaining millions of rural livelihoods in several sub-Saharan African countries.<sup>241</sup> The rise of private standards soon heralded wide-scale market exclusions and the market marginalisation of these small-scale farmers.<sup>242</sup> This continues to this day.

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<sup>238</sup> For some of this background, see, *inter alia*, Henson, *supra*; Brown, *supra*; Liu P, “Private Standards in International Trade: Issues and Opportunities”, *Paper Presented at WTO Private Standards Workshop* (9 July 2009), Geneva, available at [http://www.fao.org/fileadmin/user\\_upload/livestockgov/documents/Trade%20standards%20Liu%20WTO%20wkshp.pdf](http://www.fao.org/fileadmin/user_upload/livestockgov/documents/Trade%20standards%20Liu%20WTO%20wkshp.pdf) (last accessed on 31 August, 2011). See, also, WTO Committee on Sanitary and Phytosanitary Measures, (15 June 2009), G/SPS/GEN/932, *supra*, 3.

<sup>239</sup> In the literature, the technical terms used in relation to small-scale farmers are “small-scale growers” or “smallholders”. There are a number of different models of small-scale farmer / exporter relationship in operation. In countries such as Kenya and Zimbabwe (and previously, Zambia), under the so-called paternalistic model, exporters: mass manage, and source from, several small-scale farmers; take responsibility for the technical and managerial aspects of compliance with food standards; and take on responsibility for a significant share of the initial and maintenance costs of certification. Legge et al., *supra*, 37 - 38. See also Graffham A, MacGregor J, “Impact of EurepGAP on Small-scale Vegetable Growers in Zambia”, (2007) *Fresh Insights* 5, 7 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html) , last accessed on 31 August, 2011).

<sup>240</sup> Brown, Sander, *supra*, 6.

<sup>241</sup> Also dubbed a “bright spot of African development”, export horticulture in sub-Saharan Africa, had also “raised production standards in agriculture, created supporting industries, and provided significant employment in rural areas”. See Dolan, Humphrey, *supra*, 163. In Zambia, for example, it is reported that, in 2003 - 2004, small-scale farmers had yearly incomes ranging between £1 000 - £7 500. At that time, average rural incomes were often under £100 per year. See Graffham, MacGregor, (2007) *Fresh Insights* 5, *supra*, 1. See, also, Legge et al., *supra*, 19 - 20.

<sup>242</sup> The broad causes for market exclusion, as presented in the findings of the GlobalGAP case studies are: failure to afford certification or maintain certification costs; getting dropped by exporters due to the transaction costs associated with private standards; and rigid vertical integration of supply-chains. The case studies acknowledge the influence of other factors, such as increasing fuel costs (in Uganda), currency fluctuations (in Zambia), and the collapse of the biggest exporter (in Zambia). Nevertheless, despite the influence of these factors, it is apparent that the impact of private standards does pervade. See Kleih et al., (2007) *Fresh Perspectives* 4, *supra*, 1 - 2; UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, n 36; Graffham A, MacGregor J, “Impact of EurepGAP on Small-scale Vegetable Growers in Zambia”, (2007) *Fresh Perspectives* 3, 1 - 2 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_perspectives.html](http://www.agrifoodstandards.net/en/global/fresh_perspectives.html) ; last accessed on 31 August, 2011).



At the same time, other categories of participants – larger farmers; multinationals; and developed-country entities – have, following certification under private standard schemes, accrued a host of benefits.<sup>243</sup> A number of African small-scale farmers, who obtained certification, have managed to continue participating in global supply chains. But even in certification, many of them have found these benefits to be illusory. Where they have come about, they have often culminated in a zero-sum state of affairs. Due, in large part, to the high costs associated with obtaining and maintaining it, certification has often been matched by decreased (and progressively decreasing) margins.<sup>244 245</sup> It is safe to assert that the term “benefits”, particularly when used in relation to access to global supply chains by developing-country participants, is a bit of a misnomer. In general, it hides that fact that it is inherent in the design and application of private standards that such benefits do not accrue to developing-country producers.<sup>246</sup>

It is also pertinent that the participation of African countries in global fresh-fruit supply-chains was already established, and was growing. It is the advent of private standards that placed the most significant brakes on this growth. Now in order to regain their foothold and obtain these

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<sup>243</sup> Commonly listed benefits, associated with certification, include: product acceptability; better quality produce; enhanced ability to participate in competitive global markets; differentiation opportunities; access to niche markets and related price *premia*; expansion of market share; higher yields and profitability; increased employment; greater occupational safety; lower environmental impacts; and the ability to service the evolving tastes of consumers. See UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, 62; Legge et al., *supra*, 42; Graffham, MacGregor, (2007) *Fresh Insights 5*, *supra*, p i; WTO Committee on Sanitary and Phytosanitary Measures: (15 June 2009) G/SPS/GEN/932, *supra*, 6; (10 December 2009), G/SPS/GEN/932/Rev.1, 6.

<sup>244</sup> In several cases, margins have eventually fallen to zero. Graffham et al., (2007) *Fresh Insights 6*, *supra*, pp ix, 12, 19.

<sup>245</sup> It is also worth mentioning that some of the stereotypically mentioned benefits of certification often do not materialise for small-scale farmers who remain in global supply-chains. Price premium claims relating to *niche* products, for example, can be grossly exaggerated. See Vitalis, *supra*, pp 2, 7 - 8. Where price *premia* materialise, they are typically monopolised upon by supermarkets. Rotherham reveals how research has found that price *premia* on Fair Trade certified coffee and bananas commonly accrue (in inordinate proportion, or even entirely) to retailers rather than to producers. Rotherham, UNEP Report, *supra*, 16. See also, Fitter R, Kaplinsky R, “Who Gains From Product Rents as the Coffee Market Becomes More Differentiated? A Value Chain Analysis” (May 2001) 32(3) *IDS Bulletin Paper*; Winnet, R., ‘Supermarkets Take Cut of Fair Trade Cash for Poor Farmers’, *Crop Choice News / Times of London*, 11 July 2003, available at [http://www.newfarm.org/international/news/070103/071403/uk\\_fairtrade.shtml](http://www.newfarm.org/international/news/070103/071403/uk_fairtrade.shtml) (last accessed on 31 August, 2011).

<sup>246</sup> There is indeed, a trade-creating quality to private standards, especially considering that producers who can meet them are able to access contemporary global markets. But private standards are structured such that it is pitted against developing-country and small-scale producers that they secure these benefits. Citing Dolan, Brown and Sander note the fact that private standards are innately discriminatory against small-scale producers. Brown, Sander, *supra*, 7. There is also the related matter of supply-chain developments that are progressively decimating the participation, in global supply chains, of small-scale farmers – irrespective of whether or not they meet the strictures of private standards.

expected benefits, small-scale African farmers have to contend both with conditions which are discriminatory against them, and inordinate financial costs. Overwhelmingly, the African case studies have found that these costs are so inordinate that without substantial, *and sustained*, financial and technical assistance small-scale farmers will not be able to sustain certification.<sup>247</sup> The overwhelming message that emerges from the findings of the African case studies is that (because of private standards) the future of production for export by small-scale farmers has become extremely insecure. What is also patent is that it is not purely on account of supply-side constraints.<sup>248</sup> The observation has, in that regard, been made that importers are moving away from small-scale farmers, “*not because of product quality or productivity, but because of transaction costs associated with private retailer standards*”.<sup>249</sup>

Refusals to deal, partly on the basis of non-scientific risk association, were found to be one of the causes of reduced sourcing from small-scale farmers in Kenya and Zimbabwe. Case studies found that in both these countries, satisfactory bills of health were no longer sufficient a guarantee of product acceptability.<sup>250</sup> In cases where there have been no obvious refusals to deal, studies have found that certification strictures have taken care of the rest. Farmers in Kenya, Uganda and Zambia have all been the casualties of these stringent and rigid certification requirements.<sup>251</sup> Paradoxically, many of these were farmers who had originally managed to obtain certification. Subsequent to obtaining it, however, they found that the costs of certification - initial and recurring - dipped so significantly into their profits that many of them had lower incomes than they had prior to certification.<sup>252</sup> In many cases, margins eventually fell

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<sup>247</sup> Graffham et al., (2007) *Fresh Insights 6, supra*, generally, and pp iv, 28 - 30, 48, 50, 68; Graffham, MacGregor, (2007) *Fresh Insights 5, supra*, pp ii, 49; Legge et al., *supra*, pp 22, 40, 58; UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, 47.

<sup>248</sup> In instances in which reference is made to the benefits of private standards, the impression is sometimes given that, in order for producers to obtain these benefits, they merely need to meet the strictures of private standards (or be assisted in doing so). This paints a supply-side constrains brushstroke, which can hide many of the complexities underlying private standards.

<sup>249</sup> Legge et al., *supra*, 1.

<sup>250</sup> See Dolan, Humphrey, *supra*, 170. See also, Bureau et al., who explain that developing-country products are afflicted by a non-scientific risk association which results in refusals to deal, based purely on origin. Bureau et al., *supra*, 244.

<sup>251</sup> See, generally, UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*; Graffham et al., (2007) *Fresh Insights 6, supra*; Graffham, MacGregor, (2007) *Fresh Insights 5, supra*; Kleih et al., (2007) *Fresh Perspectives 4, supra*.

<sup>252</sup> *Ibid.*

to zero.<sup>253</sup> In addition to certifications costs, margins are falling increasing victim to the trend by certain dominant supermarkets to source below industry averages, demanding deep discounts from suppliers which affect the competitiveness of many producers.<sup>254</sup> In Kenya, the culmination of these developments has seen farmers forced into relocating to regional market destinations (primarily South Africa).<sup>255</sup> While these markets have less stringent standards, they are less commercially lucrative.

But market relocation has been the better outcome. In Zambia, it has been complete elimination, in most cases. Due to a *niche* quality to their produce, Zambian small-scale farmers have found it difficult to find alternative markets to which they can supply at a profit.<sup>256</sup> The Zambia experience also shows how damaging the inflexibility of private standards, and inconsideration of local conditions prevailing in exporting countries, has been. There is evidence that had private standards schemes been more accommodating of the original groups of small-scale farmers, which operated as associations (and managed costs as a collective), there would have been virtually no market exclusion. Maintenance and recurring costs would have been quite low, and food standards outcomes would not have been compromised.<sup>257</sup> Also, the critical mass, which supermarkets would presumably favour, would have been clearly attained. Instead, a rigid outlook resulted in the disintegration of the groups, and a consequent vicious cycle wherein any exclusions increased costs for the remaining certified farmers, leading to further exclusions.<sup>258</sup>

Once small-scale farmers have been eliminated from global markets, it has been found that recapture of lost markets proves extremely difficult.<sup>259</sup> This has forced some of the less established and potential entrant farmers to abandon their ambitions in high-value markets. This

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<sup>253</sup> See n 244, above.

<sup>254</sup> Tesco, for example, is able (as a starting point) to source from suppliers at prices which are about 4 percent under industry averages. But Tesco also reportedly extracts further discounts for promotions. Brown, Sander, *supra*, 10.

<sup>255</sup> Graffham A, Karehu E, MacGregor J, "Impact of EurepGAP on Small-scale Vegetable Growers in Kenya", (2007) *Fresh Perspectives* 2, 1 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_perspectives.html](http://www.agrifoodstandards.net/en/global/fresh_perspectives.html) , last accessed on 31 August, 2011).

<sup>256</sup> Graffham, MacGregor, (2007) *Fresh Insights* 5, *supra*, generally, and pp i, 2.

<sup>257</sup> Graffham, MacGregor, (2007) *Fresh Insights* 5, *supra*, 49.

<sup>258</sup> One of the Zambia case studies also finds that several components of the GlobalGAP system are clearly luxurious in the African context, and concludes that many could be done away with without compromising food standards outcomes (and, even, processes). The study concludes that, in respect of some depot buildings, flexibility could result in savings in the tens-of-thousands of pounds. Graffham, MacGregor, (2007) *Fresh Insights* 5, *supra*, 49.

<sup>259</sup> See Kleih et al., (2007) *Fresh Perspectives* 4, *supra*, 2.

development has been witnessed in Uganda. Ugandan small-scale farmers, who remain in or seek access to global markets, now tend towards supplying the low end wholesale and food service sectors.<sup>260</sup> As with regional markets, these markets are less lucrative than high-value markets. Of more concern, however, is that there are recent signs of an importation of elements of private standards trends into these low-value markets.<sup>261</sup>

But responding to market-driven standards is, at the same time, now the only way to participate in lucrative high-value global markets - markets which are undeniably strategic to competitiveness. It is for this reason that some previously established Kenyan farmers have sought to leverage emerging technical assistance opportunities in an attempt to recapture lost markets.<sup>262</sup> There are also new entrants who still seek access to high-value markets. Like Uganda, Ghana was not well established in global high-value fresh-fruit and vegetable markets, but was a potential entrant when private standards proliferated. At the time, farmers in Ghana were endeavouring to move from the low end into the high-value market.<sup>263</sup> At the outset, private standards had resulted in *de facto* market advantages for larger Ghanaian farmers, polarising the field and also worsening the prospects for small-scale farmers.<sup>264</sup> But respite did soon come in the form of a number of technical assistance initiatives.<sup>265</sup>

The argument could be made that the reliance on donor initiatives in Ghana is a little heavy.<sup>266</sup> Self-sustainability has been the hallmark of success of small-scale export horticulture in sub-Saharan Africa. On the other hand, it could also be argued that, as relatively new participants in

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<sup>260</sup> Particularly in the United Kingdom. See Kleih et al., (2007) *Fresh Perspectives 4*, *supra*, 1 - 2.

<sup>261</sup> Known as “standards creep” or “standards drift”, this development is beginning to see private standards trends penetrating wholesale and food service sectors. See Kleih U, et al., “Impact of EurepGAP on Small-scale Fruit and Vegetable Growers in Uganda”, (2007) *Fresh Insights 10*, pp 1, 34 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html) , last accessed on 31 August, 2011); Kleih et al., (2007) *Fresh Perspectives 4*, *supra*, 2; Legge et al., *supra*, p iii.

<sup>262</sup> The sources of technical assistance for small-scale farmers in Kenya have ranged from exporters, to development assistance agencies such as GIZ, DFID, and USAID, the Dutch Government, and GlobalGAP itself. See Graffham et al., (2007) *Fresh Insights 6*, *supra*, generally.

<sup>263</sup> See, *inter alia*, UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, pp 25, 37 - 49.

<sup>264</sup> Brown, Sander, *supra*, pp 11, 13; Legge et al., 16; UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, 37 - 49.

<sup>265</sup> For a list of some of the donor initiatives in operation in Ghana, see UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, pp 44, 47. See also, Brown, Sander, *supra*, 13; Legge et al., *supra*, pp 40, 58.

<sup>266</sup> An UNCTAD case study focusing on Ghana, Kenya, and Uganda notes, in its Executive Summary, that the three countries have received “significant donor support” to facilitate adjustment to new market conditions. UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, 47.

high value fresh-fruit and vegetable markets, leveraging on donor support would be a means for small-scale farmers such as those in Ghana to gain a foothold in global markets. But weaning themselves from donor assistance could prove difficult. Private standards have already caused even previously self-sustaining farmers to become in need of technical assistance. And given the prediction that substantial and sustained financial assistance is the only way small-scale African farmers can continuously meet the strictures of private standards, the prognosis is not good. Technical assistance in perpetuity would be the death knell of self-sustainability.<sup>267</sup>

Donor reliance might not be the only problem with technical assistance. As a starting point, technical assistance cannot be to the long-term benefit of African producers if it is based on prototypes which are not suited to their circumstances. The prototypes associated with contemporary supply-chain management and risk control, and cost-competition in the global market, have all been antithetical to the continued participation of small-scale farmers in export horticulture. Models of technical assistance, based on these, will merely serve to assist pockets of farmers, while still entrenching the potential annihilation of the small-scale *model* of farming from export horticulture.<sup>268</sup> On the other hand, it could be argued that some supply-chain developments, though they present challenges for small-scale farmers, are indicative (and a necessary upshot) of modernisation trends in global supply-chain practices. Accepting this argument, perfunctorily, presents a problematic scenario. The small-scale model of farming is quintessential to Africa's participation in international fresh-fruit and vegetable trade and a mainstay of export-led poverty reduction. The annihilation of this model farming from global supply-chains is highly problematic.

As a separate concern, technical assistance which is pegged against private standards trends also presents the risk of upward harmonisation. Private standards are already operating as *de facto* market norms. The technical assistance route could mainstream those trends, moving them towards *de jure* legitimization (as international standards). This danger is particularly present in the case of technical regulations and standards. While both the SPS and TBT Agreements oblige

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<sup>267</sup> Donor assistance is, itself, believed to not be sustainable. Graffham et al., (2007) *Fresh Insights 6, supra*, 28;

<sup>268</sup> Interviewed small-scale farmers and exporters have confirmed that donor initiatives “[did] not seek involvement of stakeholders, ... and [took] *no account of the long term viability of smallholder schemes*”. [Own emphasis] Graffham et al., (2007) *Fresh Insights 6, supra*, p v.

Members to base their food standards on international standards, under the TBT Agreement, the relevant international organisations are not prescribed.<sup>269</sup> Under that agreement, any standards (including private standards) can, in theory and through wide use, gain the status of international standards.<sup>270</sup>

Notwithstanding the foregoing, sourcing from small-scale farmers is progressively diminishing, and there are little other immediately available means than technical assistance to curb some of the market culling. It is pragmatic for those who can, to make use of it. But pockets of technical assistance cannot outweigh the net negative, long-term, systemic and practical effects of private standards.

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<sup>269</sup> Under the SPS Agreement, the recognised international organisations (the so-called three sisters) - the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention - are *specified* in Annex A:3 of the agreement.

<sup>270</sup> See International Organisation for Standardisation, “International Standards and “Private Standards”” (February 2010), ISO, 3.

## PART 4: RULES-BASED RESPONSES TO PRIVATE STANDARDS

*“Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system”*

- Paragraph 5, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### 4.1 RULES-BASED RESPONSES TO PRIVATE STANDARDS

Private standards are mainstreaming discriminatory and protectionist conduct in international trade, and are leading to the fragmentation of world markets. The Africa case studies reveal that there is a progressive reduction in the share of trade of African Members, and that this has been accompanied by profound economic, social, and sustainable development ramifications. There is a need for extraordinary systematised action to contain these effects. Anything less would beg the question what the future relevance is of the rules in international food trade. More particularly, it would raise questions in regard to their continued utility for low-income Members. The objective of this part of the paper, and the next, is to jointly consider how the rules of the WTO can themselves be the instrument for safeguarding the sanctity of the rule of law in the face of the threats posed by private standards. The discussion in this part (part 4) represents a consideration of the potential within the rules of the WTO for responding to private standards. Part 5 appraises the rules-based approach for its efficacy and its pragmatism in respect to safeguarding the rule of law.

There is textual support, from the SPS and TBT Agreements, for holding Members responsible for private conduct within their jurisdictions<sup>271, 272</sup>. Within the TBT Agreement, is also contained a Code of Good Practice, which contains a set of rules which are open to acceptance by private

<sup>271</sup> Hereinafter, “the text-based options”, when referred to collectively.

<sup>272</sup> Article 13 of the SPS Agreement, *supra*; and articles 3, 4 (read with Annex 3), and 8 of the TBT Agreement, all hold Members responsible, under certain (specified) circumstances, for conduct in relation to “non-governmental” entities within their territories.

parties. There is also evidence, from WTO jurisprudence, that there is an acceptance of the application of the public international law theory of “attribution of (private) conduct to the state”<sup>273</sup>. These possibilities have all - to various degrees, and in various combinations - begun to be considered as rules-based responses to private standards. There is, however, still far from convergence, within the WTO Committees and among commentators, on the available options, their scope, or their practical application.

Following separate discussions under the two categories of options, namely the theory of attribution, and the text-based options, this part considers their interplay and practical application. Dispute settlement is itself a rules-based option, and will naturally find consideration in the discussion.<sup>274</sup> The part concludes with a discussion on the role of the panels and AB in adopting interpretations of the law which elicit the best rule of law outcomes and take account of the interests of low income Members.

In order to contextualise the rules-based options, a brief discussion on the status of private conduct, under the rules of the WTO, follows.

#### 4.1.1 Private Conduct and Non-State Actors in WTO Law

The WTO legal system has never been understood as one where direct rights or obligations fall upon private parties. International treaties, as a general rule, are directly binding only as and between the state parties that are signatories to them.<sup>275</sup> This is not to say that there are no examples of treaty regimes which confer some direct rights and obligations upon private individuals. A notable example is to be found in the legal system of the EU. However, WTO panels and the AB have never interpreted the WTO as operating in this manner, nor do they

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<sup>273</sup> Hereinafter, “theory of attribution”.

<sup>274</sup> Dispute settlement is also important because, from a practical perspective, the rules-based options are likely to only be actualised in a dispute settlement scenario. The theory of attribution, for instance, cannot be utilised in the abstract. The argument that the conduct of a private party should be attributed to a Member would, in all likelihood, be evoked in the course of a dispute settlement scenario. And for as long as Committee discussions have not progressed on an agreed understanding on the legal import of the text-based options, dispute settlement is also theoretically the only recourse for actualising the text-based options.

<sup>275</sup> The Vienna Convention on the Law of Treaties (hereinafter, Vienna Convention) defines, in article 2(1)(a), a treaty as “an international agreement concluded between states”. Vienna Convention on the Law of Treaties, opened for signature at Vienna on 23 May 1969, U.N.T.S. 1155, 331.



appear to advocate for such an approach. This is so despite the existence of a number of areas within the WTO legal system in which there can be said to exist some form of *quasi* direct effect *vis-à-vis* private parties.<sup>276</sup> Be that as it may, there is systemic acknowledgement of a place for private actors within the system of rights and obligations in the multilateral trading system. In *US – Section 301 Trade Act* the panel considered the notion of direct effect as it exists in the law of the EU and in certain regional trade agreements.<sup>277</sup> The panel opined that “it would be entirely wrong to consider [the position of individuals to be] of no relevance to the GATT/WTO legal matrix”.<sup>278</sup> Nevertheless, the panel expressed the ultimate view that the WTO *did not* create a legal order where obligations addressed to states were to be “construed as creating legally enforceable rights and obligations for non-state entities”.<sup>279</sup> Despite this conclusion, the panel recognised a hybrid position where it regarded the WTO legal order as creating “indirect effect” *vis-à-vis* private parties.<sup>280</sup>

Commenting on the above case, Pauwelyn stresses that; “this ‘indirect effect’ does not stand in the way of WTO obligations being mainly of a reciprocal nature”.<sup>281</sup> This statement reflects the fact that the core of WTO rights and obligations is that they are state-state (Member) rights and obligations. A corollary of this is the understanding that legal standing in WTO dispute settlement is restricted to Members.<sup>282</sup>

The integrity of this state-to-state reciprocity of rights and obligations is sacrosanct, and the rules-based options should necessarily operate within those confines. It is especially so, in the context of this paper, given that the paper considers private standards to represent purely private conduct.

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<sup>276</sup> A pertinent example, in the present circumstances, is Annex 3 of the TBT Agreement (the TBT Code of Good Practice). Other instances of where this can be gleaned include; in trade remedy cases, and in portions of the TRIPS and the Government Procurement Agreements.

<sup>277</sup> Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*.

<sup>278</sup> At par 7.73.

<sup>279</sup> At par 7.72.

<sup>280</sup> At par 7.78.

<sup>281</sup> Pauwelyn J, “Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law” (2003), Cambridge University Press, 68 - 69.

<sup>282</sup> The AB in *US – Shrimp* stated, in this regard, that “[i]t may be well to stress... that access to the dispute settlement process of the WTO is limited to Members of the WTO”. *US – Shrimp*, WT/DS58/AB/R, *supra*, par 101.

## 4.2 THE OPTIONS

The text-based options have received increasing attention in the time since 2005, when the Grenadines and Saint Vincent called for the clarification of article 13 of the SPS Agreement. The theory of attribution has received comparatively less attention in the committees. However, it does feature in academic discourse, and its applicability to private standards is implicitly supported in WTO jurisprudence. There have, in fact, been suggestions, by some commentators, that the text-based options represent some sort of codification of responsibility by attribution.<sup>283</sup> Implicit in that is the suggestion that the text-based options would obviate (in part or in full) the application of the theory of attribution to private standards. This view is not the one adopted in this paper, and the two categories are taken to be distinct and are, accordingly, discussed as such. The theory of attribution will be dealt with first, as it gives context to the rest of the discussion.

### 4.2.1 Responsibility by Attribution

#### State Responsibility under WTO Law

Under the rules on state responsibility, states alone are the subjects of, and responsible for compliance with their obligations under, international law. The state cannot, as a rule, be held responsible for the conduct of private parties. Nevertheless, it is accepted that there are instances where the acts or omissions of private parties can lead to the state being found to have acted wrongfully.<sup>284</sup> There has been some debate over whether the WTO legal system forms part of the *corpus* of public international law or is a self-contained regime, disengaged from general international law.<sup>285</sup> While by some accounts, the matter is not closed, there is sufficient support for the view that the WTO legal system is a subset of general public international law.<sup>286</sup> AB

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<sup>283</sup> The viewpoints vary regarding the portions of the text they perceive as representing a codification, and on whether they consider the codification a limitation or an extension of responsibility by attribution. See, *inter alia*, Villalpando, *supra*, 406 - 407; Gandhi, “Indian Viewpoint”, *supra*, 27.

<sup>284</sup> The United Nations International Law Commission’s “Draft Articles on the Responsibility of States for Internationally Wrongful Acts”, the codification of public international law rules on state responsibility, catalogues the instances in which this would be permissible. ILC Draft Articles, *supra*.

<sup>285</sup> For an appraisal of the debate, see Lindroos A, Mehling M, “Dispelling the Chimera of ‘Self-Contained Regimes’: International Law and the WTO”, (2006) *16(5) EJIL* 857, 857 - 877.

<sup>286</sup> Mavroidis and Palmeter affirm that this is evidenced in both the codification (including in the DSU) of public international law interpretative principles and in the panels’ and AB’s increasing recourse to traditional sources of

practice affirms this to be so<sup>287</sup>, while article 3.2 of the DSU itself directs that the provisions of WTO Agreements must be clarified “in accordance with customary rules of interpretation of public international law”.<sup>288</sup>

### Private Standards and the Theory of Attribution of (Private) Conduct to the State

The theory of attribution is the legal concept which is foundational to ascribing liability to states for the conduct of private parties (individuals or corporations) under the rules on state responsibility. Article 2 of the United Nations International Law Commission “Draft Articles on Responsibility of States for Internationally Wrongful Acts” (ILC Draft Articles) states that an internationally wrongful act of a state exists where there is:

- conduct (an act or omission);
- which is attributable to the state under international law; and
- which constitutes a breach of an international obligation of the state.<sup>289</sup>

In the present case, if the legal criteria for attribution are met, the conduct of the private parties responsible for private standards would be attributed to a Member if it represents an (objective) infringement of the GATT and/or the SPS or TBT Agreements. Successfully making a case, in a particular instance, for private standards to fall under the remit of WTO rules will be synonymous with a finding that there is wrongful conduct by a WTO Member. According to the criteria listed in article 2, establishing this wrongfulness necessarily involves a three stage analysis, which begins with establishing conduct by the private parties involved in private standards, and ends with a consideration of whether that conduct constitutes a breach of the GATT, and/or the SPS or TBT Agreements. These two stages are relatively easy to surmount. They reflect what is at the heart of the discussion hitherto in this paper – private standards (and their development and application) represent conduct which objectively falls foul of the rules in international food trade. Put differently, the conduct of the private parties responsible for private standards is conduct which, if it were the conduct of a Member, would constitute a clear breach of the relevant rules contained in the GATT, and/or the SPS and TBT Agreements.

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public international law. Palmeter D, Mavroidis P C, “The WTO Legal System: Sources of Law”, (1998) 92(3) *AJIL* 398, 398 - 413.

<sup>287</sup> In its very first WTO case, the AB affirmed that the WTO legal system was a component of general public international law when it stated that the GATT and other covered agreements were *not to be read* “in clinical isolation from public international law”. Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, p 17.

<sup>288</sup> Dispute Settlement Understanding, *supra*.

<sup>289</sup> ILC Draft Articles, *supra*.

The second stage, however, - the attribution stage - is more exacting than the first and the third. It is, at the same time, critical for sustaining the theory of attribution because, in the absence of a clear legal criterion for attribution, the whole theory falls apart. The attribution stage of the analysis is difficult to surmount primarily for conceptual reasons.<sup>290</sup> Attributing the conduct of private parties to WTO Members is not an intuitive process. It is a process which effectively creates a legal linkage between purely private conduct and a Member, such that that private conduct is deemed to be the conduct of the Member.

The conceptual difficulties of attribution have borne themselves out in the case law. Dating back to the GATT-dispensation, there is a series of cases which indicates that the system has not been averse to attributing private conduct to GATT Contracting Parties/WTO Members, under certain circumstances. The theory of attribution has been made reference to in a number of WTO cases, and the panels in many of them have purported to apply the theory. However, the case law has generated conflicting messages regarding the criteria for attribution in the WTO context. It has, consequentially, been less than successful in providing a succinct criterion for attribution. As it currently stands, the case law consists of a series of tentative statements which are legally inchoate and fail to amount to a usable theory.

In *Japan – Film*<sup>291</sup>, the panel opined that the fact that an action is taken by private parties “does not rule out the possibility that it may be deemed to be governmental”.<sup>292</sup> After making reference to previous GATT cases, the panel appears to affirm that, under the WTO legal system, conduct which is private may, under certain circumstances, be “attributable” to Members.<sup>293</sup> The panel, nevertheless, went on to suggest that there was no established criteria for attribution, and revealed its reluctance to pronounce on any by concluding that the analysis needed to be determined on a “case-by-case” basis.<sup>294</sup> Similarly, in *Argentina – Hides*<sup>295</sup>, the panel stated that

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<sup>290</sup> On the conceptual difficulties confronting the application of responsibility by attribution in the WTO context, see Villalpando. Villalpando, *supra*, 396 - 398.

<sup>291</sup> Panel Report, *Japan – Film*, WT/DS44/R, *supra*.

<sup>292</sup> At par 10.56.

<sup>293</sup> At par 10.52.

<sup>294</sup> The Panel stated that the reason for this was that it was “difficult to establish bright-line rules for attribution”. At par 10.56.

<sup>295</sup> Panel Report, *Argentina – Hides*, WT/DS155/R, *supra*.

private conduct could occasion liability for a Member if it were “established that the actions are properly attributed to the [Member] government under the rules of state responsibility”.<sup>296</sup> The panel, however, then proceeded to not enter into a consideration of the criteria for attribution.<sup>297</sup>

The panels and AB have also repeatedly strained to fashion a literal linkage between the private conduct and the Member in each of these cases. The corollary of this has been to preclude them from even considering the private conduct in those cases as purely private. They have, in the process, managed to generally avoid finding a legal linkage in cases where there is no apparent or literal one. In *Japan – Film*, the panel did this by adding to the view that private conduct may be deemed governmental, the caveat “if there is sufficient government involvement with it”.<sup>298</sup> This caveat approach is maintained in the cases subsequent to *Japan – Film*. In *Canada – Autos*, the panel opined that private conduct could qualify as a requirement under article III:4 of the GATT, but added that this determination would “necessarily rest on a finding that there is a nexus between that action and the action of a government”.<sup>299</sup> Similarly, the panel in *Argentina – Hides*, while not entering into any detailed consideration of the criteria for attribution, suggested that one of the considerations for liability to ensue could be whether the Member had *knowledge* of the trade-restrictive conduct of the private parties.<sup>300</sup>

Given this history of reticence in constructing legal criteria for attribution, it is unclear how the theory of attribution will hold as an option in the circumstances, especially given the existence of textual alternatives. However, the panels’ failure to customise the theory to the WTO situation does not in itself suggest that the theory does not apply in the WTO context. With the foundation established in the case law, it is clear that there is room for the further development of the criteria for attribution. The relevance of the theory has also been systemically endorsed in the form of adopted panel reports.<sup>301</sup>

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<sup>296</sup> At par 11.51.

<sup>297</sup> A full consideration of the criteria for attribution was not necessary, however, as the case was ultimately decided on different grounds.

<sup>298</sup> Own emphasis. At par 10.56.

<sup>299</sup> Own emphasis. Panel Report, *Canada - Autos*, WT/DS139/R, WT/DS142/R, *supra*, par 10.107.

<sup>300</sup> At par 11.51.

<sup>301</sup> While reversing the panel’s finding that adopted panel reports automatically constituted “subsequent practice” (within the meaning of the Vienna Convention on the Law of Treaties), the AB in *Japan – Alcoholic Beverages II* conceded that they did have legal status, stating:

## 4.2.2 The Text of the SPS and TBT Agreements

On account of being textual, the availability (as possible responses to private standards) of the text-based options is, in relative terms, more obvious than that of the theory of attribution. Nevertheless, legal ambiguity regarding the text-based options is also rife. Their ambit and scopes of operation have been proverbial hot potatoes in the committees, whilst among commentators there are disparate opinions on virtually every aspect of the provisions.<sup>302</sup> In the continued absence of jurisprudential guidance on their interpretation, and while the endeavour to reach a common understanding on the interpretation of article 13 of the SPS Agreement is ongoing, some legal uncertainty is likely to subsist.

The following consideration of the text-based options is informed by the slant of this part of the paper – part of which it is to consider what prospects there are, from within the rules, for responding to the challenges posed by private standards. The discussion, therefore, focuses on provisions wherein there is the potential to do that. The following provisions will be discussed:

- Sentences three and four of article 13 of the SPS Agreement;
- The TBT Agreement's Code of Good Practice;
- Sentences two, three and four of article 4.1 of the TBT Agreement; and
- Article 8.1 of the TBT Agreement.

There is, however, no necessary consensus that these are the applicable provisions - even among commentators who do accept that there are text-based rules which could be applied to private standards.

The section begins with a discussion on general issues relating to the text-based options.

### 4.2.2.1 The Ambit of Operation of the Provisions: Generally

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Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, *should be taken into account* where they are relevant to any dispute. [Own emphasis]

Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *supra*, p 14 - 15. The AB did, at the same time, opine that a “concordant, common and consistent” sequence of acts or pronouncements was sufficient to meet the requirements of subsequent practice. At p 12 - 13.

<sup>302</sup> For that reason, extensive reference will be made, throughout the discussion, to the views of commentators.

## Non-governmental Standardising Bodies and Non-governmental Entities

In the Committee discussions, proponents for the applicability of text-based options have, predictably, been in support of a wide scope for the provisions. Opponents have ranged from those who prefer a narrow reading to those who reject the suggestion that the SPS and TBT Agreements have any application to private standards. One key area of substantive contention has been the meaning of the terms “non-governmental standardising body”<sup>303</sup> and “non-governmental entity”<sup>304</sup>. Another has been on whether article 13 of the SPS Agreement applies to private conduct at all.

With respect to the former, a non-governmental standardising body or entity is obviously a private party - some confirmation that the texts have some application to private conduct. However, disagreement lies in whether this extends to private conduct *in the private standards context*.<sup>305</sup> In their legal analysis of private standards, Gascoine, and O’Connor and Company, as a starting point, concede that it could be argued that private standard-setting bodies qualify as non-governmental entities for the purposes of the SPS Agreement.<sup>306</sup> They proceed, however, to consider reasons why non-governmental entities and private standard-setting entities are actually distinguishable. Their discussion covers the purpose and structure of the agreement, a pragmatic critique of whether private standard-setting entities could feasibly be covered, and the fact that “measures” under WTO law can only be governmental.<sup>307</sup> On those bases, they arrive at the conclusion that, in the context of the SPS Agreement, non-governmental entities and private

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<sup>303</sup> In the TBT Agreement, a “non-governmental body” is defined as: a body “other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation”. Annex 1.8 of the TBT Agreement, *supra*.

<sup>304</sup> In the SPS Agreement, reference is made to “non-governmental entities”, without elaboration. Roben writes that, in these circumstances, and because of the principle of “coherence in the interpretation of the two agreements”, the definition contained in the TBT Agreement is applicable to the SPS Agreement as well. Roben, *supra*, 541. The position is endorsed by other commentators: *inter alia*, Bohanes, Sandford, *supra*, 38; WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), *Private Voluntary Standards within the WTO Multilateral Framework*, Submission by the United Kingdom, G/SPS/GEN/802 (the Gascoine, and Connor and Company legal analysis), 53.

<sup>305</sup> Interestingly, the term “non-governmental standardising body/entity” is used both by those in support of the argument that the provisions cover private standards and those in opposition to it, indicating that it is, ultimately, it is a matter of interpretation.

<sup>306</sup> WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, *supra*, 53 - 54.

<sup>307</sup> WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, *supra*, 54 - 61.

standard-setting bodies are “not necessarily the same”.<sup>308</sup> In the case of the TBT Agreement, they fall just short of accepting that private standard-setting bodies are covered by the term non-governmental bodies, but conclude that the question remains “open”.<sup>309 310</sup>

Within commentators who accept that the concept could extend to private standards, are two groups who themselves have different understandings of the scope of the concept’s application. Some take the view that the term non-governmental standardising body/entity covers *all* private parties that are involved in standardisation.<sup>311</sup> The view taken by the other group is that the term covers some, but not all, private parties involved in private standards.

Bohanes and Sandford, who take the latter view, draw from the definition of “standard” (in the TBT Agreement) - which makes reference to “recognised [bodies]”<sup>312</sup> - to conclude that non-governmental standardising bodies are recognised bodies whose “central functions” are to prepare and issue standards.<sup>313</sup> They argue that, in the context of private standards, this would relate only to industry associations (national and international).<sup>314</sup> They contend, thus, that this excludes individual retailers since, as stated by them, “supermarket chains do not, [in general], have recognised activities in standardisation”.<sup>315</sup>

The state of affairs in global fresh-fruit and vegetable markets, however, does not support this conclusion. While standardisation is most certainly not the *core* activity of large retailers, it cannot be said that dominant retailers do not have recognised activities in standardisation. The

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<sup>308</sup> WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, *supra*, 54.

<sup>309</sup> WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, *supra*, 63.

<sup>310</sup> It is important to note, from the definition of non-governmental body (see n 303, above), that it *includes* non-governmental bodies which have the legal power to enforce technical regulations. More than implicitly, the inclusion of the word “including”, suggests that non-governmental bodies which do not carry such legal powers are already presumed in the definition. Bohanes and Sandford perceive its inclusion the same way. Gascoine, and O’Connor and Company appear, in parts, to concede the same. See: Bohanes, Sandford, *supra*, 38 (par 141); WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, 63.

<sup>311</sup> Koebele and LaFortune, and Roben, who, respectively, write elaborative analytical analyses of article 4 and annex 3 of the TBT Agreement, and article 13 of the SPS Agreement, write in a tone which suggests that they apply to all private conduct. Koebele, LaFortune, *supra*, 243 - 260; Roben, *supra*, 538 - 544.

<sup>312</sup> Annex 1.2 of the TBT Agreement defines a standard as a: “[d]ocument approved by a *recognised body*, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory”.

<sup>313</sup> Bohanes, Sandford, *supra*, 33 - 34 (paras 122 - 123, 125).

<sup>314</sup> Bohanes, Sandford, *supra*, 34 (par 125).

<sup>315</sup> *Ibid.*



entire discussion in part 3 reveals just the opposite. It has been noted, in part 3, that individual supermarkets are identified in a WTO Secretariat descriptive report as the *primary entities* imposing private standards.<sup>316</sup> They not only have recognised activities in standardisation, individual supermarket schemes have been an undeniably influential force in displacing the rules-based norms. In fact, their influence in the disruption of the organising function of the rules-based system, and in the attendant practical effects is ubiquitous.<sup>317</sup> And there is ample evidence from both SPS and TBT Committee discussions, that (proponent) Members expect that individual retailer schemes be treated no differently to collective international schemes and collective national schemes – more especially where they have significant trade effects.<sup>318</sup> Bohanes and Sandford themselves concede that, in light of the object and purpose (of the TBT Agreement) of minimising unnecessary obstacles to trade, there could be merit, in determining whether an entity is a recognised body, in ascertaining “whether the market effectively recognises the standardising activities of [that] entity”.<sup>319</sup>

#### Article 13 of the SPS Agreement

Article 13 of the SPS Agreement was the basis of the original request by the Grenadines and Saint Vincent for the SPS Committee to consider the application of WTO rules to private standards. In this paper, it is identified as one of the provisions which are potentially applicable to private standards - specifically its sentences three and four. However, as SPS Committee discussions have progressed it has become clear that it is not only the scope of the article which is the subject of debate. It is also under debate whether the article applies to private conduct at all. Those who contend that the article does not apply to private standards lay particular emphasis on the wording of sentence three. The sentence states that “Members shall take such reasonable measures ... to ensure that non-governmental entities ... *comply* with the relevant provisions of [the SPS] Agreement”<sup>320</sup>. It is common cause that the SPS Agreement binds only

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<sup>316</sup> WTO Committee on Sanitary and Phytosanitary Measures: (15 June 2009), G/SPS/GEN/932, *supra*, 2; (10 December 2009), G/SPS/GEN/932/Rev.1, 2. See also, n 157 and 158, above.

<sup>317</sup> See discussion in part 3, above.

<sup>318</sup> See, *inter alia*, WTO Committee on Sanitary and Phytosanitary Measures, (23 September 2008) G/SPS/W/230, *supra*, 1 - 2; WTO Committee on Technical Barriers to Trade (22 July 2009), *Fifth Triennial Review of the Agreement on Technical Barriers to Trade*, Revised Proposal by India, G/TBT/W/321.

<sup>319</sup> Bohanes, Sandford, *supra*, 33, n 75.

<sup>320</sup> [Own emphasis.] Article 13 of the SPS Agreement, *supra*.

WTO Members, and that SPS measures can only be governmental.<sup>321 322</sup> The contention, therefore, is that private parties could not be called upon to comply with an agreement under which they are not bound.<sup>323</sup>

This has led to the contention that article 13 relates to cases where Members *rely* on the services of non-governmental entities in SPS standardisation.<sup>324 325</sup> The most immediate examples of these would be situations where standardising services are delegated or outsourced to, or where standards are adopted from, private parties. The view taken in this paper is that this is not the only logical conclusion to arise from these facts. And it is submitted that there is space for a different conclusion to emerge from the wording of sentence three, read in the context of the arrangement of the entire article. Firstly, there is academic support for a different interpretation. Roben, who writes a detailed (sentence-by-sentence) interpretative elaboration of article 13, avers that what sentence three refers to is *objective* compliance with the SPS Agreement.<sup>326</sup> The

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<sup>321</sup> That the agreement covers only governmental SPS measures is presumed to be the case, although the agreement does not necessarily expressly this clearly. But in *EC – Biotech*, the panel did affirm that the SPS Agreement covers only government measures. See Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006, par 7.149.

<sup>322</sup> Article 1.1 states that the agreement applies to “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade”, with the definition and an illustrative list in Annex A(1) also appearing to include activities which might not be considered governmental. On this, see the analysis by the WTO Secretariat: WTO Committee on Sanitary and Phytosanitary Measures (24 January 2007), G/SPS/GEN/746, *supra*, 4 - 5. On the strength of the interpretation by the panel in *EC – Biotech*, Gascoine, and O’Connor and Company, are, however, highly critical of the analysis by the WTO Secretariat. See WTO Committee on Sanitary and Phytosanitary Measures: (3 March 2011), G/SPS/W/256, *supra*, 8; (9 October 2007), G/SPS/GEN/802, *supra*, 72 - 74. It is not clear why - the WTO Secretariat’s analysis is clearly *textual*, and also correctly concedes that article 2 of the agreement suggests that it covers the conduct of *Members*. Admittedly, the Secretariat’s analysis makes no reference to *EC – Biotech*. However, the conclusion in both analyses is the same - the SPS Agreement binds only the conduct of WTO Members.

<sup>323</sup> See Bohanes, Sandford, *supra*, 37 - 39 (paras 138 - 145); WTO Committee on Sanitary and Phytosanitary Measures: (3 March 2011), G/SPS/W/256, *supra*, 8; (9 October 2007), G/SPS/GEN/802, *supra*, 53.

<sup>324</sup> *Ibid.*

<sup>325</sup> To support the contention, Bohanes and Sandford use a conceptual argument which reads like a hybrid between attribution, and situations where standardising services are delegated to, or standards are adopted from, private parties. Neither conceptual position is supported here. As already noted, the position taken in this paper is that the text-based options are not renditions of the theory of attribution. And, with regard to situations where Members rely on private standardising services, sentence five of article 13 deals with them, specifically (and expressly). There *is* the appearance that it is attribution, as envisaged under articles 8 and 11 of the ILC Draft Articles, *rather than article 2*, to which they refer. If that is the case, their argument is accepted here in so far as it relates to sentence five (and not the entire article 13). See Bohanes, Sandford, *supra*, 37 - 39 (paras 138 - 145). See also, 73 - 74, below.

<sup>326</sup> Roben, *supra*, 543.

author, in fact, argues that article 13 is unquestionably applicable to purely private conduct.<sup>327</sup> Another pointer towards a different conclusion comes from the article itself. Sentence five of article 13 reads:

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.

Sentence five delineates obligations which are specific to instances where Members rely on private parties for their SPS standardisation. Interpretation rudiments support the conclusion that, as an article containing distinct sentence-based obligations, the entire article could not relate to the scenario that only sentence five covers.<sup>328</sup> The inclusion of sentence five ostensibly distinguishes it from sentences three and four, suggesting the two preceding sentences relate to the conduct of private parties *other than* in instances where Members rely on their services. These would be instances of purely private conduct - such as that represented by private standards.<sup>329</sup>

#### Provisions which are not relevant to private standards

Some of the provisions which refer to non-governmental standardising bodies and entities do not, it would appear, relate to private standards. This seems to be the case with article 3 of the TBT Agreement, and sentence five of article 13 of the SPS Agreement. Article 3 of the TBT Agreement relates to the preparation, adoption, and application, of (mandatory) technical regulations by *inter alia* non-governmental bodies. The article appears intended for situations where standardising services are delegated or outsourced to, or the technical regulations of

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<sup>327</sup> The author even makes the following express assertion: “the sole qualification” is that “the actions [of that non-governmental body] be relevant to the purposes of the SPS Agreement”. Roben, *supra*, pp 541, 542.

<sup>328</sup> Elaborating on its *US – Gasoline* formulation of the principle of effective treaty interpretation, wherein it had stated that “an interpreter [was] not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”, the AB in *Korea – Dairy* stated the following:

it is the *duty* of any treaty interpreter to read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously. An important corollary of this principle is that ... [the] sections and parts [of a treaty] should be read as a whole.” [Emphasis in original.]

Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, par 81. See also, Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, *supra*, p 23; Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, par 6.31.

<sup>329</sup> Bohanes and Sandford, actually accept that this is what appears to be meant by sentence five. They add that this is reinforced by the definition of a non-governmental body. The commentators, however, are swayed against the applicability of article 13 to private standards due to the fact that private standards are not SPS measures. See Bohanes, Sandford, *supra*, 38 - 39. See also, 71 - 72, above.

Members have been adopted from, private parties. This would suggest that the article does not cover purely private conduct and is, consequently, not relevant for present purposes.<sup>330</sup> The same view is taken here in relation to sentence five of article 13 of the SPS Agreement, which is considered here to be the SPS Agreement equivalent of article 3 of the TBT agreement. Bohanes and Sandford construe article 3 of the TBT Agreement similarly. The authors' verdict is that, for the purpose of article 3, the non-governmental body is "effectively part of the government".<sup>331</sup> Their views on article 13 of the SPS Agreement, however, are (as noted above) not fully supported here.<sup>332</sup> Only in so far as they relate to sentence five of the article, they are taken to be applicable here.

#### 4.2.2.2 Article 13 of the SPS Agreement

Article 13 of the SPS Agreement comprises five sentences which are distinct in import and in scope of operation. While the article is a unitary article, and the five sentences are to be understood cumulatively, only sentences three and four are taken here as operative in relation to private standards.<sup>333</sup>

##### Sentence three of Article 13

Sentence three represents a positive obligation upon Members which relates to measures taken by non-governmental entities within their territories. It reads:

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.

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<sup>330</sup> Gandhi considers that, on the basis of its text, Article 3 of the TBT Agreement can successfully be used as applicable to purely private standards. This viewpoint, however, is not supported by the evidence from the text. See Gandhi, (2005) 39(5) *JWT*, *supra*, 873 - 875. See also Gandhi, "Indian Viewpoint", *supra*, 26 - 29, for an identical argument.

<sup>331</sup> At 19 (par 63). It is self-evident that when private actors act under the direction of a state, or when the state adopts their conduct as its own, that conduct would in effect be the state's. These situations resemble those covered by articles 8 and 11 of the ILC Draft Articles. To the extent that it resembles articles 8 and 11 of the ILC Draft Articles, article 3 does represent some codification of state responsibility (but not of responsibility by attribution).

<sup>332</sup> See n 325, above.

<sup>333</sup> Sentences one and two relate, respectively, to Member responsibility for: the observance of their obligations under the agreement; and the conduct of other-than-central governmental bodies. They are not operative in relation to private standards, and are, accordingly, not discussed here.

The sentence obliges members to take “reasonable measures”. Reasonableness elicits different nuances in different contexts<sup>334</sup> but will, as a rule, have both a subjective and an objective element. The subjective prong, taken with the qualification “as may be available to them”, suggests that a Member’s own circumstances could dictate quite significantly whether reasonable measures are found to have been taken in a particular case. This could represent a limitation to the practical reach of the obligation.<sup>335</sup> Nevertheless, by reason of the objective prong, it can be accepted that what is reasonable cannot be determined by a defending Member, or its domestic circumstances, alone.<sup>336</sup> Additionally, as obligations under a covered agreement, any actions/inaction in relation to article 13 are reviewable under the dispute settlement process.<sup>337</sup>

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It can be concluded, thus, that Members appear to be under an obligation to ensure that private parties - in this instance, entities which are responsible for private (SPS-related) standards – act in conformity with the provisions of the SPS Agreement. The next stage of the analysis relates to what sort of action is required of Members to discharge the obligation entailed by sentence three. Some commentators have isolated two distinct (alternative) permutations for the obligation envisaged in article 13 – an obligation of conduct, or an obligation of results (or effect).<sup>339</sup> Depending on whether the obligation is taken as one of conduct, or one of effect, the outcomes could be quite disparate. An obligation of conduct would mean that the Member, in

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<sup>334</sup> The AB in *US – Hot-Rolled Steel* notes that reasonableness:

implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is “reasonable” in one set of circumstances may prove to be less than “reasonable” in different circumstances.

Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, par 84.

<sup>335</sup> Roben suggests that reasonableness (also) implies proportionality between the measures taken, the object pursued, and the negative effects of the measures. Roben, *supra*, 542. In the present circumstances, such negative effects would relate to any prejudice to the individual rights of the private parties involved in private standards. These individual rights are primarily assessed against a domestic law standard.

<sup>336</sup> The argument that only defending Members could determine what was reasonable in a particular circumstance was rejected as far back as under the GATT regime. Koebele and LaFortune suggest that this would hold more true under the more-legalised regime of the WTO. Koebele, LaFortune, *supra*, 258.

<sup>337</sup> Article 11 of the SPS Agreement reads: “The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement”.

<sup>338</sup> This dilutes the subjectivity component. Roben, who notes the potential pertinacity of the subjective component, concludes that it is “ultimately [a] matter of autonomous determination and supervision on the international plane whether the measure[s] a Member has employed [satisfy] the reasonableness test”. Roben, *supra*, 542. See also, Koebele, LaFortune, *supra*, 258.

<sup>339</sup> See, in this regard, Bohanes, Sandford, *supra*, pp 27, 35, 39.

merely taking reasonable measures, discharges its obligations under sentence three. As long as the Member successfully shows that it took the reasonable measures it would, in that case, be immaterial that the private conduct remained unchanged.<sup>340</sup> This makes an obligation of conduct a weak one for practical purposes. An obligation of effect, on the other hand, entails that the reasonable measures which are taken guarantee an SPS-Agreement-consistent outcome.<sup>341</sup> The discharge of the obligation lies in the *results* of the measures taken.

Roben expresses the view that the object of sentence three is to “ensure effective application of the SPS Agreement”, and to “prevent its being circumvented by private action”.<sup>342</sup> If this is accepted, the argument for an obligation of effect is convincing. All the same, this magnitude of obligation appears onerous and potentially quite pervasive. An obligation of effect could potentially hold Members responsible for all failures to obtain SPS-consistent outcomes - even where they have taken measures which are “reasonable” within their capabilities or constitutional limitations. And, as private standards are generally not in conformity with the SPS Agreement, this type of obligation could end up being far reaching. Not only would it be onerous on Members, it could also have a disproportionate effect on the individual rights of the affected private parties.<sup>343</sup> By all appearances, however, the risk of a complete obligation of effect is obviated by the qualification “as may be available”. In the end, it would have to be within the interpretation and application process that a position is negotiated somewhere between the provision having absolutely no substantive effect, and it being onerous on Members and private individuals or corporations in their jurisdictions.<sup>344</sup>

### Sentence four of Article 13

Sentence four represents the corresponding negative obligation relating to SPS-related conduct by non-governmental entities. It reads:

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<sup>340</sup> See Bohanes, Sandford, *supra*, 35 - 39.

<sup>341</sup> *Ibid.*

<sup>342</sup> Roben, *supra*, 542.

<sup>343</sup> As noted at n 338, above, according to Roben it is a matter of “autonomous determination” on the international plane whether the measures a Member takes satisfy the reasonableness required under the sentence. The author, however, makes it clear that sentence three *does not* oblige Members to take measures that would disproportionately affect any individual rights that private parties have under their constitutional (or other) laws. Roben, *supra*, 542. This, together with the fact that the SPS Agreement is not an agreement which binds private parties, would probably obviate an obligation of results.

<sup>344</sup> Discussed in 4.3 and 4.4, below.

In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.

The thrust of sentence four is to proscribe conduct, on the part of the Member, which creates conditions wherein private parties are encouraged to act in a manner inconsistent with the SPS Agreement. Sentence four appears, on its face, to be more exacting than sentence three.<sup>345</sup> It expressly operates on a measurement of effect, and suggests that the intent of the Member (or purpose of measures taken) could be irrelevant. Moreover, the effect can be direct *or* indirect. Most private standards, as they are described in this paper, fall into the category of SPS-Agreement-inconsistent conduct. However, the phrase “which have the *effect* of”, does suggest that causality would need to be shown before a violation under this sentence can be found. This limits an over-wide obligation upon Members.

In the end, just as in the case of sentence three, the issue comes down to the prevention of the circumvention of the SPS Agreement.<sup>346</sup> It has been indicated that article 13 was inserted in the SPS Agreement for the twin reasons of: ensuring that liberalisation of trade in agriculture was not “negated by SPS measures”; and to “ensure the agreement’s effectiveness”.<sup>347</sup> If both sentences are approached with that understanding, then favourable outcomes for Members aggrieved by private standards are prospective.

#### 4.2.2.3 Article 4 and Annex 3 of the TBT Agreement

Under the TBT Agreement, there is more of an obvious legal regime for private parties and private conduct. Annex 3 of the agreement (the Code of Good Practice<sup>348</sup>) is a rules-based framework which governs technical standards and the standardisation activities of (*inter alia*) private standardising bodies. It is open to voluntary acceptance by these private parties and is, upon acceptance, *directly* binding upon them. Article 4 of the agreement contains Member

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<sup>345</sup> The “relevant sections” limitation is also absent in sentence four. However, when one considers it, it is commonsensical that, in these circumstances, obligations requiring Members to take positive measures would be comparatively less onerous than those requiring restraint.

<sup>346</sup> Of sentence four, Roben writes: “[i]n essence, [sentence four] prohibits Members from circumventing the agreement by relying on private action”. Roben, *supra*, 543.

<sup>347</sup> Roben, *supra*, 539.

<sup>348</sup> The “Code of Good Practice for the Preparation, Adoption and Application of Standards”. Annex 3 of the TBT Agreement, *supra*.

obligations which relate the Code of Good Practice. The two taken together - article 4 and the Code of Good Practice - represent two important foresights by the negotiators of the Uruguay Round. The first was that (voluntary) standards could have the potency to represent considerable (*de facto*) market access barriers. The second was that the conduct of private parties in the area of food standards was potentially pervasive enough upon Members to warrant some form of direct regulation.<sup>349</sup>

The existence of a legal regime for private parties and private conduct in the agreement has apparently not precluded all contention relating to the applicability of the TBT Agreement to private standards. When they were discussed at a 2005 meeting of the TBT Committee, some Members asserted that the TBT Agreement had no application to private standards.<sup>350</sup> In subsequent statements, in the course of discussions in the SPS Committee, some Members have contended that the Code of Good Practice applies to governmental and quasi-governmental standards (and not to private standards).<sup>351 352</sup> There is also the issue of the Member obligations relating to the Code of Good Practice (contained in article 4) in respect of whose scope there is no existing jurisprudential guidance.

Nevertheless, there is affirmation of the view that the Code of Good Practice is applicable to private standards, and that it is perceived as offering greater legal certainty in relation to private standards. Even in SPS Committee discussions on private standards, there have been, since the start of discussions, proposals for guidance to be sought from the Code.<sup>353</sup> Some have related to the adoption of the Code's prototype, and the formulation of a corresponding SPS Code of Good

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<sup>349</sup> For the negotiating history of the TBT Agreement, see: WTO Committee on Trade and Environment / Committee on Technical Barriers to Trade (29 August 1995), WT/CTE/W/10 / G/TBT/W/11, *supra*. Koebele and LaFortune describe Article 4 of the TBT Agreement as a “compromise between the limited authority of [Members] to ... compel ... non-governmental entities on the one hand, and the maintenance of the balance of rights and obligations under the TBT Agreement, on the other”. Koebele, LaFortune, *supra*, 254.

<sup>350</sup> WTO Committee on Technical Barriers to Trade (6 August 2007), G/TBT/M/42, *supra*, 30 - 31.

<sup>351</sup> WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), G/SPS/W/230, *supra*, 6.

<sup>352</sup> For a list of standardising bodies that have accepted the TBT Code of Good Practice, see ISO, “WTO TBT Standards Code Directory 2010”, at <http://www.iso.org/iso/wto-tbt-scd.pdf> (last accessed on 31 August, 2011). Several of the entities on the list are clearly identified and designated as non-governmental.

<sup>353</sup> See WTO Committee on Sanitary and Phytosanitary Measures: (circulated 18 August 2005) G/SPS/R/37/Rev.1, 6 (par 19); (24 January 2007), G/SPS/GEN/746, *supra*, 6 - 7.



Practice.<sup>354</sup> In others, it has even been suggested that the Code of Good Practice - at it stands - could cover certain activities in private SPS-related standardisation.<sup>355</sup>

### The Code of Good Practice (Annex 3 of the TBT Agreement)

Private parties who accept the Code of Good Practice are independently bound by it, and the attendant obligations are their own. The obligations provided for in the Code of Good Practice are quite similar to the substantive Member obligations which relate to technical regulations (contained in article 2 of the agreement). The transparency and notification obligations are, however, comparatively less cumbersome.<sup>356</sup>

Any private parties that are involved in private standards, and have accepted the Code of Good Practice, would be bound by its obligations. This, of course, also means that those private parties involved in private standards, that have not accepted the Code, are not bound by it. For present purposes, it is not immediately clear what the consequences are for private parties that have accepted, but are not complying with, the Code. It is clear that the inclusion of private parties as addressees of the Code was intended to enhance disciplines for private parties involved in standardisation, but its rules in their regard appear to be soft ones.<sup>357</sup> The facts that private parties are not subject to WTO dispute settlement, and that withdrawal from the Code of Good Practice is permissible at any time, only confirm this.

### Article 4.1 of the TBT Agreement

Article 4.1 is an apparent route towards making the Code of Good Practice enforceable. The article contains an independent and overarching obligation, *upon Members*, to ensure that private parties accept and comply with the Code. Unlike sentences three and four of article 13 of the SPS Agreement, the operative sentences in article 4.1 of the TBT Agreement relate to voluntary standards (technical standards) rather than mandatory ones. There are, in fact, no equivalent provisions in the TBT Agreement relating to private conduct *vis-à-vis* mandatory standards

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<sup>354</sup> The proposal has not been adopted, however, and remains on a list of “possible actions” for the SPS Committee. See WTO Committee on Sanitary and Phytosanitary Measures (3 March 2011), G/SPS/W/256, *supra*, 9 - 10.

<sup>355</sup> See WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), G/SPS/W/230, *supra*, 6.

<sup>356</sup> For an in-depth analysis of the provisions of the Code of Good Practice, see Koebele, LaFortune, *supra*, 243 - 253.

<sup>357</sup> On the role of the Code in enhancing disciplines for private parties, see Koebele, LaFortune, *supra*, pp 247, 248.

(technical regulations).<sup>358</sup> A probable explanation for the difference could be that, as all SPS measures are mandatory, any provisions capturing private conduct under the SPS Agreement necessarily do so in a milieu of mandatory measures. The TBT Agreement, in contrast, has a legal regime which inherently makes a distinction between mandatory and voluntary standards. It, also, contains within it its own specialised regime - the Code of Good Practice - which covers standards prepared and issued by private parties.

#### Sentence two of Article 4.1

It is to the specialised regime of the Code of Good Practice that the operative parts of article 4.1 relate. Like article 13 of the SPS Agreement, article 4.1 comprises a number of sentences that are distinct in import and scope of operation. For the purposes of this discussion, the operative sentences are two and three.<sup>359</sup> Sentence two of article 4.1 reads:

[Members] shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardising bodies within their territories, as well as regional standardising bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.

For present purposes, liability under this sentence arises where there is a failure by a Member to take reasonable measures to ensure compliance (presumably by those who have accepted it) and *acceptance* of the Code of Good Practice by the private parties who are responsible for private standards. The liability of Members subsists whether or not the private parties in question have accepted the Code of Good Practice.<sup>360</sup>

Reasonableness here is taken to be a relative and contextual concept, and the argument made in that regard in the discussion on article 13 of the SPS Agreement applies here too.<sup>361</sup> As in the case of article 13 of the SPS Agreement, the ultimate determination of what is reasonable in a particular case, hinges upon what type of obligation is taken to be entailed by sentence two. The TBT Agreement does actually contain a concrete indication of what type of obligation is entailed

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<sup>358</sup> With the exception of article 3 which, as noted previously, appears to be the equivalent of sentence five of article 13 of the SPS Agreement.

<sup>359</sup> Sentence one is not relevant to the present discussion, as it relates to central government standardising bodies.

<sup>360</sup> Sentence 4 of article 4.1 reads: “The obligations of Members with respect to compliance of standardising bodies with the provisions of the Code of Good Practice *shall apply irrespective of whether or not a standardising body has accepted the Code of Good Practice*”. [Own emphasis.]

<sup>361</sup> See 75, above. Koebele and LaFortune write, of reasonableness, that because what is reasonable is fully reviewable under dispute settlement, it cannot be subjectively determined by a Member alone. Koebele, LaFortune, *supra*, 258.

in its regard. Article 14.4 states that the dispute settlement provisions may be invoked where a Member considers that another Member has not achieved “satisfactory results”, under (*inter alia*) articles 4 and 8.<sup>362</sup> The allusion to an expectation of results suggests that it is an obligation of effect. However, as in the case of sentence three of article 13 of the SPS Agreement, sentence two of article 4.1 contains the internal limitation - “as may be available”. This internal limitation pre-empts onerous obligations which could arise from an obligation of effect.<sup>363</sup>

#### Sentence three of Article 4.1

Sentence three of article 4.1 reads:

In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code of Good Practice.

The sentence proscribes Member conduct which creates conditions wherein private parties are encouraged or required to act in a manner inconsistent with the Code of Good Practice. It represents negative obligations which are complementary to the positive ones contained in sentence two. The essence of the obligations in the sentence resembles that of those in sentence four of article 13 of the SPS Agreement. Intent does not appear to be a prerequisite for liability to ensue. Nevertheless, from the insertion of the words “which have the effect of”, causation, it would appear, would still need to be shown.

#### **4.2.2.4 Article 8.1 of the TBT Agreement**

Article 8.1 relates to conformity assessment procedures operated by private parties. It places upon Members two distinct obligations. In sentence one, Members are obliged to ensure that private parties, that conduct conformity assessment procedures, do so largely in compliance with the rules which govern governmental organs.<sup>364</sup> Sentence two is a negative obligation which prevents Members from requiring or encouraging such parties to act in a manner inconsistent with the rules which govern governmental organs. The plain language of article 8.1 suggests that it relates to (purely) private conformity assessment activities, and Member obligations relating to

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<sup>362</sup> [Own emphasis] Article 14.4 of the TBT Agreement, *supra*.

<sup>363</sup> See discussion at 87 - 88, below.

<sup>364</sup> With the exception of the obligation to notify the proposed conformity assessment procedures. See Articles 8.1 and 8.2 of the TBT Agreement, *supra*.

those activities. A contrast may, in that regard, be drawn between article 8.1 and the succeeding article 8.2, which contains obligations for Members in instances where Members rely on the conformity assessment services of private parties.<sup>365</sup> Finally, the wording of article 8.1 also suggests that it relates to the *action* of conformity assessment, rather than to the measures which are the subject of those conformity assessment procedures.<sup>366</sup>

#### 4.3 APPLICATION OF (AND INTERPLAY BETWEEN) THE RULES-BASED OPTIONS

The discussion in the foregoing subsections affirms that there are theoretical legal possibilities for responding to private standards using the rules of the WTO. But the real effect of these rules-based options will only become clear upon application. The question of application has received scant attention in legal analyses of private standards. But given that private standards represent private conduct, application could never be a straightforward matter. This subsection seeks to provide a bridge between the theoretic and the substantive potential of the rules-based options. It gives some consideration to how they would apply in practice. The subsection makes some salient points relating to both the application of the rules-based options, and their associated interplay.

##### Interplay between the Theory of Attribution and the Text-based Options

Some commentators have suggested that the text-based options are renditions of state responsibility (more specifically, responsibility by attribution). The view propounded by some among them is that the provisions represent a codification, thereof, in the WTO context.<sup>367</sup>

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<sup>365</sup> There are similarities in the structures of articles 8 of the TBT Agreement and 13 of the SPS Agreement. Article 8.1 of the TBT Agreement contains positive and negative obligations for Members, which relate to the conformity assessment activities of non-governmental bodies - in a manner similar to sentences three and four of article 13 of the SPS Agreement. And as with sentence five of article 13 of the SPS Agreement, the subsequent provision - article 8.2 - delineates from the former, obligations of Members which are specifically identified for instances where Members rely on the conformity assessment services of non-governmental bodies.

<sup>366</sup> Commentators, such as Prévost, appear to understand it the same way. See, Prévost, (2008) 33 *SAYIL*, *supra*, 27. Bohanes and Sandford, however, argue that conformity assessment procedures are linked to the technical regulation or standard (as the case may be) the fulfillment of which is being assessed. They conclude, therefore, that the obligations (under article 8.1) depend on whether the conformity being assessed relates to technical regulations or to technical standards. Bohanes, Sandford, *supra*, 37 (par 137). Respectfully, based on the wording of the provision, the former view is the more plausible.

<sup>367</sup> See n 283, above.

Implicit in those suggestions, is the contention that the text-based options obviate the theory of attribution in the present context. This viewpoint has some shortcomings. The theory of attribution and the text-based options are articulated differently and are also conceptually distinct. Under the theory of state attribution, the questionable conduct is the private conduct itself. Liability on a Member ensues on account of that private conduct being *attributed* to the Member. The text-based options, on the other hand, although relating to private conduct, reflect the responsibility of the Member - *for its own conduct* - *vis-à-vis* that of private parties. The argument that the texts represent renditions of responsibility by attribution is also challenged by the contrary viewpoints of other commentators. Koebele and LaFortune write, of responsibility in article 4.1 of the TBT Agreement, that it is “*independent of responsibility by attribution*”.<sup>368</sup> Also writing in the context of article 4.1, Bohanes and Sandford cogently articulate the conceptual distinction between the two, in the following manner: they state that the theory of attribution reflects “responsibility by attribution”; while the text-based options reflect “responsibility for failure to discipline private WTO-inconsistent behaviour”.<sup>369</sup> The view taken by the latter group is the one adopted in this paper. Given, in any case, that the text-based options do not cover the GATT, even if it were to be accepted that the text-based options represented a self-contained form of responsibility by attribution, the theory of attribution could not, in view of its application to measures covered by the GATT, be fully excluded. The two categories would, therefore, both still apply in the present circumstances.

Nevertheless, this does not suggest that the two categories of options will, in practice, necessarily operate in parallel. The tone of discussions in the WTO Committees indicates that, within the WTO system, the slant is (in relative terms) towards the text-based options. It has also been observed that judicial demeanour in WTO review indicates a general preference for “textual hooks” over any alternatives.<sup>370</sup>

### Application of the Theory of Responsibility by Attribution Option

<sup>368</sup> Koebele, Lafortune, *supra*, 259 – writing in the context of sentence 3 of article 4.1. In the context of sentence 3, the authors write that the sentence imposes a “separate and independent obligation”, from that deriving from the international law rules of responsibility by attribution, “on the WTO Member to interfere”. At 256.

<sup>369</sup> Bohanes, Sandford, *supra*, pp 5 - 6, and 64.

<sup>370</sup> Bohanes, Sandford, *supra*, 26. See also, in this regard: *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p 11; Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, *supra*, par 114; Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, *supra*, par 181.

All the same, responsibility by attribution does have textual founding. The private conduct which is attributed to the Member will invariably constitute an infringement of (textual) provisions in the GATT, or the SPS or TBT Agreements. The matter of whether the theory of attribution will thrive as a tool for responding to private standards lies more in the willingness of the panels and AB to build on their own jurisprudence. But its application to private standards does reveal some practical difficulties. Even if a defending Member in a case were to be found to have acted wrongfully and, thus, in violation of its WTO obligations, enforcement could prove impractical. The DSU directs panels and the AB, where they conclude particular measures are inconsistent with a covered agreement, to recommend that the Member concerned bring their measures into conformity with that agreement.<sup>371</sup> Under a consistent line of reasoning the recommendation, for present purposes, would be for the losing Member to bring the offensive components of the private standards into conformity with the GATT, or the SPS or TBT agreements. The typical suite of remedies which is attendant to panel and AB recommendations includes: cessation; compensation; the suspension of concessions; and countermeasures. And if compliance with these recommendations is not forthcoming, the winning Member also has the option to take retaliatory measures. From these options, cessation is the only sensible one for present purposes, particularly for developing-country Members. It is the only option which is aimed at curbing the actual conduct which is the cause of the challenges resultant from private standards. The other remedies are also unsuitable for the reason that they also happen to be incongruous with the circumstances of Members who lack economic or political clout. They are, in fact, known to be of limited utility to them, where low-income Members are involved in dispute settlement.<sup>372</sup> However, it is still difficult to imagine how cessation itself would practically materialise in the context of private standards, given that the offensive conduct is not literally conducted or directed by Members.

It is also far from certain that if a case involving private standards were to come before them, the panels and AB would usefully advance beyond the *status quo*. Their tacit endorsement of the

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<sup>371</sup> Article 19.1 of the *Dispute Settlement Understanding, supra*.

<sup>372</sup> For analyses of the nature of remedies in WTO law *vis-à-vis* the circumstances of low income Members, see, Cho S, “The Nature of Remedies in International Trade Law” (2004) 65 *U. Pitt. L. Rev.* 763; Shaffer G, “How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies” (March 2003) ICTSD, available at [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf) (last visited on 31 August, 2011).

theory of attribution might remain just that. Villalpando argues that the challenges that the panels and AB have faced in designing solid criteria for attribution reveal an inherent difficulty in utilising the theory of attribution in the WTO context. He argues that its theoretical applicability is overshadowed by a noticeable practical unsuitability. The resultant is a situation where panels and the AB are forced to both conduct themselves on a case-by-case basis, and on the basis of intuitive reasoning.<sup>373</sup> The author argues that state responsibility for private conduct is better manifested, in the WTO context, through the notion of a ‘catalyst act’.<sup>374</sup> Citing public international law practice, the author packages the notion as responsibility for (WTO) wrongful conduct, carried out by a Member (or its organs), *and* catalysed or revealed by the conduct of private parties.<sup>375 376</sup>

A full consideration of the notion of a catalyst act is beyond the scope of this paper, but in so far as it could attenuate the conceptual and practical difficulties inherent in the theory of attribution, it may warrant some consideration by panels and the AB hearing a prospective case. Villalpando argues that the panels and AB, in fact, already subscribe to the theory, and have been reasoning on its basis in a number of cases - even if inadvertently.<sup>377</sup> In two of the cases cited by the author - *Korea – Beef* and *Japan – Semiconductors*<sup>378</sup> - the AB and a panel, respectively, found that (purely) private trade restrictive conduct in the two cases had been facilitated by some prior governmental conduct.<sup>379</sup> In both cases, the findings of wrongfulness were hinged on that prior catalysing conduct.<sup>380</sup> If such an argument were to successfully make its way into the present circumstances, an example of a prior catalysing omission would be Member governments’ failures to act against private anti-competitive behaviour in their jurisdictions, in the end,

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<sup>373</sup> Villalpando, *supra*, pp 397 - 398, 409.

<sup>374</sup> At 414 - 418.

<sup>375</sup> *Ibid.*

<sup>376</sup> The applicability of this theory to private standards is also endorsed by Gandhi, although the author apparently perceives it to be an extension of the theory of attribution. See Gandhi, (2005) 39(5) *JWT*, *supra*, 866 - 867; Gandhi, “Indian Viewpoint”, *supra*, 17 - 18. Villalpando, however, who makes the case for its use, packages it as a formulation of broader state responsibility, rather than as an extension of the theory of attribution.

<sup>377</sup> The author identifies its application in *Japan – Film* and *Argentina – Hides*. Villalpando, *supra*, 417 - 418.

<sup>378</sup> Panel Report, *Japan - Trade in Semiconductors*, adopted on 4 May 1988, BISD 35S/116.

<sup>379</sup> Although the panel categorised it as relating to attribution, the European Communities’ argument in *Argentina - Hides* apparently follows the “catalyst act” line of reasoning. The argument was rejected by the panel – in part due to its finding of insufficient evidence. It, in any case, became irrelevant, as the case was ultimately decided on different grounds. See World Trade Organisation, *WTO Analytical Index: Guide to WTO Law and Practice*, Volume 2, First Edition (2003), 1304 - 1305.

<sup>380</sup> For a discussion on the findings in the two cases, see Villalpando, *supra*, 416 - 417.

allowing it to manifest in the current WTO-inconsistent behaviour. An example of a prior catalysing act could be the enactment of certain requirements inherent in domestic legislation, such as the EU and UK food safety laws, which have encouraged private parties to act in a way which now has now manifested in WTO-inconsistent behaviour.<sup>381</sup>

The notion of a catalyst act, however, might not go the whole way in attenuating the difficulties of attribution, nor does it cover every gap within the text-based options. There is a particular issue in relation to components of private standards which manifest in WTO-inconsistent outcomes, but in respect of which no linkage to some positive rules or provisions can be fashioned. Some of the anti-competitive components of private standards, particularly those which are not strictly food-standards-related, would fall into this category. This could present possible grounds for a so-called non-violation complaint, under article XXIII of the GATT.<sup>382</sup> Article XXIII(1)(c) relates to nullification and impairments of benefits accruing under the GATT which are caused by the “existence of any ... situation”.<sup>383</sup> Owing to its catch-all quality, the so-called “situation authority” is quite amenable to applicability to private standards. Beyond the anti-competitive elements, it captures all aspects of private standards – as distinct from some of the other rules-based options which variously require separations of: technical SPS components, and technical TBT components; responsibility by attribution, from failures to discipline; and food-standards-related components, from non food-standards-related components. According to Hudec, the problem of private barriers “fits the words” of the situation authority “quite nicely”.<sup>384</sup> The non-violation remedy, however, is a very exceptional one in WTO practice.<sup>385</sup>

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<sup>381</sup> It is clear that legal due diligence requirements have played a more than negligible role in precipitating the rise in stringent private food safety standards. For more background on the role played by due diligence requirements, see: Graffham et al., (2007) *Fresh Insights 6, supra*, pp 1, 2, 23; Graffham, MacGregor, (2007) *Fresh Insights 5, supra*, pp 1, 2, 44; UNCTAD, *Experiences of Ghana, Kenya and Uganda* (2008), *supra*, pp 20, 25, 66; Brown, Sander, *supra*, 7, Stanton, *supra*, 1 - 2; Liu, *supra*, 3. See also Graffham A, “EU Legal Requirements for Imports of Fruits and Vegetables (A Suppliers Guide)”, (2006) *Fresh Insights 1*, “Definitions Section”, and 4 - 5 (available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html)), last accessed on 31 August, 2011).

<sup>382</sup> While neither non-violation complaints, nor the notion of a catalyst act, are part of the primary rules-based options considered in this paper, they fall under the broader gamut of theoretical possibilities for dealing with private standards.

<sup>383</sup> Article XXIII(1)(c) of the GATT, *supra*.

<sup>384</sup> Hudec, *supra*, 98.

<sup>385</sup> The non-violation remedy is seldom used in the GATT/WTO case law, and has generally been approached with economy. As noted by the panel in *Japan – Film*:

Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been ‘on the books’ for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article [XXIII] claims. This



### Application of the Text-based Options

A key element in the application of the text-based options will lie in what the discharge of the obligations contained in the provisions entails for Members – or what a panel or the AB determine that it entails. As already noted, the distinction between whether the obligations are obligations of conduct or of effect is not nominal. The two are vastly different. This, in turn, affects what the expectations a claimant Member should be, in regard to what action the defending Member is to take to rectify a violation, in a particular case. In fact, it is also a determinant of whether there has been any violation to begin with.<sup>386</sup>

With regard to the TBT Agreement, at least, it is ostensible from the dispute settlement provisions that the obligations are obligations of effect. Article 14.4 states that:

... dispute settlement provisions [contained in Article 14] can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under [*inter alia* Articles 4 and 8] - and its trade interests are significantly affected.<sup>387</sup>

The reference to “results” lends unequivocal weight to the argument that, under articles 4 and 8 of the TBT Agreement, Member obligations are obligations of effect. The provision even goes on to add that: “such results shall be the equivalent to those as if the [private] body in question were a Member”.<sup>388</sup> Citing the first portion of article 14:4, Kobele and LaFortune, conclude that article 4 of the TBT Agreement entails the “full responsibility [of Members]” for the *effect* of measures.<sup>389</sup> In general, however, having Members ensure an SPS- or TBT- Agreement-consistent result every time in relation to private standardising conduct imposes an obligation

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suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as *an exceptional instrument of dispute settlement*. [own emphasis]

At par 10.36. Additionally, some commentators reject (or argue, as the panel in *Japan – Film*, for restraint in) its applicability to private anti-competitive behaviour. See, *inter alia*, Roessler F, “Should Principles of Competition Policy be Incorporated into WTO Law through Non-Violation Complaints?” (1999) 2(3) *JIEL*, 413; Mavroidis P, Van Siclen S J, “The Application of the GATT/WTO Dispute Resolution System to Competition Issues”, (1997) 31(5) *JWT*, 5; Cho S, “GATT Non-Violation Issues in the WTO Framework: Are They the Achilles’ Heel of the Dispute Settlement Process?”, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=sungjoon\\_cho](http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=sungjoon_cho) .

<sup>386</sup> If it is, say, an obligation of conduct, if a prospective defending Member successfully shows that they had taken reasonable measures, then they would have shown that there has been no violation, notwithstanding the WTO inconsistent conduct or its effects subsisting.

<sup>387</sup> Article 14.4 of the TBT Agreement, *supra*.

<sup>388</sup> [Own emphasis] Article 14.4 of the TBT Agreement, *supra*.

<sup>389</sup> [Own emphasis] Koebele, Lafortune, *supra*, 259.

upon Members whose exactingness is considerably greater than is conceivable.<sup>390</sup> But perhaps it is not that enigmatic if one considers that within both articles 4 and 8 is contained the qualification “as may be available”. As it relates to those articles, article 14 would, inevitably be understood in the context of the availability of measures. As noted by Koebele and LaFortune, the limit of availability suggests that “if a Member is unable to act for factual or legal reasons, it has not breached its obligation”.<sup>391</sup>

The SPS Agreement is more open to interpretation. Article 11 - its dispute settlement provision - is silent on what type of obligation is entailed by the obligations contained in the SPS Agreement’s provisions. Given that article 14 of the TBT Agreement is especially explicit, the comparative silence could mean that the SPS Agreement provisions are not intended to operate on the basis of effect, as the former’s appear to be. For an agreement which does not extend to private conduct to the extent that the former does, the difference is perhaps not fortuitous.

#### General Considerations Relating to Application

Legally, the issue of private standards has elements of novelty and uncertainty. Practically too, the application of the rules-based options presents some novel challenges. And even if the legal (and related practical application elements) were straightforward there is still a miscellany of individual considerations which could affect the practical application the rules-based options. These cannot all be considered here.<sup>392</sup> But private standards are simply a manifestation of a multilateral system of trade that is dynamic and constantly evolving. When WTO Members resolved to create a “durable multilateral trading system”<sup>393</sup> they were reflecting the fact that

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<sup>390</sup> The authors are even led to conclude, from the wording of article 14.4, that the compliance with the provision entails that Members are fully responsible under article 4 “*even in the absence of available and reasonable measures*”. Koebele, LaFortune, *supra*, 259.

<sup>391</sup> Koebele, LaFortune, *supra*, 257.

<sup>392</sup> Suffice to say, the panels and AB will, invariably, find it challenging to treat private standards under a standardised approach. Private standards are composite and enormously heterogeneous, and within the different categories are nuances which increase their heterogeneity. The number, and possible permutations, of the rules-based options could further complicate the application process. There are also pragmatic considerations which arise from the cross-border element of many NGO and international retailer schemes. The apparent territorial limitation, contained in the text-based options, has been raised (however) by some as an indication that the text-based options do not operate extraterritorially. See Gascoine, and O’Connor and Company, who place considerable emphasis on the apparent territorial limitation, in: WTO Committee on Sanitary and Phytosanitary Measures (9 October 2007), G/SPS/GEN/802, pp 9, 53, 68, 73. Roben, in contrast, ascribes a jurisdictional quality to the concept of “within their territory”, and reads it to extend to extraterritorial and personal jurisdiction. Roben, *supra*, at 542.

<sup>393</sup> Paragraph 4, Preamble to the Marrakesh Agreement, *supra*.

WTO agreements were “[not to be] static normative frameworks”<sup>394</sup>, but responsive to evolution in international trade. *US - Shrimp* is a lauded illustration that the system and its rules have a threshold for adapting to changed circumstances. The case is also an illustration of the willingness of the, in that case, AB to interpret the covered agreements in light of “contemporary concerns of the community of nations”<sup>395</sup>. Taking express account of current developments in the multilateral trading system, the AB opined that the term “natural resources” in article XX(g) of the GATT was not “static” in content but was, rather, “evolutionary”.<sup>396</sup> In *Japan – Alcoholic Beverages II* the AB reiterated this *ethos* when it stated that: “WTO rules [were] reliable, comprehensible and enforceable” and that they were not “so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world”.<sup>397</sup> On the strength of such statements, there can be an expectation here that if a case involving private standards comes before a panel or the AB current developments in, and concerns underlying, private standards discourse will be taken in to account.

#### 4.4 PRIVATE STANDARDS AND THE RULES-BASED OPTIONS: THE ROLE OF PANELS AND THE APPELLATE BODY

The panels’ and AB’s mandate in interpretation is limited to clarifying the provisions of the covered agreements.<sup>398</sup> To wit, whichever way they consider or approach the rules-based options in a case before them, they are bound to remain within these confines of interpretation. However, within those confines, there could be a spectrum of interpretative outcomes. In the case of private standards, the developing-country element should aim to attain, along this spectrum, interpretative outcomes which are friendly to developing-country Members.

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<sup>394</sup> Qureshi A H, “Interpreting World Trade Organisation Agreements for the Development Objective”, (2003) 37(5) *JWT* 847, 850.

<sup>395</sup> At par 129.

<sup>396</sup> At par 130.

<sup>397</sup> The AB continues: “They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system ... through the establishment of the dispute settlement system”. Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *supra*, p 31.

<sup>398</sup> Article 3.2 of the *Dispute Settlement Understanding*, *supra*.

Article 3.2 of the DSU states that the panels and AB must clarify provisions of the covered agreements, in accordance with “customary rules of interpretation of public international law”.<sup>399</sup> The general rule of interpretation in international law is to be found in article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention), which provides that a treaty is to be interpreted “in its context [including its preamble], and in the light of its object and purpose”.<sup>400</sup> In WTO case law, there is a division of opinion on how the elements of interpretation espoused in article 31 are to be considered. The one view is that the elements constitute a holistic rule of interpretation.<sup>401</sup> The other view – the preponderant one in the case law – is that the text is supreme, while the rest of the elements are supplementary.<sup>402</sup> In *US – Shrimp*, the AB opined that it is only where the meaning imparted by the text is “equivocal or inconclusive”, or where “confirmation of the correctness of the reading of the text itself is desired” that light may be sought from the object, purpose and context.<sup>403</sup> The disparity is largely immaterial in the present case. Neither the interpretation nor the wording of the rules-based options is unambiguous. It is, consequently, predictable that all the elements contained in the general rule of interpretation would need to be considered in interpreting them.

A number of cases emphasise ascertaining intention as one of the primary goals of interpretation, with many taking very process of interpretation as being synonymous with the determination of intention.<sup>404</sup> In a multi-member, dynamic, and evolving collective such as the WTO, intention can be nebulous. In the present case, this might be complicated by the novelty and contentiousness of the legal aspects of private standards, and disparity of permutations of the rules-based obligations. It will, thus, be a likelihood that additional recourse might need to be made to supplementary means of interpretation. According to article 32 of the Vienna Convention, recourse may be had to these supplementary means, “including the preparatory

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<sup>399</sup> *Ibid.*

<sup>400</sup> Articles 31(1) and 31(2) of the Vienna Convention on the Law of Treaties, *supra*.

<sup>401</sup> Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*, par 7.22.

<sup>402</sup> See, for example: Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras 45 - 46; Appellate Body Report, *EC – Hormones*, *supra*, par 181; Appellate Body Report, *US – Shrimp*, *supra*, par 114.

<sup>403</sup> Appellate Body Report, *US – Shrimp*, *supra*, par 114.

<sup>404</sup> See, *inter alia*, Appellate Body Report, *India – Patents (US)*, par 46; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paras 84, 93.

work of the treaty and the circumstances of its conclusion”.<sup>405</sup> This approach is validated by WTO practice in instances where, as in the present case, intention could not be immediately gleaned from the text.<sup>406 407</sup>

Whether it is directly for the purpose of ascertaining intention or otherwise, there is a suite of resources, from both within the general rule of interpretation and from supplementary means, to assist in the interpretation of the rules-based options. Another guide to interpretation, the Marrakesh Agreement’s preamble, could play a particular role in a case involving private standards.<sup>408</sup> It is worth recalling the agreement’s preambular undertaking to ensure that developing countries and LDCs, “secure a share in the growth of international trade”<sup>409</sup>. Improving the situation of developing-country Members is an overarching systemic undertaking, which permeates the covered agreements.<sup>410</sup> The specific prejudice that developed-country Members have suffered on account of private standards, and the attendant outcomes which are inconsistent with the system’s assurances to them, makes the preambular undertakings more pertinent and glaring. It is also to be expected that developing countries will be the probable claimants in initial cases involving private standards. The developing-country Member element should, for these reasons, be especially pronounced in the cognisance of a panel or the AB

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<sup>405</sup> Vienna Convention on the Law of Treaties, *supra*.

<sup>406</sup> See, for example: Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *supra*, p 10; Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, *supra*, par 92.

<sup>407</sup> A number of commentators discussing private standards note that the negotiators of the Uruguay Round could not, at the time of drafting the texts, have predicted private standards (more especially, SPS-related) in their current formulation. By implication, they could not have intended them to be covered by WTO rules. See, for example, Prévost, (2008) 33 *SAYIL*, *supra*, 6 - 7; Gascoine, and O’Connor and Company, in WTO Committee on Sanitary and Phytosanitary Measures, (9 October 2007), G/SPS/GEN/802, *supra*, 74 - 78. Whether the negotiators predicted the current manifestation of private standards as it is today, or not, what is self evident in the text of the text-based options that they intended to: prevent the circumvention, through private action, of the rules of the WTO; and/or oblige Members to discipline WTO-inconsistent private behaviour. In the case of the TBT Agreement, there is clear evidence, in the negotiating history, that they did intend to enhance disciplines for private parties involved in standardisation. See: WTO Committee on Trade and Environment / Committee on Technical Barriers to Trade (29 August 1995), WT/CTE/W/10 / G/TBT/W/11, *supra*. See, also, Koebele, LaFortune, *supra*, pp 247, 248.

<sup>408</sup> Defining the role of the Marrakesh Agreement’s preamble in illuminating the interpretation of the covered agreements, the AB in *US – Shrimp*, stated that the preamble, “gives colour, texture and shading”, to both the interpretation of the covered agreements, and the Member rights and obligations contained therein. Appellate Body Report, *US – Shrimp*, *supra*, paras 152, 153 and 155. See also Appellate Body Report, *Brazil – Desiccated Coconut*, p 17; Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, *supra*, par 7.75.

<sup>409</sup> Paragraph 2, Preamble to the Marrakesh Agreement, *supra*.

<sup>410</sup> This undertaking, and references to the circumstances of developing countries, abound in the preambles to the various covered agreements. See also, paragraphs 7 and 9, respectively, of the preambles to the SPS and TBT Agreements.

hearing a prospective case involving private standards. Article 21.2 of the DSU itself directs that, with respect to measures which are the subject of dispute settlement, particular attention be paid to the interests of developing-country Members.<sup>411</sup>

There have been some criticisms levelled against the approach that the panels and AB take in relation to the rights and interests of developing-country Members. In separate statements, the LDC and Africa Groups excoriate the panels and AB for failing to adequately take account of the rights and interests of developing-country Members in the interpretation process.<sup>412 413</sup> The Africa Group contends that the panels and AB often harm developing countries through allowing interpretative ambiguities to elicit and entrench outcomes which prejudice them. They argue that this often takes place when interpretations which promote the development and equity concerns of developing-country Members could have been elicited within the confines of the rules and of the judicial mandate. The statement goes as far as contending that the panels and AB have *exceeded* their judicial mandate when they have interpreted and applied provisions in a manner which has prejudiced the interests and rights of developing-country Members.<sup>414</sup> Whether the concerns of the Africa and the LDC blocs are perceived or real is not necessarily relevant to the present argument. What their statements do reflect is the fact that, without exceeding their judicial mandate, the panels and the AB can seek to avoid interpretative outcomes which fail to safeguard the interests of low-income Members. For the purposes of this paper, however, the ultimate test of the success of responses to private standards is whether they successfully safeguard the rule of law. Their ability to respond appropriately to the circumstances of developing-country Members is also ultimately tested within that context.

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<sup>411</sup> Article 21.2 of the Dispute Settlement Understanding, *supra*.

<sup>412</sup> WTO Dispute Settlement Body Special Session, Negotiations on The DSU (25 September 2002), *Proposal by the African Group*, Statement by Kenya, on behalf of the Africa Group, TN/DS/W/15; WTO Dispute Settlement Body Special Session, Negotiations on The DSU (9 October 2002), *Proposal by the LDC Group*, Statement by Zambia, on behalf of the LDC Group, TN/DS/W/17.

<sup>413</sup> WTO Dispute Settlement Body Special Session, Negotiations on The DSU (7 October 2002), *Proposal by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, Statement by India, on behalf of: Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18.

<sup>414</sup> WTO Dispute Settlement Body, Special Session (25 September 2002), TN/DS/W/15, *supra*, 1.

## PART 5: APPRAISING THE RULES-BASED APPROACH

*“Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system”*

- Paragraph 5, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### 5.1 CONSTRAINTS TO THE EFFICACY AND PRAGMATISM OF THE RULES-BASED APPROACH

It is beyond dispute that private standards go against the spirit of the GATT, and the SPS and TBT Agreements. Indeed, this paper has argued that private standards threaten the very rule of law in international food trade. The discussion in part 4 confirms that there are legal principles and positive legal provisions which could provide a basis upon which private standards could be made amenable to the letter of the GATT, and the SPS and TBT Agreements. At the same time, the discussion also reveals some quite considerable uncertainty surrounding, and divergence of opinion regarding, the scope of applicability of the available rules-based options. Given the urgency of the situation on the ground this, in itself, raises questions relating to the expediency of the rules-based options. Compounding that, are issues of a systemic nature which could have an impact on the pragmatism of a rules-based *approach* to private standards. These could have a bearing on: whether the rules-based options are likely to even be used; or if they are, whether they are likely to succeed.

Underpinned by these systemic considerations, this part of the paper assumes a global discussion on economic, institutional, political, market, and legal realities which could impact on the efficacy of the rules-based options. They are broadly divided into: dispute settlement; political and institutional issues; the public/private divide; market and operational realities; and the PPM issue, in the discussion which follows.

### 5.1.1 Dispute Settlement

Approaches to private standards which are predicated upon use of the DSM might be problematic in the short term. As things stand, claimant Members in cases involving private standards are likely to be developing countries. In spite of the positive developments noted in part 2, low income Members – and African ones especially – are still not sufficiently predisposed to using WTO dispute settlement.<sup>415</sup> There are still several factors which continue to place them at a chronic disadvantage of experience, financial capacity, and dispute settlement readiness, relative to developed-country opponents. This imbalance between litigants is evident throughout the entire chain of dispute settlement-related processes – all the way through to enforcement.<sup>416</sup>

Granted, academic arguments have been made in support of developing countries using the DSM to respond to private standards.<sup>417</sup> But given the above, the dispute settlement route might turn out to be a risky endeavour for under-resourced Members. The risk is not attenuated by the fact that, based on the observations made in part 4, it is still far from clear what the outcomes of the dispute settlement process would substantively connote.

Adding to these constraints, the legalisation of relations in international trade has not completely eradicated the underlying power dynamic within the WTO system. Private standards are contentious – already reflecting a developed-country / developing-country divide in Committee discussions. Experience has shown that, in instances of controversial subjects, low-income

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<sup>415</sup> It is widely recognised that developing-country Members still face lingering constraints relating to “legal knowledge, financial endowment, and political power”. See Shaffer G, “The Challenges of WTO Law: Strategies for Developing Country Adaptation”, (2006) 5:2 *WTR* 177, 177 and onwards. See also, Read, “WTO Dispute Settlement Understanding in the Wake of the GATT”, *supra*, 40 - 43. While the services of an organisation such as the ACWL could attenuate the first two constraints, not all developing-country Members that presently or potentially participate in high value fresh-fruit and vegetable export trade are eligible for the ACWL’s services. It should be noted, in any case, that due to tangential, incidental, and other pre-case and post costs, the services of the ACWL might not always turn out to be completely free.

<sup>416</sup> As already noted in part 4, even if the decision goes in favour of the complaining party, most available remedies are not suited to the circumstances of low income Members. Economic retaliation, for example, emblematic of enforcement in the WTO dispute settlement system, is often touted as one reason the WTO has the most effective enforcement system in international law. But it is the strength of this method of enforcement which reveals its major limitation. Its reliance on the ability of retaliatory measures to cause stress (or the real threat thereof) to key sectors of an economy means that it is unsuited to the circumstances of economically or politically weak Members. See Cho, *supra*, 784 - 786.

<sup>417</sup> See, especially, Gandhi, “Indian Viewpoint”, *supra*; Gandhi, (2005) 39(5) *JWT*, *supra*. See also, Villalpando, *supra*.



Members can be reticent about taking confrontational stances towards developed-country Members.<sup>418</sup> Taking all of this into account, it is worth giving consideration to how much reliance should be placed on the responses predicated on the use of dispute settlement.

### 5.1.2 Political and Institutional

The situation might be slightly different for higher income developing-country Members. They, indeed, might be able to afford to take the dispute settlement route, and to carry any risks associated with the uncertainty and protraction of the process.<sup>419</sup> It is, however, worth considering whether a litigious approach is appropriate at all in the circumstances. Private standards pose a systemic challenge. The membership of the WTO has already made a decision to deal with the matter of private standards collectively and comprehensively. It might be a political impropriety to risk derailing that process through resort to a side endeavour. A litigious one, in particular, could be premature given that Members have, under consideration, an endeavour to arrive at a common understanding on the scope of the available rules-based options.

The very fact of leaving it to the panels and the AB to pronounce on the issue of private standards could be, itself, a political impropriety. As the structures whose legal mandate it is to interpret the rules of the covered agreements, the panels and AB are the proper and competent bodies to pronounce on the legal parameters of rules-based options. At the same time, leaving a politically sensitive issue such as private standards to be pronounced upon in dispute settlement might show itself to be a political overloading the dispute settlement system.<sup>420</sup> The argument

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<sup>418</sup> A lack of political will and an apparent fear of reprisal, and power-politics have all been identified as contributors to this. Shaffer G, (2006) 5:2 *WTR* 177, *supra*, generally. See also Shaffer G, “WTO Technical Assistance and Capacity-Building”, in Petersmann E-U (ed.), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*, (2005) 245, 260; Hoekman B, “Strengthening the Global Trade Architecture for Development: The Post Doha Agenda”, (2002) 1:1 *WTR* 23, 35 - 36.

<sup>419</sup> In one of the papers in which he argues for developing-country Members to challenge private (NGO) standards through the DSM, Gandhi makes the argument specifically in relation to India. Gandhi, “Indian Viewpoint”, *supra*. High income developing-country Members such as India and Brazil have indeed become more proactive in asserting their interests, including through using the DSM. It can also be accepted that, in theory, any favourable results derived by these Members could benefit other affected Members, as they would be awarded on an MFN basis.

<sup>420</sup> As things stand, if they were to pronounce on private standards, the panels and AB might find themselves in a quagmire in which they are destined to be accused of either being overly restrained or of overstepping their mark - whichever way they approach the matter. Gandhi, a foremost academic proponent of a litigious approach to private

against taking politically sensitive issues to dispute settlement has been made particularly strongly.<sup>421</sup> It has frequently been opined that such are matters for negotiated settlement among Members.<sup>422</sup>

The manner in which private standards are handled in the WTO is also significant from an external credibility point of view.<sup>423</sup> The issue of private standards has a pronounced public perception element – the very proliferation of private standards is, in part, a symptom of suspicion regarding the WTO. When it has involved Member conduct, dispute settlement involving food safety and environmental issues has always elicited vociferous public sentiment.<sup>424</sup> The possibility of the rules-based options manifesting as a mechanism under which conduct which is effectively private is, under the guise of legality, drawn under the rules of the WTO must be avoided. Such an outcome would be an untenable one for the WTO system's external credibility.<sup>425</sup>

### 5.1.3 The Public/Private Divide

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standards, himself concedes that the issue of private standards is one of “such wide-ranging consequence”, which might best be addressed “by the WTO and its membership, *instead of being left to the dispute settlement mechanism*”. [Own emphasis] Gandhi, “Indian Viewpoint”, *supra*, 33; Gandhi, (2005) 39(5) *JWT*, *supra*, 879.

<sup>421</sup> The argument has been made *both* by those who believe that the panels and AB are competent, within their mandate, to pronounce on such matters, and those who believe that they overstep it (and/or threatens the diplomatic underpinnings of the WTO system) when they do. See, *inter alia*: Bartels L, “The Separation of Powers in the WTO: How to Avoid Judicial Activism”, (2004) 53 *ICLQ* 861, generally; Howse R, “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate”, 15 - 18, available at <http://worldtradelaw.net/articles/howshrimp.pdf> (also published in (2002) 27 *Colum. J. Envtl. L.* 489; Cho, (2004) 65 *U. Pitt. L. Rev.* 763, *supra*; Schoenbaum T J, “WTO Dispute Settlement: Praise and Suggestions for Reform”, (1998) 47 *ICLQ* 647, 647 - 658.

<sup>422</sup> In pronouncing on politically sensitive issues, the panels and AB are invariably placed in political quagmire. Commenting on *EC - Hormones* and *EC - Bananas III* - two cases which the author dubs “wrong cases” in the WTO - Cho opines that political hot potatoes, such as these, should be “*kept away from the WTO dispute settlement mechanism* to protect its judicial integrity”. The author adds that resolutions of such matters should be achieved by “an *ex ante* prevention of disputes *through intergovernmental and/or trans-governmental cooperation cum deliberation*”. [Own emphasis] Cho, (2004) 65 *U. Pitt. L. Rev.* 763, *supra*, 784.

<sup>423</sup> The latter part of the last century brought to the fore the value of an externally transparent and credible system to its playing a successful role as a multilateral institution. In large part due to the influence of public interest groups, the WTO suffered a crisis of credibility and public image, which climaxed with the derailing of the Seattle Ministerial Conference. See p 14 - 15, and n 45 - 46, above.

<sup>424</sup> *Ibid.*

<sup>425</sup> Publicised controversies about the WTO being a sinister omnipresence that threatens public health have tapered-down somewhat. But food standards remain politically sensitive, and the potency (and miscellany) of interest groups with an interest in the debate on private standards should be duly taken into account. On the dangers of such a course for the credibility of the WTO, see Bernstein, Hannah, *supra*, 578.

The use of WTO rules to capture what is ostensibly private conduct could also provoke questions around the sanctity of the public–private divide. Admittedly, there is never a clean divide between private and governmental conduct in the multilateral trading system. This paper has shown that along the continuum between what is purely governmental and what is purely private, are areas of murkiness. Despite all of that, there remains a clear definitional difference between governmental and private conduct. From a legal point of view, this distinction remains sacrosanct since only WTO Members are the subjects of WTO law. Naturally, the rules-based options may only be utilised and understood within those confines. From a practical point of view, however, the risk of overstretch does exist. Because private actors are *not* subject to WTO strictures, it is not out of the ordinary for their autonomous conduct to be incongruous with the rules of the WTO. Potentially, all private standards could be covered by the rules-based options. If the process is taken to its logical extreme, the practical effect could be to subsume private standards into governmental ones, or to merge the two. As already noted, this could affect the credibility of the WTO system.<sup>426</sup>

At some point, there is a chance that the rules-based options could also become legally problematic - particularly the theory of attribution. International responsibility for the conduct of private parties is occasioned upon states in exceptional circumstances. As an exception, the theory of attribution cannot be adopted as a standard approach for dealing with private standards.<sup>427</sup>

#### 5.1.4 Market and Operational

An over-blurring of the line between governmental food standards and private food standards is also, inherently, problematic. When one considers it, (although some objectives coincide) private standards have a separate existence to, and serve different needs from those served by, governmental standards. Their objectives are also quite differently articulated. All things equal, the two types of standards are optimal where they operate in a complementary manner.<sup>428</sup>

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<sup>426</sup> *Ibid.*

<sup>427</sup> A similar argument would apply in respect of article XXIII(1)(c) non-violation “situation” complaints. See p 86, and n 385, above.

<sup>428</sup> See n 129, above.

There are also impracticalities to utilising WTO food-standards rules to target private trade-distorting conduct in a demand- and supply- driven market. The rules of the WTO, intended as they are for governments, do not operate with a necessary appreciation of the commercial and operational realities of private entities. To begin with, there is a set of elements of private standards that reflect autonomous business decisions which are driven by contemporary retail trends – elements unrelated to food standards. While in the case of the food standards elements, commercial realities do demand that producers in fresh-fruit and vegetable value-chains meet the expectations of importers and retailers. The rules can go only so far if producers from low income Members continue to not meet the expectations of the market, and at some point it becomes artificial to use them.<sup>429</sup> This is so especially when one considers that the rigours of the market do call for enterprises to be readily responsive to matters relating to food standards. For retailers such as supermarkets, it is imperative that they are rigorous in their oversight and quality assurance. Any shortcomings (whether perceived or real) can carry with them real reputational and legal ramifications.<sup>430</sup>

Of course, things are not all equal. The whole discourse reveals that private standards are not operating in a manner which is complementary to governmental standards, and also that the business decisions underlying them can be questionable. Aggressive business practices; market-culling of poor farmers; collusive practices among and between retailers and NGOs; and gratuitous refusals to deal, do not reflect fair business practices. Nevertheless, many of these are not, strictly speaking, food standards matters.<sup>431</sup> It is doubtful whether WTO food-standards rules are the best instrument for dealing with private anti-competitive behaviour and unfair business practices.<sup>432</sup>

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<sup>429</sup> See comments by Mosoti and Gobena, on the commercial realities of (high-value) agricultural markets. Mosoti, Gobena, *supra*, 25.

<sup>430</sup> See Brown, Sander, *supra*, 6 - 8, on the influence of legal due diligence requirements and reputational concerns. See also, sources cited at n 381, above.

<sup>431</sup> In their food standards components, it is apparent that private standards are often protectionist and not always, strictly-speaking, consumer-driven. But these are distinguishable from a set of anticompetitive elements of private standards which relate to business decisions and processes that are not principally related to food safety, or environmental, ethical or related objectives. See 37 - 38, above.

<sup>432</sup> On calls for a specialised multilateral framework, for dealing with anti-competitive private conduct in international markets, see Hudec, *supra*, generally. See also, 4.3, above, for a brief discussion on currently available options for dealing with the anti-competitive components of private standards. In 1996, the EU attempted to

### 5.1.5 The Process and Production Methods (PPM) Issue

As they typically incorporate a number of considerations which are based on non product-related PPMs, this could rule out the applicability of the TBT Agreement-based options to significant segments of private standards. As noted above, the PPM debate has its own rendition in the TBT Agreement<sup>433</sup>, with the apparently prevailing view being that the agreement does not cover product standards based on non product-related PPMs. Considering that the TBT Agreement is an agreement specifically dedicated to technical regulations and standards, this could constitute a considerable dilution to the efficacy of the rules-based options.<sup>434</sup> This is especially so when one considers that the non product-related PPM elements of private standards are considered especially pervasive. Of course technical regulations and standards which are based on non product-related PPMs could still be at variance with the principle of non-discrimination, and would on account of that still offend articles I and III of the GATT. But this would leave only the generic rules of the GATT, under the (arguably-more-conceptually-complex) theory of attribution, to apply to technical regulations and standards which are based on non product-related PPMs.

Another standalone obstacle in relation to the PPM issue is the PPM debate itself. In order to facilitate a dialogue on bringing non product-related PPM elements of private standards under the remit of the TBT Agreement, one would inadvertently reopen the PPM debate. Since the debate's origins, the principal opponents to the inclusion of non product-related PPMs under the purview of the TBT Agreement have been developing countries.<sup>435</sup> It is not immediately

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introduce into WTO discussions, a number of new issues - one of which was multilateral rules on competition. These issues were quite resoundingly rejected by developing-country Members. See n 461 and 462, below.

<sup>433</sup> The currently prevailing view in the WTO is that technical regulations and standards which are based on non product-related PPMs do not fall under the purview of the TBT Agreement. See p 15 - 16, and n 54, above.

<sup>434</sup> Across the divide between commentators who support the use of the TBT Agreement to deal with private standards, and those who do not, there is agreement that the matter of the exclusion of non product-related PPMs from the agreement is a relevant constraint. See Gandhi, (2005) 39(5) *JWT*, *supra*, 858, 876, 878; Gascoine, and O'Connor and Company, in WTO Committee on Sanitary and Phytosanitary Measures, (9 October 2007), G/SPS/GEN/802, *supra*, pp 31 - 32, 65.

<sup>435</sup> See n 54, above.

obvious whether developing-country Members - even those who back bringing private standards under the remit of WTO rules - would welcome a reopening of that debate.<sup>436</sup>

## 5.2 WHAT HAPPENS TO THE RULES-BASED OPTIONS?

This appraisal is not aimed at discrediting the rules-based options. The view of this paper remains that they are a nucleic component to any legal analysis of private standards, and an indispensable component of an overall strategy for dealing with them. It would, in fact, be grossly anomalous if the rules-based options did nothing for the rule of law. Nevertheless, it is patent that the infrastructure is not in place to allow a defined rules-based approach to succeed in dealing with the challenges posed by private standards. Given the constraints facing a rules-based approach, it is necessary to appraise whether faith should be put into responses to private standards which are theoretical possibilities but might turn out to be practically infeasible. Many of the constraints identified in this appraisal reflect systemic issues which cannot be glossed-over. Even if some of the theoretical legal uncertainties are resolved, the nature of the constraints and impediments identified in this part, it is submitted, raise questions concerning the pragmatism of rules-based approach.

## 5.3 A CASE FOR A MULTIPRONGED STRATEGY

It is, in fact, doubtful that the rules-based options would have been appropriate as a sole strategy. The issue of private standards is an especially composite one, containing multilevel considerations. A clinically rules-based approach ignores some of these and, in the process,

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<sup>436</sup> Gandhi suggests that this probable fear by developing countries to, by arguing for the use of WTO rules to discipline private standards, reopen the debate, might stand in the way of developing-countries attempting to use dispute settlement to challenge private standards. Gandhi, (2005) 39(5) *JWT*, *supra*, pp 858, 877, 878; Gandhi, "Indian Viewpoint", *supra*, 33. This is magnified by the fact that it is already apparent that not all developing-country Members have been active participants in, or even proponents of, the private standards discussion. In the early days of the private standards debate, some even cautioned that the focus which was being placed on private standards represented a diversion from the primary imperative to assist developing-country Members with meeting official standards. See WTO Committee on Sanitary and Phytosanitary Measures: News Items (28 February and 1 March, 2007), *supra*.

becomes inept at the task of safeguarding the rule of law. In a paper on the general challenges to the full integration of developing countries into the world economy, Hoekman argues that the WTO system alone cannot deal with trade-related issues or trade-related challenges.<sup>437</sup> The author contends that some of the most effective actions for strengthening the trade architecture for the poorest WTO Members are located outside of the WTO.<sup>438</sup> In what he describes as a multipronged strategy, Hoekman's recommendation is that a combination of concerted and unilateral actions (many external to the WTO) is the most effective approach to reducing global antitrade biases and improving the effectiveness of the WTO system. The argument, and much of the premise upon which it is based, is germane to the present circumstances. Given the insufficiency of a purely rules-based approach, and the urgency of the situation, it is necessary to consider the complementary contribution of the rules-based approach and parallel interventions. Drawing inspiration from the multipronged approach, the next part of the paper offers recommendations for a multilayered approach to private standards.

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<sup>437</sup> Hoekman, (2002) *1:1 WTR, supra*, 23 - 45.

<sup>438</sup> *Ibid.*

## PART 6: RECOMMENDATIONS

*“Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system”*

- Paragraph 5, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

### 6.1 RECOMMENDATIONS FOR A MULTIPRONGED STRATEGY

In three recent reports<sup>439</sup>, the SPS Committee lists six recommendations for “agreed actions for the SPS Committee” in relation to its work on private standards. The first five are:

- that the SPS Committee should develop a working definition of SPS-related private standards, and limit discussions accordingly;
- the regular exchange of information between the Committee and the three sisters<sup>440</sup> relating to respective work and developments in relation to private standards;
- for the WTO Secretariat to inform the SPS Committee of relevant developments in other WTO fora;
- for Members to sensitise private sector bodies in their territories, that are involved in SPS-related standardisation, to the issues raised in the SPS Committee and the importance of international standards (as set by the three sisters)<sup>441</sup>; and

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<sup>439</sup> WTO Committee on Sanitary and Phytosanitary Measures: (3 March 2011), G/SPS/W/256, *supra*; (6 April 2011), G/SPS/55; (20 June 2011), G/SPS/W/261. See, also, WTO Committee on Sanitary and Phytosanitary Measures: News Items (30 and 31 March, 2011), *Members Take First Steps on Private Standards in Food Safety, Animal-Plant Health*, available at [http://www.wto.org/english/news\\_e/news11\\_e/sps\\_30mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/sps_30mar11_e.htm) (last accessed on 31 August, 2011).

<sup>440</sup> The so-called three sisters: the Codex Alimentarius Commission; the International Office of Epizootics; and the International Plant Protection Convention, are the officially recognised international standardising bodies under the SPS Agreement. See p 60, and n 269, above.

<sup>441</sup> This action represents an endeavour to export WTO rules (international standards) to the private standard-setting sphere. From another perspective, these could, arguably, be the beginnings of some soft obligation upon Members. It could, in this regard, also contribute towards defining the type of obligation which is entailed in the text-based obligations.



- for the committee to explore co-operation with the three sisters in developing information material underlining the importance of international SPS standards.

For the output of over four years of work, the five outcomes are a little vacuous.<sup>442</sup> There is a resounding inaudibility of the rule of law perspective. The reticence to advance the discussion on article 13 is also apparent. The enigmatic sixth action, in fact, reinforces apprehensions of inherent polarity, and/or gives the appearance that little substantive progress in being made in the Committee. It reads:

Members are encouraged to exchange, outside the formal and informal sessions of the SPS Committee, relevant information regarding SPS-related private standards to enhance understanding and awareness on how these compare or relate to international standards and governmental regulations, without prejudice to the different views of Members regarding the scope of the SPS Agreement.<sup>443</sup>

Be that as it may, work is continuing.<sup>444</sup> The recommendations in this part are presented in the context of the premise that work in the Committees is ongoing. They are a cross-section of: actions from within and from outside of the WTO; actions which directly relate to private standards and those which do so indirectly; and actions with immediate and those with long-term effect. They represent interventions and actions which are currently, or could be, taking place on these various levels. An effective multipronged approach should seek to draw complementarities across these different actions and interventions. From the perspective of the WTO, these complementarities do not take place by necessary default, however. It is in this regard that the role of the SPS and TBT Committees is taken to be critical for the ultimate symbiosis of the actions recommended herein.

### 6.1.1 Actions located within the WTO

#### A Joint SPS-TBT Committee Working Group on Private Standards

Among the issues raised by Members who had attempted to purge the discussion on private standards from the respective WTO committees, was the fact that it was already under discussion

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<sup>442</sup> It is also unfortunate that a working definition of SPS-related private standards would be an issue at this stage of the discussion.

<sup>443</sup> WTO Committee on Sanitary and Phytosanitary Measures (20 June 2011), G/SPS/W/261, *supra*, 1.

<sup>444</sup> Annex I of the report of the SPS Committee working group on private standards contains a list of proposed actions in respect of which engagement is not yet closed. See WTO Committee on Sanitary and Phytosanitary Measures (3 March 2011), G/SPS/W/256, *supra*, 7 onwards.

in the other committee.<sup>445</sup> There are some valid considerations here, at least in relation to the danger of duplication. However, confining the discussion to either one of the committees does not necessarily represent the optimal resolution to the problem of duplication. SPS measures and technical regulations and standards are technically distinct – while, at the same time, private standards are problematic on account of both their SPS and TBT components. A contained discussion in the SPS Committee will divest the conversation of the TBT components, while a contained discussion in the TBT Committee would similarly divest the conversation of its SPS components. This could result in suboptimal outcomes. Bearing in mind that private standards represent a unique, unitary, situation facing the WTO it is (from a systemic perspective) probably artificial to separate the two discussions in the first place.<sup>446 447</sup> A special joint SPS and TBT Committee working group could enrich the discussion and its outcomes. It would certainly cover concerns relating both to duplication and the sub-optimality of artificial separation.<sup>448</sup>

### An SPS Code of Good Practice?

In her proposals for possibilities for disciplining SPS-related private standards, Prévost considers the workability of an SPS Code of Good Practice.<sup>449</sup> Such a code could go some way towards enhancing disciplines for private parties involved in SPS-related standardisation. It would also foster progress, since the intractable tension regarding whether or not the SPS Agreement covers

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<sup>445</sup> See p 40 and n 175, above.

<sup>446</sup> The clinical technical separation, as it relates to the rules applicable to the two categories of standards, is understandable. In the analysis of the some of the rules-based options, it is pertinent. But it is necessary to appreciate that, as they relate to a systemic issue facing the WTO, private standards present a unitary challenge. From their on-the-ground implications, that also appears to be the case. In its analysis of SPS Committee questionnaire responses, the WTO Secretariat observes that a number of Members, in their descriptions of the private standards which most affect them, included TBT-related issues. In explaining this inclusion of TBT issues, Secretariat notes that, “from the perspective of the producers, which have in most instances provided the inputs for the replies, what matters is the whole range of market access conditions”. In WTO Committee on Sanitary and Phytosanitary Measures (15 June 2009), G/SPS/GEN/932, *supra*, 3, and n 7. For substantive treatment, the matter of private standards needs to be treated comprehensively, and the issues tied together somehow. Somewhere between a joint SPS/TBT working group, and some type of coordinating mechanism, might lie the optimal solution.

<sup>447</sup> The problems of separation are, arguably, manifesting in the apparent bickering (over six years after the official discussions commenced) in the SPS Committee over a working definition for SPS-related private standards. See the first reported agreed action in the 2011 SPS Committee report in relation to its work on private standards.

<sup>448</sup> In the Committee discussions, the consideration has only been in relation to the utility of joint *meetings* or *information sessions* between the SPS and TBT Committees. The idea, which was posed in one of the questions in SPS Committee questionnaires, was rejected by almost half of respondent Members. The other (about) half did accept the idea of joint meetings, also proposing agenda items. WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), G/SPS/W/230, *supra*, 5 - 6.

<sup>449</sup> Prévost, (2008) 33 *SAYIL*, *supra*, 28 - 30.

private standardising conduct represents a digression from the attainment of substantive headway.

A shortcoming of the SPS Code of Good Practice proposal might be the fact that the archetype TBT Code has, arguably, not been especially influential in enhancing disciplines for private standardising conduct. Another drawback is the fact that there are still Members who maintain that the TBT Code relates to quasi-governmental, rather than purely private, conduct.<sup>450</sup> Similar disputation over the scope and addresses of a comparable code within the SPS Agreement is not unlikely.

If an SPS Code were to be adopted, it would need enabling infrastructure. An amendment to article 13 of the SPS Agreement, or the insertion of a provision similar to article 4.1 of the TBT Agreement might also be necessary. In order to effect the necessary changes, the agreement of Members under article 12.1 of the SPS Agreement, or article X of the Marrakesh Agreement would be required.<sup>451</sup>

#### The TBT Agreement and the TBT Code of Good Practice

The theoretical potential of the TBT Code of Good Practice to respond to some of the challenges posed by private standards is apparent. However, in order to make it more effective, an appraisal of the role which the Code has thus far played, and should be playing going forward, might be necessary. The prototype, however, does still have such potency that it has been proposed to assist in the development of a similar code under the SPS Agreement. It has also been suggested that the TBT Code of Good Practice, as it stands, could (resourcefully) be extended to respond to SPS-related private standardising activities. In a WTO Secretariat collation of SPS Committee questionnaire responses, some Members are recorded as stating that the Code's principles relating to "transparency, participation of developing countries, impartiality and consensus,

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<sup>450</sup> See p 78, and n 351, above.

<sup>451</sup> See Prévost, (2008) 33 *SAYIL*, *supra*, 29 - 30. Prévost, however, believes that it is doubtful that a proposal for an SPS Code of Good Practice would elicit much support from developed-country Members. The author (at 30) expresses the view that the influence of large developed-country retailer and consumer interest lobbies will preclude these Members from assenting to such a code. It is, in fact, one of the proposed actions in respect of which the working group of private standards could not reach consensus. It is recorded on the same list - in Annex 1 of the report - as the article 13 endeavour. See WTO Committee on Sanitary and Phytosanitary Measures (3 March 2011), G/SPS/W/256, *supra*, 9 - 10.

effectiveness and relevance, coherence, and the development dimension” could be usefully utilised.<sup>452</sup>

It appears, also, that it would be possible to harness article 8.1 of the TBT Agreement to straddle SPS-related private standardising activity. As argued above, article 8.1 relates to the *action* of conformity assessment.<sup>453</sup> If private bodies that have accepted the Code also happen to be involved in SPS-related conformity assessment activities, the prescriptions of article 8.1 could, arguably, cover conformity assessment in the SPS-related context.<sup>454</sup> The obvious rejoinder from detractors would be that the TBT Agreement relates only to technical regulations and standards.<sup>455</sup> In practice, however, even if the proposal for harnessing the TBT Agreement to cover SPS-related private standards is rejected, its influence would probably spill over. Due to the compositeness of private standards, the same schemes that would on account of their TBT elements, be covered by the TBT Agreement and Code of Good Practice, would often also contain SPS-related elements.

### Collaboration with International Standardising Organisations

Market trends clearly project an ever expanding reach for private standards. Managing them might have to, in the longer term, entail increasing focus on exploring approaches towards formulating a mutually beneficial coexistence between them and governmental standards. The idea has appealed to some Members that collaboration with international standardising bodies might provide some forum for the rationalisation or harmonisation of private standards.<sup>456</sup> It

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<sup>452</sup> WTO Committee on Sanitary and Phytosanitary Measures (23 September 2008), G/SPS/W/230, *supra*, 6.

<sup>453</sup> Rather than to the measures which are the subject of the conformity assessment procedures. See p 82 and n 366, above.

<sup>454</sup> Prévost even argues that if the term “non-governmental body” is understood to include non-governmental bodies with no enforcement power, then article 1.8 could also cover private bodies involved in SPS-related standardising activity – *even where the same are not involved in TBT-related standardising activities*. Prévost, (2008) 33 *SAYIL*, *supra*, 27.

<sup>455</sup> Article 1.5 of the TBT Agreement states that the provisions of the TBT Agreement “do not apply” to SPS measures, as defined in the SPS Agreement. Article 1.5 of the TBT Agreement, *supra*. Prévost, however, believes that a rejoinder would be that private SPS-related standards *are not* SPS measures for the purposes of the SPS Agreement. Prévost, (2008) 33 *SAYIL*, *supra*, 27.

<sup>456</sup> It has variously presented in formats which range between loosely structured information-sharing arrangements and formalised collaborative structures. The relevant actions, within the SPS Committee’s six agreed actions, lie somewhere between the two. It might be worth noting that there is an inordinate representation, within the agreed actions, of actions relating to collaboration with international standardising bodies. The second, fourth, fifth, and sixth actions all contain elements of collaboration with international standardising bodies, with the former two

could, in the process, also provide a platform for injecting transparency into private-standard-making and -application.

This route should, however, be approached with circumspection. To begin with, one of the issues which is distinctive of private actors in standardisation is their objective of distinguishing their products from those of competitors. Harmonisation and rationalisation is incongruous with this observed behaviour.<sup>457</sup> It is, therefore, a little doubtful that collaboration (at least) for the purpose of harmonisation and rationalisation will work as smoothly as desired. More fatally, collaboration could potentially smuggle or subsume private standards trends into international standards and, by implication, into official standards.<sup>458</sup>

### Competition Policy

In a paper on disciplining private anti-competitive behaviour in international markets, Hudec argues for the formulation, within the WTO system, of a defined perspective (and, ultimately, rules) on anti-competitive behaviour.<sup>459</sup> While conceding that competition law is best defined under national competition laws - the purview of national competition authorities - the author argues that national regimes have proven to be blunt instruments in dealing with anti-competitive behaviour in the international trading environment.<sup>460</sup> The experience of the abortive attempt by the EU (at the 1996 Singapore Ministerial Conference) to introduce the matter of competition policy into WTO discussions<sup>461</sup>, and the nature of the discussion itself, might foretell a

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relating to direct collaboration. See WTO Committee on Sanitary and Phytosanitary Measures: (6 April 2011), G/SPS/55, *supra*, pp 2, 3; (20 June 2011), G/SPS/W/261, *supra*, 1.

<sup>457</sup> The objectives underlying private standards and the needs of supermarkets and NGOs (in standards-setting) are fundamentally different from those which inform harmonisation and rationalisation within the governmental standards space. See: WTO Committee on Sanitary and Phytosanitary Measures (26 June 2008) *Report of the STDF Information Session on Private Standards*, Note by the Secretariat, G/SPS/50, 2 (par 7); Henson, *supra*, 13 - 14; Prévost, (2008) 33 *SAYIL*, *supra*, n 85.

<sup>458</sup> For some remarks on the delicate balance between simple collaboration and inadvertent importation, see Mbengue M M, "Private Standards and WTO Law", (2011) 5:1 *BioRes Trade and Environment Review*, ICTSD, 10 - 11. In the case of technical standards, especially, the line towards private standards becoming international (and, thus official) standards, becomes easier to cross with an increase in the prevalence of those standards and increased acknowledgement of them in official spheres. See p 59 - 60 and n 270, above.

<sup>459</sup> Hudec, *supra*.

<sup>460</sup> At 80 - 84.

<sup>461</sup> Competition policy is one of the so-called "new-generation" or "Singapore issues" that were rejected by developing-country Members when the EU sought to introduce them for negotiation at the 1996 Singapore Ministerial Conference. See n 432, above.

developed- / developing-country Member divide on this matter.<sup>462</sup> But whether the competition policy is successfully formulated, or not, the anti-competitive angle certainly does need to be explored in WTO discussions on private standards.

### 6.1.2 Actions located outside of the WTO

This paper has decidedly taken the position that the issue of private standards is not primarily a supply-side one, and has made a case for a state of affairs that is considerably more profound. Nevertheless, private standards are ultimately market-based, and market interventions (supply- and demand-side) have an indispensable role to play. Arresting the market elimination which is currently taking place could be aided by supply-side assistance, particularly technical and financial assistance. The demand-side perspective is aroused by the fact that the issue of private standards is underlain by a consumer demand element. This creates space for a range of actions by producers and their advocates which could be aimed at stimulating demand for the exports of small-scale producers from developing countries.<sup>463</sup>

In so far as market interventions make a contribution towards the attainment of the rules-based system's objective of successfully integrating developing countries into global markets, it has an

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<sup>462</sup> As noted by Hoekman, so-called new generation issues, which include rules on competition, are regarded with "great suspicion" by developing-country Members. Hoekman, (2002) *1:1 WTR, supra*, 24. Paradoxically, in the present circumstances it might suit developing-country Members to push for such rules.

<sup>463</sup> In a concerted counter-campaign, small-scale fresh-fruit and vegetable farmers (and exporters) from Kenya, earned noteworthy success in countering a food miles labelling campaign by United Kingdom supermarkets. The farmers adopted a multipronged, multi-stakeholder approach to engaging on their cause – which ended in the withdrawal, by supermarkets, of "air-freighted" labels. During that period, details regarding the questionable science behind food miles also came to the fore. In the present case, when directed at consumers, demand-side interventions can work both to taper information asymmetry in the market, and stimulate demand for products which have developmental benefits. On the food miles issues, and the role of demand-side interventions, see MacGregor J, Vorley B, (eds.), "Fair Miles? Weighing Environmental and Social Impacts of Fresh Produce Exports from Sub-Saharan Africa to the UK (Summary)", (2006) *Fresh Insights* 9, available at [http://www.agrifoodstandards.net/en/global/fresh\\_insights.html](http://www.agrifoodstandards.net/en/global/fresh_insights.html) (last accessed on 31 August, 2011); Ellis K, Keane J, "A Review of Ethical Standards and Labels: Is There a Gap in the Market for a New 'Good for Development' Label?", *ODI Working Paper* 297 (November 2008), ODI; Ellis K, Keane J, "How do Ethical and Fair Trade Schemes affect Poor Producers? Do we need a New 'Good for Development' Label? *ODI Opinion* 115 (November 2008), ODI. See also: 'Food Miles Don't go the Distance', *BBC News*, 16 March 2006, available at <http://news.bbc.co.uk/2/hi/science/nature/4807026.stm> ; 'How the Myth of Food Miles Hurts The Planet', *The Guardian*, 23 March 2008, available at <http://www.guardian.co.uk/environment/2008/mar/23/food.ethicalliving> ; 'Tesco Reveals Plans to Cut 'Food Miles'', *Evening Standard*, 15 September 2006, available online at <http://www.thisismoney.co.uk/money/markets/article-1602412/Tesco-reveals-plan-to-cut-food-miles.html> (all last accessed on 31 August, 2011).

important role to play in bolstering the rule of law. There is also an apparent correlation between Members who are successfully integrated into world markets (and have comparatively more economic and political power), and the ability to more effectively use the rules of the WTO. There is, in that regard, a level of mutual reinforcement between the rules of the WTO, markets (and market integration), and power (economic and political). It cannot be overstressed, however, that technical assistance interventions which are modelled on prototypes which are rigid, which decimate the small-scale model of farming, or which take place in perpetuity do not contribute to the rule of law.<sup>464</sup>

Technical assistance, therefore, needs to take place where there is a common understanding of the nature of the negative effects of private standards and what characterises their benefits. Consultation and engagement among stakeholders is crucial.<sup>465</sup> Within this, a proactive stance by developing countries and affected developing country producers (and their advocates) is imperative.<sup>466</sup>

### 6.1.3 Systemic Actions

Recalling the discussion in part 5, many of the constraints to the success of the rules-based options are systemic. It is in their nature that any actions taken to resolve them would not generate immediate results. However, general capacity constraints, the underuse of dispute settlement, and the PPM issue, reflect standing themes which recur in discourse relating to developing countries in the WTO. Their persistence and intractability inspire the question whether the rules, as currently constituted, are sufficiently adaptive to (or have kept up with) evolution in international food trade. Making them more adaptive could entail efforts which

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<sup>464</sup> See discussion at 58 - 60, above.

<sup>465</sup> In a communication to the SPS Committee, UNCTAD identifies this need for stakeholder consultation, making the following recommendation: “[t]here is a need for more dialogue between representatives of private-sector standard-setting organisations, governments and producers/exporters in developing countries”. WTO Committee on Sanitary and Phytosanitary Measures (26 February 2007), G/SPS/GEN/761, *supra*, 11.

<sup>466</sup> With small-scale producers, themselves, observing that consultations have been opaque a proactive stance, on their part, is imperative. See n 268, above. The Integrated Crop Management Assessment System in South Africa is one such (“noteworthy”) example of a proactive producer-side response to private standards. See WTO Committee on Sanitary and Phytosanitary Measures (15 June 2009), G/SPS/GEN/932, *supra*, 5.

range from making better use of existing rules to those which could entail some changes to the rules.

The DSU contains (underused) mechanisms which do not require full-blown dispute settlement. A number of them, which are more suited to the circumstances of low income Members, and diminish the political impropriety associated with a fully litigious approach, could be deployed to circumvent the challenges associated with dispute settlement.<sup>467</sup> Technical assistance provisions, which have been long-charged with being under-operational, could also be made better use of. But fully operationalising technical assistance provisions might ultimately require a more structural process, similar to the one being undertaken, under the Doha Round Mandate, in respect of provisions relating to special and differential treatment.<sup>468</sup>

At the level of constraints pertaining to the PPM issue, and structural issues relating to dispute settlement, consideration might also need to be given to possible changes to the rules. The current review of the DSM can already be seen as a component of an endeavour to make the rules more adaptive. With regard to the PPM matter, there has been no paucity of calls for a reconsideration of the apparent exclusion of non product-related PPMs from the ambit of the TBT Agreement. In some of them, it is argued that that the fears of those who are wary of the imposition of domestic preferences would actually best be allayed by the inclusion of non product-related PPMs under the remit of the TBT Agreement.<sup>469 470</sup> Despite probable resistance from some developing-country Members, the imperative for more pragmatic and responsive rules might, indeed, warrant an awakening of the PPM debate from dormancy.

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<sup>467</sup> Consultations between parties, and good offices, conciliation and mediation, are, respectively permitted by articles 4 and 5 of the Dispute Settlement Understanding.

<sup>468</sup> Under paragraph 44 of the *Doha Ministerial Declaration, supra*. That review process was precipitated by the fact that special and differential treatment of developing-country Members, while entrenched in positive provisions, and in a number of the covered agreements, was an ineffectual concept because the provisions governing it were ineffective, or under- or non-operational. See Prévost D, “‘Operationalising’ Special and Differential Treatment of Developing Countries under the SPS Agreement”, (2005) 30 *SAYIL*, 82 - 111.

<sup>469</sup> In a paper critiquing, among other matters, the exclusion of non product-related PPMs from the scope of the agreement, McDonald argues that the TBT Agreement has failed to make the correct balance between market access rights and the rights of Members to take measures relating to product standards. The author contends that the current approach towards PPMs *promotes* the protectionist abuse of non product-related PPMs. McDonald, *supra*, 249 - 274. See, also, Gandhi, (2005) 39(5) *JWT, supra*, pp 858, 877 - 880,

<sup>470</sup> There could be some merit to considering the veracity of this argument. Protectionist abuse through the use of non product-related PPMs currently escapes scrutiny under the specialised rules of the TBT Agreement. It is instead, left only to the generic ones of the GATT.



## 6.2 WHERE DO THESE INTERVENTIONS LEAVE THE RULE OF LAW PROPOSITION?

The multilateral trading system does not begin and end with the WTO or its rules. If anything has been salient in this paper, it is that the converse is true. The issue of private standards is especially multifaceted. These recommendations take aim at the multiple layers that make up private standards. But as part of an overall strategy, the actions recommended in this part should not represent a compendium of parallel actions which might individually contribute to solving the challenges posed by private standards. As was noted at the beginning of the part, the objective should be that the various actions and interventions operate in a mutually reinforcing manner. It is for this reason that the work which the WTO Committees are undertaking is positioned to be the single most comprehensive of the responses to private standards. The committees have the best vantage point to, within the course of their work and deliberations, harness synergies between the rules-based approach, and the various other actions.

This work should be underlain by the perpetually implied rule of law mandate which informs the Committees' work.<sup>471</sup> In a statement to the SPS Committee, the Mercosur bloc emphasises that the work being undertaken in the Committee is "essential to protect the balance of rights and obligations which Members have laid down in the SPS Agreement".<sup>472</sup> To this, the bloc adds that the Committee's aim should be to create operational mechanisms to enable Members to find solutions to "the practical problems of access" and for the avoidance of "the creation or maintenance of unjustified trade restrictions that weaken the commitments made at the multilateral level".<sup>473</sup> Such statements affirm that, from the perspective of the WTO, all interventions - even the practical ones - should be meaningful primarily in terms of their rule of law contribution.

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<sup>471</sup> As parties to a treaty, Members are also under a collective duty to ensure that their treaty obligations are upheld and that the rights of parties to the treaty are not weakened. See comments by Mercosur regarding the principle of *pacta sunt servanda*. WTO Committee on Sanitary and Phytosanitary Measures (30 September 2009), G/SPS/W/246, *supra*, 2.

<sup>472</sup> To the statement, the bloc adds: "observing the principles of international law". WTO Committee on Sanitary and Phytosanitary Measures (23 December 2009) *Private Standards*, Statement by Mercosur (Argentina, Brazil, Paraguay and Uruguay), G/SPS/W/249, 1.

<sup>473</sup> WTO Committee on Sanitary and Phytosanitary Measures (23 December 2009), G/SPS/W/249, *supra*, 2.

Within all these processes, the rules-based approach should not be sidelined. The primary rules-based options are still a critical component of engagement on a strategy towards private standards. There is obviously still room for further work – both in the Committees and in general academic discourse. But the exigency of a common understanding on the rules-based options in so far as it plays a role in averting a litigious approach should not be underestimated. It cannot be denied that dispute settlement involving private standards is fated to be, at present, legally and politically complex. A prematurely litigious approach could turn out to be damaging in the long-term. It might also result in a missed opportunity to explore strategies for creating some mutually reinforcing interaction between the two regimes (rules-based and market-based), and for diminishing the disconnect between them. With all trends, and many projections, pointing to an increase in the dominance of private standards, a considered and holistic approach is essential.

## PART 7: CONCLUSION

*“Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalisation efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations”*

- Paragraph 4, Preamble to the Marrakesh Agreement Establishing the World Trade Organisation

In view of what has transpired in international food markets, since the genesis of private standards, it is crucial that decisive action is taken to ensure that the rules of the WTO are not devaluated to the point where they are conscripted to superfluity. The system, which has already taken political strain on the level of the negotiating table, can little afford that. At the same time, care should be taken to ensure that private parties are not unduly encumbered by rules whose addresses are actually governments. It is a balancing act. What is clear, however, is that if the rules continue to be weakened, the rule of law will eventually capitulate to some of the vagaries of the market and associated power dynamics.

When small island-nation Members, Saint Vincent and the Grenadines, and Africa Group Member, Egypt, formally suggested that the rules applicable to governmental (Member) measures be made applicable to private standards, their immediate concern related to their loss of market access. The gravity of the market access implications of private standards is now undisputed. The appeals of the petitioners for the rules of the WTO to come into play were, however, also indicative of their faith in the centrality of the rules to the WTO system. They also revealed a foreboding regarding the systemic ramifications of private standards. In the few years since the issue of private standards gained prominence in the WTO, these implicit presentiments have materialised. It is these systemic ramifications *vis-à-vis* the centrality of the rules that drove the main thesis in this paper. The objective of the paper was to approach the matter of private standards comprehensively. This entailed understanding them beyond their practical

effects, and also occasioned the consideration of a response strategy which went beyond the parameters of the rules-based options.

Private standards might not yet be cataclysmic for the WTO system. But they are definitely insidious in that direction. The negotiators of the WTO decided on a rules standard for governing their conduct and interrelations in international (food) trade. And for the past two decades, successive efforts have been aimed at strengthening that system of rules and making it work more effectively. Private standards - if their rules and market access effects continue unabated - can only lead to these rules becoming progressively irrelevant. The WTO system can little afford for its rules to become marginalised. They are the very foundation of the system. With over 150 countries subscribing to that system of rules, upholding their sanctity is an imperative.

But while the immediate motivation for this paper was the systemic threat posed by private standards, private standards are, in the final analysis, simply one reflection of changing dynamics in international trade. International trade operates in a dynamic and evolving environment - international food trade, even more so. Food risks, food sourcing trends, market trends, and consumer trends and habits, are constantly evolving. Even on the back of, and in parallel to, private standards several new issues have arisen. Many of them also involving private parties, and also expected to have disproportionate trade effects on developing-country exports.<sup>474</sup> Ultimately, the matter comes down to the durability of the rules-based system in an evolving multilateral environment. If it is to live up to the Marrakesh Agreement's preambular resolution to develop a "durable" and "integrated" multilateral trading system<sup>475</sup>, the WTO system should be one that is responsive to these changed (and changing) circumstances.

Durability necessarily entails the capacity of the WTO system to respond to changed circumstances and changing multilateral priorities, while still managing to hold firm its standing objectives. This means that, on the one level, its standing objectives, as reflected primarily in the

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<sup>474</sup> In part, due to difficult multilateral climate change negotiations, there are indications of an upsurge in unilateral climate-related measures - including climate-related food labelling. See n 36, above. There is also evidence that even though the food miles matter has apparently taken a sideline, procurement decisions and procurement planning will continue to be underlain by food miles considerations. See Legge et al., *supra*, 43.

<sup>475</sup> Paragraph 4, Preamble to the Marrakesh Agreement, *supra*.

preamble to the Marrakesh Agreement (and contained in the preambles to the individual covered agreements), should remain firm and attainable. On the other level, the operational part - the rules - should be responsive to novel situations and to novel challenges. Allied to this durability, the preamble makes reference to the necessity of an integrated system of multilateral trade. This connotes a cohesive arrangement in which markets are not fragmented.

Fragmented markets and wide-scale market eliminations should not even be conceived of, given the existence of the WTO system. If the WTO is to mean anything to its Members – particularly the most vulnerable ones – there must be sustained and concerted efforts, aimed at safeguarding the integrity of the system of rules. Most Members of the WTO are developing countries. If decisive action is not taken to deal with private standards, and to curb the related marginalisation of the rules, this could lead the system back to a default where “might makes right”, rather than “right makes might”.<sup>476</sup> It is true that the rules are not a substitute for the dynamics of markets, but it would truly be something of a paradox if WTO Members (and the poorest of them at that), in spite of the existence of the rules-based system, are pushed further into the peripheries of the global trading system. It would call into question the future relevance of the rules and the continued utility, of WTO membership, for low-income Members. That would be an onerous price to pay for not taking appropriate action, and over twenty years of multilateral efforts would indeed have been a waste. Fortunately, private standards have a firm place on the agenda of the WTO Committees.

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<sup>476</sup> See Bacchus, “The WTO and the International Rule of Law”, *supra*, 10.

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