

**THE APPLICABILITY OF THE SPS AGREEMENT TO
PRIVATE STANDARDS**

By

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I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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CHAPTER 1

INTRODUCTION

1.1 Background to the research

Global production and trade in goods and services are increasing dramatically and agricultural and food (agri-food) products are no exception.¹ It logically follows that developing countries, where historically relatively little production took place, must participate in this growth for it to be sustainable. Indeed, despite having to contend with often weak environmental, health and safety regulatory frameworks, developing countries are becoming major producers of agri-food products.² The changing dynamics of world trade and the rise in production capacity of developing countries is posing a serious challenge to international trade regulation and the safe handling of food.³

It could be argued that the creation of the World Trade Organisation (“WTO”), to a large extent, facilitated this rise in global trade and, therefore, instigated change. The WTO is the first international entity that regulates trade between nations, aiming to open national markets and ensuring that trade flows as smoothly, predictably and freely as possible. The proposition of free trade is that when tariffs and quotas are eliminated and non-tariff trade barriers prohibited, global markets should form easier and more rapidly and, consequently, the WTO system of trade rules will usher in a new world of global prosperity. Therefore, the WTO trade law, at least theoretically, should facilitate the ability of the private agricultural food sector to consolidate and expand internationally.⁴

Due to this prosperity a more sophisticated consumer is emerging, demanding assurance that the food on offer is safe and of a high quality. Traditionally it is the sovereign responsibility of governments to guarantee that the food on offer is safe when delivered to

¹ J Wouters et al ‘*Private Standards, Global Governance and Transatlantic Cooperation: The Case of Global Food Safety Governance*’ (2008) Leuven Centre for Global Governance Studies, Leuven University Unpublished p.3. In 2000 some \$558 billion worth of agricultural products crossed national borders.

² *Ibid.*

³ *Ibid.*

⁴ L Busch & C Bain ‘*New! Improved? The Transformation of the Global Agrifood System*’ Department of Sociology and Institute for Food and Agricultural Standards Michigan State University 69(3) (2004) 321 – 346.

consumers. They prescribe compulsory minimum food safety standards as an instrument for guaranteeing that the food offered to its citizens is safe for consumption. WTO Members must perform this task in accordance with the multilateral trade rules negotiated in the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”). This Agreement aims to protect Member’s rights to adopt measures to protect human, animal and plant life or health, while at the same time subjecting these rights to the requirement that the SPS measures adopted by the Member concerned do not inflict arbitrary or unjustifiable discrimination between Members where the same conditions prevail or be a disguised restriction on international trade.⁵

However, high profile food scares in a number of countries have served to fuel consumer concerns and erode confidence in the standards set and applied by governments. This, together with other factors, gave rise to the emergence of private standards. Private standards are non-State initiatives to regulate trade across the supply chain. International trade in goods is increasingly being subjected to strict and comprehensive privately developed standards and its associated certification schemes. Agri-food systems are, therefore, currently and more frequently governed by a combination of public and private regulation.

The situation was brought to the attention of WTO Members in the meeting of the Committee on Sanitary and Phytosanitary Measures (“SPS Committee”) of June 2005, when St. Vincent and the Grenadines raised the issue of private standards as a specific trade concern.⁶ They pointed out the negative impact EuroGAP (now known as “GlobalGAP”) certifications with regards to pesticides had on its banana exports as it had been made a condition for continued trade between St. Vincent and the Grenadines and the United Kingdom supermarkets.

In St. Vincent and the Grenadines' view, SPS measures were to be introduced by governments and not by private entities or non-governmental organisations. Some of the

⁵ Art 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”).

⁶ Committee on SPS ‘Private Standards and the SPS Agreement’ *Note by the Secretariat (G/SPS/GEN/476)* 24 January 2007, p1. A special committee (the “SPS Committee”) has been established within the WTO as a forum for the exchange of information among Member governments on all aspects related to the implementation of the SPS Agreement. The SPS Committee reviews compliance with the Agreement, discusses matters with potential trade impacts, and maintains close co-operation with the appropriate technical organisations (such as the three international standard setting bodies). When Members have a problem with how another Member is implementing a measure they can bring this up for discussion in the SPS Committee under the agenda item, specific trade concerns, at one of its meetings at the WTO headquarters in Geneva.

measures dealt with in the EuroGAP certification programme were, according to St. Vincent and the Grenadines, clearly within the scope of the SPS Agreement. St Vincent and the Grenadines (and also Jamaica, Peru and Argentina) argued that Article 13 of the SPS Agreement obliged Members to ensure that non-governmental bodies within their territory acted in a manner consistent with the SPS Agreement. It was submitted that Members should be obliged to take measures which reduce the exclusionary and other trade-restrictive effects of private standards. Such submission notably argues that:⁷

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

In response, the EC stated that EuroGAP is a private sector consortium representing the interests of major retailers and its private standards activities are not subject to government controls. This controversy within the SPS Committee marked the beginning of the debate among WTO Members, and also among academics, as to the legitimacy of private standards in international trade and its (in)consistency with the SPS Agreement. The topic of private standards has thus been on the agenda of the SPS Committee as a general issue ever since.⁸

The discussions in the SPS Committee regarding private standards include concerns Members have of their effects on trade and, in particular, on market access.⁹ There are also discussions in the SPS Committee as to whether or not private standards fall within the scope of the SPS Agreement. While some Members are of the view that setting standards for the products they purchase is a legitimate private sector activity with which governments should not interfere, others are of the view that the SPS Agreement makes governments in importing

⁷ Committee on SPS Measures, 'Private Industry Standards' *Communication from Saint Vincent and the Grenadines* (G/SPS/GEN/766) 28 February 2007, p 1.

⁸ Committee on SPS Measures 'Private Standards and the SPS Agreement' *Note by the Secretariat* (G/SPS/GEN/476) 24 January 2007, p 1.

⁹ *Ibid.*

countries responsible for the standards set by their private sectors. The latter maintains that private standards do not meet WTO requirements and are more trade-restrictive than necessary to protect health. This view is reflected in a statement by the Argentine representative to the SPS Committee:¹⁰

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

1.2 Research Problem

There is an on-going debate as to whether or not private standards are subject to the disciplines enshrined in the SPS Agreement. As outlined above, while some Members are of the view that setting standards for the products they purchase is a legitimate private sector activity with which governments should not interfere, others opine that the SPS Agreement makes governments in importing countries responsible for the standards set by their private sectors. The relevant problem with which WTO Members are confronted is the lack of explicit language in the SPS Agreement to address private standards. Although Article 13 of the SPS Agreement makes provision for Members' responsibility for acts of 'non-governmental entities' legal scholarship has questioned whether the scope of this term should extend to private firms that base their business decisions on private food safety standards.

¹⁰ Committee on SPS Measures, 'Summary of the Meeting Held on 20-30 June 2005' (G/SPS/R/37).

1.3 Research Questions

The following questions are addressed in this analysis:

What do WTO Members, the SPS Committee and legal academia mean by private standards, and why have they developed? As importantly, what are the trade-related effects that private standards bring about?

Is there scope under the SPS Agreement for application of WTO rules to the development, adoption and implementation of private standards? If so, what are WTO Members called upon to do (or not to do) in respect of the use of private standards by non-governmental bodies as the basis for their business decisions? Also, are WTO Members fully responsible for the acts of the private firms within their jurisdiction just as they are responsible for the acts of their central governments?

What are the actions that WTO Members are considering in order to mitigate possible negative trade effects of private standards?

1.4 Thesis Statement

To what extent, if at all, the SPS Agreement, in the context of other WTO Agreements (such as the Agreement on Technical Barriers to Trade (“TBT Agreement”)) apply to private standards and the activities of non-governmental standard-setting and standard-applying organisations. In other words, does the SPS Agreement make provision for the development and application of private standards to be subjected, to any extent or by any means, to the multilateral framework of rules and disciplines, established by the SPS Agreement, to guide the development, adoption and enforcement of SPS measures in order to minimize their negative effects on trade?

1.5 Significance of the Study

As food safety-related private standards are a relatively new and complex phenomenon, and WTO Members are struggling to find ways to deal with it under the current WTO legal framework, this study will add to the debate a possible alternative that seeks to interpret the relevant provisions of the SPS Agreement in such a way as to leave scope for application to

private food safety standards. Accordingly, the legal analysis will attempt to offer a novel approach to the interpretation, most notably, of Article 13 of the SPS Agreement.

1.6 Literature Review

The body of work relating to what private standards are, its drivers and the WTO Members concerns with regards to its effect on trade are extensive and for the most part relatively uniform. Some of the works have a legal approach but many have been done from an economical trade base. There has been almost no detailed legal analysis on whether private standards are subject to the SPS Agreement. Thus in order to undertake this study the most relevant sources are the SPS Agreement itself, together with relevant jurisprudence of the WTO dispute settlement organs (namely, WTO panels and the Appellate Body). Where appropriate, the negotiating history or *travaux préparatoires* of the relevant WTO Agreements are also employed.

There are two points on which the literature was at variance: the effects of private standards on international trade, and whether a legal analysis of the SPS Agreement supports the finding that private standards are regulated by that Agreement. On the former, as no comprehensive empirical study has been conducted, the differing views are, to a very large extent, speculation. The two most complete works on the aspect of private standards is a paper prepared by Spencer and Humphrey for FAO/WHO and a paper by Washington and Ababouch prepared for FAO. Both of these papers give a detailed analysis of the working of private standards. While the former focuses more on their interaction with the Codex and the latter on the fish trade.¹¹ Both studies highlight the confusion the proliferation of private standards is causing for stakeholders but that it has become a valuable tool in trade.

One of the few legal analyses was done by Brussels-based law firm O' Connor and Company which was subsequently incorporated in a submission by the United Kingdom to the WTO.¹² It made a textual analysis of the SPS, TBT and other WTO agreements and

¹¹ S Washington & L Ababouch 'Private standards and certification in fisheries and aquaculture Current practice and emerging issues' (2011) FAO Fisheries and Aquaculture Department Rome, Italy & S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009.

¹² Committee on SPS Measures 'Private Voluntary Standards within the WTO Multilateral Framework' Submission by the United Kingdom (G/SPS/GEN/802) 9 October 2007.

concluded that the application of the provisions of the SPS Agreement to non-governmental standard setting and standards applying entities in the light of article 13 of the SPS Agreement depends very much on the definition of ‘non-governmental entity’. It fails however to set out to offer such a definition, which the current study endeavours to provide. Without a good underpinning analysis, it concludes further that even if non-governmental entities are not directly addressed by the provisions of the SPS Agreement, WTO Members have a responsibility to ensure that the activities of non-governmental entities comply with the Agreement.

The only other comprehensive legal analysis found on this topic was done by Tracey Epps.¹³ She concludes that the SPS Agreement does not cover private standards as they are not SPS measures within the meaning of Annex A(1) to the SPS Agreement. Accordingly, concludes Epps, the actions of private entities developing and applying private standards are excluded from the scope of the Agreement.

1.7 Methodology

The approach in this research will be descriptive, analytical and prescriptive. The descriptive and analytical approach will be used when defining ‘private food safety standards’ and describing the international trade rules within which they operate. Furthermore, when determining the applicability of the SPS Agreement to private standards, a detailed analytical study will be performed on Article 13 of that Agreement. Finally the prescriptive method will be used to present the interpretation of Article 13 and the practical actions of the SPS Committee, and the *ad hoc* working group along with its Members. A desktop study will be made by gathering and analysing the available literature in the library and documents available on the Internet.

¹³ T Epps ‘Demanding perfection: private food standards and the SPS Agreement’ in MK Lewis & S Frankel (eds) *International Economic Law and National Autonomy* (2010) 73.

1.8 Limitations to the study

Only private standards related to food safety are discussed in the context of the SPS Agreement, although the TBT Agreement may also be relevant. A limitation on this research is the very little literature on a legal analysis of Article 13 of the SPS Agreement. This provision has never directly been addressed by panels or the Appellate Body. However, in ascertaining the meaning of the prescriptions in Article 13, resort will be had to the general means of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties.

1.9 Outline of Chapters

Chapter one provides a background of the study, the research problem, research questions, thesis statement, significance of the study is discussed, a review of the literature, the methodology use and the limitations of the study.

Chapter two attempts to define ‘private standards’ by examining its attributes, functions and objectives and points out the different elements that make private standards functional. It further discusses the drivers behind the evolution of private standards. Finally, it lays out observable effects of private standards on international trade and the reactions that such effects has aroused in the international community.

Chapter three delves back into the origins of the SPS Agreement and its negotiating history with a view to understanding the reason for being of the Agreement. Next, there is a brief explanation of the provisions of SPS Agreement before plunging into the legal question whether, and if so how, private standards are regulated under the SPS Agreement. In so doing, a legal analytical study of Article 13 of the SPS Agreement is made, analysing each of the sentences of this provision in turn.

Chapter four contains a discussion on current negotiations within the WTO to mitigate the adverse trade effects brought about by private food safety standards. To this effect, this analysis touches upon the activities of the SPS Committee in relation to private standards, as well as those of the *ad hoc* working group. In particular, the twelve concrete actions in the framework of these discussions are detailed.

Chapter five contains a summary of the findings of the study, as well as the conclusions drawn therefrom. Finally, it will set out the study's recommendations.

CHAPTER 2

PRIVATE FOOD SAFETY STANDARDS

2.1 Introduction

Food safety is traditionally seen as a sovereign responsibility of governments, which must ensure that their citizens trust that the food on sale is safe to consume and that they are not being misled by deceptive and fraudulent practices.¹⁴ Towards this end, governments develop public regulations, usually in the form of compulsory minimum food safety requirements or standards, referred to as ‘public standards’, as a prerequisite for products to enter their markets. Since public standards are subjected to scrutiny by the WTO, the course of progression of these standards is therefore influenced by the provisions of the WTO Agreements with which WTO Members have to comply and, in the case of food safety, the SPS Agreement.

Over the last two decades, however, the emergence of so-called private standards has changed the face of food safety regulation. Non-governmental entities have taken the initiative to set private standards in such a way that, according to estimates by the United Nations Conference for Trade and Development, the number of private schemes regulating food safety amount to around four hundred and rising.¹⁵ Private standards are often called private voluntary standards as they are not measures imposed by governments with which an exporter has to comply in order to have its product cross the border of a country. Instead it is conditions of purchase (on agricultural goods) which the exporter has to comply with in order to sell its product to a specific private buyer (such as very large supermarket chains in importing countries).¹⁶ The end-result is that, in actuality, agri-food systems are governed by an array of interrelated public and private standards.

Irrespective of whether a standard is of a public or private nature, the role of all standards is to facilitate the coordination of agri-food value chains across space and between producers

¹⁴ G Smith ‘*Interaction of Public and Private Standards in the Food Chain*’ (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, p. 7.

¹⁵ Committee on SPS Measures ‘Private Standards and the SPS Agreement’ *Note by the Secretariat* (G/SPS/GEN/476) 24 January 2007, p1. This estimation was five years ago and could well be above that now.

¹⁶ J Wouters et al ‘*Food Safety, Private Standards and International Trade Law*’ Leuven Centre for Global Governance Studies, Leuven University Unpublished, p 5, available at: http://www.transatlantic.be/publications/wouters-marx-hachez_final.pdf.

and/or firms.¹⁷ In so doing, standards transmit credible information on the nature of products and the conditions under which they are produced, processed and transported.¹⁸ With the emergence of private standards, private organisations and non-governmental organisations (NGOs), as opposed to governments, are increasingly determining the content of the information that is being transmitted. Non-governmental entities set standards which prescribe the characteristics of agricultural food products and the conditions under which it must be produced, processed and transported.¹⁹ These conditions vary and may deal with production methods as well as actual product attributes, and covers not only food safety (traditionally the function of government authorities in importing countries) but also food quality, animal feedstuffs, animal welfare, environmental protection, labour practices, occupational health and safety, social issues and traceability.²⁰ In relation to food safety, where regulatory authorities in the importing countries could be expected to insist that official requirements are fully adequate to protect consumers' health, standards imposed by buyers may, in practice, be yet more stringent.²¹

¹⁷ The ISO/IEC GUIDE 2:2004(E/F/R) p 12, 14 define standards as '... a document, established by consensus and approved by a recogni(s)ed body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context', and 'Standards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits'. It goes further to define *other* standards in a note: 'Standards may also be adopted on other bases, e.g. branch standards and company standards. Such standards may have a geographical impact covering several countries'.

¹⁸ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p 11. In J Wouters et al 'Food Safety, Private Standards and International Trade Law' Leuven Centre for Global Governance Studies, Leuven University Unpublished, p5, Wouters, explain that standards, specifically private standards, guide producers on how to produce their goods, and provide information and assurance to consumers and business partners on what they purchase.

¹⁹ J Wouters et al 'Food Safety, Private Standards and International Trade Law' Leuven Centre for Global Governance Studies, Leuven University Unpublished, p5. The development of standards is done by non-state actors in a standards-setting body while the conformity assessment and enforcement is done by either an independent accredited third-party or by the actors themselves.

²⁰ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p4. One of the defining characteristics of these private standards, particularly as they relate to food safety, is an increasing focus on the processes by which food is produced. The same trend exist with public regulation where there are an increasing importance of process standards, as exemplified in the use of Hazard analysis and critical control points (HACCP) in regulations relating to matters such as food hygiene. The standard involves not only a specification of what outcomes are to be achieved, but also sets of rules to show how this should be achieved, and a governance structure of certification and enforcement (as well as systems to generate and approve changes to each of these elements as the standards evolve over time). It for this reason that some bodies involved in private standards, such as GFSI, refer to 'schemes' rather than standards.

²¹ Committee on SPS Measures 'Private Voluntary Standards within the WTO Multilateral Framework' *Submission by the United Kingdom* (G/SPS/GEN/802) 9 October 2007, p 14.

If public standards set a suitable level of minimum food safety the question arises why would private institutions spend resources on developing and applying private standards in addition to compliance with public standards? Where private standards become the industry norm what effect may it have on trade? This chapter attempt to answer these questions and although it is not the object of this analysis to summarise the extensive literature and studies made on the subject of private standards, it is nevertheless necessary that the analysis of the legal relationship between the SPS Agreement and private standard be done with an appreciation of the basic nature of private standards, its particular characteristics, its effects and its scale, as background. The chapter will start with an attempt to define private food safety standards by investigating its attributes, functions and the different elements which makes them operational. It then goes on to discuss the drivers behind the evolution of private standards. Finally it addresses the effects of private standards on international trade and the concerns that WTO Members have with regards to the proliferation of private standards.

2.2 Defining private standards

Defining private standards is not an easy task and attempts thereto in the WTO SPS Committee are on-going.²² There are several types of private standards, being their most remarkable permutations, *inter alia* who develops them, how they are developed, their functions and objectives, the factors of agri-food systems they address, who adopts them, how they are implemented, how they are governed and their impact on the agri-food sector.²³ The array of attributes that a private standard may have seems to weaken a clear definition of the term.²⁴ They furthermore do not operate in isolation from public standards and the distinction between them can become murky. In fact, private standards are, to a great extent, a response to the evolution of public regulation and very often triggered by an expected or existing public regulation.²⁵

²² This will be discussed further in chapter 4.

²³ SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p1.

²⁴ The functions that the private standard are designed to perform will determine what kind of private standards it will be and its different attributes.

²⁵ SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p1.

The term used to identify the standards under discussion, in itself, varies and creates confusion. The most widely used terms are ‘private standards’ and ‘voluntary standards’, interchangeably but also together as ‘private voluntary standards’. Both terms imply that these standards are developed by non-governmental entities,²⁶ and that non-compliance therewith will not trigger legal sanctions.²⁷ Indeed, the literature distinguishes between mandatory and voluntary standards and between standards set by public and private entities, when defining the concept. Public or private depends on who or which entity *sets* the standard and the extent to which a private standard is voluntary in turn depends on the entity *adopting* the standard, that is, the nature of the power wielded by the entity requiring the standard be *implemented* by another entity.²⁸ This hints at the notion that a distinction between the different functions of standards that make them operational provides the basis for understanding whether a standard is of a public or private, voluntary or mandatory nature and can be used to formulate a definition. In this respect, there are five different operational functions that can be distinguished: standards-setting, adoption, implementation, conformity assessment and enforcement.²⁹

Standard setting is the formulation of written rules and procedures and can be carried out by several actors depending on the type of standard. The WTO classification of the different types of standards are based on who sets (define and codify) them.³⁰ Following this typology, standards may take the form of individual company standards, collective national standards or collective international standards. The first of the three typologies, *i.e.* individual company

²⁶ This might be commercial or non-commercial private entities.

²⁷ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p5. The confusion this might create is discussed more fully below. Now it will suffice to say that in practise this distinction is not a simple one. Governments may promulgate standards with which compliance is voluntary or they may require compliance with private standards.

²⁸ Henson, SJ & Humphrey J (2008) ‘*Understanding the Complexities of Private Standards in Global Agri-Food Chains*’ Paper presented at the workshop: Globalization, Global Governance and Private Standards, University of Leuven, November 2008, p2.

²⁹ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 7.

³⁰ Committee on SPS Measures ‘Private Standards and the SPS Agreement’ *Note by the Secretariat* (G/SPS/GEN/476) 24 January 2007, p 2 & 3. This typology is generally followed by the literature although this is one of several possible categorisations. Distinctions can also be drawn between pre- and post-farm gate standards, or between business-to-business standards or standards tied to a particular labelling or logo scheme intended for consumers. The scheme listed in this study caters for all these categories. The three forms of private agri-food standards that this study distinguishes are individual company standards, collective national standards and collective international standards. Given the complexity of standards, not all standards fall neatly into the suggested typology.

standards, are standards by individual firms, mostly large food retailers, which set and adopt them across their supply chains.³¹ Second, collective national standards are set jointly by different organisations such as industry associations and NGO's, which operate within the boundaries of a single country. The standards are open for adoption by the entities themselves or by any other entity that wishes to adopt them. Some of these standards are specifically designed to differentiate products from competing products. This is often linked to the origin of the products, establishing claims about the attributes of food sourced from a particular country or region, which are marketed as an indicator of superior quality.³² Other collective national standards, however, are of a national nature since they have been developed by national entities notwithstanding their international application through the adoption thereof by a globalised supply chain.³³ A third set of standards, collective international standards, are set by organisations with international membership and are designed to be adopted and implemented internationally.³⁴

A second function involved in making private standards operational is the decision of an entity to *adopt* standards. Several adoption scenarios exist. It could entail the entity adopting a standard to implement it itself or require its suppliers to implement the rules and procedures, *inter alia*, in their production process, or in the transportation of the goods. For example, a retailer can adopt a private standard and then oblige its suppliers to implement

³¹ S Washington & L Ababouch 'Private standards and certification in fisheries and aquaculture Current practice and emerging issues' (2011) FAO Fisheries and Aquaculture Department Rome, Italy, p 72. Individual company standards are mostly intended to communicate to consumers the superiority of the product or process attributes of the individual firm's own or private sub-brand or label products. Examples are Tesco's Nurture, Tesco Nature's Choice and Carrefour's Filières Qualité. Suppliers, from possibly around the world, will be certified to this standard. Therefore, regardless of where the individual firm operates, these standards can have international reach. Retailer product specifications are often communicated down the value chain but are increasingly communicated directly to the producer as some retailers are now buying directly from them. Many have their own audit and inspection requirements. For example, Carrefour, the world's second largest retailer, buys shrimp directly from farmers in Thailand, which involves sending their own inspectors to verify that products and farming practices meet their own standards.

³² These types of collective national standards will therefore often be associated with a label or trademark to distinguish it and to communicate to consumers whatever message it was designed for. An example is Karoo Lamb from SA.

³³ This is true of the British Retail Consortium (BRC) Global Standard for Food Safety. Although originally developed by a trade body in the UK, it is applied to suppliers in multiple countries and can be adopted by suppliers not selling into the UK market if they feel that this presents a competitive advantage.

³⁴ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p 6. For example, GlobalGAP (formerly EurepGAP) was initially created by an international coalition of European retailers. Its membership now is more diverse and much more international. These standard-setting organisations may have non-business actors. Indeed, private standards are being set by differing combinations of public, private and NGO actors. Therefore, the organisations that create collective international standards may represent the interests of commercial entities (for example food retailers, processors or producers) or NGOs, or both.

them in the production processes.³⁵ Likewise, groups of producers can formulate standards which they adopt themselves or other existing standards, in an effort to gain a competitive advantage or define company values and strategies. The reasons behind a decision to adopt are important to understanding the drivers of private standards and the power it yields.³⁶

The *implementation* of the private standards is the third function of their application. The implementer will be the company that applies the standard (the rule) in its own operations and will therefore not necessarily be the standard-setter or adopter.³⁷

The fourth function involves verifying that the implementer is also complying with the standards (rules) and providing documented evidence thereof; in short, *conformity assessment*. This may constitute self-declaration by the implementer of the standard, inspection by standards adopters (second-party certification) or inspections by an independent third-party (third party certification).³⁸

Enforcement is the last function in making a standard operational. There must be a set of procedures indicating how the standard setter will react in instances where the conformity assessment shows that there is non-compliance to the standard. This procedure may involve invoking corrective action and finally sanctions to withdraw recognition of the standard-setting organisation if corrective action is not taken.³⁹

When some functions of private standards are performed by the private entities and others by the public institutions, then the boundaries between public and private standards become blurred.⁴⁰ For instance, governments may set standards and leave the decision to adopt the standard as optional. The literature labels these standards as public voluntary standards. At the same time, standards may be set by private actors but the adopter thereof is governments, making the implementation mandatory. These standards are called legally-mandated private standards. Private voluntary standards, however, are those standards that are *set* by such

³⁵ This could be a standard developed by the company itself, or one it helped to develop, for example as part of a standards-setting coalition. But also a standard created by another body.

³⁶ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 7.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 8.

commercial or non-commercial private entities, as firms, or industry organisations, or NGOs, and are *adopted* by non-state actors. The adoption of standards by private or non-State actors means that they are not mandatory in the sense that there is no legal sanction for failing to comply therewith nor associated with a legal penalty for non-implementation. But when the private actor adopting a standard is a dominant market player these standards becomes *de facto* mandatory for a product to enter a defined market because the power that these private adopters yield is of such a magnitude that the consequences for not complying with the required private standards will have the effect of the implementer losing accreditation with a particular standard scheme, further being excluded from placing its products in certain prominent markets.

The foregoing reveals that the concept of private standards has two key attributes. First, they are voluntary in that there is no legal compulsion for compliance and second, all the major functions associated with the system of standards are undertaken by private entities, such that there is no appreciable role for the State.⁴¹

2.3 Drivers behind the evolution of private standards

Why do organisations increasingly rely on private standards instead of adopting public standards to meet their different objectives?⁴² A simplistic and short explanation can be found by way of using the example of large supermarket chains, the most demanding in terms of private standards.⁴³ The supermarket environment is very competitive and they continually have to differentiate their products and brands to secure market share to the detriment of their competitors. They are the final link in the supply chain and have the responsibility to supply products in a way that meet consumer expectations. Moreover, in recent decades a more

⁴¹ SJ Henson & J Humphrey J ‘*Understanding the Complexities of Private Standards in Global Agri-Food Chains*’ (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p3. Thus, the entity setting the standards is private, whether commercial or non-commercial. It has no power to compel adoption or implementation of the standard. Instead it’s adopted by a commercially powerful private entity that sees value therein to insist that its suppliers implement these standards. As conformity assessment are performed by a private auditor and the standard is enforced by a private certification body, the definition holds that all the functions associated with private standards are undertaken by private entities. One of the only potential roles for the public sector in this system of private standards is to establish a credible system of accreditation within which private certification bodies operate.

⁴² Despite possible higher cost implications of using private standards.

⁴³ S Washington & L Ababouch ‘*Private standards and certification in fisheries and aquaculture Current practice and emerging issues*’ (2011) FAO Fisheries and Aquaculture Department Rome, Italy, p 86.

sophisticated consumer has emerged that demands higher quality food. Empirical studies reveal that, notable in developed and high-income developing countries, consumers increasingly care for the type of food they purchase.⁴⁴ Supermarkets are under the additional pressure to show due diligence in terms of food safety assurance, and to present their corporate social responsibility (CSR) credentials.⁴⁵ Public standards, which inherently do not allow for differentiation, flexibility or value attributes such as CSR cannot perform all the functions retailers need it to perform. To this end, private standards emerge, designed specifically to perform one or both of its two main objectives, as highlighted by the literature and reflected in the example, i.e. product differentiation and risk management.⁴⁶ Private standards provide opportunities to both protect (risk management) and enhance reputation (product differentiation) in a cost-effective manner.

Private standards and its associated certification schemes do not all share the same aims and objectives, and the proliferation of private standards can usually be attributed to a combination of a number of factors. The combination will depend on the interests and competitive strategies of the organisations involved (be it a retailer, a producer or an NGO) and the functions it needs the private standards to perform.⁴⁷ At the same time, these organisations operate in an increasingly globalised and complex world and need to be responsive to changes in international market structures, supply chains and public food safety regulations.⁴⁸ A short list of the factors driving the proliferation of private standards include the high profile of a number of food safety scares and problems of confidence in some regulatory agencies; legal requirements on companies to demonstrate ‘due diligence’ in the prevention of food safety risks; growing attention to corporate social responsibility and a

⁴⁴ G Smith ‘*Interaction of Public and Private Standards in the Food Chain*’ (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, p. 17.

⁴⁵ S Washington & L Ababouch ‘*Private standards and certification in fisheries and aquaculture Current practice and emerging issues*’ (2011) FAO Fisheries and Aquaculture Department Rome, Italy, p 86.

⁴⁶ SJ Henson & J Humphrey J ‘*Understanding the Complexities of Private Standards in Global Agri-Food Chains*’ (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p15.

⁴⁷ *Ibid.*

⁴⁸ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 11.

drive by companies to minimize ‘reputational risks’;⁴⁹ globalization and vertical integration of supply chains; and the expansion of supermarkets nationally and internationally.⁵⁰

A detailed discussion of these key factors will be structured in four broad categories. First, in recent years there have been profound changes to food safety regulatory systems as a response to real or perceived risks. Secondly, consumers are becoming more concerned about what happens during the food production processes and this forms part of their changing conception of food safety and quality. Third, the globalisation of food supply chains and coordination economies creates new opportunities for competitiveness, but also create new risks and challenges for value chain coordination and control. Fourth, responsibility for ensuring food safety has been devolved from the State towards the private sector.⁵¹

2.3.1 Reforms of food safety regulatory systems

Consumers need protection against incidences of informational asymmetry, the presence of externalities that cannot be detected through an examination of a product at the time of purchasing and against fraud due to artificial product differentiation. Market forces alone will not provide such protection, so governments are required to promulgate public regulations containing minimum food safety levels.⁵² Despite these minimum standards and modern-day technological advances, there have been a considerable amount of high profile food scares in the last decade such as the bovine spongiform encephalopathy (BSE) case.⁵³ These incidences are seen as signals of system-wide problems and erode consumer confidence in public regulation. This is particularly relevant in the progressively greater globalisation of agri-food value chains, where products originate from countries where local food safety assurance systems are perceived to be weak and can be seen by consumers as having local

⁴⁹ The issue of corporate responsibility as an emerging concept of concern for the international community is addressed in Chapter 3 below.

⁵⁰ Committee on SPS Measures ‘Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee’ (G/SPS/W/256) 3 March 2011, p 256.

⁵¹ SJ Henson & J Humphrey J ‘*Understanding the Complexities of Private Standards in Global Agri-Food Chains*’ (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p5.

⁵² G Smith ‘*Interaction of Public and Private Standards in the Food Chain*’ (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, p. 5.

⁵³ S Washington & L Ababouch ‘*Private standards and certification in fisheries and aquaculture Current practice and emerging issues*’ (2011) FAO Fisheries and Aquaculture Department Rome, Italy Unpublished, p 13. That is Mad cow disease.

significance.⁵⁴ Thus, private institutions may have the greatest incentive to implement private standards where there is the perception that public food safety governance is insufficient and it can provide additional guarantees. In this instance, private standards act as a substitute for missing or inadequate public institutions to reduce real or perceived risks to health and safety.⁵⁵

Because food safety concerns consist of a combination of well-established and new sources of risks, often controversial due to difficulties quantifying the risks involved⁵⁶, public regulatory systems continuously have to adjust to these concerns by expanding their scope and rigour. Retailers and other food firms have, in turn, to comply with public regulatory systems, minimising the associated costs. Compliance with new and stricter public regulations is one of the main drivers in the growth of private standards.⁵⁷

A further reformation in both public regulations and private standards is the shift from a performance-based approach towards a management- or risk-based approach, the latter focusing on the prevention and control of food safety hazards from 'farm to fork'.⁵⁸ This development could be a more efficient and cost effective approach to ensure compliance with the new and more stringent public food safety regulations as opposed to the previous regime of merely testing and verifying the end-product. Although testing and verification are

⁵⁴ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p 9.

⁵⁵ SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p 6.

⁵⁶ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p 9. Well established anxieties such as heavy metal contamination, mycotoxins and Bovine Spongiform Encephalopathy (BSE)) and there are also 'new' hazards that have become of heightened importance on the political 'radar screen', for example avian influenza.

⁵⁷ *Ibid.* See also SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p 6.

⁵⁸ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p4. The management- or risk based approach require process standards which involve the following: It is a basis to communicate processes and practices relating to how food is produced, transported or processed. There are monitoring and enforcement, through second or (increasingly) third party certification. It is codified and sets out rules and procedures and provides clear instructions as to how rules are to be implemented, monitored and enforced. They include some form of traceability to link particular food products to a point downstream in the value chain. At his point the standard specifies and controls processes.

essential, it should be combined with documented production practices aimed at preventing and controlling food safety hazards at every step of the production process, thus ensuring the integrity of the entire supply chain.⁵⁹

An example of a public regulation reflecting the trend towards, on the one hand, production control management and the private sector's responsibilities, on the other, is the European Union ("EU") Regulation (EC) No 178/2002:⁶⁰

In order to ensure the safety of food, it is necessary to consider all aspects of the food production chain as a continuum from and including primary production and production of animal feed up to and including sale or supply of food to the consumer because each element may have a potential impact on food safety.

Another example of public regulations prescribing process controls, this time an EU summary of import conditions for seafood, reiterating that:⁶¹

The food law of the European Union implements the principle of quality management and process-oriented controls throughout the food chain – from the fishing vessel or aquaculture farm to the consumer's table. Spot checks on the end product alone would not provide the same level of safety, quality and transparency to the consumer.

2.3.2 Changing conceptions of food safety and quality

A change in demographics and social trends are partly responsible for consumers altered expectations with respect to food quality and safety. Civil society and consumer advocacy groups are insisting on a notion of food safety that is not simply limited to food fit for human consumption, instead, it encompasses a vast array of safety attributes that range from search, through experience to credence attributes.⁶² Consumer concerns also include quality aspects

⁵⁹ Most notable are metasystems such as HACCP and traceability. See S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes' (ALINORM 09/32/9D – Part II) May 2009, p 9. See also SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p 6.

⁶⁰ (CEC, 2002: preamble to paragraph. 12

⁶¹ (CEC, n.d.)

⁶² These attributes encompass the manner in which products are produced (for example organic versus conventional agricultural production methods) and the existence of substances in food that are perceived to be unsafe, including those purposefully used in food production (for example pesticides and hormones) and contaminants (for example PCBs and dioxins).

of a broader nature, related to such issues as the impact on the environment, animal welfare and welfare of workers.⁶³

Media campaigns, organised boycotts and protests against certain retailers and their procurement policies have obliged private companies to adjust their agendas to conform to the changing conception of food safety and quality. This has caused competition in the food retail sector to no longer be based predominantly on price but to shift to competition with a focus on quality. In this context, retailers differentiate themselves on their reputation with respect to the overall quality image of their brand and through their CSR policies. Since the safety and quality attributes retailers rely on to set itself apart are almost all credence in nature, they employ the reputation of a private standard to transmit information and assurances about the nature of the food and social environmental conditions of production. Examples of private standards for these purposes are organic, SA 8000, Ethical Trading Initiative and Fair Trade and Freedom Food.⁶⁴

2.3.3 *Globalisation*

The rise in global trade as referred to at the introduction of this chapter, is causing agri-food products to cross more geographical zones and covering greater distances to be sold in foreign markets. This necessitates change in the dynamic of global supply chains and agri-food markets. At the same time, globalisation influences the transformation of public regulations and conceptions of food safety and quality.⁶⁵ There are now a multitude of products available on shelves across the world, tracing where they all originate from and aligning this with appropriate risk management is perhaps too cumbersome a task to be performed by public institutions alone. Developed country legislators are therefore progressively holding business operators responsible for incidents of food safety failures, regardless of whether they originate within or outside national borders. This responsibility results in motivating private entities to develop private standards and process controls.⁶⁶ Globalisation further encourages the use of private standards as the risk for food safety failures are higher in a fragmented supply chain. The sheer distances that products travel

⁶³ SJ Henson & J Humphrey J 'Understanding the Complexities of Private Standards in Global Agri-Food Chains' (2008) Paper presented at the workshop: Globalization, Global Governance and Private Standards, Leuven University Unpublished, p 8. For example, small carbon footprint, sustainable fisheries, or to issues such as animal welfare or social responsibility.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

creates logistical challenges and make coordination and control extremely difficult. Large supermarket chains and other food businesses invest a great deal in their brand capital and even one food safety failure can be very costly. Consequently, they are extremely risk adverse and, in an effort to prevent the negative consequences of a food safety failure to its highly invested brand capital, impose standards and rules on all their producers. This implies that these conditions apply across the board to food production systems which operate in different economic and political circumstances and differ in terms of producer characteristics, regulatory frameworks, environmental conditions, technical expertise etc.⁶⁷

2.3.4 Devolution of the State

For the reasons discussed already but also in the belief that a public-private cooperation will make regulatory systems more effective and alleviate restraints on the State's fiscal capacity, governments have established a 'legal position' for private standards by progressively shifting the responsibility for food safety to the private sector. This development is illustrated by the preamble to the European Union's General Food Law legislation that states:⁶⁸

A food business operator is best placed to devise a safe system for supplying food and ensuring that the food it supplies is safe; thus, it should have primary legal responsibility for ensuring food safety.

States expect food business operators to develop their own food safety control systems and ensure effective implementation through systems of auditing while the role of government is to simply inspect and verify these audits. It gets more complicated when the level of legal liability varies amongst countries.⁶⁹ For instance, a warranty defence (i.e., if the supplier states that the food is safe, the buyer is not legally liable) against prosecution for the sale of unsafe food is acceptable in many European countries. In the United Kingdom (UK)

⁶⁷ *Ibid.*

⁶⁸ (CEC, 2002: preamble to paragraph 30).

⁶⁹ Prior to the 1990 Food Safety Act, UK food legislation allowed for the so-called 'warranty' defence. A person accused of an offence would escape conviction if they could prove that, when he bought the product, he obtained a written warranty from his supplier that the product could be lawfully sold or dealt with; that there was no reason to believe, when the offence was committed, that the true position was otherwise, and that the product was in the same state as when he bought it. The 1990 Act puts food business operators under 'strict liability' to sell safe food, but there is a statutory defence (i.e. one which is specified in the legislation) of due diligence. If all reasonable precautions are taken, the strict liability does not apply. In many European countries a positive case of negligence has to be proved. So, food business operators in countries which have not implemented strict liability are not subject to the same level of risk as in countries that have.

however, a warranty defence is no longer sufficient and the 1990 Food Safety Act puts food business operators under ‘strict liability’ to sell safe food, but provide a statutory defence of due diligence. If all reasonable precautions are taken, the strict liability does not apply. This encourages the development of private standards designed to facilitate companies in demonstrating due diligence.⁷⁰ In fact, the promulgation of the UK 1990 Food Safety Act caused multiple retailers to develop their own private standards, further progressing to a consolidation of these standards in the form of the BRC Global Standard. It is not only the legal threat but the risk to brand capital in a culture of ‘name and shame’ with respect to violations of food legislation, that serves as an important driver for private entities to rely on private standards.⁷¹

2.4 The Implications of Private Standards and Member Concerns

As will be discussed in chapter three, WTO Members have the obligation to take into account the interest of other countries when establishing trade policies and granting access to their national markets. Because standards are applied across national borders, regardless of the levels of industrialisation and economic development, environmental circumstances, local practices and regulatory systems in the different countries; there is always the potential for these standards to act as true non-tariff barriers. As private standards are frequently characterised as going beyond the requirements of public standards, they pose the potential to have negative effects on trade.⁷²

This ‘going beyond’ involves at least three different elements. First, private standards may set a higher standard for particular food product attributes and/or supplements than the end-product food safety standards contained in the State’s legislation. In other words, private standards may be seen as more stringent or more extensive than public standards.⁷³ This is probably the most widely-held perspective on the relationship between private and public

⁷⁰ The adoption of private standards such as GlobalGAP and the BRC Global Standard are precisely designed to provide such a due diligence defence. The second paragraph of the BRC Global Standard Food website refers specifically to it rile in providing a due diligence defence.

⁷¹ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 12.

⁷² *Ibid.*

⁷³ Similarly, the Field to Fork standard of Marks and Spencer in the UK includes requirements that ‘ban’ around 70 pesticides in fruit and vegetables to be sold fresh or to be used as ingredients in prepared foods that are manufactured for sale under the Marks and Spencer own label.

standards. Second, private standards may increase the scope of activities regulated by the standard, which can be extended both vertically and horizontally. Increased vertical coverage means extending the span of control up and down the value chain. Increased horizontal coverage relates to including new elements to be regulated by the standard. Food safety standards, for example, frequently include additional elements such as environmental and social impacts. Third, private standards are much more specific and prescriptive about how to achieve the outcomes defined by standards and which production processes to be used than is the case with public standards. In many cases public mandatory standards lay down the basic parameters of a food safety system, while private standards elaborate on what this system should look like in order to be effective. It should be noted that some public regulations also perform this function when they specify particular procedures to be adopted by food producers and processors to assure food safety.⁷⁴

The above-mentioned elements impose significant costs on food suppliers and exporters, even more so where there are a multitude of standards and almost no harmonisation among them. In addition, private standards are more demanding in nature and the use of third-party certification to ensure compliance with complex rules and procedures at various points along the value chain (including pre-farm-gate controls used in the widely-adopted GlobalGAP standard), are too complex and too expensive for small farmers to meet. Such expenses can arise from fixed investments in adjusting production and processing facilities, personnel and management costs to implement the standard and associated control systems and the costs of conformity assessments. The costs are likely to be higher in developing countries where public regulatory systems are less developed and therefore exclude, most notably, small- and medium-sized producers from international markets and supply chains. Private standards are furthermore prescriptive, rather than outcome-based, operational procedures which disregards the concept of equivalence.

Another concern is the lack of transparency, consultation and appeal mechanisms for private standards. Although WTO Members undertake to notify all new public food quality standards and to provide opportunities for trade partners to raise their concerns and engage in dialogue, this does not apply to private standards. Private standards often deviate from international standards or from official governmental requirements (for example, for

⁷⁴ Henson S & Humphrey J, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes'(ALINORM 09/32/9D – Part II) May 2009, p 12.

maximum residue limits) and there is no scientific basis required for such deviations. Finally, they impact on the structure and modus operandi of global agri-food markets, further driving processes of consolidation and integration and enhancing the power of dominant firms.⁷⁵

2.5 Concluding Remarks

Defining private standards is problematic due to its many possible attributes. This study employed the five functions that make private standards operational to assist in defining it, which is standards-setting, adoption, implementation, conformity assessment and enforcement. The different drivers behind these initiatives are usually linked with the two main objectives of private standards, which is to provide opportunities to both protect (risk management) and enhance reputation (product differentiation) in a cost effective manner.

The definition of private standards offered in this analysis has two key attributes. First, they are voluntary in that there is no legal compulsion for compliance and second, all the major functions associated with the system of standards are under taken by private entities, such that there is no appreciable role for state actors. Where however, the private actor adopting a standard is a dominant market player these standards becomes *de facto* mandatory for a product to enter a defined market. In these circumstances, private standards may potentially operate as true non-tariff barriers and impede market access where it is too difficult for producers, especially for developing countries, to comply with the stringent and ever increasing standards.

⁷⁵ S Henson & J Humphrey, Joint FAO/WHO Food Standards Programme Codex Alimentarius Commission, Thirty Second Session ‘*The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*’ (ALINORM 09/32/9D – Part II) May 2009, p 3.

CHAPTER 3

PRIVATE STANDARDS IN THE SPS AGREEMENT

3.1 Introduction

Despite being a relative recent phenomenon, the proliferation of private food safety standards are increasingly becoming an issue of great concern for several countries given the significant effects on the normal course of international trade. The distinctive feature of private standards, as opposed to conventional trade instruments, is that these are developed and implemented by private firms and entities. The traditional notion that international rules governing the relations among states apply only in relation to acts of the governments has been called into question in the case of private standards when large, dominant private firms have the *de facto* ability to prevent, through imposing compliance with private standards, products from having access to the market of the importing country, thus turning the rights and obligations carefully negotiated under the WTO covered agreements futile.

In this connection, Members of the WTO, as well as legal academics, are currently debating how to address the issue of private standards under the existing set of rules that shape the world trading system. Trade-related issues concerning food safety are governed by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). In this Agreement, WTO Members have undertaken to comply with a number of rules when developing, promulgating and implementing measures necessary to protect human, animal and plant health or life. Accordingly, it is in the context of this Agreement where the answer to the question of whether there exist rules in respect of private standards appears to lie.

The analysis that follows begins by outlining the history of the SPS Agreement through the Tokyo and the Uruguay Rounds, before laying out the structure and specific obligations that WTO Members have undertaken under the SPS Agreement. Finally, it examines whether the SPS Agreement contains disciplines governing, directly or indirectly, the imposition of private standards by operators in the importing Member as a precondition to purchasing or handling imported products.

3.2 The Origins of the SPS Agreement; How it Came About

The international trade rules governing a government's right to regulate food safety is contained in the SPS Agreement, which was negotiated during the GATT's Uruguay Round and, currently forms part of the WTO agreements listed in Annex 1A to the Agreement Establishing the World Trade Organisation ("the Marrakech Agreement"). The origins of the SPS Agreement may be traced as far back as the conclusion of the GATT 1947 itself, which contained national treatment obligations with respect to government regulation (Article III:4), as well as the prohibition of quantitative import and export restrictions, including prohibitions (Article XI) and, at the same time, sufficient latitude to pursue legitimate objectives even if, in so doing, the GATT obligations were not observed. This balance has been described by the WTO Appellate Body as 'on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate'.⁷⁶ Among such legitimate objectives, GATT negotiators included, in Article XX(b), Members' freedom to impose measures necessary to protect human, animal and plant health of life even if such measures contravened the relevant obligations in the GATT 1947.

During the Tokyo Round of GATT negotiations (1973 - 1979), the issue of domestic regulation turned critical. Governments were increasingly regulating trade through domestic instruments in order to pursue certain legitimate non-trade objectives. In order to address these concerns, GATT negotiators concluded the Tokyo Round Agreement on Technical Barriers on Trade, also called the 'Tokyo Standards Code'. The objective of this instrument was to develop the relevant general exceptions set out in Article XX of the GATT 1947 in such a way as to address more effectively certain non-trade objectives, the pursuance of which were in conflict with the performance of GATT obligations. In this way, the relationship between a GATT obligation and a legitimate objective would no longer take the form of a 'rule-exception' or 'breach-justification'. Rather, the Tokyo Standards Code advanced a new interaction between GATT obligations and non-trade concerns, whereby no GATT obligation was breached if the requirements in the Tokyo Standards Code were met.

⁷⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 109. It is to be recalled in this respect that, according to Article III:4 of the Marrakech Agreement, the GATT 1947 is legally distinct from GATT 1994. However, the provisions of the GATT 1994 are the same as those of the GATT 1947 adopted at the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1947, as subsequently amended and rectified. Accordingly, all of the comments made in relation to the GATT 1994 are, in principle, applicable to the GATT 1947.

The Tokyo Standards Code was not intended to set out disciplines for SPS measures in particular, but rather to regulate technical requirements irrespective of the content of such measures.⁷⁷ Among these, the Tokyo Standards Code made disciplines for technical regulations that pursued, *inter alia*, the ‘protection for human health or safety, animal or plant life or health’. By the same token, the Tokyo Standards Code established a number of specific obligations such as the use of international standards as the basis for technical regulations; that technical regulations respect the national treatment and most-favoured nation principles and be no more trade restrictive than necessary to achieve the desired legitimate objective; as well as preparation, publication, notification and harmonization requirements.

Despite the betterments advanced by the Tokyo Standards Code, SPS measures, in particular, were the subject of increased concern during the 1980’s because the Tokyo Standards Code was incapable of providing effective regulation to this class of measures. Thus, under the section devoted to negotiations on trade in agriculture, the signatories of the Punta del Este Declaration (the ‘kick-off’ of the Uruguay Round) recognized as a priority to ‘minimiz(e) the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements’.⁷⁸ From this moment, negotiations relating to SPS measures were to be dealt with by the Negotiating Group on Agriculture, thus moving away from other technical regulations addressed by the Committee on Technical Barriers to Trade.

In order to advance SPS negotiations, the Negotiating Group on Agriculture established in September 1988 a Working Group on Sanitary and Phytosanitary Regulations and Barriers⁷⁹, which issued a draft text of the contracting parties on 20 November 1990.⁸⁰ This draft (intended to be a ‘Decision’ to be annexed to the final negotiations on agriculture) reflected

⁷⁷ Annex I to the Tokyo Standards Code defined a ‘technical regulation’ as ‘(a) technical specification, including the applicable administrative provisions, with which compliance is mandatory’. Technical specification, for its part, was defined as ‘(a) specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product’.

⁷⁸ Ministerial Declaration of 20 September 1986 (Punta del Este Declaration), deciding to launch Multilateral Trade Negotiations (The Uruguay Round), section captioned ‘Agriculture’.

⁷⁹ The issues discussed in the framework of the Working Group on Sanitary and Phytosanitary Regulations and Barriers were illustrated in, ‘Synoptic Table of Proposals Relating to Key Concepts’ *Negotiating Group on Agriculture* (MTN.GNG/NG5/WGSP/W/17) 30 April 1990. See also, ‘Communication from the Cairns Group’ *Negotiating Group on Agriculture* (MTN.GNG/NG5/W/112) 25 and 26 September 1989.

⁸⁰ Draft Text for the Framework of an “Agreement on Sanitary and Phytosanitary Measures”, MTN.GNG/NG5/WGSP/W/23, 28 June 1990.

the results of the discussions in the Working Group, namely: that SPS measures be applied only to the extent necessary to protect, human, animal or plant life and health and be based on verifiable evidence; that SPS measures be determined on the basis of an assessment of an acceptable level of sanitary and phytosanitary risk; that the risk assessment should consider scientific evidence, processing technology, quarantine treatment, national inspection systems and relevant economic consideration; harmonization based on standards promulgated by the relevant international scientific organisations; equivalency of regulation techniques and procedures; observance of national treatment; and strengthening linkages with appropriate international scientific organisations.⁸¹

In December 1991, the then Director-General of the GATT, Arthur Dunkel, tabled a revised draft of all the agreements under negotiation ('the Dunkel Text').⁸² As far as SPS negotiations were concerned, the Dunkel Text followed, for the most part, the proposed Draft by the Chairman of the Working Group on Sanitary and Phytosanitary Measures, but introduced some modifications such as eliminating economic considerations from the risk assessment. Consequently, the resulting SPS Agreement was largely based on the Dunkel Text.⁸³ As a result, the SPS Agreement forms part of the 'single undertaking' as a separate agreement in Annex 1A to the Marrakech Agreement and, as such, all WTO members are bound by it.

3.3 Structure of the SPS Agreement; General Obligations

Against this historic backdrop, pursuant to Article 1.1, the SPS Agreement applies to 'all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade'. The requisites for an SPS measure to qualify as such are set out in Annex A(1) thereto. Such definitions describe measures aimed at protecting human, animal or plant health or life from risks arising from the entry, establishment or spread of *inter alia*, pests, diseases, additives, contaminants, toxins or disease-causing organisms. Accordingly, 'SPS measures' are defined in Annex A(1) by reference to the risks the products concerned pose and the

⁸¹ R Gliffin 'History of the Development of the SPS Agreement' in *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and Agreement on Technical Barriers to Trade (TBT)* (2000) Food and Agriculture of the United Nations, Rome, p. 3-5.

⁸² 'Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' (MTN.TNC/W/FA) 20 December 1991.

⁸³ D Merlinda et al 'Agriculture and the WTO', (2004) p. 217.

specific characteristics that make such products hazardous. As pointed out by the WTO Appellate Body, ‘(a) fundamental element of the definition of “SPS measure” set out in Annex A(1) is that such a measure must be one “applied to protect” at least one of the listed interests or “to prevent or limit” specified damage’.⁸⁴ By contrast, it is not the type of product that will determine whether something is an SPS measure; a ban on apples or pesticides will not be dispositive, on this basis alone, of whether a measure is under the scope of the SPS Agreement.

Critically, the definitions in Annex A(1) fail to offer guidance as to which types of entities may promulgate or issue SPS measures for purposes of the SPS Agreement. Yet, this issue was addressed by the Appellate Body in *Australia – Apples*, where it found that ‘(a)lthough Annex A(1) refers to “any measure”, neither the *SPS Agreement* nor the DSU contains a definition of the term “measure” and that ‘the Appellate Body has held that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member’.⁸⁵ In other words, ‘(t)he acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the State’.⁸⁶ It is important to underscore that the Appellate Body’s definition of a ‘measure’ for purposes of WTO law relates to acts and omissions *attributable* to the organs of the State (WTO Member). Conversely, this definition does not describe a ‘measure’ as acts or omissions *by* the State (WTO Member). This entails that a measure under WTO law may be taken by an entity other than an organ of the State; and yet be considered a ‘measure’. By extension, the same conclusion may be drawn as concerns SPS measures, which are those that, in addition to being attributable to a WTO Member, directly or indirectly affect international trade and fall into the definitions of Annex A(1) to the SPS Agreement.

By its terms, the SPS Agreement aims at elaborating on Article XX(b) of the GATT 1994.⁸⁷ It thus begins by recognizing Members’ ‘right’ to take SPS measures ‘necessary for the protection of human, animal or plant life or health, provided that such measures are not

⁸⁴ Appellate Body Report, *Australia – Apples*, para. 172.

⁸⁵ Appellate Body Report, *Australia – Apples*, para. 171.

⁸⁶ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

⁸⁷ The eight recital of the Preamble to the SPS Agreement sets out the following: ‘*Desiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)’. In the same vein, Article 2.4 establishes that ‘(s)anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)’.

inconsistent with the provisions of this Agreement'. Moreover, the SPS Agreement repeats, in Article 2.3, the language used in the *chapeau* to Article XX of the GATT 1994 to the effect the SPS measures must not arbitrarily or unjustifiably discriminate between Members where the same conditions prevail or restricts international law in a disguised manner.⁸⁸

Turning to the specific provisions of the SPS Agreement, Article 3 ('Harmonization') establishes an obligation to base SPS measures on 'international standards, guidelines or recommendations, where they exist'⁸⁹, in which case the SPS measures at issue are presumed to be in line with the GATT 1994. In the case of food safety, Annex A(1) to the SPS Agreement makes clear that the relevant international standards are those by the CODEX Alimentarius Commission. In addition, Members may depart from international standards, guidelines or recommendations to the extent necessary to achieve the appropriate level of protection and provided that such more stringent measures rest on scientific justification or on a risk assessment to achieve the appropriate level of protection Member chooses to pursue.⁹⁰ National food safety regulations of various Members are often dissimilar and products have to meet a different set of conditions in order to gain access to each market. To address this market access problem caused by proliferating food standards, Article 3 seeks to harmonise SPS measures across Member States. 'Harmonisation' is defined in Annex A(2) as the establishment, recognition and application of common SPS measures by different Members. In order to achieve this objective, Members are requested to base their SPS measures on international standards, guidelines and recommendations where they exist.⁹¹ For food safety, the SPS Agreement prescribes the international standards established by the CODEX Alimentarius Commission, as the standards on which Members should base their

⁸⁸ It seems that the draftsmen of the SPS Agreement wished to prevent Members from using measures under the guise of an SPS objective with the true intention to protect their domestic industries, and thus circumventing the commitments undertaken regarding the reduction of tariffs and elimination of quantitative restrictions. SPS Measures 'Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee' (G/SPS/W/256) 3 March 2011, p. 10.

⁸⁹ To this end, WTO Members undertake to engage in the preparation and periodic reviews of such international standards, guidelines and recommendations in the framework of international scientific organisations, in particular 'the CODEX Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention'. (Article 3.4 of the SPS Agreement)

⁹⁰ The 'appropriate level of protection' is defined in Annex A(1) to the SPS Agreement as '[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory'. The Appellate body has made it clear that '[i]t is the 'prerogative' of a WTO Member to determine the level of protection that it deems appropriate'. (Appellate Body Reports, *US/Canada – Continued Suspension*, para. 523; Appellate Body Report, *Australia – Salmon*, para. 199)

⁹¹ Hereafter, wherever there is a reference to international standards it includes guidelines and recommendations.

measures.⁹² The SPS Committee can however identify further relevant international organisations that is open for membership to all WTO Members, other than the three sister organisations listed in Annex A(3), which promulgates appropriate international standards for matters which or not covered by the already listed organisations. The SPS Committee has to date identified no other relevant organisation.

Article 4 ('Equivalence') requires Members to treat other Members' SPS measures as 'equivalent' to the extent that 'the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection'. Article 5 ('Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection') contains a myriad of complex obligations relating to the risk assessment, many of which have been the subject of WTO dispute settlement. To begin with, SPS measures must be based on an assessment of risks to human, animal or plant life or health that is appropriate to the circumstances and taking into account available scientific evidence,⁹³ as well as techniques developed by the relevant international organisations. Members must also take into consideration relevant economic factors in assessing the risk,⁹⁴ as well as the objective of 'minimizing negative trade effects'. Moreover, Members must avoid arbitrary or unjustifiable distinctions in the levels of protection it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Very critically, Members undertake to ensure that their SPS measures 'are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection'.⁹⁵ Article 5 also makes

⁹² Annex A(3) specifies what should be understood by international standards, guidelines and recommendations. Annex A(3)(C) deals with food safety and prescribes the standards, guidelines and recommendations established by the by the CODEX Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminant, methods of analysis and sampling, and codes and guidelines of hygienic practices as the basis for Member's SPS measures. Annex A(3)(B) and (C) respectively prescribes for animal health and zoonoses the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics and for plant health the Secretariat of the International Plant Protection Convention in cooperation with regional organisations operating within the framework of the International Plant Protection Convention.

⁹³ Appellate Body Report, *Australia – Apples*, paras. 213-215; Appellate Body Reports, *US/Canada – Continued Suspension*, paras, 590 and 591.

⁹⁴ Such economic factors are: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks. (Article 5.3 of the SPS Agreement)

⁹⁵ Footnote 3 to Article 5.6 of the SPS Agreement further explains that 'a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade'.

provision for temporary SPS measures for which relevant scientific evidence is insufficient, provided that: (i) it is adopted on the basis of ‘available pertinent information’; (ii) Members continue to seek additional information necessary for a more objective risk assessment; and (iii) within a reasonable period of time.⁹⁶ Hence, this provision seeks to prevent members from developing and applying SPS measures which, under the appearance of food safety measures, actually pursue protectionist purposes.

Article 6 (Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence) requires Members to ensure that their SPS measures are adapted to the sanitary or phytosanitary characteristics of the area from which the product originated and to which the product is destined. In addition, Articles 7 through 10 provide for obligations relating to control, inspection and approval procedures; transparency; technical assistance; and special and differential treatment. As concerns transparency requirements in Article 7 and Annex B, Members are under an obligation to publish and notify changes in their SPS measures, and allow a reasonable interval between the publication and the entry into force of the measure, in order for other Members to have the opportunity to comment on these and producers and exporters, in particular from developing countries, to have time to adapt their production and/or processing methods as necessary. When the measure derogates from international standards or where there is no international standard for a member to base its measure on, the notification must be published at an early stage. This requirement exists to afford Members an opportunity to give comments which could be taken into account during amendments. Moreover, Members agreed in Article 9 to assist in providing technical assistance to those Members who need it, either bilaterally or through international organisations, in order to help them comply with their SPS measures.⁹⁷ More specifically, special and differential treatment should be afforded to developing countries. Under Article 10, Members must, in the preparation and application of SPS measures, take the special needs and capacities of developing countries into account, notably by granting them more time to comply with SPS requirements. Article 11, for its part, contains WTO dispute settlement clauses, while Article 12 sets out the administration of the SPS Agreement that falls on the Committee on Sanitary and Phytosanitary Measures (‘SPS Committee’).

⁹⁶ Appellate Body Report, *US/Canada – Continued Suspension*, paras. 621-735; Appellate Body Report, *Japan – Apples*, paras. 169-188; and Appellate Body Report, *Japan – Agricultural Products*, paras. 86-94. See also, *EC – Biotech*, paras. 7.3386-7.3399.

⁹⁷ Article 9(2) in addition requires Members to consider providing the necessary technical assistance where a substantial investment is required in order for an exporting developing country Member to fulfil the SPS requirements of an importing Member.

3.4 Private Standards and the SPS Agreement

This brief explanation of the relevant obligations contained in the SPS Agreement begs the question of whether, as a legal matter, the SPS Agreement makes provision for the regulation of the implementation of private food safety standards and, if so, what kind of disciplines the SPS Agreement imposes on WTO Members when, in requiring fulfilment with such standards, the normal course of international trade is affected. As pointed out above, pursuant to Article 1 of the SPS Agreement, SPS measures must be developed and applied in accordance with the provisions of the SPS Agreement. By contrast, the provisions of the SPS Agreement do not directly address private actors or non-governmental standards setting or standards applying organisations and as such these actors seem to have no obligation to comply with the SPS Agreement. Indeed, Members have expressed concern that private standards are developed and applied heedless of the rules, guidelines and recommendations of the SPS Agreements and they have raised several issues in this regard. This includes for example, the multiplication of private standards schemes and lack of harmonization between them, lack of transparency, consultation and appeal mechanisms and the prescriptive, rather than outcome-based, operational procedures required by private standards, which disregards the concept of equivalence between schemes, which leads to a repetition of certification. Critically, the content of private standards is not necessarily scientifically justified and there might be a lack of recognition of certificates issued in this regard or there might not be a recognized certification body in the developing country. From a legal point of view there is a fundamental difference between the situation where a product may not be brought to market (because it does not comply with public standards) and the situation where a product legally brought to the market is not bought by its intended customer (because it does not comply with this customer's private requirements). From an economic point of view, and for all practical purposes, these two situations may amount to the same result where the customers concerned dominate the market.⁹⁸ Therefore, even if government measures comply with the provisions of the SPS Agreement, the issue remains whether, by reason of the imposition of private standards, exporters from other countries are prevented from placing their products in the market of the WTO Member in which such private standards are required.

⁹⁸ G Smith 'Interaction of Public and Private Standards in the Food Chain' (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, p. 17.

From the provisions of Articles 1 through 12 outlined above, it is unclear what the implications under the SPS Agreement are in the case of SPS measures by private firms (*e.g.* refusal to purchase from certain suppliers) that are based on private standards. In this respect, the only provision in the SPS Agreement that references actions of non-governmental entities is Article 13 of the SPS Agreement, which reads as follows:

Implementation

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

Article 13 of the SPS Agreement finds its origin in Articles 3 and 4 of the Tokyo Standards Code, which made provision for the responsibility of States for acts by local governments and non-governmental bodies. Interestingly, the Tokyo Standards Code established in Article 2 the relevant substantive obligations of that Agreement. Such obligations were acquired in relation to central government as the title to Article 2 itself recognized (Article 2: Preparation, adoption and application of technical regulations and standards by central government bodies). The substantive obligations set forth in the TBT Agreement agreed upon in the context of the Uruguay Round replicated for the most part the prescriptions of Article 2 of the Tokyo Standards Code and continued the trend to impose such disciplines only on central government bodies. As concerns acts by entities other than central government bodies, whether government in nature or not, Article 3 of the TBT Agreement developed in much the same way as Article 13 of the SPS Agreement, the instances in which acts by such entities would engage the responsibility of a WTO Member

with respect to breaches of the relevant obligations as a result of acts by these entities.

Whilst the provisions in first through fourth sentences of Article 13 of the SPS Agreement resemble the language used in Article 3 of the TBT Agreement, there is significant difference between these Agreements. For the TBT Agreement directs the substantive obligations in Article 2 thereof at *central government bodies*, while acknowledging responsibility for acts of local governments and non-governmental entities inconsistent with the obligations in Article 2 of that Agreement to the extent the WTO Member concerned fails to take the actions prescribed in Article 3. Quite differently, the SPS Agreement addresses the obligations set out in Articles 2 through 11 to *WTO Members*. A WTO Member is, according to Articles XI and XII of the Marrakech Agreement, a State or separate customs territory and, therefore, subject to the application of the general principles of international law. It is, thus, a principle of international law that acts and omissions by organs of the State apparatus are considered part of the State.⁹⁹ Such organs may be part of the central administration, the legislature or the judicial branch. Moreover, State organs are also those of limited territorial jurisdiction within the State, such as provinces or municipalities. According to Article 4.1 of the ILC Articles on State Responsibility, '(t)he conduct of any State organ shall be considered an act of that State under international law, ... whatever its character as an organ of the central Government or of a territorial unit of the State'.

What is more, acts by entities of non-governmental character may in certain instances also compromise the responsibility of the State when, for example, the State adopts, entrusts or directs such entities (Article 5 of the ILC Articles on State Responsibility) or the State assumes such actions of its own (Article 11 of the ILC Articles on State Responsibility). Accordingly, reference to WTO Members, *i.e.* States, in the relevant obligations in Articles 2 through 11 of the SPS Agreement is not limited to central governments but also to all the entities, whether governmental or otherwise, whose acts may be attributable to the WTO Member as a whole.

⁹⁹ The ILC Articles on State Responsibility are applicable to State actions. Accordingly, separate customs territories which are Members of the WTO but do not have the status of a State (Hong Kong, Macau and Chinese Taipei (Taiwan)) are not subject to the scope of the ILC Articles on State Responsibility. Yet, since the provisions in that instrument reflect customary international law, as recognized by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* and the WTO Appellate Body in *US – Anti-Dumping/Countervailing Duties (China)*, the principles laid down in the ILC Articles on State Responsibility may be also useful in determining whether the separate customs territories that are WTO Members are responsible for acts of their local governments or by non-governmental entities within their jurisdictions.

As examined in detail below, Article 13 of the SPS Agreement lays out the circumstances in which acts by governmental organs different from the central government, non-governmental entities and regional bodies (‘organs, entities and bodies’) are attributable to the WTO Member when such acts are at variance with the relevant obligations of the SPS Agreement, and the WTO Member concerned has failed to take the actions prescribed in each of the sentences of Article 13. With the foregoing considerations of general import each of the sentences of Article 13 of the SPS Agreement is examined in turn.

3.4.1 Article 13, First Sentence: Recognition of Responsibility

The first sentence of Article 13 of the SPS Agreement prescribes that ‘Members are fully responsible under this Agreement for the observance of all obligations set forth herein’. Certain observations in respect of the nature of the proviso in the first sentence are apposite. As an initial matter, Article 13, first sentence, enshrines a rule of responsibility, rather than an obligation.¹⁰⁰ Yet, responsibility in the first sentence may refer to two different, albeit related, ideas, the first being understood as referring to the onus conferred on WTO Members to prevent violation of the obligations of the SPS Agreement. A second meaning of ‘responsibility’ in turn relates to the creation of new legal relations created by a breach of an international obligation attributable to a WTO Member. Otherwise put, the distinctive trait of these meanings is that the first exist before the breach of an obligation, whereas the other arises as a result of the breach of the obligation in question, (that is, the new legal relations between the parties created upon the breach of the obligation).

When Article 13, first sentence, alludes to Members being ‘fully responsible’ for the observance of all obligations set forth in the SPS Agreement, it appears that the draftsmen of the Agreement referred to both aspects of ‘responsibility’. That would mean that the sentence confirms, in conformity with general public international law, the overall responsibility of the

¹⁰⁰ An obligation emanating from international treaties is regulated through the Vienna Convention on the Law of the Treaties (“VCLT”), whereas the law of international responsibility has been codified in the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“the ILC Articles on State Responsibility”). The VCLT prescribes the formation, performance, novation and cessation of obligations, whereas the ILC Articles on State Responsibility makes disciplines for attribution, excuses and consequences of an eventual breach of international obligations. (International Court of Justice, *Case Concerning the Gabčíkovo-Nagymaros Project*, para. 47; See also J Crawford ‘The System of International Responsibility’ in J Crawford *et al The Law of International Responsibility* (2010) p 22) Put differently, obligations constitute ‘primary rules’ (what States undertake to do or to abstain from doing), whereas the law of State responsibility provides for ‘secondary rules’ (the legal relations or consequences arising from the breach of an obligation that is attributable to a State bound to honour such an obligation). E David ‘Primary and Secondary Rules’ in J Crawford *et al The Law of International Responsibility* (2010) p 27-33.

sovereign state for compliance with its obligations regardless of its domestic dispensation. This is so because, as the title to Article 13 suggests when read together with the text of this provision, the purpose of this provision is to implement the SPS Agreement, that is to say, to give meaningful effect to the provisions envisaged therein, in respect of all the organs, entities and bodies within the jurisdiction of the WTO Member. Because implementation means giving effect to the SPS Agreement, putting it into application, the text of Article 13 gives an insight into what are the organs in respect of which a WTO Member is responsible. Moreover, by targeting organs, entities or bodies, the drafters of the SPS Agreement were concerned with the possibility that the carefully negotiated benefits gained through the SPS Agreement be otherwise frustrated as a result of actions by such organs, entities or bodies. By not addressing this general rule of responsibility to every possible actor but to Members alone, Members are prevented from invoking its internal structure as a defence against fulfilment of its obligations under the SPS Agreement. Thus, Article 13, first sentence, express the imperative that WTO Members are, by virtue of their being bound by the SPS Agreement, ‘fully responsible’ for the observance of the obligations set out therein, regardless of the nature of the organ, entity or body at stake.

The second connotation of ‘responsibility’ in the first sentence of Article 13 comes into play when any of the organs, entities and bodies mentioned in the following sentences infringes an obligation in the SPS Agreement. There, the first sentence must be understood as recognizing that WTO Members must respond for the acts by such organs entities and bodies. It bears observing that, by the very architecture of the SPS Agreement, a WTO Member’s responsibility for inconsistent acts of organs, entities and bodies does not arise in the same way as responsibility arising from inconsistent acts of the central government. In the latter scenario, responsibility of the WTO Member concerned is engaged as soon as an act of the central government is inconsistent with any of the obligations of the SPS Agreement. By contrast, responsibility of the WTO Member concerned is engaged in respect of inconsistent acts by organs, entities and bodies only where the applicable requirements in either of second through fifth sentences are fulfilled.

The second aspect of ‘responsibility’ (*i.e.* arising from the violation of an international obligation, such as the obligations contained in the SPS Agreement) is the scope of application of the law of State responsibility, as codified in the ILC Articles on State Responsibility. A State is responsible for an act if: the act in question is attributed; it breaches

an international obligation; and there are not causes excluding such responsibility.¹⁰¹ Relevant to Article 13 is the issue of attribution that may be defined as ‘the body of criteria of connection and the conditions that have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subject of international law) which has acted in a particular case’.¹⁰² As examined below, Article 13, first sentence, colours the remainder of Article 13 such that the subsequent sentences constitute special rules of attribution of acts of organs, entities and bodies to the WTO Members when the conditions set out therein, arise.

Before embarking on the analysis of each of the sentences, it is worthy of mention that, admittedly, some would vigorously argue that Article 13, second through fifth sentences, prescribes obligations in their own right. This is so because, arguably, second through fifth sentences introduce normative language in the sense that WTO Members ‘shall take possible measures and mechanisms’ (second sentence), ‘shall take such reasonable measures as may be available to them’ (third sentence), ‘shall not take measures’ (fourth sentence) and ‘shall ensure’ (fifth sentence). Thereupon, some could argue that such normative language, prescribing an action or inaction, illustrates that WTO Members has acquired specific obligations. It is submitted, however, that despite the use of the auxiliary ‘shall’ in each sentence, the purpose of such provisions is to determine the instances in which an act by organs, entities and bodies is attributable to the WTO Member, which is the subject of the obligations under Articles 1 through 11 of the SPS Agreement. The use of ‘shall’ simply serves the purpose of indicating which measures that WTO Members are expected to adopt in order to break the attribution linkage in relation to the acts of such organs, entities and bodies.¹⁰³

In short, it should be undisputed that the first sentence of Article 13 does not contain an obligation, but rather, recognition of full responsibility of WTO Members for the observance of the SPS Agreement. More debatable is, perhaps, whether the provisions of second through

¹⁰¹ L Condorell & C Kress ‘The Rules of Attribution: General Considerations’ in J Crawford *et al* *The Law of International Responsibility* (2010) p 224.

¹⁰² *Ibid.*, para. 221.

¹⁰³ In addition, the title to Article 13 is ‘Implementation’ of the SPS Agreement. This affords support to the argument that, when the heading and the text of Article 13 are read together, what this provision sets forth is how the Agreement is to be observed by WTO Members in respect of entities, bodies and government bodies other than the central government. The Appellate Body has relied on titles of WTO provisions in order to ascertain the interpretation of treaty terms. (Appellate Body Report, *China – Raw Materials*, para. 320; Appellate Body Report, *US – Softwood Lumber IV*, para. 93; and Appellate Body Report, *US – Carbon Steel*, para. 67).

fifth sentences contain rules of attribution, specific obligations, or both. Although this study advocates for deeming such legal precepts as rules attributing certain acts to WTO Members when certain requirements set out therein are met (as opposed to actual obligations to do or not to do something), it is possible that WTO panels be reluctant to endorse this approach. Were such panels to find that sentences second through fifth set out specific obligations, these may nevertheless not be autonomous, but rather dependent upon the primary obligations of the SPS Agreement. In such circumstances, panels should find a violation of the primary obligation in the SPS Agreement breached by the act of the a organ, entity or body (and imputable to the WTO Member), and only consequently, an inconsistency with the relevant sentence of Article 13 for failure to take, or not to take, actions as the case may be.

3.4.2 Article 13, Second Sentence: Positive Measures and Mechanisms in Relation to Other than Central Government Bodies

The second sentence of Article 13 establishes that ‘Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies’. This legal precept may be divided into three main components. First, the particular action that is required is the formulation and implementation of positive measures and mechanisms. This obligation is, as the provision itself mandates, a positive one. Second, the aim of the ‘positive measures and mechanisms’ must be that they be ‘in support of the observance’ of the SPS Agreement. Third, the observance of the SPS Agreement, which the ‘positive measures and mechanisms’ must support, is in relation to other than central government bodies.

What is required of WTO Members under Article 13, second sentence, is a particular behavior, an act, consisting of formulating and implementing positive measures and mechanisms. Furthermore, the content of the positive measures or mechanisms is only to ‘support () the observance’ of the SPS Agreement. The term ‘support’ may be defined as, *inter alia*, ‘material assistance’.¹⁰⁴ It therefore seems that, as long as the positive measures or mechanisms provide material assistance to the observance of the SPS Agreement, the positive measures and mechanisms would pass muster under the Article 13, second sentence.

¹⁰⁴ The Appellate Body has observed that the use of dictionaries is a permissible point of departure in ascertaining the ordinary meaning of a treaty term in accordance with Article 31 of the VCLT. (Appellate Body Report, *US – Gambling*, para. 164)

Interestingly, Article 13, second sentence, does not speak to the issue of whether the positive measures or mechanisms need to *ensure* the observance of the SPS Agreement. It may be the case that a WTO Member formulates and implements a measure in support of (*i.e.* providing material assistance to) the observance of the SPS Agreement, and yet be insufficient fully to comply with any of the provisions of the SPS Agreement. This situation appears to be not outlawed by Article 13, second sentence. Hence, formulating and implementing positive measures and mechanisms, irrespective of their ultimate result or effectiveness, seems to be sufficient to comply with the obligation of the second sentence of Article 13.

In addition, the positive measures and mechanisms of which the second sentence of Article 13 speaks must be directed at other than central government bodies. It is, however, less than clear what this provision intends to address. A textual interpretation of the term ‘other than central government bodies’ may include an all-encompassing ocean of entities provided that they do not belong to the central government. This may comprise such entities as government bodies on the provincial or municipal level, or non-governmental entities, whether private or social. Yet, a contextual interpretation may restrict the meaning of ‘other than central government bodies’ in the second sentence of Article 13. This is so because the third sentence of Article 13 provides for a separate rule of responsibility of WTO Members in relation to observance of the SPS Agreement by regional and non-governmental entities. Whilst this provision is analyzed below, it suffices to say at this point that Article 13, second sentence, may not extend to regional and non-governmental entities, as these are the subjects of separate disciplines in the next sentence. Accordingly, the clause ‘other than central government bodies’ appears to refer to a class of government bodies that do not belong to the central structure of the government of the WTO Member.

All in all, it appears that the second sentence of Article 13 foresees a rule of responsibility of WTO Members when SPS measures are adopted by government entities outside the structure of the central government. A Member’s responsibility is engaged when it fails to formulate and implement positive measures and mechanisms ‘in support of’ the observance of the SPS Agreement, and such non-central government entities act inconsistently with the provisions of the SPS Agreement. By contrast, the second sentence of Article 13 does not attribute responsibility for the lack of observance of the SPS Agreement by levels of government other than the central government provided that ‘positive measures and mechanisms in support of’ the observance have been put in place. At any rate, Article 13,

second sentence, is concerned with government conduct and, therefore, such actions as private standards are excluded from that precept.

3.4.3 Article 13, third sentence: Reasonable Measures in Relation to Non-Governmental Entities and Regional Bodies

The third sentence of Article 13 reads as follows: ‘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’. Like all of the obligations in Article 13, the third sentence contains a qualification to the attribution of (SPS Agreement) inconsistent acts of non-governmental entities and regional bodies in cases. The third sentence may, thus, be broken down into three components:

- a) Members shall take such reasonable measures as may be available to them;
- b) to ensure that non-governmental entities, as well as regional entities;
- c) comply with the relevant provisions of the SPS Agreement.¹⁰⁵

For purposes of this analysis, this study begins by ascertaining the entities addressed by the third sentence (non-governmental entities and regional entities), followed by the first and third elements of this provision.

3.4.3.1 Non-governmental entities and regional bodies

Article 13, third sentence, addresses the attribution of the conduct of non-governmental entities and regional bodies to of WTO Members. By its terms, the clause ‘non-governmental entity’ is an entity that does not form part of any government, whether central or local. This compels the question of what a government is for purposes of WTO law. In this connection, the Appellate Body has noted that ‘the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority’.¹⁰⁶ Moreover, the Appellate Body has recently observed that a ‘public body’ is different from a ‘private body’ in that the former exercises

¹⁰⁵ A similar breaking down of the constituent elements of Article 13, third sentence, is found in J Wouters et al ‘*Food Safety, Private Standards and International Trade Law*’ Leuven Centre for Global Governance Studies, Leuven University Unpublished.

¹⁰⁶ Appellate Body Report, *Canada – Dairy*, para. 97.

authority or control inherent of a government body.¹⁰⁷ By exclusion, where an entity does not enjoy lawful authority to regulate, control or supervise individuals, or otherwise restrain their conduct, this entity is to be considered non-governmental.

Another issue bearing on the interpretation of ‘non-governmental entity’ is the breadth of concept. However, legal scholarship has debated whether ‘non-governmental entities’ within the meaning of Article 13, third sentence, signifies *any* entity as long as it does not form part of the formal structure of the government. Digby Gascoigne argues that non-governmental entities only private entities that been entrusted by a government to perform certain tasks.¹⁰⁸ Others, such as Tracey Epps, have stretched the notion of ‘non-governmental entities’ to include standard-setting organisations, such as GlobalGAP.¹⁰⁹ Whilst these positions purport to find support in other WTO covered agreements, along with the negotiating history, it is impossible to discern from these interpretative means the scope of the term ‘non-governmental entities’ in the SPS Agreement.

Contrary to what Gascoigne posits, it is unlikely that ‘non-governmental entities’ within the meaning of Article 13, third sentence, comprises such entities that, despite being private in nature, are entrusted by a government to act contrary to the SPS Agreement. Pursuant to Article 8 of the ILC Articles on State Responsibility ‘(t)he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’. When the acts of persons are a function of the direction or entrustment of a government, the act is considered for all purposes as an act by the government itself. Accordingly, when a person or entity that, in principle, is non-governmental acts at the behest of the government, and such an act is inconsistent with the SPS Agreement, that act must be attributed, immediately, to the WTO Member who will have to respond for the inconsistency of the act. In such circumstances, the special rule of responsibility in Article 13, third sentence, is inapplicable.

¹⁰⁷ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 292. In that dispute, the Appellate Body considered that ‘government’ and ‘public body’ connote a sufficient degree of commonality or overlap in their essential characteristics, being the former a ‘superordinate’ and the latter ‘one hyponym’. (*Ibid.* para. 288)

¹⁰⁸ Committee on SPS Measures ‘Private Voluntary Standards within the WTO Multilateral Framework’ *Submission by the United Kingdom (G/SPS/GEN/802)* 9 October 2007 p 22.

¹⁰⁹ T Epps ‘Demanding perfection: private food standards and the SPS Agreement’ in MK Lewis & S Frankel (eds) *International Economic Law and National Autonomy* (2010) 73, p 86.

With this backdrop, there appears to be no reason to narrow the concept ‘non-governmental entities’ as including only those that have been delegated certain powers that are governmental in nature. Nor are there any reasons to consider that the term ‘non-governmental entities’ refers to a certain type of them (standard-setter organisations or NGOs) but not to the others (private firms). In this connection, the Appellate Body has stated that ‘the term “private body” describes something that is *not* “a government or any public body”’.¹¹⁰ This suggests that private firms are non-governmental entities, just as are such entities as associations, unions, chambers of entrepreneurs, or altruistic foundations (think-tanks or non-governmental organisations). In many domestic jurisdictions, some of the entities often escape the ambit of private law to fall into what is known as social law. Regardless, the reference to ‘non-governmental entity’ in Article 13, third sentence, is so broad as to encompass all sorts of bodies, whether private or social, provided that they do not form part of any government.

In addition, Article 13, third sentence, also relates to ‘regional bodies in which relevant entities within their territories are members’. Admittedly, the SPS Agreement is not a model of clarity when it makes reference to regional entities. As an initial matter, ‘regional entities’ refer to bodies covering a geographic portion. This is reinforced by the reference to ‘within their territories’. In addition, these regional bodies are made up of ‘relevant entities’. Yet, it is unclear what the ‘relevant entities’ Article 13, third sentence means. Annex I to the TBT Agreement affords a definition of ‘regional entities’, for purposes of that Agreement, as a ‘(b)ody or system whose membership is open to the relevant bodies of only some of the Members’. Although the definitions in Annex I to the TBT Agreement are of exclusive application to the TBT Agreement, they may nevertheless serve as a useful comparator in interpreting terms in other WTO covered agreements. Accordingly, a ‘regional body’ in Article 13, third sentence, of the SPS Agreement may signify a body covering a certain geographic dimension that comprises, or may comprise, relevant entities of only some of the Members. Whilst this definition sheds more light on the meaning of a ‘regional body’, it is still unclear which ‘entities’ are ‘relevant’. A possible interpretation that may be advanced is that ‘relevant entities’ are those that are non-governmental in nature, since the same third sentence refers to such entities. Thus, if the provision alludes to non-governmental entities in the first place, and then refers to ‘regional bodies’, the ‘relevant entities’ that comprise such ‘regional bodies’ should be no other than the non-governmental entities previously alluded to.

¹¹⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 291.

Accordingly, regional bodies are those whose membership consists of non-governmental bodies of some, but not all, WTO Members. Despite this interpretative effort, neither Article 13 of the SPS Agreement, third sentence, nor Annex I to the TBT Agreement illuminates the reader in this respect.

The foregoing reveals that, since private actions such as the development and implementation of private standards are actions by non-governmental entities and, as such, are not *a priori* excluded, by operation of the third sentence of Article 13, from the scope of application of the SPS Agreement.

3.4.3.2 To take such reasonable measures as may be available to them to ensure compliance with the relevant provisions of the SPS Agreement

The specific obligation prescribed in Article 13, third sentence, consists of WTO Members taking ‘such reasonable measures as may be available to them’ to ensure that non-governmental entities and regional bodies comply with the provisions of the SPS Agreement. For the sake of analyzing the obligation in the third sentence, it is pertinent to parse it into its requisite elements, namely: (i) ‘to take such reasonable measures as may be available to them’; and (ii) to ensure that non-governmental entities and regional bodies comply with the provisions of the SPS Agreement. These elements are examined in turn.

(i) ‘(T)o take such reasonable measures as may be available to them’

Article 13, third sentence, calls on WTO Member to take such reasonable measures as may be available to them. As an initial matter, the obligation is in essence to adopt ‘measures’. In this respect, it is commonplace that a ‘measure’ for purposes of WTO law refers ‘in the usual case, (to) the acts or omissions of the organs of the state, including those of the executive branch’.¹¹¹ It thus follows that a ‘measure’ under the third sentence of Article 13 is an act or omission of the organs of the State, *i.e.* the WTO Member.

Moreover, Article 13 of the SPS Agreement requires that WTO Members take measures only to the extent that they are ‘reasonable’. But, what is to be regarded as ‘reasonable under WTO law? In this respect, the Appellate Body in *US – Hot-Rolled Steel* interpreted the term ‘reasonable’ for purposes of Article 6.8 of the Anti-Dumping Agreement, as:

¹¹¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 86.

... the word "reasonable" 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.¹¹²

The panel in *Mexico – Telecoms*, for its part, drew upon the Appellate Body's above interpretation to understand the term 'reasonable' in the GATS's Reference Paper as follows:¹¹³

The ordinary meaning of the word "reasonable" suggests something that is "not irrational, absurd or ridiculous". Defined positively, reasonable can be defined as something "of such an amount, size, number, etc., as is judged to be *appropriate or suitable to the circumstances or purpose*". The term "reasonable" thus suggests that the interconnection rates should be "suitable to the circumstances or purpose"... Flexibility and balance are also part of the notion of "reasonable".
(Footnotes omitted)

What transpires from these passages is that the term 'reasonable' in WTO law denotes a measure of flexibility and balance according to the circumstances of a given case. In all cases, however, 'reasonable' is something considered to be 'appropriate or suitable to the circumstances'. Hence, the precise extent of the term 'reasonable' is not susceptible to being ascertained in the abstract but only in the light of all the surrounding circumstances must be weighed up.

The term 'reasonable' qualifies the noun 'measure'. Therefore, a reasonable measure within the meaning of Article 13, third sentence, is an act or omission by a WTO Member, which is appropriate in the light of the circumstances to ensure that non-governmental entities and regional bodies comply with the provisions of the SPS Agreement.

In addition, Article 13, third sentence, stipulates that the 'reasonable measure' be available to the Member concerned. This suggests that, what in a single fact pattern may be available to one WTO Member, it may not be within the reach of another WTO Member. In this regard, Article 13 of the SPS Agreement fails to identify the specific criteria applicable to

¹¹² Appellate Body Report, *US – Hot-Rolled Steel*, para. 84.

¹¹³ Panel Report, *Mexico – Telecoms*, para. 7.182. The Panel heavily relied on the Appellate Body report in *US – Hot-Rolled Steel* and noted that, although that dispute dealt with the Anti-Dumping Agreement, the reasoning was equally applicable to the GATS. (*Ibid.*)

determining whether a measure is ‘available’ to the WTO Member. To ascertain the meaning of a measure available to a WTO Member it is pertinent to consider what the Appellate Body has found, as a matter of interpretation, in respect of the necessity test in Articles XX of the GATT 1994 and XIV of the GATS.¹¹⁴ This is relevant to the study of Article 13, third sentence, because the term ‘measure reasonably available’ (as developed by the doctrine of the Appellate Body in the backdrop of the GATT and GATS general exceptions) closely resembles the term ‘such reasonable measures as may be available’ in Article 13, third sentence. The Appellate Body has observed in this respect that a measure is not ‘reasonably available’, when ‘it is merely theoretical in nature, for instance, where the responding party is not capable of taking it, or where the measure imposes an undue burden on that Member, such as “prohibitive costs or substantial technical difficulties”’.¹¹⁵ This holding seems to apply with equal force to the term ‘available’ in Article 13, second sentence. For one thing, measures that are in principle reasonable to ensure that non-governmental entities and regional bodies comply with the provisions of the SPS agreement may nevertheless be unavailable to WTO Members for a myriad of reasons. For instance, a WTO Member may find restraints in encroaching upon private rights of traders. This is all the more relevant in the case of private standards since such instruments are developed and implemented by private actors in the exercise of day-to-day transactions. Non-governmental entities remain free to conduct their own research and suggest standards, based on the results of their research, to be applied as a precondition to importing, purchasing or selling agricultural products. In much the same way, a government may not be expected to interfere with the freedom of private operators to engage, in full autonomy, in the sale and purchase of agricultural products. It would be outrageous to conceive of a government that imposes a retail store the products it has to sell. Thus, a private firm that chooses to sell only products that comply with certain standards developed by non-governmental entities may not be obliged to change their policies on the grounds that its required standards do not conform to international standards or otherwise to sound scientific studies, as required in Article 3 of the SPS Agreement.

Although Article 13, third sentence, has never been subject to interpretation or application by WTO panels, let alone the Appellate Body, there is at least one instance in which a GATT

¹¹⁴ See Appellate Body Report, *Korea – Various Measures on Beef*, para. 164 and Body Report, *Korea – Various Measures on Beef*, para. 164.

¹¹⁵ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 318.

panel, in *Canada – Gold Coins* passed on the consistency of a measure with a similar GATT provision. In that dispute, South Africa challenged certain measures adopted by the Ontario province as inconsistent with Article III:2 of the GATT. Canada argued that its obligations were qualified by Article XXIV:12 which states that ‘(e)ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories’. Admittedly, Article XXIV:12 of the GATT does not refer to non-governmental entities and regional bodies, but rather addresses regional and local governments. Despite this difference, both Article XXIV:12 of the GATT and Article 13, third sentence, of the SPS Agreement contain the same action, namely, to take such reasonable measures as may be available to Members to ensure compliance by the relevant entities with the provisions of the GATT or the SPS Agreement, as the case may be.

In this connection, the GATT panel in *Canada – Gold Coins* made some interesting findings. First, it concluded that Article XXIV:12 contained a qualification of the basic obligations under the Agreement and that ‘this qualification applied to Canada's obligation under Article III:2 in respect of measures taken by the Province of Ontario’.¹¹⁶ Second, the GATT panel concluded that ‘Article XXIV:12 applies only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence’.¹¹⁷ Third, the GATT panel noted that Article XXIV:12 serves as an exception to the general principle (set out in Article 27 of the Vienna Convention) that a party to a treaty may not invoke its internal law as a justification for not performing its treaty obligations, and that ‘Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties’.¹¹⁸

Returning to Article 13, third sentence, it must be recalled that this provision was carried forth to the SPS Agreement from the Tokyo Standards Code. At the time, several contracting parties realized the difficulties of enjoining non-governmental entities to comply with WTO Members’ SPS obligations. For the ever-evolving nature of science itself reveals that

¹¹⁶ GATT Panel Report, *Canada – Gold Coins*, para. 53.

¹¹⁷ *Ibid.*, para. 56.

¹¹⁸ *Ibid.*, para. 63 and 64.

governments may find themselves prevented from compelling private entities to disregard private standards that indicate the need for a higher level of protection. Indeed, the development of scientific studies is mostly performed by non-governmental entities, and the results of such studies are released into the public domain, so that traders of agricultural products will be faced with a quandary: on the one hand, selling products that are formally approved by the government's existing regulations but fall short of further scientific results showing the need for a higher level of protection; or, on the other hand, rejecting such products pursuant to more up-to-date standards even if they comply with government regulations.

Against this backdrop, what are the reasonable measures available to a WTO Member to ensure compliance by non-governmental entities and regional bodies with the SPS Agreement? A WTO Member may enact regulations that require sellers of agricultural products to confine the imposition of private standards to only those that rest on demonstrated scientific evidence. For instance, in a document submitted to the GATT Secretariat in 1981, the United States reported that it had complied with obligation under Article 4.1 of the Tokyo Round Agreement on Technical Barriers on Trade ("Tokyo Standards Code")¹¹⁹ through adding in Section 403 of the Trade Act of 1979 the following clause: "(t)he President shall take such reasonable measures as may be available to promote the observance by State agencies and private persons... ." of the procedures and provisions of the Trade Act of 1979'. The United States further offered some examples of measures taken pursuant to Section 403. In particular, the United States stated:¹²⁰

The Federal Government has already taken measures to encourage the compliance of state agencies and private persons. For example, the Office of the U.S. Trade Representative, in Washington, has circulated a letter to the Governors of the fifty states, signed by the U.S. Trade Representative, informing the state Governors of the obligations of the Standards Code. The Department of Agriculture, also, is directly cooperating with state departments of agriculture. The Department of Commerce has published a pamphlet summarizing the provisions of the Standards Code and the relevant portions of the Trade Act of

¹¹⁹ Article 4.1 of the Tokyo Standards Code stated the following: 'Parties shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories comply with the provisions of Article 2'.

¹²⁰ 'Information on Implementation and Administration of the Agreement' (TBT/1/Add.1/Suppl.3) 20 February 1981.

1979 and is distributing this pamphlet as widely as possible to state agencies and private organizations. The Department of Commerce also sponsored a ‘Conference on International Standardization Issues’ which was attended by representatives from dozens of U.S. private standards and certification bodies. Furthermore, the Departments of Commerce and Agriculture are presently drafting a set of Voluntary Guidelines for state agencies and private persons on procedures that might be used in developing and promulgating standards that will comply with the provisions of the Standards Code.

However, a government must account for the fact that a more sophisticated and conscious consumer is emerging, mainly in the developed world, requiring a higher quality of food. Indeed, empirical evidence shows that private firms utilize private standards as a way to differentiate their products from their competitors, grounded on the safety of their products, with a view to securing that new segment of the market made up of affluent consumers ‘with sophisticated and varied tastes’.¹²¹ In addition to capturing this high quality food market, private actors are increasingly accountable for acts that impinge upon core values inherent to mankind. Abusive business practices have moved the international community, led by the United Nations, to put in place a strategic policy ‘U.N. Global Compact’, which lists ten principles in order to align acts of private corporations to universally accepted principles in the areas of human rights, labour, environment and anti-corruption. Relevant to the analysis of food safety private standards is Principle 1 of the U.N. Global Compact to the effect that ‘(b)usinesses should support and respect the protection of internationally proclaimed human rights’, and Principle 2, which states that ‘(b)usinesses should make sure they are not complicit in human rights abuses’.¹²² Thus, when public health is at risk, private firms may be required, under these principles, to do their utmost in order to eliminate the possible risks posed by their business-related activities.

Accordingly, firms will not hesitate to implement private standards to avoid being perceived by their customers as skimping on efforts to protect the health of the ultimate

¹²¹ G Smith ‘*Interaction of Public and Private Standards in the Food Chain*’ (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, para. 47.

¹²² Along similar lines, the Organisation for Economic Development and Cooperation (OECD) has recently published the ‘Guidelines for Multinational Enterprises’, which set out that ‘A. Enterprises should ... 2. Respect the internationally recognised human rights of those affected by their activities’. These Guidelines promote ‘good corporate governance practices drawn from the OECD Principles of Corporate Governance’ and, to this end, it creates a surveillance mechanism whereby local governments are required to be heedful, and accord sympathetic consideration, to complaints against human rights abuses by multinational corporations.

consumers of their products, even if such private standards whose level of protection goes beyond existing international standards or sound scientific evidence. Governments, for their part, will most likely refuse to enjoin private entities to lessen their high standards since these are, all the more so when they seem to pursue a legitimate objective. It would be unreasonable to demand that a WTO Member dismiss the significance of the (potential) corporate responsibility of private actors.

At any rate, it would be largely ineffective to oblige private actors to conclude transactions without factoring private standards into their decisions. For a trader is free to purchase and sell at will without justification. If a trader is told that private standards that exceed international standards, or do not accord to sufficient scientific evidence, should not be weighed in a business decision, such trader will simply not express the reason for rejecting an offer. Thus, restricting the use of private standards in commercial transactions, through government regulation, may prove to be intrusive and ineffective.

WTO Members may, perhaps, use other means to persuade traders to comply with the SPS Agreement. For instance, it may be considered updating the existing SPS government regulations in a way that reflect the latest state of science. This is not always feasible since this would have to be based on international standards or on scientific evidence, which may not be at a government's disposal. Moreover, a WTO Member may engage all interested parties in consultations and informative sessions as to the relevant products and processes that are of concern and how to address in the least-trade restrictive manner. Furthermore, WTO Members must be vigilant about not allowing the use of private standards for the pursuance of certain illegitimate goals. For instance, competition laws must apply to instances of vertical integration, *e.g.* when a trader, which belongs to a conglomerate, requires fulfilment of a private standard that another entity of the same business group is able to meet.

More importantly, as outlined above, it may be concluded that one of purposes of implementing private standards in business activities is to 'inform consumers about different quality attributes and have the effect of increasing consumer loyalty while lowering the price elasticity for the food product concerned'.¹²³ When food safety measures of private firms rest on private standards and do not conform to the relevant provisions of the SPS Agreement,

¹²³ G Smith 'Interaction of Public and Private Standards in the Food Chain' (2009) OECD Food, Agriculture & Fisheries AGR/CA/APM(2006)21/FINAL Unpublished, para. 48.

WTO Members must be vigilant that consumers are not misled into believing that, through certain private standards, the products sold by such firms are safer than others. To give but one example, assume that a private firm refuses to buy products made of a chemical substance and advertises its products as being free of such a substance because, say, it may conduce to respiratory diseases. If there is no international standard by CODEX Alimentarius Commission or, else, scientific justification for a higher level of protection, the measure of this private firm would be inconsistent with the SPS Agreement, and WTO Members would be entitled, and required, to promulgate measures that prevent consumers from being misled into deceptive marketing of products as ‘safer’.

The foregoing illustrates the significant constraints that WTO Members may find in ensuring that non-governmental entities comply with the provisions of the SPS Agreement. These difficulties were timely recognized during the Uruguay Round in the context of TBT negotiations, in respect of Article 3.1 of the TBT Agreement, tantamount to third sentence of Article 13 of the SPS Agreement. According to the *travaux préparatoires* available to date, the European Economic Community and the United States coined the reference to ‘take such reasonable measures as may be available to’ Members as a ‘best effort’ undertaking.¹²⁴ Because of the discontent caused by this species of obligation, negotiators agreed on a Code of Conduct, annexed to the TBT Agreement, to which bodies other than the central government, whether local governments, regional bodies or non-governmental entities, should adhere. However, no equivalent Code of Conduct was created for the SPS Agreement.

In brief, Article 13, third sentence, sets out a rule of attribution of acts by non-governmental entities and regional bodies to WTO Members when the latter do not take such reasonable measures as may be available to them to ensure that such entities and bodies comply with the provisions of the SPS Agreement.

(ii) To ensure that non-governmental entities and regional bodies comply with the relevant provisions of the SPS Agreement

The last element of Article 13, third sentence, of the SPS Agreement relates to the result that is intended to be accomplished through the taking of reasonable measures available to a WTO Member, namely: to ensure that non-governmental entities and regional bodies comply

¹²⁴ ‘Code of Good Practice for Non-Governmental Standardizing Bodies: Proposal by the European Economic Community’ (MTN.GNG/NG8/W/49) 28 July 1989. See also, ‘Improved Transparency on Regional Standards Activities in the GATT Agreement on Technical Barriers to Trade: Proposal by the United States’ (MTN.GNG/NG8/W/49) 5 July 1988 TBT/W/112.

with the relevant provisions of the SPS Agreement. Certainly, this clause results somewhat puzzling for it is hard to imagine how non-governmental entities and regional bodies may comply with the provisions of the SPS Agreement that are not addressed to them but to WTO Members. Thus, if the obligations set out in Articles 2 through 11 of the Agreement are imposed on WTO Members, how can non-governmental entities and regional bodies comply with such obligations?

At first glance, it appears that Article 13, third sentence, intends to substitute ‘WTO Members’ for ‘non-governmental entities’ and ‘regional bodies’ whenever the SPS Agreement sets forth a substantive obligation. Thus, if a non-governmental entity restricts its purchases to products that meet certain food safety standards, such private measures must be based on international standards (Article 3.2), or on scientific evidence (Article 3.3 and 5.1 of the SPS Agreement). By the same token, such private measures must be no less trade restrictive than necessary to achieve the appropriate level of protection (Article 5.6)¹²⁵, and imposed on a non-discriminatory basis (Article 5.5). Yet, the substitution approach may prove problematic because there appears to be no textual support for extending the scope of the obligations to entities that are not the WTO Members themselves. The WTO covered agreements impose obligations on WTO Members and do not lay down rights or obligations on non-governmental entities.¹²⁶

Moreover, it is doubtful whether certain of the obligations in the SPS Agreement may be complied with by non-governmental entities and regional bodies. For instance, transparency (Article 7), technical assistance (Article 9), or special and differential treatment (Article 10) obligations seem to be outside the scope of conduct of non-governmental bodies. Other obligations may equally be argued that non-governmental entities and regional bodies are not capable of complying or failing to comply with them. Accordingly, it is unlikely to conclude that reference to ‘comply(ing) with the relevant provisions’ of the SPS Agreement by non-governmental entities and regional bodies in Article 13, third sentence, does not intend to impose actual obligations on such entities and bodies.

¹²⁵ As noted above, under the SPS Agreement it is the WTO Member itself that determines the appropriate level of protection that it intends to achieve. (Appellate Body Reports, *US/Canada – Continued Suspension*, para. 523; Appellate Body Report, *Australia – Salmon*, para. 199). Therefore, when the SPS measure in question is adopted by a non-governmental entity, it must not depart from the appropriate level of protection set by the WTO Member as a whole.

¹²⁶ See JH Jackson ‘Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals’, in *Continuity and Change in EU Law: Essays on Honour of Sir Francis Jacobs* (2008) p 373–375.

To surmount the shortcomings presented by the ‘substitution’ approach, it may also be advanced that Article 13, third sentence, suggests that non-governmental entities and regional bodies may be capable of complying with the provisions of the SPS Agreement only when they are deemed to be part of the WTO Member itself. The question, hence, becomes how an act by a private entity be considered an act by the WTO Member. The first sentence of Article 13 makes clear WTO Members are ‘fully responsible’ for the observance of the provisions of the SPS Agreement (Article 13, first sentence). The third sentence of the same provision establishes that WTO Members must take ‘reasonable measures’ to ensure that non-governmental entities and regional bodies comply with the provisions of the SPS Agreement. Accordingly, a WTO Member is fully responsible for any breach of any of the provisions of the SPS Agreement by acts of such entities and bodies only when it has not taken ‘reasonable measures’ for purposes of the third sentence of Article 13.

Some remarks are worthy of analysis in this respect. It is important to recall that, according to Article 1.1 of the ILC Articles on State Responsibility, two elements make up the responsibility of a State, namely: (i) attribution of the act in question; and (ii) the breach of an international obligation. As a special rule of attribution, Article 13, third sentence, establishes that an act of a non-governmental entity or a regional body is attributable to a WTO Member when it fails to take ‘reasonable measures’. This is so because, by its terms, the third sentence of Article 13 allows a WTO Member to disengage its ‘full’ responsibility of an act by a non-governmental entity or a regional body by taking ‘reasonable measures’ within the meaning of that sentence. However, where a WTO Member fails to take such measures, this is not sufficient *a priori* to conclude that the responsibility of a WTO Member has been engaged. For the second element of State responsibility (the breach of the international obligation) is met only when the act of the non-governmental entity or regional body (already attributed to the WTO Member), is inconsistent with the provisions of the SPS Agreement.

This appears to be the only plausible explanation of the clause in Article 13, third sentence, that non-governmental entities and regional bodies comply with the relevant provisions of the SPS Agreement. It is not that these entities and bodies are obliged to do, or refrain from doing, something, but rather, it is the WTO Member that assumes attribution for the acts of the non-governmental entities or regional bodies concerned. This clause will trigger the breach of the obligation when the acts in question have already been attributed to the WTO Member.

3.4.4 Article 13, Fourth Sentence: Negative Conduct not to Require or Encourage Actions Inconsistent with the SPS Agreement

In addition to taking ‘reasonable measures’, WTO Members are required ‘not (to) 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’. As an initial matter, the fourth sentence of Article 13 serves as a complement to the second and third sentences in that it attempts to foreclose a scenario where local government bodies, as well as non-governmental and regional entities infringe the provisions of the SPS Agreement as a result of a WTO Member’s positive action of encouraging or requiring them to act in the manner they do. As Professor Röben rightly points out, Article 13, fourth sentence, ‘prohibits Members from circumventing the Agreement by relying on private action’.¹²⁷ Thus, while the second and third sentences are directed at WTO Members taking measures, the fourth sentence provides for a negative action, that is, to refrain from encouraging or requiring these bodies and entities to act inconsistently with the SPS Agreement.

As with the previous sentences, Article 13, fourth sentence, sets out a rule of attribution of acts by local governments and non-governmental and regional entities to a WTO Member. Here, again, attribution is not automatic, but requires that the WTO Member undertakes a positive conduct in the form of encouraging or requiring an inconsistent action. These actions are different in the degree of compulsion. Encouraging” means that the local government or non-governmental or regional entity does not feel compelled to carry out an act but, if it does so, the entity concerned will be better off.¹²⁸ On the other hand, ‘requiring’ suggests an element of compulsion to the effect that there is no possibility to avoid compliance with the WTO Member’s order without receiving a sanction or not being able to exercise a right.¹²⁹

The form of attribution set out in the fourth sentence of Article 13 closely resembles the one set out in Article 8 of the ILC Articles on State Responsibility, which reads: ‘(t)he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’. Hence, when a WTO

¹²⁷ V Röben ‘Article 13’, in R Wolfrum *et al* *WTO - Technical Barriers and SPS Measures* (2007) p 543.

¹²⁸ Panel Report, *Japan – Film*, para. 10.48.

¹²⁹ Panel Report, *US – COOL*, paras. 7.389-7.392.

Member encourages or requires a local government, or a non-governmental or regional entity to act inconsistently with the provisions of the SPS Agreement, the act, which is in principle attributable to the body or entity itself, is in reality an act of the WTO Member because the body or entity in question acts under the instructions or upon the giving of bounties in exchange for the inconsistent conduct.

It may be argued that the fourth sentence is dispensable when viewed against second and third sentences. This is so because when a WTO Member encourages or requires a local government body, or a non-governmental or regional entity to act inconsistently with the provisions of the SPS Agreement, it would turn clear that the WTO Member concerned is failing to take ‘positive measures and mechanisms’ within the meaning of Article 13, second sentence, or ‘such reasonable measures as may available to’ it, for purposes of the third sentence of Article 13. Yet, despite this apparent redundancy, it is inescapable to conclude that the draftsmen of the SPS Agreement wished to ensure that WTO Members would be attributed the acts of local government bodies and non-governmental and regional entities, where the Members themselves encourage or require such bodies and entities to act inconsistently with the provisions of the SPS Agreement.

3.4.5 Article 13, Fifth Sentence: Not to Rely on Services of Non-Governmental Entities to Comply with Provisions of the SPS Agreement

Finally, Article 13, fifth sentence, makes provision for a rule of responsibility in respect of acts by non-governmental entities that supply services to WTO Members for the implementation of SPS measures. According to the fifth sentence, ‘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’.

Under the fifth sentence, the responsibility for the inconsistency of the relevant provisions of the SPS Agreement is engaged when the WTO Member fails to ensure that the service supplier, whose services were relied upon for the implementation of SPS measures, is not complying with the provisions of the SPS Agreement. Legal scholarship has suggested in this respect that, for purposes of Article 13, fifth sentence, ‘(i)mplementation (of SPS measures) comprises both the setting and enforcement of standards’.¹³⁰ It appears that reference to ‘implementing’ connotes enforcement of SPS measures. However, it is submitted that

¹³⁰ V Röben ‘Article 13’, in R Wolfrum *et al* *WTO - Technical Barriers and SPS Measures* (2007) p 543.

extending the term to standard-setting activities is troublesome for the SPS Agreement does not regulate the way in which standards are created. A standard created by a non-governmental entity fails to comply with, at least, one of the requisite elements of an ‘SPS measures’, namely, that it affects international trade as provided for in Article 1.1 of the SPS Agreement. This is so because a standard takes the form of guidelines or characteristics ‘aimed at the achievement of the optimum degree of order in a given context’ and, hence, are objective descriptions of quality.¹³¹

Rather, what is the subject of regulation under the Agreement are SPS measures, the basis of which are international standards (in the case of food safety, standards by the CODEX Alimentarius Commission) or, else, on scientific evidence. Therefore, if a government asks a laboratory to develop a standard, this very act falls outside the scope of the SPS Agreement. Moreover, the term ‘implementing SPS measures’, as set forth in the fifth sentence, suggests the prior existence of an SPS measure. Setting a standard appears to fall outside the meaning of ‘implementation’ of an SPS measure. Standards are, instead, the basis upon which SPS measures rest. Therefore, the fifth sentence of Article 13 appears to address situations of enforcement of application of existing SPS measures, instead of standard-setting, which on formation may, or may not, be the basis of future SPS measures.

A WTO Member may rely on services for implementing SPS measures in cases where, for instance, laboratories are hired by a WTO Member needs to conduct a risk assessment in respect of agricultural goods originating in certain targeted countries (*e.g.* pursuant to an overarching, existing SPS measure that requires the ban of imports, when subjected products pose, for example, a potential for a disease). Under Article 13, first sentence, it is not necessarily that the government delegates its inherent powers or authority to enact SPS measures to a non-governmental entity, as the mandate of the contract may be restricted to undertaking a scientific analysis or risk assessment, whilst the government may retain the ultimate power to adopt and implement the binding SPS measure, *e.g.* ban on imports. However, because such SPS measures may be based on the results of the scientific analysis carried out by a non-governmental entity, as well as on the possible recommendations thereto, Article 13, fifth sentence, deems the act of the non-governmental entity (*e.g.* a laboratory) as an act of the WTO Member for purposes of the SPS Agreement to the extent that the WTO Member fails to ‘ensure’ that this entity does comply with the Agreement.

¹³¹ The notion of ‘standard’ is addressed in Chapter 2 above.

Accordingly, Article 13, fifth sentence, does not appear to address the setting of standards, but rather, the implementation of existing SPS measures, that is, the enforcement or application of measures that, *inter alia*, affect international trade. Under Article 13, fifth sentence, the responsibility of the WTO Member for the act of the non-governmental entity is engaged when the Member fails to ‘ensure’ that the supplier it hires complies with the provisions of the SPS Agreement (attribution), and when such acts are, in actuality, inconsistently with any of the obligations of the Agreement.

3.5 Concluding remarks

The outcome of this analysis yields a conclusion unheard of elsewhere in academic literature, let alone, WTO jurisprudence. For Article 13 of the SPS Agreement sets out, rather than independent obligations to carry out actions or inactions, rules of responsibility of WTO Members for actions of non-governmental entities when Members do not take the action or inaction required in the third, fourth and fifth sentence of Article 13. Thus, once the conduct of the non-governmental entities is attributed to the WTO Member by operation of the rules in Article 13, that conduct becomes as one undertaken by the Member itself and the relevant obligations of the SPS Agreement apply with the same force as they apply to acts of central governments.

It has also been observed that ‘non-governmental entity’ in the third, fourth and fifth sentences of Article 13 covers, *inter alia* private firms, which develop, adopt and implement private standards. Such private firms, as supermarket chains, must work together with WTO Members in order to act consistently with the SPS Agreement. Where a WTO Member does not ‘take such reasonable measures as may be available to’ it to ensure that these private operators act consistently with the SPS Agreement, the responsibility of that Member may be engaged under Article 13, third sentence. By the same token, if that WTO Member encourages or requires a private firm to act in a manner inconsistent with the SPS Agreement, such inconsistency may under Article 13, fourth sentence, be attributable to the WTO Member. Finally, if a Member does not ensure that the private firm, on whose services the WTO Member relies for implementing SPS measures, complies with the SPS Agreement, the acts of this private firm are attributable to the WTO Member in question.

In brief, the gist of Article 13 is not a qualification or attenuation of the obligations of WTO Members in respect of acts by *inter alia* non-governmental entities. Rather, Article 13 deals with the instances in which WTO Members *may* be responsible for the acts of non-governmental entities (such as private firms) that are inconsistent with the SPS Agreement. This may be the case of the adoption and implementation of private standards when they do not accord with Article 3 of the SPS Agreement.

CHAPTER 4

CURRENT DISCUSSION AND PROPOSED ACTIONS BY THE SPS COMMITTEE

4.1 Introduction

What seems to be clear from the legal analysis of Article 13 is that private standards are not explicitly mentioned in the SPS Agreement and, therefore, WTO Members may invoke all sorts of arguments to escape the disciplines set out therein. Even if, as concluded above, Article 13 provides for a rule of attribution of acts of non-governmental entities to WTO Members (including the development and implementation of private food safety standards), the attribution link is bridged only to the extent that a Member fails to take reasonable measures (third sentence), encourages or requires such entities to act contrary to the SPS Agreement (fourth sentence), or fails to ensure that services supplied by non-governmental entities in which it relies comply with the provisions of the SPS Agreement. It may thus be argued that Article 13 is at best a soft provision, as the implementation of private standards by private firms is attributed to the WTO Member not in all circumstances but only when it is demonstrated that the State has not taken, or has taken, any of the actions set out in the relevant sentences in Article 13. To counter this situation, WTO Members have within the WTO sought more certainty and practical actions.¹³²

The obvious best solution would be a negotiated interpretation to the definition of private standards, how it is governed by the SPS Agreement and in accordance with that, what sort of measures would be reasonable for Members to take. It is acknowledged by the SPS Committee and Members alike, that a negotiated way forward, which would satisfy the concerns of Members at both ends of the debate, is unlikely.¹³³ This is evident from the most recent meeting of the SPS committee¹³⁴, where Members discussed the implementation of the actions with respect to SPS-related private standards agreed by the committee.¹³⁵ The discussion was focused, *inter alia*, on the proposed working definition of SPS-related private

¹³² Committee on SPS Measures 'Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses' *Note by the Secretariat* (G/SPS/W/230) 25 September 2008, para 10.

¹³³ *Ibid.*

¹³⁴ Fifty-third meeting on 26 to 29 March 2012.

¹³⁵ Committee on SPS Measures 'Actions Regarding SPS-Related Private Standards' *Decision of the Committee* (G/SPS/55) 6 April 2011. See, also, Committee on SPS Measures 'Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee' (G/SPS/W/256) 3 March 2011.

standards. Although, by the time of writing, there is no official document available on this meeting, interviewing the South African representative at this meeting, it was confirmed that Members could not come closer to a definition of SPS-related private standards, as was the ambition, and have in fact moved away from consensus in this regard.

None the less, the development of practical steps to deal with specific problems in a concrete manner, are desirable and the SPS Committee has made progress herein. In July 2008, the Chair of the SPS Committee circulated a questionnaire seeking proposals on what the SPS Committee could and should do to (1) reduce the negative effects that SPS-related private standards have on international trade, especially for developing countries, and (2) enhance the potential benefits arising from SPS-related private standards for developing countries.¹³⁶ Thirty Members responded and the Secretariat circulated a summary thereof, including some proposals for possible actions.¹³⁷ As previously agreed, those Members who provided responses to the Chair's questionnaire within the deadline were invited to form an *ad hoc* working group on SPS-related private standards and met seven times between October 2008 and October 2010.¹³⁸

The mandate of this *ad hoc* working group was to ultimately present a report to the SPS Committee containing proposals for concrete actions to be considered and adopted by the Committee, in an effort to bring more structured and concrete examples to its discussions on SPS-related private standards.¹³⁹ It was agreed that this would involve a three-step study by the *ad hoc* working group, focusing on proposals made by Members.¹⁴⁰

¹³⁶ Committee on SPS Measures 'Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee' (G/SPS/W/256) 3 March 2011.

¹³⁷ Committee on SPS Measures 'Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses' *Note by the Secretariat* (G/SPS/W/230) 25 September 2008. What was apparent from the summary is Members wide range of views regarding the issue of private standards, the extent to which they establish SPS requirements, their effects on trade and development, and their legal relationship with the SPS Agreement.

¹³⁸ Members of the *ad hoc* working group on SPS-related private standards consists of: Argentina, Australia, Belize, Brazil, Canada, Chile, China, Colombia, Costa Rica, Dominican Republic, European Union, Ecuador, Egypt, Guatemala, Japan, Mexico, Mozambique, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Peru, St. Vincent & the Grenadines, South Africa, Chinese Taipei, Thailand, United States, Uruguay and Venezuela.

¹³⁹ Committee on SPS Measures 'Private Standards – Identifying Practical Actions for the SPS Committee – Summary of Responses' *Note by the Secretariat* (G/SPS/W/230) 25 September 2008, paras 4-7.

¹⁴⁰ Committee on SPS Measures 'Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee' (G/SPS/W/256) 3 March 2011. As the first step, the Secretariat circulated a Questionnaire on SPS-related Private Standards. The questionnaire sought information from Members regarding products and markets of concern, the relevant private and international standards, trade effects, costs of compliance, and a number of related elements. As the second step, a compilation of replies summarising the

The *ad hoc* working group presented six actions to be endorsed by the SPS Committee, without prejudice to the views of Members regarding the scope of the SPS Agreement. In addition, the *ad hoc* working group also presented *other* six actions, not yet endorsed, but still under consideration as consensus was not reached at that stage.

4.2 Actions on which the SPS Working Group has reached consensus¹⁴¹

Action 1: As an initial matter, the SPS Committee set out to construct a definition for SPS-related private standards. The discussion in chapter one on the definition of private standards in relation to food safety illustrated that private standards do not operate in isolation. Not only are they not always easily distinguishable from public standards but they are often interwoven with standards related to TBT-, environmental- and other related matters. Although producers are only concerned with meeting the standards required to export their products, regardless of the nature, the SPS Committee is mandated to deal only with SPS-related standards and its effects on trade.¹⁴² Accordingly, the first action adopted by the SPS Committee is to develop a working definition of SPS-related private standards and to limit its discussions to these.

To this end, Members were invited to submit specific proposals on a working definition and to comment on the proposed definitions received. Based on these the following working definition on SPS-related private standards was presented for the consideration of the SPS Committee meeting in March 2012:¹⁴³

SPS-related private standards are [voluntary] requirements which are [formulated, applied, certified and controlled] [established and/or adopted and applied] by non-governmental entities [related to] [to fulfill] one of the four objectives stated in Annex

information contained in the 40 responses received from 22 Members was circulated. The *ad hoc* working group considered the compilation of replies during its meetings in June and October 2009. As the third step, the working group requested the Secretariat to prepare a document identifying possible actions by the SPS Committee the working group agreed in October 2010 to present its report on possible actions regarding SPS-related private standards for the Committee's consideration.

¹⁴¹ Committee on SPS Measures 'Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee' (G/SPS/W/256) 3 March 2011, p 2-6.

¹⁴² The wide range of issues covered by private standards make it more difficult to single out the SPS-related requirements and determine whether any trade effects can be attributed to these.

¹⁴³ Committee on SPS Measures 'Proposed Working Definition on SPS-Related private Standards' *Note by the Secretariat* (G/SPS/W/265) 6 March 2012, p 1, 2.

A, paragraph 1 of the SPS Agreement and which may [directly or indirectly] affect international trade. These four objectives are:

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

This study will discuss three components of the definition. First, the content of a private standard must be ‘... [voluntary] requirements..’. In this regard, two additional elements were proposed to WTO Members to consider at its March 2012 meeting¹⁴⁴; first, that the requirement referred to should include ‘... technical regulations, guidelines and recommendations.’ Whether this was developed by non-governmental entities themselves or derived from existing private, official or international standards is irrelevant.¹⁴⁵ What is of importance is that its application must be part of the non-governmental entities' commercial objectives. A private standard according to this suggestion must address marketplace demands, including consumer preferences and must form part of a private, commercial and contractual relationship. The former part of this suggestion is problematic. As was seen in chapter two, private standards are often developed in response to the market but not exclusively so. It is very often designed to respond to an existing or expected government regulation and totally removed from demands from the marketplace.

Second, the actions required to bring the private standards into operation must be performed by non-governmental entities. Both what these actions should be and that it must be performed by non-governmental entities were subject to further consideration by the SPS

¹⁴⁴ Committee on SPS Measures ‘Proposed Working Definition on SPS-Related private Standards’ *Note by the Secretariat* (G/SPS/W/265) 6 March 2012, p 2.

¹⁴⁵ Although a private standard may be derived from international standards, it is not developed, endorsed or promulgated by the Codex, IPPC or OIE.

Committee.¹⁴⁶ It is clear from the suggestions that a private standard must be developed, applied, implemented and enforced by non-governmental entities. The moment any of these actions are performed by a governmental entity, it will no longer be considered as an SPS-related standard. However, as stated in chapter two, there are many standards where the distinctions of what entity performs which action are blurred. For instance, ISO standards have involvement of both private entities and governments. These standards will then not be considered as private standards. As to the much debated concept of what is a non-governmental entity, the SPS-Committee suggested that a ‘... non-governmental entity is any entity that does not possess, exercise, or is not vested with governmental authority. Non-governmental entities are private entities, including sector bodies, companies, industrial organizations and enterprises.’

The third component of the definition of a SPS-related private standard correlates with the wording of Article 1 of the SPS Agreement, to the effect that the Agreement will apply to SPS measures that ‘... may directly or indirectly, effect international trade’. The SPS Committee suggested in this regard that when the Member concerned assesses whether an SPS-related private standard may affect international trade, it should consider relevant available information such as:¹⁴⁷

The value or other importance of imports to the importing and/or exporting Members concerned, whether from other Members individually or collectively; the potential development of such imports; and difficulties for producers in other Members, particularly in developing country Members, to comply with the proposed SPS-related private standard. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.

Action 2: The SPS Committee should regularly inform its three sister organisations – Codex Alimentarius, OIE and IPPC - regarding relevant developments in its consideration of SPS-related private standards, and should invite these organisations to likewise regularly inform the SPS Committee of relevant developments in their respective bodies. As a concern related to private standards is that, as explained above, they sometimes deviate or go beyond

¹⁴⁶ Committee on SPS Measures ‘Proposed Working Definition on SPS-Related private Standards’ *Note by the Secretariat* (G/SPS/W/265) 6 March 2012, p 2.

¹⁴⁷ *Ibid.*

the standards established by the international standard-setting bodies referenced in the SPS Agreement. These bodies may benefit from regular information exchanges on this topic.

Action 3: The WTO Secretariat should inform the SPS Committee of relevant developments in other WTO councils and committees which could be of relevance for its discussions on SPS-related private standards. Private standards play an increasingly important role in all areas of international trade and it could be beneficial for the SPS Committee to keep abreast of relevant developments across all the WTO bodies.

Action 4: Member governments should communicate with and help relevant private sector bodies in their countries in which they are involved, and especially those setting SPS-related private standards, to understand the issues raised in the SPS Committee and the importance of the international standards of Codex Alimentarius, OIE and IPPC. Such communication could be achieved through meetings or other means and encourage harmonization, mutual recognition of standards by private standard holders, cost reduction in the areas of compliance and certification, and further transparency and consultation mechanisms. It would also help Members build an understanding of the extent and functions of SPS-related private standards.

Action 5: The SPS Committee should explore the possibility of working with the Codex Alimentarius, OIE and IPPC to support the development and/or dissemination of informative materials underlining the importance of international SPS standards. When producers and traders become aware of the differences between public and SPS-related private standards and the merits of science-based international standards, it may contribute to the further incorporation of international standards in public and private requirements and may also improve the ability of producers and exporters to engage those setting private standards in an open discussion on the content of these standards.

Action 6: Members should exchange information on SPS-related private standards and develop their understanding of how these relate to international and government standards and regulations. Although the working group invited the SPS Committee to endorse this action, it is still being under consideration. While there is agreement to exchange information, there are differing views as to whether this should be part of the SPS Committee's agenda. During the SPS Committee meeting held on 20 June 2011 on the proposed revisions to action

6, Members proposed that this exchange should take place ‘... outside the formal and informal sessions of the SPS Committee...’.¹⁴⁸

4.3 Actions on which the SPS Working Group has not reached consensus

In addition to the six agreed actions covering defining private standards, sharing information, and cooperation between the WTO’s SPS Committee and other organisations, there are six remaining actions still under discussion. Proposed possible actions on which the working group has yet to reach consensus are:¹⁴⁹

Action 7: The SPS Committee should provide a forum for the discussion of specific trade concerns concerning SPS-related private standards. There is a standing agenda item on specific trade concerns at the SPS Committee and Members may raise specific issues or concerns on other Member’s measures. Under the auspices of this agenda item it has been suggested that Members may raise specific trade concerns relating to private standards. The Member in whose territory the entity that has developed or implemented the standard in question is located would then relay the concern raised to the private entity, seek explanations and revert back to the SPS Committee, as appropriate. The objectives would be to raise the level of communication between Members and entities which adopt SPS-related private standards, facilitate the understanding of the reasons underpinning a standard, and allow exporting Members to try to find positive solutions to specific problems detected.

Participants in the *ad hoc* working group have expressed divergent views on this proposed action. Although there are members who endorse this, others are of the view that private standards are not covered by the SPS Agreement, and insist that neither the governments of Members nor the SPS Committee can interfere in the private contractual relations of firms, unless the use of private standards conduce to deceptive or anti-competitive practices..

Action 8: The SPS Committee should develop guidelines on the implementation of Article 13 of the SPS Agreement as concerns SPS-related private standards. This approach could be one way to reinforce the key principles of the SPS Agreement, such as scientific

¹⁴⁸ Committee on SPS Measures ‘Proposed revision 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) 20 June 2011, p 1.

¹⁴⁹ Committee on SPS Measures ‘Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee’ (G/SPS/W/256) 3 March 2011, p 7-9.

justification, transparency and equivalence in the private standards arena. Some participants in the *ad hoc* working group have indicated that it would be premature to develop guidelines before reaching a clear understanding on the meaning of the term ‘non-governmental’ entities in relation to SPS-related private standards.

Action 9: The SPS Committee should develop a transparency mechanism regarding SPS-related private standards. Transparency is one of the key principles of the SPS Agreement which private standards appear to lack. A possible way to address this concern would be the development of a more formal transparency mechanism for SPS-related private standards through the SPS Committee. As expressed by some participants in the working group there are some practical problems with this. For instance, who would be responsible to notify, *i.e.* Members or private firms? If it is the responsibility of Members, how will they become aware of all private standards within their territory? In addition, issues such as time, cost, government jurisdiction, and intellectual property may arise.

Action 10: The SPS Committee should develop a Code of Good Practice for the preparation, adoption and application of SPS-related private standards. The TBT Agreement, for example, provides for a Code of Good Practice for the Preparation, Adoption and Application of Standards and the same has been suggested for SPS-related private standards. An SPS Code of Good Practice could take the form of an SPS Committee recommendation, or could be submitted through the Committee's parent bodies to the Ministerial Conference for adoption as an authoritative interpretation. Alternatively, given that a number of private standards contain SPS- as well as TBT-related elements, entities involved in private standards could be encouraged to subscribe to the TBT Code of Good Practice (Attached to the TBT Agreement as Annex 2). However, questions could arise as to whether the ‘non-governmental standardising bodies’ referred to in the TBT Code of Good Practice would cover the type of private standard-setting entities alluded to in the SPS Committee discussions.

Action 11: The SPS Committee should develop guidelines for the governments of WTO Members to liaise with entities involved in SPS-related private standards.

Action 12: The SPS Committee should seek clarification as to whether the SPS Agreement applies to SPS-related private standards. A further clarification could be based on

specific written submissions from Members.¹⁵⁰ Alternatively, the SPS Committee could instruct the Secretariat to seek a legal opinion on this question from a qualified legal entity, for consideration by the SPS Committee. If Members were to reach consensus on a decision, this could be forwarded to the Council for Trade in Goods and, eventually, to the General Council and/or the Ministerial Conference for formal adoption as an authoritative interpretation within the meaning of Article IX:2 of the Marrakesh Agreement. In accordance with Article 12.7 of the SPS Agreement together with the decision of the Fourth Session of the Ministerial Conference, Members are instructed to review the operation of the SPS Agreement at least once every four years.

Article 12.7 also states that ‘(w)here appropriate, the Committee may submit to the General Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation’. Unlike an agreement on the clarification of a particular provision (so-called ‘authoritative interpretation’ under Article IX:2 of the Marrakesh Agreement), any formal amendment of the text of the SPS Agreement would presumably need to be pursued in accordance with Article X of the Marrakesh Agreement.

Apart from any initiative of the SPS Committee, the extent of the applicability of the SPS Agreement to SPS-related private standards could also be the subject of deliberations of a dispute settlement panel established under the WTO's Dispute Settlement Understanding. As noted in chapter 3 above, it appears that private food safety standards, when used in a way that affect international trade, may upon fulfilment of the prescribed conditions in Article 13 be attributable to WTO Members and, therefore, be violative the substantive obligations consicrated in the SPS Agreement.

4.4 Concluding Remarks

The actions under discussion by the SPS Committee, in theory, would indeed bring some relief to those WTO Members faced with practical problems related to private standards. However, as can be inferred from the divergent views of Members regarding these proposed

¹⁵⁰ See Committee on SPS Measures ‘Private Voluntary Standards within the WTO Multilateral Framework’ *Submission by the United Kingdom* (G/SPS/GEN/802) 9 October 2007.

actions, it is unlikely that consensus will be reached and as a result the sought-after certainty and practical solutions will stay amiss. Missing

Ideally, Members should reach consensus in the context of the SPS Committee on a submission to the General Council or the Ministerial Conference for formal adoption as an authoritative interpretation to determine whether Article 13 and in particular 'nongovernmental entities' may cover private firms that implement private standard. Taking into account Members differing views on private standards, such consensus is doubtful.

CHAPTER 5

CONCLUSION

Chapter two made an attempt at defining public standards and examined the drivers behind its evolution. It furthermore considered the trade-related effects private standards may have. On these points the following findings were made:

- Private standards are voluntary in that there is no legal compulsion for compliance and all the major functions associated with the system of standards are undertaken by private entities, such that there is no appreciable role for the State;
- The different drivers behind private standard initiatives are usually linked with two main objectives of private standards, i.e. to provide opportunities to both protect (risk management) and enhance reputation (product differentiation) in a cost effective manner;
- In recent years there have been profound changes to the public food safety regulatory systems as a response to real or perceived risks. Consumers have less confidence in public regulatory systems and have a more sophisticated conception of food safety and quality. The globalisation of food supply chains and coordination economies creates new opportunities for competitiveness, but also create new risks and challenges for value chain coordination and control. Increasingly, the responsibility for ensuring food safety has been devolved from the State towards the private sector;
- The market power of the non-governmental entities adopting private standards and requiring implementation thereof by their supplies are so strong that these standards are becoming *de facto* mandatory despite it being defined as voluntary; and
- Private standards may potentially act as non-tariff barriers and impede market access where it is too difficult for producers, especially from developing countries, to comply with the stringent and ever increasing standards.

Chapter three addressed the applicability of the provisions of the SPS Agreement to private food safety standards when used by private operators as the basis of their business decisions. In this respect, this analysis reached the following findings:

- The obligations in the SPS Agreement are imposed on WTO Members and, in particular, to the actions by central governments. Such actions are immediately attributable to the WTO Member to which the central government concerned belongs;
- Article 13 of the SPS Agreement establishes rules of responsibility of WTO Members, rather than specific obligations, for actions of governments other than the central government (second and fourth sentences); non-governmental entities (third, fourth and fifth sentences); and regional bodies (third and fourth sentences). Actions by these entities and bodies are to be attributed to the WTO Member concerned when the latter fails to take the action or inaction prescribed in each of the sentences of Article 13;
- Relevant to private standards, the third, fourth and fifth sentences of Article 13 of the SPS Agreement set out that WTO Members shall: (i) ‘take such reasonable measures as may be available to them’ to ensure that ‘non-governmental entities comply with the relevant provisions of the SPS Agreement’; (ii) refrain from encouraging or requiring ‘non-governmental entities’ to act inconsistently with the SPS Agreement; and (iii) ensure that ‘non-governmental entities’ that supply services relied upon by WTO Members for implementing SPS measures comply with the provisions of the SPS Agreement; and
- Pursuant to the relevant rules of interpretation set out in Articles 31 and 32 of the VCLT, ‘non-governmental entities’ may be interpreted as encompassing any entity not linked to the government. Developers, adopters and implementers of private standards (when the government does not intervene in any of these steps) are deemed to be ‘non-governmental entities’ for purposes of Article 13 of the SPS Agreement. Hence, the provisions of third, fourth and fifth sentences apply to entities that participate in the formation, adoption and implementation of private standards.

Chapter four analysed the actions WTO Members are considering in order to mitigate possible negative trade effects of private standards and found the following:

- A negotiated interpretation to the definition of private standards, how it is governed by the SPS Agreement and in accordance with that, what sort of measures would be reasonable for Members to take, is unlikely.
- WTO Members are seeking more certainty and practical actions to deal with the problems associated with private standards. An *ad hoc* working group presented six

actions to be endorsed by the SPS Committee and *other* six actions, not yet endorsed, but still under consideration as consensus were not reached at that stage.

Thereupon, this analysis concludes that there is little doubt that private standards do present challenges for developing countries and may impact negatively on trade. But the drivers behind the evolution of private standards have illustrated its value for non-governmental institutions to protect and enhance their reputations. Key, here, is to recognise that despite the stringency of these standards, they play a valuable role in the global value chain. Furthermore, they are closely linked to public standards and in many instances their function is to provide assurances to buyers in the global agri-food value chains that regulatory requirements have been met. It can therefore be concluded that these private standards will not be done away with. Instead, the linkages between public and private standards should be optimised to facilitate food safety and trade and its negative effects mitigated.

In this regards the conclusion of this analysis, that *there is indeed scope in the SPS Agreement for application to private standards, even where the formation, adoption and implementation are conducted by “non-governmental entities”*, may be helpful to achieve the goal of optimising the role that private standards play. This is not to say that WTO Members are directly responsible for the breach of an SPS obligation caused by an action of such non-governmental entities. Rather, the inconsistent acts of these entities are attributable to the State, only when the latter does not take the actions or inactions that third, fourth and fifth sentences provide for. Hence, by assuming attribution of the acts of such non-governmental entities, the WTO Member concerned may be found to act inconsistently with the relevant obligations of the SPS Agreement as a result of the pervasive effects that WTO-inconsistent private standards bring about on international trade.

As an authoritative interpretation with regards to the interpretation of Article 13 is desirable, yet unlikely, chances are that this debate would finally be brought to a WTO panel. This study recommends that WTO panels interpret Article 13 of the SPS Agreement as containing rules of responsibility for acts of *inter alia* non-governmental entities. Once an act by such entities is attributed to the WTO Member, the whole universe of obligations in the SPS Agreement apply to the actions at issue in the same way as they apply to acts of central governments.

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