# Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities

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## 1 Introduction

Sanitary and phytosanitary (SPS) requirements are those conditions applied to food and agricultural products to address food-safety risks and risks from pests or diseases in plants or animals. Such requirements may be laid down by central or local governmental bodies or by agencies authorised by them,[1] or may be set by non-governmental bodies without regulatory authority.[2] The latter category of SPS requirements, commonly known as 'private sector standards', have no binding force. Nevertheless, they may have an important impact on exports of food and agricultural products, particularly from developing countries.

For example, certain SPS standards for food products may be set by supermarket chains as a precondition for the acceptability of products from suppliers.[3] Importers

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[1]Note that while certain agencies established by governments to develop standards (eg national bureaus of standards, which are in some countries public bodies) may establish non-mandatory standards, when these standards relate to food safety issues, or to animal or plant health, governments typically take these standards up in national legislation and make them mandatory.

[2]Another source of non-binding standards are those set at *international* level by the relevant international standard-setting bodies, namely the Codex Alimentarius Commission, the World Organisation for Animal Health, and the International Plant Protection Convention. These standards are, however, not private sector standards as their development and adoption is carried out by representatives of states, not private entities.

[3]For general discussions on the effect of supermarket standards on developing country suppliers of food and agricultural products see Berdequé JA *et al Food safety in food security and food trade: Case study: Supermarkets and quality and safety standards for produce in Latin America* (September 2003) available at: http://www.ifpri.org/2020/focus/focus10/focus10_12.pdf visited on 23 January 2008; Food and Agriculture Organization *Rise of supermarkets across Africa threatens small farmers: Opportunities and challenges in a changing market* (8

in certain sectors may establish Codes of Practice setting out standards with which exporters must comply before the importers will purchase their products.[4] Industry organisations may also self-regulate in order to create consumer confidence in the products they supply and avoid the need for government regulation.[5] Voluntary safety-labelling schemes may be used by suppliers to provide a competitive advan-

October 2003) available at: http://www.fao.org/english/newsroom/news/2003/23060-en. html visited on 23 January 2008. Catherine Dolan and John Humphrey see the relationship between large retailers in developed countries and suppliers in developing countries as a form of 'governance', where retailers exercise close control over the supply chain. They provide an interesting analysis of the consequences of the control exercised by UK supermarkets over trade in fresh vegetables for the inclusion or exclusion of different types of producers and exporters as well as for the long-term prospects for the fresh vegetables industry in Kenya and Zimbabwe. Dolan and Humphrey *Governance and trade in fresh vegetables: The impact of UK supermarkets on the African horticulture industry* available at: http://www.colorado.edu/geography/class_homepages/geog_3662_s06/uk.pdf visited on 23 January 2008. A 2003 study reports that consolidation in the EU retail sector has increased the power of large retail chains over developing country suppliers. Such retailers prefer to deal with large production units in developing countries, rather than small producers, because the former can more easily undertake compliance measures. This results in the exclusion of small farmers or producers from export markets. See Technical Centre for Agricultural and Rural Cooperation ACP-EU, *Study of the consequences of the application of sanitary and phytosanitary (SPS) measures on ACP countries* (May 2003) at 14-15, available at: http://www.tcd.ie/iiis/policycoherence/index.php/iiis/content/download/371/1446/file/CTA%20Impact%20of%20SPS%20Measures%20on%20ACP%20countries.pdf visited on 23 January 2008. The 2005 Human Development Report of the UNDP also identifies, as one of the main problems affecting developing country trade, the role of supermarkets as 'the main gatekeeper to developed country markets for agricultural produce'. The same problems mentioned above are highlighted in this report. See United Nations Development Programme, *Human Development Report 2005. International cooperation at a crossroads: Aid, trade and security in an unequal world* (2005) at 142-143, available at: http://hdr.undp.org/en/media/hdr05_complete.pdf, visited on 2 January 2008.

[4]There has been a proliferation of Codes of Practice (COPs) in various sectors in the EU, setting standards for all aspects of the food chain (such as growing, processing, transportation etc). Although these COPs are not mandatory, importing firms will only source their imports from exporters that meet the standards of the Code of Practice. The best known COP is the EUREPGAP, which is the Good Agricultural Practices standard of the European Retailer Produce Working Group. EUREP also has a standard for Good Warehouse Practice for fruit and vegetables (note that in September 2007, EUREPGAP was rebranded as GLOBALGAP). Similarly, the British Retail Consortium has a global standard on food safety and quality, a standard for food packaging materials, and for non-genetically modified food ingredients. The Grain and Feed Association (GAFTA) has a COP for shipping and transport of grain, and over 80 standard contract forms for trade verification, examination and quality control in transit. The European Spice Association sets minimum standards for imported spices and herbs, dealing with EU requirements regarding pesticide residues, aflatoxins, trace metals and microbiological contamination. See Technical Centre for Agricultural and Rural Cooperation ACP-EU in 3 above.

[5]An interesting example of self-regulation by an industry group in order to build consumer confidence, is that of the 'stewardship' programmes developed and implemented by the Crop Protection Institute of Canada, a trade association representing the 'life-science' industry (ie the industry producing pesticides and genetically modified crops). Hepworth 'Industry stewardship as a response to food safety concerns' in Phillips and Wolfe (eds) *Governing food: Science, safety and trade* (2001) at 63-74.

tage to their products.[6] In addition, systems of certification of compliance with voluntary safety standards administered by national standards bodies, whether public or private, serve to provide guarantees to buyers of certain safety levels, beyond those required by regulations.

Until the 1990s, voluntary requirements and labelling and certification schemes administered by national (public or private) standard-setting bodies were typically limited to technical and quality standards, rather than health standards. When voluntary standards set by national standards bureaus or actors in the private sector dealt with safety issues, governments often converted the standard into a regulatory requirement and took over responsibility for ensuring compliance. Voluntary, primarily private sector, SPS standards did exist in a few circumstances, particularly in countries where government regulation was inadequate to provide the level of food-safety that some consumers demanded. This was, and still is, the case in some developing countries with weak SPS regulatory regimes where private sector standards fill the gap by providing consumers with the choice of buying safer products at a price premium.[7] Distributional problems arise, however, as safety becomes the prerogative of wealthier and more educated consumers who can take advantage of the choice offered by these schemes.

The 1990s saw the introduction of private sector food-safety standards also in certain developed countries, where the concern of some consumers with food-safety risks is such that they are willing to pay more for the assurance of very high safety standards, exceeding regulatory requirements. Examples of the latter are low residue levels for pesticides and labelling and certification schemes for organic fruit and vegetables. Since their introduction in the 1990s, there has been an explosion in the number and variety of private standards in the area of food

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[6]Berdequé *et al* n 3 above mention the example of a safety-labelling scheme in use in Guatemala. The Agricultural and Environmental Integral Protection Program, a public-private entity with experience in meeting export standards, has created the 'Safety Certification Seal' to address local and regional certification requirements for safety labelling. Although this is a voluntary system, some producers that supply the largest supermarket chain in Guatemala are upgrading their production systems in line with this new programme.

[7]Farina *et al* discuss the example of the Argentinean milk industry where, by the early 2000s, consensus was growing that public sanitary regulations were inadequate, being weaker than both international standards and the private standards of domestic processors. As a result, private industry has taken over the development of milk standards and monitoring their implementation. Farina *et al* 'Private and public milk standards in Argentina and Brazil' (2005) 30 *Food Policy* at 302-315, 312-313. Similarly, Berdequé *et al* n 3 above at 254-269, 154, on the basis of case studies in Costa Rica, Guatemala, El Salvador, Honduras and Nicaragua report that the rise of the use of private standards by Latin American supermarket chains occurs in the context of the near-absence of public food safety standards and the lack of effective implementation of such standards where they do exist. In this regard, see also Henson and Reardon 'Private agri-food standards: Implications for food policy and the agri-food system' (2005) 30 *Food Policy* at 241-253, 245.

safety and good agricultural practice, for example, the Euro-Retailer Produce Working Group's Good Agricultural Practice Standards (EUREPGAP)[8] and the Global Food Safety Initiative (GFSI).[9] These standards have proliferated in response to factors such as the decline in consumer confidence in national SPS regulation following food-safety scares; the increased liability of retailers for the safety of the products they sell; the growing use of food safety and quality claims by retailers for firm and product differentiation;[10] and growing consumer demands for food characteristics not typically addressed in regulations, such as organic production or biotech-free food.[11]

While, due to the impetus created by these factors, private sector standards are rapidly increasing in the area of food safety, the same cannot be said for the areas of animal and plant health.[12] As the driving force for stricter animal or plant health requirements comes from domestic producers, rather than consumers, there is no price premium to be gained by private action in this area. Neither do the same

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[8]As noted in n 4 above, in September 2007 EUREPGAP was rebranded as GLOBALGAP.

[9]Gascoine *et al Private voluntary standards within the WTO multilateral framework* (March 2006) Annex 1, 40. The GFSI was created in 2000 at the request of Chief Executive Officers of food industries to promote continuous improvement in food safety and improve cost efficiency in the food supply chain. It also promotes concvergence of food safety standards through benchmarking of private sector food standards. Committee on Sanitary and Phytosanitary Measures *Report of the STDF Information Session on Private Standards (26 June 2008). Note by the Secretariat*, G/SPS/50, circulated on 24 July 2008 par 7.

[10]Henson explains that retail firms use private sector standards in an attempt to differentiate their products from those of other retailers to protect and increase their market share. Leading firms, to avoid the supermarket 'price wars', compete instead in the area of safety and quality standards. Henson states: 'private standards have arguably become a critical element of strategies to differentiate products and firms, that requires the consistent supply of food safety and quality attributes supported by branding and certification'. Henson 'The role of public and private standards in regulating international food markets' presented at the *IATRC Summer Symposium on Food Regulation and Trade: Institutional Framework, Concepts of Analysis and Empirical Evidence*, Bonn) May 28-30 2006 at 13, available at: http://www.ilr1.uni-bonn.de /iatrc/iatrc_program/Session%204/Henson.pdf visited on 27 May 2008.

[11]A 2005 World Bank study identifies these and other factors and refers to them as the 'carrot' and the 'stick' behind greater involvement of economic actors in the food supply chain. It notes that some of these private responses are stimulated by regulatory measures while others fill gaps in governance responding to consumer concerns. Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department *Food safety and agricultural health standards: Challenges and opportunities for developing country exports* Report no 31207 (10 January 2005) at 26, available at: http://siteresources.worldbank.org/ INTRANETTRADE/Resources/Topics/Standards/standards_challenges_synthesisreport.pdf. See also Gascoine *et al* n 9 above Annex 1, 40.

[12]Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department *Food safety and agricultural health standards: Challenges and opportunities for developing country exports* 31207 (2005) at 4-5 and 30, available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/01/25/ 000160016_20050125093841/Rendered/PDF/31207.pdf visited on 18 May 2008.

liability issues arise for importers of products that may introduce risks for plant or animal health. Regulatory requirements thus continue to predominate in these areas as there is little incentive for private sector action.[13]

While private sector standards have the potential to stimulate improvements in production practices and provide a competitive advantage to producers that comply with these standards,[14] they can also be extremely burdensome for suppliers in less developed countries, and in particular for small-scale producers.[15] Despite the fact that compliance with private sector standards is voluntary, these standards have an important impact on international trade. This is due to the fact that compliance with particular private sector standards is required by large supermarket chains. A few such chains control the greatest share of the market,[16] making the standards *de facto* mandatory for producers, especially of high-value food and agricultural products, wishing to export their products.[17] Thus, the distinction between mandatory SPS requirements laid down in regulations, and voluntary SPS standards demanded by private parties, is losing much of its relevance for economic operators in the food and agricultural industries.

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[13]An exception to this is, of course, where human health risks may flow from pests or diseases of plants or animals. In such cases, consumer demands and liability regimes do create incentives for stricter private standards. An example of this is the refusal of retailers to stock British beef in the aftermath of the BSE crisis.

[14]Jaffee and Masakure provide an example of the successful, though costly, adjustment of the leading suppliers in the Kenyan vegetable industry to meet stringent private sector standards. The impetus for this strategic reorientation of the relevant industry is ascribed to the realisation of Kenyan suppliers of the need to gain a competitive advantage in the face of increased competition from North and West African suppliers. The large investments undertaken in implementing a range of food safety and quality systems to achieve compliance with private sector standards have resulted in the forms involved gaining the status of preferred suppliers to European retailers. Jaffee and Masakure 'Strategic use of private standards to enhance international competitiveness: Vegetable exports from Kenya and elsewhere' (2005) 30 *Food Policy* at 316-333.

[15]Gascoine *et al* n 9 above Executive Summary par 2. With regard to the exclusionary effect of private sector standards on small holders in OECD countries, see Fulponi *Final report on private standards and the shaping of the agro-food system* AGR/CA/APM(2006)9/FINAL (31 July 2006) at par 76, available at: http://www.olis.oecd.org/olis/2006doc.nsf/43bb6130 e5e86e5fc 12569fa005d004c/4e3a2945ffec37eec12571bc00590ce3/$FILE/JT03212398.PDF visited on 27 May 2008.

[16]The high level of concentration within food retailing, so that in many industrialised countries five firms control over 50% of the food retail market, is the main driving factor for buyer-driven supply chains. These firms are often multinationals, and source their products globally, making use of vertical integration or exclusive contracts with preferred suppliers. Henson n 10 above at 10-11. This situation raises concerns from a competition perspective, as such firms are able to impose their requirements on suppliers which are obliged to comply or will be excluded from the market.

[17]Gascoine *et al* n 9 above Annex 1, 40.

## 2 The role of the SPS Agreement

The distinction between regulatory SPS requirements and voluntary private sector SPS requirements retains its importance when one bears in mind the role of the SPS Agreement of the World Trade Organization (WTO) in disciplining government, not private, SPS requirements. The SPS Agreement seeks to distinguish measures aimed at health protection, from those that constitute disguised forms of agricultural protectionism. To achieve this objective, the SPS Agreement requires that SPS measures adopted by WTO members that may affect international trade, comply with certain disciplines.[18] *Inter alia*, SPS measures must be based on a risk assessment meeting the requirements set out in the SPS Agreement, unless they are harmonised around the standards developed by the three relevant international standard-setting bodies referenced in the Agreement. In addition, SPS measures must be applied in a non-discriminatory manner, not be more trade restrictive than necessary, and meet specific transparency requirements. Through these disciplines, the SPS Agreement limits the trade restrictive effect of legitimate SPS measures adopted by WTO members, and weeds out SPS measures that stem not from health concerns but rather from protectionist objectives.

As the SPS Agreement was negotiated before private sector standards became widespread in the SPS area, it was not intended to extend to these standards. Instead, the SPS Agreement is based on the traditional view of the role of government regulation in the area of sanitary and phytosanitary risks. In this view, self-regulation, voluntary schemes and purchaser requirements can be regarded as market instruments used by economic operators to ensure that the supply of risk-free food and agricultural products meets the demand for these products in a way that maximises profits.[19] This is normal, and acceptable, market behaviour. However, due to market failure, economic operators are not induced to take into account the interests of all affected actors.[20] The unregulated market therefore fails to provide an optimal level

[18] In this article, the term 'disciplines' is used frequently to refer to the relevant WTO rules. Although every effort has been made to avoid WTO jargon in this work, this particular instance of 'GATT-ese' is retained due to its aptness for describing the impact of the rules discussed. Alternative terms such as 'rules' or 'obligations' do not capture the essence of the *SPS Agreement* provisions – which allow, but *discipline* health regulations – as fittingly.

[19] Although the profit motive is not the basis for voluntary standards set by NGOs, these standards usually reflect concerns such as fair trade, environmental protection and animal welfare, rather than concerns with SPS risks, and therefore fall outside the scope of this discussion.

[20] As noted in the WTO's *World Trade Report* of 2005: 'The distinction between public and private standards will depend not so much on whether standards are public law, but rather on whose interests are taken into account when a standard is set and enforced. In the case of public standards, it is assumed that the interests of all actors in an economy are taken into account when the standard is set. This implies that the effect on the profits of all companies and the wellbeing of all consumers has been considered. Externalities like those related to the environment or to public health are also factored into the decision-making of the government.

of safe food and agricultural products or leads to distributional problems. Therefore, governments step in to oblige operators on the market to act in a way that will result in an optimal safety level, equally accessible to all. The vulnerability of government regulators to private interest pressures, however, may result in sub-optimal or protectionist regulations. It is therefore government intervention in the market that needs to be disciplined. The SPS Agreement was negotiated to meet this need.[21]

## 3 The SPS Agreement and private sector standards

Recently, much discussion has arisen with regard to the scope of application of the SPS Agreement and in particular, the issue of which entities are covered by its rules. This issue has gained prominence due to the fact that the adoption and implementation of SPS requirements is increasingly in the hands of bodies *other* than central government.

Some of these bodies involve governmental action at sub-national level, such as local government regulators (states, provinces, or cantons) or at supra-national level, such as regulatory bodies under regional agreements (for example the FSANZ).[22] Others may involve both governmental and non-governmental actors, such as national bureaus of standards, which may be public or private bodies that set non-mandatory standards but whose standards are often relied upon by governments in enacting regulations.[23] In addition, increasingly SPS requirements are imposed by private sector actors, such as supermarkets and retail consortia.[24]

This development away from central government regulation, towards local, supra-national and private governance structures in the area of SPS should be seen in the context of the broader discussion around the contemporary shifts in

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Private standards, on the other hand, are assumed to take account only of the profits of firms. Depending on the situation, individual firms will decide if they are willing to cooperate in standard-setting activities. Private standards may implicitly take consumer interests into account, but only if these interests correspond to their own interests.' WTO Secretariat, *World Trade Report 2005: Exploring the links between trade, standards and the WTO* (World Trade Organization, Geneva), 30 June 2005, 32-33, available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf, visited on 4 June 2007.

[21]Whether this approach is still appropriate in the light of the proliferation of private sector standards in the SPS area is open to question. This issue is discussed in the analysis of the applicability of the SPS Agreement, below at section 4.2.

[22]The FSANZ (Food Standards Australia New Zealand) is the regulatory body for food established under a regional agreement between Australia and New Zealand.

[23]Examples of such bodies, with different levels of government involvement, are the South African Bureau of Standards, Standards Australia, the Mauritius Standards Bureau, the Bureau of Standards of Jamaica and the Bangladesh Standards and Testing Institute.

[24]Examples of private sector standards imposed by supermarket chains are Tesco's Nature's Choice and the British Retail Consortium Global Standard – Food.

the locus of governance,[25] and the role of the WTO in addressing soft law norms created by different non-state actors. It has been argued that:

> The emergence of regional and local governments on the world scene, coupled with an aggressive trade agenda encompassing politically sensitive areas to some degree under the control of these local entities, increases the potential for disguised restrictions on trade and other protectionist measures which could thwart trade liberalization.[26]

According to Joost Pauwelyn, in failing to address the increasingly important 'non-traditional' patterns of regulation, such as those reflected in 'soft norms' created by non-state actors, WTO law risks being 'under-inclusive'.[27] The question thus arises whether the SPS Agreement can be applied in such a way as to take account of this shift in governance.

## 4 The scope of application of the SPS Agreement

Like all multilateral WTO agreements, the SPS Agreement binds all WTO members. In terms of article 1.1, its disciplines apply to SPS measures which may directly or indirectly affect international trade. The applicability of the disciplines in the SPS Agreement to SPS measures adopted by bodies other than the central government, is addressed in article 13. This provision states:

> Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive

[25]Joanne Scott refers to the rise of private sector standards as a key element in the 'transformation of the governance landscape'. Scott *The WTO agreement on sanitary and phytosanitary measures: A commentary* Oxford Commentaries on the GATT/WTO Agreements (2007) at 302. In 1997, Anne-Marie Slaughter developed the theory of the 'disaggregated state' which addresses the idea of the transfer of power from central government authorities to subnational levels of government. Slaughter emphasises the rise of 'global governance' through the networking of functionally distinct parts of the disaggregated state with their counterparts abroad. Slaughter 'The real new world order' (1997) 76/5 *Foreign Affairs* at 183-197, 184. An example of the attention currently given in academic research to the move from traditional state-based governance to new forms of governance where public functions are carried out by local, regional and private bodies, is the 'Shifts in Governance' project of the Dutch Organisation for Scientific Research (NWO) which addresses issues of 'governance beyond the state' and 'governance without government'. See the website for this project, available at: http://www.nwo.nl/nwohome.nsf/pages/NWOP_5T8L5H visited on 25 May 2008.

[26]Hayes 'Changing notions of sovereignty and federalism in the international economic system: A reassessment of WTO regulation of federal states and the regional and local governments within their territories' (2004) 25/1 *Northwestern Journal of International Law & Business* 1-36, 10.

[27]Pauwelyn 'Non-traditional patterns of global regulation: Is the WTO "missing the boat"?' presented at the *Conference on Legal Patterns of Transnational Social Regulations and Trade* (European University Institute, Florence) 24-25 September 2004 at 19-21, available at: http://eprints.law.duke.edu/1311/1/6Sept04.pdf, visited on 25 May 2008. Pauwelyn notes that the WTO exemplifies the traditional focus of international law on hard law, centred on states. However, he points out that today's normative governance patterns are quite different, involving non-state actors and soft law norms. *Id* 2.

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

Thus, members are fully responsible for the implementation of the SPS Agreement, which includes a certain level of responsibility for the actions of bodies other than central government. They must enact and implement *positive measures* to support the observance of its rules by bodies other than central government bodies. In addition, members must take all *reasonable measures* available to them to ensure that regional bodies in which their entities are members, as well as non-governmental bodies in their territories, comply with the SPS Agreement. Further, members are prohibited from requiring or encouraging non-compliance with the Agreement by local, regional or non-governmental bodies. Members may not rely on non-governmental bodies to implement their SPS measures unless these bodies comply with the SPS Agreement. Thus the rules contained in the SPS Agreement will have an impact not only on the central government bodies of a member, but indirectly also on other bodies under its responsibility which are active in the area of sanitary and phytosanitary protection. It is the task of the member to promote the compliance by these bodies with the disciplines of the SPS Agreement.

The limits of this responsibility are, however, not clear. In particular, the types of entities that are covered by this provision and the extent of action required of a Member demand clarification.

### *4.1 Applicability to SPS measures of regional or local government bodies*

The first issue that arises is whether article 13 of the SPS Agreement entails the responsibility of WTO members to ensure that their regional or local government bodies comply with the disciplines of the Agreement. This issue was addressed in the only dispute in which the interpretation of article 13 of the SPS Agreement has been at issue thus far, namely *Australia – Salmon (Article 21.5 – Canada)*.

The Panel in that case held that the sanitary measures taken by the government of Tasmania, an Australian state, fell under the responsibility of Australia, both

under WTO law and under general international law,[28] and were thus subject to the SPS Agreement. It found as follows:

> Article 13 of the *SPS Agreement* provides unambiguously that: (1) 'Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein'; and (2) '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'. Reading these two obligations together, in light of Article 1.1 of the *SPS Agreement* referred to earlier, we consider that sanitary measures taken by the Government of Tasmania, being an 'other than central government' body as recognized by Australia, are subject to the *SPS Agreement* and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations.[29]

This finding is not controversial. It embodies the now generally accepted view that measures by various organs of state, including local government bodies, are considered as measures attributable to a WTO member and therefore falling under its responsibility.[30] Under the GATT 1994, this principle is reflected in the 'Understanding on the Interpretation of Article XXIV of the GATT',[31] which clarifies that

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[28]The Panel, *inter alia*, referred to art 27 of the *Vienna Convention on the Law of Treaties* which states that a party may not invoke provisions of its internal law for its failure to perform a treaty. Latin H 'Ideal versus real regulatory efficiency: Implementation of uniform standards and "fine tuning" regulatory reforms' (1985) 37 *Stanford Law Review* 1267-1332. It also referred to art 22.9 of the DSU which states that the dispute settlement provisions of the covered agreements can be invoked in respect of measures by regional or local governments or authorities within the territory of a Member.

[29]Panel Report *Australia – Salmon (Article 21.5 - Canada)* par 7.13. Canada had also made a claim in this case that Australia had violated its obligation under art 13 of the *SPS Agreement* to formulate and implement positive measures and mechanisms in support of the observance of the provisions of the Agreement by other than central government bodies. The Panel found that Canada had not substantiated this claim. *Id* par 7.162.

[30]A similar finding was recently made by the Panel in *Brazil – Retreaded Tyres* which found that measures taken by Rio Grande do Sul, a state of the Federative Republic of Brazil, were attributable to Brazil as a WTO Member and therefore should be considered as 'measures' for purposes of art 3.3 of the DSU. It stated: 'regardless of the relationship between these states [sic] laws and the federal laws based on the jurisdictions covered by the respective law within its domestic legal system, the Brazilian government is ultimately responsible for ensuring that its constituent states respect Brazil's obligations under the WTO…' Panel Report *Brazil – Retreaded Tyres* par 7.406.

[31]See par 14 of the 'Understanding on the interpretation of article XXIV of the General Agreement on Tariffs and Trade' in *The results of the Uruguay round of multilateral trade negotiations: The legal texts* (1994) at 31-34. Art XXIV:12 of the GATT 1994 requires each Member to 'take such reasonable measures as may be available to it' to ensure observance with the GATT by regional and local governments and authorities in its territory. This could be understood as limiting a Member's responsibility for subnational levels of government, in view of possible constitutional limitations on their authority over such subnational entities. The Understanding clarifies that, instead, a Member can be challenged in dispute settlement in respect of measures taken by regional or local governments or authorities. This is more in line with the approach in international law to the issue of state responsibility for the acts of subnational levels of government. As noted by Hayes n 27 above 20, the early doubts as to whether art XXIV:12 of the GATT reflects an intention to opt out of the customary

article XXIV:12 of the GATT 1994 entails that dispute settlement proceedings may be invoked against a member in respect of measures taken by regional or local government or authorities within its territory.[32] This principle is embodied in article 29 of the Vienna Convention on the Law of Treaties, which provides:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

This has been taken to mean that in federal states, the state party to the treaty is responsible not only for the acts of its central government but also for those of local government bodies in its territory. In addition, article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke provisions of its internal law for its failure to perform a treaty. Thus the constitutional limits of the authority of central government over sub national levels of government cannot be used as an excuse for the violation of treaty obligations by lower levels of government. Similarly, article 4 of the International Law Commission's (ILC) 'Articles on Responsibility of States for Internationally Wrongful Acts' of 2001 provides that:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[33]

The ILC's commentary to this article emphasises the long-established nature of the principle of state responsibility for acts of local government bodies. It further notes that:

> It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations.[34]

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international law principle of state responsibility for subnational levels of government have been removed by the Understanding and 'there is now no question that federal GATT/WTO members remain fully responsible for the actions of their component governmental units'.

[32]On this issue see further Cottier and Schefer 'The relationship between World Trade Organization law, national law and regional law' (1998) 1/1 *Journal of International Economic Law* at 83-122, 85-86; Hayes n 27 above 1-36.

[33]Article 4 of Michaelson 'Rethinking regulatory reform: Toxics, politics and ethics' (1996) 105 *Yale Law Journal* at 1891-1925. These *Articles* were taken note of in Resolution 56/83 adopted by the General Assembly of the UN on 12 December 2001 and are to be found in the Annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49 (vol I)/Corr 4. *Official Records of the General Assembly, Fifty-Sixth Session, Supplement no 10* (A/56/10), chp IV.E.1. The *Articles* aim to formulate, through codification and progressive development, the basic international law rules concerning the responsibility of States for their internationally wrongful acts.

[34]Wagner 'The science charade in toxic risk regulation' (1995) 95 *Columbia Law Review* at 1613-1723 par 9.

It is therefore clear that WTO members will be held directly responsible not only for the acts and omissions of their central government bodies, but also for acts and omissions of lower levels of government. Such local government bodies must therefore comply fully with the SPS Agreement. To facilitate such compliance, the second sentence of article 13 of the SPS Agreement requires members to implement *positive measures* to support compliance by other than central government bodies with the SPS Agreement.[35] A Member is thus obliged to assist proactively its local government bodies in their compliance.

### *4.2 Applicability to private sector SPS standards*

More contentious is the question whether article 13 of the SPS Agreement extends the application of the Agreement to private sector standards. While, as discussed above,[36] this issue did not arise during the negotiation of the SPS Agreement due to the fact that safety regulation was then typically still in the hands of governments, with the proliferation of private sector SPS standards since the mid-1990s,[37] the issue has come to the forefront of attention. Currently, private sector standards are no longer limited to technical specifications, ethical standards or quality requirements,[38] but also cover safety

[35]At first sight the applicability of this obligation in respect of 'other than central government bodies' would seem to extend to all bodies that are not central government bodies, thereby including non-governmental bodies and regional bodies in which entities of a WTO Member are members. However, when seen in the context of the rest of art 13, a narrower interpretation of this provision is clearly called for, limiting it to *government* bodies other than at central government level. The third sentence of art 13 addresses a Member's responsibility with regard to compliance by non-governmental and regional bodies. To read *both* the second and third sentences as covering these types of bodies would not make sense due to the two different obligations contained in each. With respect to government bodies other than at central government level, the second sentence of art 13 requires positive measures to support compliance. The fact that the acts of local government bodies are considered acts of the relevant members, and that members are obliged to comply with the *SPS Agreement*, explains why members are not required to take measures to 'ensure' the compliance of local government bodies, but only to support it. Even in the absence of an omission to take positive supportive measures, a member can be found to violate the *SPS Agreement* if acts of its subnational levels of government are not in conformity with the *SPS Agreement*.

[36]See above at p 10.

[37]WTO Secretariat notes that there are over 400 private sector standard schemes currently in operation. Some of these are developed by individual firms (eg, Tesco Nature's Choice), others are developed collectively by national retailers (eg, the British Retail Consortium Global Standard – Food) or by international consortia (such as GLOBALGAP, which was previously EUREPGAP). Committee on Sanitary and Phytosanitary Measures n 9 above par 5. As reported by Henson n 10 above, in 1999 the British Retail Consortium Global Standard was used by fewer than 500 UK processors, but by 2005 it was in use by 5500 processors in 64 countries.

[38]Note that many private sector standards, such as those addressing animal welfare and fair labour practices, would not meet the definition of an SPS measure since they do not aim to protect human, animal or plant life or health within the territory of the importing member. However, increasingly food-safety issues are addressed in private standards, making the

issues such as maximum levels for pesticide residues, requirements for the traceability of food products, and process standards such as Hazard Analysis and Critical Control Point (HACCP) requirements.

Most often, these private sector standards are stricter than national SPS regulations,[39] or lay down complex process requirements rather than product specifications. Although private sector standards are voluntary in nature, the wide-scale application of such standards as purchasing requirements by large supermarket chains, which dominate the market for food and agricultural products,[40] has the effect of excluding non-conforming suppliers from this market. As a result, these standards take on *de facto* binding force.[41]

Several empirical studies have been carried out that confirm the significant impact of private sector standards on the agri-food sector in general, and on developing-country producers in particular.[42] It has been noted that the impact of these standards on developing-country producers is disproportionate.[43] In particular, the challenge of complying with private sector standards has the effect of excluding small-scale producers in developing countries from

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question of the applicability of the SPS Agreement particularly relevant.

[39]In a 2006 OECD study, Lisa Fulponi, n15 above par 50, notes that over 85% of leading retailers reported that their required standard was higher than the government regulatory standard, and about 50% reported that it was significantly higher.

[40]Eg, EUREPGAP membership included the 30 largest retailers across 12 EC Member States, accounting for 85% of the Western European fresh produce market. Chia-Hui Lee *Private food standards and their impacts on developing countries* (2006) at 13, available at: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf visited on 26 May 2008. The fact that the oligopolistic nature of food retailing enables large retailers to require suppliers to be certified for compliance with private standards is noted by Hatanaka *et al* 'Third-party certification in the global agrifood system' (2005) 30 *Food Policy*at at 354-369, 358-359.

[41]As noted by the WTO Secretariat: '…the choice of whether or not to comply with a voluntary standard becomes a choice between compliance or exit from the market. In this way, the distinction between private voluntary standards and mandatory "official" or "public" requirements can blur'. Committee on Sanitary and Phytosanitary Measures n 9 above par 9. On the blurring distinction between public and private regulation and mandatory and voluntary norms, see also David Vogel, who argues that rather than seeing these as sharp dichotomies, they should be seen as the ends of a continuum to avoid hiding the changing relations of power in international relations. Vogel 'Private global business regulation' (2008) 11 *Annual Review of Political Science* at 261-282, 265.

[42]See, eg, Chia-Hui Lee n 40 above; Henson n 10 above; Fulponi n 15 above; Jaffee *et al Food safety and agricultural health standards: Challenges and Opportunities for developing country exports* 10 January 2005 at 26-29, available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/01/25/000160016_20050125093841/Rendered/PDF/31207.pdf visited on 18 May 2008.

[43]Committee on Sanitary and Phytosanitary Measures, *Considerations relevant to private standards in the field of animal health, food safety and animal welfare: Submission by the World Organization for Animal Health (OIE)*, G/SPS/GEN/822, circulated on 25 February 2008, pars 5-8.

participating in the export market for high-value agricultural products.[44]

Among the main concerns raised by developing countries with regard to private sector standards are the great variety of such standards[45] and the non-recognition of equivalent standards set by other bodies.[46] In addition, most often certification of conformity with such standards by a specified independent (or 'third party') body is required.[47] As usually these conformity assessment bodies are not local but foreign bodies, their rates are not affordable for local producers.[48] Private sector standards are even more burdensome in cases where

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[44]Henson *et al* 'Private food safety and quality standards for fresh produce exporters: The case of Hortico Agrisystems, Zimbabwe' (2005) 30 *Food Policy* at 371 - 384, 373. Henson *et al* argue that there is evidence of this exclusionary effect of private standards and refer to the example of the Kenyan fresh vegetable industry. They report that the participation of small-scale producers in the Kenyan export supply chain for fresh vegetables decreased sharply from 45% of these exports in the mid-1980s, to an estimated 18% by 1998.

[45]Eg, as reported by Chia-Hiu Lee, n 40 above at 10, in the meat industry alone, many different certification schemes are in place in different countries such as the Dutch *Integrale Keten Beheersing*, the Belgian *Certus*, the British Assured British Meat, the French *Label Rouge* and the German *Qualität und Sicherheit*. It should be noted, however, that some effort is being made to coordinate various private sector standards, either through consortia of retailers adopting a harmonised set of private standards (eg EUREPGAP) or by the practice of 'benchmarking' which entails setting out key criteria against which various private sector standards are assessed (eg the Global Food safety Initiative). *Id* at 13-14. Henson, n 10 above, however argues that it is unlikely that a harmonised private sector standard will emerge. He states: 'as fast as collective private standards are evolving, leading food retailers are introducing their own proprietary standards in particular spheres of food safety and/or quality to retain scope of product differentiation'.

[46]Since private sector standards are often introduced to create marketplace differentiation between products that are in fact equivalent in sanitary terms, as a means to create a competitive advantage for a product, commercial considerations argue against recognising the standards of other private bodies as equivalent. The issue of the recognition of equivalence between private sector schemes was among those addressed in the recent information session on private standards organised by the Standards and Trade Development Facility. Committee on Sanitary and Phytosanitary Measures n 9 above para. 2.

[47]The fact that small-scale producers often find the costs of compliance certification prohibitive was pointed out by the representative of International Certification and Risk Services (CMi), the largest independent certifier of compliance with GLOBALGAP standards for fresh produce, and the sole certifier of Tesco's Nature's Choice, at the information session on private standards organised by the Standards and Trade Development Facility (STDF) in 2008. *Id* para. 9.

[48]Hatanaka *et al* n 40 above 354-369 at 355 and 364. Hatanaka *et al* point out that the drive towards the use of third party certification is based on its 'appeal to technoscientific values such as independence, objectivity and transparency in an attempt to increase trust and legitimacy among … customers and to limit liability'. However, they note that the high costs of third-party certification requirements have the capacity to exclude small and medium sized suppliers, especially those in developing countries, from global markets. A similar point is made by Gascoine *et al* n 9 above par 13 who note further, referring to a 2005 USAID study, that certification costs cannot be passed on by producers down the supply chain because of the competitive environment where there are so few buyers and so many suppliers.

they are developed without consultation of producers.[49] In addition, often there is no scientific justification for the stricter standard.[50] The ability of private SPS standards to escape the disciplines of the SPS Agreement therefore risks undermining the Agreement's achievements in improving market access.[51]

The question here is *not* whether private actors, such as supermarkets, retail consortia and third party certifiers, can be bound directly to the SPS Agreement. The SPS Agreement, like other WTO agreements, binds only WTO members.[52] Therefore only actions (or omissions) by WTO members,[53] or attributable to them,[54] can be challenged in dispute settlement proceedings under the covered

[49]This results in private sector standards that ignore variations in production conditions, which accentuates the difficulties of compliance with private sector standards faced by developing countries according to the Managing Director of CMi. This statement was made in the context of his presentation during the information session on private sector standards organised by the STDF in 2008. Committee on Sanitary and Phytosanitary Measures n 9 above at para. 9.

[50]Chia-Hui Lee, n 40 above at 27, reports that certain major retailers (including Aldi, Lidl, Metro and Rewe) required that all Ivory Coast pineapple producers be EUREPGAP certified by 1 January 2006, but imposed an additional requirement that pesticide residue levels be limited to a third of the maximum levels permitted by the EU. Gascoine *et al*, n 9 above footnote 10, point out that either the retailers involved were ignorant of the fact that EU residue levels are established at the lowest level achievable by good agricultural practice, or they intended to deceive consumers by claiming that their products were safer due to this more stringent private standard.

[51]At the meeting of the SPS Committee in 2005, where the issue of private sector standards was first raised, Argentina pointed out that international disciplines have been negotiated to limit the trade restrictive effects of SPS measures and that members have devoted time and financial and human resources to attending all the international meetings where standards were discussed, developed and implemented. It noted that if the private sector could impose unnecessarily trade restrictive standards, and members 'had no forum in which to advocate some rationalization of these standards, twenty years of discussions in international fora would have been wasted'. Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting Held on 29-30 June 2005. Note by the Secretariat. Revision*, G/SPS/R/37/Rev 1, circulated on 18 August 2005, par 20.

[52]As noted by the WTO Secretariat in its note on private standards and the *SPS Agreement*, while the definition of 'SPS measures' in Annex A.1 of the *SPS Agreement* is not explicitly limited to government measures, the provisions of the *SPS Agreement* explicitly refer to the rights and obligations of 'members'. Committee on Sanitary and Phytosanitary Measures n 9 above at par 15.

[53]In *US – Corrosion Resistant Steel Sunset Review* the Appellate Body held that '[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings'. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, par 81.

[54]Referring to the abovementioned finding in *US – Corrosion Resistant Steel Sunset Review* (although it incorrectly called the dispute *US – Carbon Steel*) the Panel in *EC – Approval and Marketing of Biotech Products* noted that for the EC's general *de facto* moratorium on the approval of biotech products to be a challengeable measure, it must be attributable to the EC. The Panel held that the 'common plan or course of action' followed by the EC Commission and a group of five EC Member States in order to prevent the final approval of applications regarding biotech products was a measure challengeable under the *SPS Agreement* as,

agreements.[55] The question is instead in which cases a member can be held responsible for the actions of private parties in its territory, or of regional bodies in which entities in its territory are members. This question has received some academic attention in recent years.[56] It has also been extensively discussed at meetings of the WTO SPS Committee, since it was first raised in 2005.

An examination of some of the comments by WTO members on this issue at the SPS Committee illustrates the lack of clarity that exists with regard to the role of the SPS Agreement in addressing private sector standards. The issue was raised before the SPS Committee for the first time in 2005 by Saint Vincent and the Grenadines with regard to the application of EUREPGAP standards to bananas by UK supermarkets.[57] Jamaica raised a similar concern with regard to EUREPGAP requirements for fresh fruit and vegetables.[58] The EC responded that EUREPGAP was not an EC body, and that its standards could not be seen as EC requirements.[59] Peru then raised the question of the interpretation of the reference in article 13 of the SPS Agreement to non-governmental entities in the territory of a member.[60] Mexico expressed the view that it is only when SPS measures were adopted by governmental authorities that a member is obliged by article 13 to ensure that governmental and non-governmental entities implement them properly. Mexico suggested that the SPS Committee look at Annex 3 of the TBT Agreement which establishes a Code of Good Practice applicable to non-governmental standard-setting institutions developing food quality standards.[61]

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according to the Panel, the Commission and five EC Member States are organs of the EC, from the perspective of international law. Thus, their actions were held to be attributable to the EC. Panel Report, *EC – Approval and Marketing of Biotech Products* par 7.1294.

[55]As held by the Panel in *Japan – Film*: 'As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) [of the GATT 1994] and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties'. Panel Report, *Japan – Film* par 10.52.

[56]Zeladis 'When do the activities of private parties trigger WTO rules?' (2007) 10/2 *Journal of International Economic Law* at 335-362; Gascoine *et al* n 9 bove. See also Villalpando 'Attribution of conduct to the state: How the rules of state responsibility may be applied within the WTO Dispute Settlement System' (2002) 5/2 *Journal of International Economic Law* at 393-420. On this issue as it relates to private sector standards for environmental protection, see Gandhi 'Regulating the use of voluntary environmental standards within the World Trade Organization legal regime: Making a case for developing countries' (2005) 39/5 *Journal of World Trade* at 2005, 855-880.

[57]Committee on Sanitary and Phytosanitary Measures, n 51 above at par 16.

[58]*Id* at par 17.

[59]*Id* at par 18.

[60]*Id* at par 19.

[61]*Ibid.*

From these comments it is clear that there is a need for clarification of three main issues. First, it is necessary to examine in which cases actions by private bodies might be regarded as measures by a member, challengeable under the SPS Agreement. Second, article 13 of the SPS Agreement must be examined to determine whether, and if so how, members are required to discipline private sector bodies that develop, impose or implement SPS standards in their territories.[62] Third, there is a need for an examination of the possible role of a Code of Good Practice such as the one that exists in the TBT Agreement. These three issues will be addressed in turn.

### 4.2.1 Attribution of private action to a WTO member

The question of when an action by a private entity is deemed an action by a WTO member is important as a member is fully responsible for compliance with all the obligations of the SPS Agreement. Examples of situations where this question might arise, as noted by the WTO Secretariat, are where a government regulator decides to incorporate a standard developed by a private body into its SPS regulation. In addition, a government could condition the granting of import permits on third party certification of compliance with its own, or even private sector, SPS requirements.[63] If such actions are allowed to escape the disciplines of the SPS Agreement, members would be encouraged to delegate tasks in this area to private bodies to evade their obligations.[64]

This issue is, however, not limited to the field of SPS regulation, but has arisen under other WTO agreements.[65] In *Japan – Film*, the panel noted that, 'what may appear on their face to be private actions may nonetheless be attributable

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[62]In its 2007 paper on the issue of private standards under the *SPS Agreement*, the WTO Secretariat listed some issues for possible consideration by the SPS Committee in this regard, including what 'positive measures and mechanisms' and what 'reasonable measures' members can take to ensure compliance with the *SPS Agreement* by non-governmental entities. Committee on Sanitary and Phytosanitary Measures n 9 above at pars 17 and 26.

[63]*Id* at par 17.

[64]The Panel in *Japan – Film* noted this risk. Panel Report, *Japan – Film* par 10.328.

[65]Under the GATT 1947, eg, the GATT Panel in *Canada – FIRA* found that the term 'laws, regulations or requirements' in art III:4 included written purchase undertakings by private investors, which once they were accepted, became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. GATT Panel Report, *Canada – FIRA* par 5.4. Under the GATS, the definition of the 'measures by Members' that fall within the scope of application of the Agreement includes 'measures taken by: … non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities'. Art I:3 of the GATS. The issue is also addressed in customary international law. Art 5 of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts* provides: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

to a government because of some governmental connection to or endorsement of those actions'.[66] It further held that private party action may be deemed governmental 'if there is sufficient government involvement with it'.[67] However, it recognised that no bright-line rules can be established to determine whether there is sufficient government involvement, and a case-by-case examination is necessary.[68]

This idea is to some extent expressly incorporated into article 13 of the SPS Agreement. Where government involvement takes the form of measures requiring or encouraging non-governmental bodies or regional bodies to act inconsistently with its rules, article 13 of the SPS Agreement explicitly prohibits such measures. Similarly, article 13 prohibits reliance by members on the services of non-complying non-governmental bodies for implementing SPS measures. Such actions by a member would be, in themselves, a violation of article 13. However, in the light of the attribution case law developed under the GATT, one could argue that there is likely to be a sufficient nexus between the inconsistent action by the private body and the member that requires, encourages or relies on such action, to attribute the action to the member involved. As such, the private action becomes a measure by a member subject to all the disciplines of the SPS Agreement and can be challenged as such, independently of article 13.

Similarly, there can be cases beyond those mentioned in the last two sentences of article 13, where a private body's action is attributable to a member. For example, where a member relies on a private body, not for the implementation of its SPS measures (as covered by article 13), but for the elaboration thereof. A typical example is that of independent national bureaus of standards, whose food safety standards are often relied upon by government regulators. As the standard becomes an SPS measure of a member, the manner in which it was elaborated must comply with the disciplines of the SPS Agreement, for example with regard to its basis in a risk assessment, transparency, etc. In this way, members are prevented from outsourcing their regulatory tasks to private bodies in order to evade their obligations under the SPS Agreement.

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[66]Panel Report, *Japan – Film* par 10.52. The issue was already addressed by the GATT Panel in *Review Pursuant to Article XVI:5*, which found that private party subsidy schemes that were dependent for their enforcement on some form of government action, were subject to the notification obligation in art XVI:1 of the GATT 1947. GATT Panel Report, *Review Pursuant to Article XVI:5* par 12.

[67]Panel Report *Japan – Film* n 54 above at par 10.56.

[68]*Ibid.*

### 4.2.2 Reasonable measures to ensure compliance by non-governmental and regional bodies

To the extent that actions by private bodies cannot be attributed to a member, in the absence of a sufficient level of government intervention, the question arises whether article 13 of the SPS Agreement nevertheless makes members responsible for ensuring the conformity of such actions with the provisions of the Agreement. This issue is addressed by the third sentence of article 13, which obliges members to 'take such reasonable measures as may be available to them' to ensure compliance with the SPS Agreement by non-governmental entities within their territories and by regional bodies in which entities in their territories are members.

It must first be determined whether private entities that set, implement or check conformity with SPS standards, either at national level (eg the British Retail Consortium) or at regional level (eg EUREP) are covered by this provision. If so, it would require WTO members to take the *reasonable measures* available to them to ensure that these private bodies in their territories, or regional bodies in which entities in their territory participate, comply with the SPS Agreement. This raises the additional question of what is meant by 'such reasonable measures as may be available'.[69]

The terms 'non-governmental entities' and 'regional bodies' are not defined in the SPS Agreement. There is also no case law under article 13 of the SPS Agreement that addresses the question whether this article's reference to 'non-governmental entities' and 'regional bodies' brings under its scope private sector bodies that set, implement, or check conformity with, SPS standards at national and regional level.

In view of the discussion during the negotiation of the SPS Agreement it appears that negotiators wanted to prevent the evasion of the disciplines of the SPS Agreement by members, through allowing more and more SPS requirements to be developed or implemented through independent agencies or regional networks of regulators. By minimising the level of government intervention in such national or transnational bodies, the member concerned might be able to avoid the attribution of their actions to it. In light of these concerns to prevent the evasion by members of the new disciplines, and in view of the fact that at the time of negotiation of the SPS Agreement private sector SPS standards were rare, it is likely that the reference to 'non-governmental entities' in article 13 of the SPS Agreement was intended by negotiators to refer to bodies such as national standards bureaus, which in many members operate independently of

[69]Gascoine *et al* n 9 above at 74-77 and 80-81.

government, but whose standards in the area of food safety are frequently incorporated in national regulation.

Some indication of the meaning of 'regional bodies' is given by the specification in article 13 that they are bodies in which entities in a member's territory are members. In other words, unlike the meaning of 'regional' in article XXIV:12 of the GATT, these are not sub-national government authorities. Instead, they are transnational bodies in which entities within the relevant member participate. The word 'regional' indicates that these bodies are open for membership by the relevant entities of some but not all WTO members. This is the same meaning found in the definition of 'regional body or system' in the TBT Agreement, and there seems to be no reason why this meaning would not be apt in the SPS context. It is likely that for purposes of the SPS Agreement this term was intended to refer to SPS regulatory bodies established under regional agreements, such as FSANZ,[70] or to transnational cooperative networks in which SPS regulatory agencies of members participate. In other words, it would appear that the scope of the third sentence of article 13, as originally intended, was limited to those bodies that had some link to government regulatory agencies, which while insufficient for attribution of their actions to the member concerned, could provide some possibility for evasion of SPS disciplines.

While this narrow meaning of non-governmental and regional bodies was most likely intended by the drafters of the SPS Agreement, the question arises whether a 'good faith' interpretation of these terms, as required by article 31 of the Vienna Convention on the Law of Treaties, would today require consideration of the changed circumstances in SPS governance. It is to some extent arguable that an evolutionary interpretation is called for,[71] in the light of

[70]Note that the term 'regional bodies' does not encompass the EC for purposes of art 13 of the *SPS Agreement*. The EC, in its own right, is a Member of the WTO. It is directly bound by the obligations of the *SPS Agreement* and its actions are considered analogous to acts of a 'central government body'. Thus no reliance on art 13 is necessary with regard to acts by EC organs. This interpretation is supported by the fact that under the *TBT Agreement* an explanatory note to the definition of a 'central government body' notes that '[i]n the case of the European Communities the provisions governing central government bodies apply.' This explanatory note clarifies, however, that where regional bodies are created within the EC, these would fall under the provisions on 'regional bodies'. There is no reason to expect a different interpretation under the *SPS Agreement*. In fact, in the disputes under the *SPS Agreement* involving the EC, no recourse to art 13 was needed and the provisions of the *SPS Agreement* were simply applied to the actions of the EC directly.

[71]A contrary argument is made by Bernstein and Hannah with respect to standards set by 'non-state market driven governance systems', which they propose should be kept outside the ambit of WTO disciplines, even if they are explicitly adopted or implicitly supported by members. According to these authors, a 'transnational regulatory space' should be preserved for such systems from WTO disciplines, as they serve to embed societal values in the global marketplace. To open the door for WTO challenges to such systems would threaten the legitimacy of the WTO, in their view. Bernstein

the fact that private sector bodies at subnational and transnational level (such as Wal-Mart or GLOBALGAP) currently play such an important role in elaborating, implementing and assessing conformity with private sector SPS standards, to the extent that the distinction between public and private sector SPS requirements loses much of its meaning for producers of food and agricultural products.[72] Such an evolutionary interpretation, while going further than the original intention of the drafters, seems justifiable as it is in accordance with the ordinary meaning of the terms of article 13 of the SPS Agreement, which in no way limit the scope of 'non-governmental entities' or 'regional bodies' to bodies with some link to government regulatory agencies.[73] In

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and Hannah 'Non-state global standard setting and the WTO: Legitimacy and the need for regulatory space' (2008) 11/3 *Journal of International Economic Law* 575-608, 578. It is argued here, in respect of private sector SPS standards, that while regulatory space should be respected to enable private firms to respond to consumer demands for higher safety levels, some level of procedural discipline is certainly called for. The legitimacy of some private sector SPS standards can be questioned due to the non-participatory and untransparent nature of the standard-setting process. In fact the GLOBALGAP partnership of food retailers has faced criticism regarding the legitimacy of its standards, which are seen as focused on retailer interests and lacking in stakeholder participation and transparency. This differs from the trend among non-state standard setters in the areas of environmental or labour standards, such as the Fairtrade Labelling Organisations and the Rainforest Alliance, which work towards ensuring the legitimacy of their standards by aligning themselves with best practice standards in standard setting as developed by the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance. In view of the absence of such a trend in the area of private sector SPS standards, and their importance as *de facto* barriers to trade, a certain level of discipline would not be misplaced.

[72]Such an evolutive interpretation goes a step further than that applied by the Appellate Body in *US – Shrimp*. In the latter dispute, the Appellate Body interpreted the term 'exhaustible natural resources' in art XX(g) of the GATT 1994 in an 'evolutive' manner to include living resources (such as turtles). In that case, the Appellate Body noted that the treaty provision had been crafted over 50 years before. The 'contemporary concerns of the community of nations' as embodied in international environmental treaties, according to the Appellate Body, showed that both living and non-living resources were to be considered natural resources. The Appellate Body referred to *Namibia (Legal Consequences) Advisory Opinion* (1971) ICJ Rep p 31, where the International Court of Justice stated that in the case of concepts embodied in a treaty that are by definition, evolutionary, their interpretation cannot remain unaffected by the subsequent development of law … . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'. Appellate Body Report, *US – Shrimp* pars 129-130 and fn 109. By contrast, the proposed interpretation of 'non-governmental entities' and 'regional bodies' in art 13 of the *SPS Agreement* is based on changes in the normative framework of SPS requirements that occurred over a much shorter period (less than a decade) due to the exponential increase in private sector SPS standards. In addition, these changes do not relate to the 'subsequent development of law' or the 'legal system prevailing at the time of the interpretation', but rather to the development of *de facto* binding force of private sector standards due to the concentration of large retailers and their dominance of the food and agricultural market.

[73]By way of contrast, see the definition of 'non-governmental body' in Annex 1.7 of the *TBT Agreement*: 'Body other than a central government body or a local government body, including a non-government body which has legal power to enforce a technical regulation'. See also the definition of 'measures by Members' in art I:3 of the GATS which refers to measures taken by

addition, it would be in keeping with the purpose of article 13, namely to take account of the reality of shifts in SPS governance by requiring members to take reasonable steps to discipline non-governmental and regional actors in the field, to extend its coverage to the new, and arguably most important, actors in these categories. This interpretation would give the third sentence of article 13 a wide ambit. However, this does not mean that members would thereby be responsible for every act of a private body that does not conform to the provisions of the SPS Agreement.

It is necessary to examine the *limits* of the obligations of members under the third sentence of article 13 of the SPS Agreement. In the first place, the nature of the obligation in this sentence should be noted. It is an obligation of conduct (a so-called 'best-endeavour' obligation) rather than an obligation of result. Members are not required actually to ensure compliance by non-governmental entities and regional bodies, but only to take such reasonable measures as may be available to them to ensure such compliance. As a result, non-compliance with the rules of the SPS Agreement by a non-governmental body will not necessarily entail the responsibility of a member under article 13. Only the failure of the member to take the required reasonable measures would be challengeable. It would seem that such a challenge can be brought independently of a claim of non-compliance by a private entity of a particular provision of the SPS Agreement.

From the cautious terms in which the third sentence of article 13 is framed, it appears that the extent of the obligations of members in respect of compliance by non-governmental and regional bodies is somewhat limited. Members are not obliged to take all measures possible within their legal system to ensure compliance by such bodies, but only to take 'such reasonable measures as may be available' to them to do so. It is useful to examine the ordinary meaning of the words used, in the light of their context and the object and purpose of the Agreement in order to try to obtain clarity as to the meaning of article 13.[74]

The applicable definition of 'reasonable' in the *Concise Oxford Dictionary* is 'within the limits of reason; not greatly less or more than might be expected'.[75]

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'non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities'.

[74]Article 31 of the *Vienna Convention on the Law of Treaties* provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. As noted by the Panel in *US – Section 301 Trade Act*, the elements of art 31 constitute a holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Panel Report, *US – Section 301 Trade Act* par 7.22.

[75]*Concise Oxford Dictionary* (1995) (9ed). The definition includes other meanings of reasonable that are not applicable to this context (eg having sound judgement or inexpensive).

The same dictionary defines 'available' as 'capable of being used, at one's disposal'.[76] While it is clear that article 13 does not oblige members to take *all* measures at their disposal, these dictionary definitions leave open the question of which measures at a member's disposal it 'might be expected' to use to discipline the actions of different types of 'non-governmental' and 'regional' bodies. As has been held by the Appellate Body, dictionary definitions are not dispositive of the ordinary meaning of treaty terms but must be seen in the light of the surrounding circumstances.[77] It seems logical that what is 'reasonable' in one set of circumstances is not necessarily so in another. In particular, while a relatively high level of government intervention may be regarded as reasonable with respect to independent national standards bureaus and regional networks of regulators in which governmental agencies of a member participate, this is not the case with regard to private economic actors such as supermarkets and retail consortia. In a free market economy, the level of government intervention in normal competitive behaviour of economic actors is limited to what is necessary to pursue public policy objectives such as consumer protection and prevention of anticompetitive practices. It is doubtful whether preventing food companies from responding to consumer demands for a higher level of food safety falls within these limits.

The context for the interpretation of article 13 of the SPS Agreement includes other WTO agreements. The phrase 'such reasonable measures as may be available' is also found in article XXIV:12 of the GATT 1947 with regard to local and regional government bodies and has been interpreted to require a 'serious, persistent, and convincing effort' by a contracting party to ensure compliance.[78] In addition, it has been held that in determining which measures are 'reasonable' for purposes of this article, the consequences of the non-observance of the provisions of the GATT by local government for trade

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Only the relevant part of the definition is quoted here.

[76] *Ibid.*

[77] As noted by the Appellate Body in *EC – Chicken Cuts:* 'The Appellate Body has observed that dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties "as expressed in the words used by them against the light of the surrounding circumstances".' Appellate Body Report, *EC – Chicken Cuts* par 175. Here the Appellate Body referred to its earlier case law in Appellate Body Report, *US – Softwood Lumber IV* par 59; Appellate Body Report, *US – Offset Act (Byrd Amendment)* par 248; and Appellate Body Report, *US – Gambling* par 166.

[78] GATT Panel Report *Canada – Provincial Liquor Boards (US)* par 5.37. Note that this dispute was decided before the 'Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade' was adopted in the Uruguay Round, limiting the flexibility allowed by this provision with regard to local and regional government bodies, as discussed above.

relations with other contracting parties 'are to be weighed against the domestic difficulties of securing compliance'.[79] These cases dealt with measures by local government bodies, in respect of which it is arguable that much more can be regarded as 'reasonable' than in respect of private economic actors, as discussed above. Examples of reasonable measures that may be available to members to ensure compliance by national and transnational private bodies with the SPS Agreement could be:[80] the dissemination of information or provision of training on the Agreement to private sector bodies; agreement of Memoranda of Understanding with private sector bodies in which these bodies commit to comply with the relevant disciplines of the Agreement;[81] the provision of financial incentives for private sector bodies to comply with these provisions; and the development of a national policy in this regard.

It does not seem, however, that the 'reasonable measures as may be available' required of members extend to the enactment of legislation obliging private sector bodies to comply with the disciplines of the SPS Agreement.[82] If this were required, it is more likely that the sentence would read 'Members shall take *all* measures available to them …' or even 'Members shall ensure …'. An interpretation of the third sentence of article13 to require legislative action imposing the rules of the SPS Agreement on private entities would disregard the qualifiers 'reasonable' and 'may be available' entirely, contrary to the principle of effective treaty interpretation.[83]

In fact, such an interpretation would seem to be a step too far. The provisions of the SPS Agreement were clearly not drafted with private sector standards in mind. They apply disciplines pertaining to best regulatory practices that address aspects of the risk analysis process carried out by national regulators. As a result, the extent of intervention in private economic activity that would result

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[79]GATT Panel Report *Canada – Gold Coins* par 69. The GATT Panel relied, for its interpretation of 'reasonable', on the 'Note *Ad* art III:1of the GATT' which clarifies what 'reasonable measures' in art XXIV:12 would mean for purposes of legislation of local governments imposing internal taxes. The Panel stated: 'According to this note the question of whether the repeal of such enabling legislation would be a reasonable measure required by article XXIV:12 should be answered by taking into account the spirit of the inconsistent local tax laws, on the one hand, and the administrative or financial difficulties to which the repeal of the enabling legislation would give rise, on the other'. *Ibid.*

[80]These examples are identified, with regard to the *TBT Agreement*, by Gascoine *et al* pars 11 and 66.

[81]Such a Memorandum of Understanding exists with regard to the TBT Agreement between the Commonwealth of Australia and Standards Australia, an independent national standard-setting agency.

[82]Gascoine *et al* n 9 above par 66.

[83]As held by the Appellate Body in *US – Gasoline*, a treaty may not be interpreted in such a way that clauses would be reduced to redundancy or inutility. Appellate Body Report, *US – Gasoline* at 21.

if article 13 were interpreted to require members actually to ensure that private sector standards comply with all these disciplines, seems inappropriate.

Of course, arguments based on the negotiating history of the SPS Agreement are not dispositive.[84] They could be countered by a call for an evolutionary interpretation of the Agreement to take account of the current reality where the difference between public and private standards for exporters has blurred. More importantly than the negotiating history, however, the object and purpose of the SPS Agreement militates against an interpretation to the effect that members would have to ensure compliance with its provisions by private entities through legislative means. The aim of the SPS Agreement is to achieve a balance between the sovereign right of members to protect health in their territories, and the need to prevent protectionism under the guise of SPS regulation. The application of its disciplines to private sector bodies would not seem to further this objective. Private sector bodies that develop, impose and assess conformity with private standards are not motivated by a responsibility for health protection, but rather by commercial interests.[85] Neither can they be accused of protectionism since their activities are in most cases of a global nature and dependant on imports. Rather, their actions raise concerns in the area of anti-competitive practices such as abuse of a dominant position.[86] This is not a problem that the SPS Agreement is designed to address. Therefore, it seems

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[84]In terms of art 32 of the Vienna Convention on the Law of Treaties recourse may be had to supplementary means of interpretation of treaties, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the general rule of interpretation contained in art 31. In that function, the negotiating history of the SPS Agreement is useful to consider as it confirms the interpretation arrived at through a consideration of the wording, object and purpose and context of the Agreement.

[85]Even though private SPS standards may aim at food safety and thus at the protection of human health, this cannot be taken to mean that private bodies are *responsible*, in the way sovereign governments are, for the protection of health. Consequently, the considerations that play a role in the activities of private bodies in this area differ significantly from those that underlie governmental regulatory activity. Government regulation has a normative foundation in the sovereign duty to ensure the rights to life, health and safe food, and incorporate considerations of distributional equity. The standards elaborated or implemented by private bodies are instead a way to increase profits through responding to affluent consumers' willingness to pay a price premium for higher levels of safety, and to reduce costs from liability for damage from unsafe products. To require private bodies to behave as governmental regulators in this area, for example by making sure that there are no arbitrary or unjustifiable distinctions in the level of protection they aim at in similar situations and to harmonise their measures around international standards unless the need for a stricter measure can be scientifically justified, would be to disregard this important difference.

[86]Gascoine *et al* n 9 above at par 17(ii) recommend, as a possible way forward, an examination of domestic competition issues that arise from the use of private standards as a means of collusion or abuse of a dominant position by retailers. The role of national governments to ensure that private sector standards do not constitute or conceal anti-competitive practices is also noted in Jaffee *et al* n 42 above at 9.

inappropriate to oblige members to enact legislation to ensure that private sector bodies comply with the SPS Agreement. While legislation directed at private bodies is a tool 'at the disposal' of members, it does not seem to be a 'reasonable measure' in this context. It is arguably sufficient that a member provide information and create incentives for private sector bodies at national and transnational level to respect the provisions of the SPS Agreement that are relevant to them.

While the current regulatory disciplines of the SPS Agreement are not suitable for application to private sector standards, the reality of the fact that such standards are a significant obstacle to trade in food and agricultural products, cannot be ignored. This is particularly so due to the disproportionate burden these standards place on developing-country producers, and in particular on small-scale producers in these countries. The development impact of private sector standards therefore merits serious attention. The issue is how best this matter can be addressed.

## 5 Possibilities to discipline private sector standard-setting

The question arises whether an approach to private sector standards such as the one embodied in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) would be the best way forward. The TBT Agreement was negotiated in full awareness of the importance of the private sector in setting, applying and assessing conformity with technical standards. It therefore has more elaborate provisions to address actions by non-governmental bodies.

The term 'non-governmental body' is defined in annex 1.8 of the TBT Agreement to mean a '[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation'. A literal reading of this rather vague provision, particularly of the word 'including', seems to indicate that both bodies with and bodies without the power to enforce technical regulations are covered. However, it could also be argued that the specific mention of bodies with enforcement power means, *a contrario*, that bodies lacking such power are not covered by this term. Such a limited interpretation would negate the possibility to bring private sector standards under the TBT Agreement; a consequence to be avoided.

Similar to the situation under the SPS Agreement, as well as under the Tokyo Round Standards Code, the TBT Agreement contains 'second level' obligations with respect to non-governmental bodies. In particular, members are required to take such reasonable measures as may be available to them to ensure that these bodies comply with the disciplines of the TBT Agreement with respect to

the preparation, adoption and implementation of technical standards and the implementation of conformity assessment procedures.[87]

However, the TBT Agreement goes further than this. In respect of voluntary standards it establishes a Code of Good Practice for the Preparation, Adoption and Application of Standards (the CGP). This CGP lays down obligations for standardising bodies, whether central or local government bodies, regional bodies, or non-governmental bodies. These obligations include: non-discrimination; avoidance of unnecessary barriers to trade; the use of international standards as a basis for standards unless they would be ineffective or inappropriate; avoidance of duplication of work; publication of a work programme every six months; prior notification of draft standards with provision of a comment period; and a requirement to take into account and respond to comments, and prompt publication of adopted standards.[88]

With regard to non-governmental and regional bodies, members are obliged to take reasonable measures to ensure that these bodies accept and comply with the CGP.[89] However, whether or not the standardising body has accepted the CGP, the member's obligation to take reasonable measures to ensure compliance therewith applies. This should not create the impression that direct challenges are possible against non-governmental bodies that have accepted but not complied with the CGP. The obligations of the TBT Agreement bind members only, and it is the relevant member that is responsible if it has not taken the 'reasonable measures' available to it to ensure compliance.

It is arguable that the CGP in the TBT Agreement also covers entities that set private sector SPS standards, and that its article 8 covers private entities that assess conformity with SPS standards. If 'non-governmental body' under the TBT Agreement is understood to include non-governmental bodies with no official enforcement power, it would cover private bodies that develop, implement and assess conformity with private sector SPS standards. In addition, although SPS measures are excluded from the scope of application of the TBT Agreement,[90] it can be argued that this does not apply to private sector SPS standards as they are not 'SPS measures' for purposes of the SPS Agreement. While the definition of an SPS measure in Annex A.1 of the SPS Agreement is not explicitly limited to governmental measures, unlike the TBT Agreement, the SPS Agreement contains no provisions specifically applicable to voluntary

[87]Article 3.1 of the TBT Agreement with regard to technical regulations and art 8.1 of the TBT Agreement with regard to conformity assessment procedures.
[88]It is interesting to note that the ISEAL Alliance's Code of Good Practices for Setting Social and Environmental Standards takes up several elements of the TBT Code of Good Practice.
[89]Article 4.1 of the TBT Agreement.
[90]Article 1.5 of the TBT Agreement excludes from its scope of application SPS measures as defined in the SPS Agreement.

standards or conformity assessment procedures carried out by private bodies. It would therefore be strange to view such standards and procedures as SPS measures. This conclusion would be further reinforced if one were to follow the approach of the Panel in *EC – Approval and Marketing of Biotech Products*, requiring that to be an 'SPS measure' as defined in the SPS Agreement, a measure must take the 'form' of a law, decree or regulation, all of which are by definition government measures.[91]

This approach to the applicability of the CGP and article 8 of the TBT Agreement has the benefit of bringing some discipline to bodies setting, implementing and assessing conformity with private sector standards, without the need for negotiating new rules or guidelines. Be that as it may, it appears that WTO members do not regard private SPS standards as falling under the TBT Agreement's disciplines for standards, and in particular the CGP. Of all the non-governmental entities that have notified their acceptance of the CGP, none are active in the area of SPS standards.[92] Further, when members were asked by Chair of the TBT Committee if they wished to discuss the issue of private SPS standards under the TBT Agreement, they did not indicate any interest in doing so. In the view of the Chair, this was due to the fact that the SPS element of private standards schemes was perceived by members as more problematic than other elements.[93] It appears that particular disciplines, differing from those of the TBT Agreement, are regarded as necessary by members to address private SPS standards.

The suggestion that a separate Code of Good Practice for the Preparation, Adoption and Application of Standards should be developed for the SPS Agreement, similar to that in annex 3 to the TBT Agreement, has some merit. This would enable members to draft disciplines that *are* appropriate for private sector bodies that set, apply and assess conformity with SPS standards.[94] In particular, these disciplines

[91]Panel Reports, par 7.149

[92]Under art 4.2 of the *TBT Agreement*, acceptance must be notified to the ISO/IEC Information Centre in Geneva, not to the WTO. Note, as reported by Gascoine *et al* n 9 above at par 24 that the list of standardising bodies that notified their acceptance of the CGP by January 2006 included no non-governmental standard setting bodies concerned with SPS standards. This was still the case in February 2008, when 160 standardising bodies from 116 members had notified acceptance of the CGP, including 84 central governmental standardising bodies, 65 non-governmental standardising bodies, three statutory bodies, two parastatal bodies, three non-governmental regional bodies, one central governmental/non-governmental body, one central governmental/local governmental body and one autonomous body. The list is updated regularly and the latest version can be found in Committee on Technical Barriers to Trade, *List of Standardizing Bodies That Have Accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards since 1 January 1995. Note by the Secretariat. Revision*, G/TBT/CS/2/Rev 14, circulated on 20 February 2008.

[93]Committee on Sanitary and Phytosanitary Measures n 51 above at par 140.

[94]This suggested Code of Good Practice would therefore extend further than that of the TBT Agreement in that the disciplines for conformity assessment procedures conducted by private bodies would be incorporated therein.

could target those practices of private bodies that developing-country members have identified as particularly problematic, such as lack of transparency,[95] absence of prior consultation to allow for input from producers,[96] undue burden from costly and complex conformity assessment procedures, and non-recognition of equivalence.[97] This Code of Good Practice should stop short of requiring private sector bodies to base their measures on international standards, conduct risk assessments for their measures, or undertake any other activities inherent to the national regulatory process but inappropriate to the activities of private bodies. Members could then undertake to take reasonable measures available to ensure compliance with the SPS Code of Good Practice.[98]

It should be noted, however, that the agreement among WTO members needed to adopt such a Code of Good Practice for the SPS Agreement, whether in the form of guidelines adopted by the SPS Committee in terms of its competence under article 12.1 of the SPS Agreement,[99] or in the form of an amendment to

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[95]Private standards of retail chains are often proprietary as they are part of a firm's competitive strategy. As a result, suppliers not in a relationship with the retailer are not informed of the requirements to be met.

[96]Some private standards, such as EUREPGAP, are developed by technical committees that include representatives not only of retailers but also of suppliers from different countries, thus including broad based stakeholder consultations. However, many others , resulting in standards compliance with which may be beyond the capacity of producers in developing countries, as they do not take account of local conditions or risk mitigation approaches.

[97]Benchmarking possibilities, such as the one for EUREPGAP, provides a possibility for the recognition of the equivalence of the GAP standards elaborated in developing countries. For example MexicoGAP, developed by the Mexican Ministry of Agriculture, and ChileGAP, developed by a private fruit industry body, have been successfully benchmarked to EUREPGAP. However, as reported by UNCTAD, benchmarking is not a viable option in many developing countries as the national standard, to be recognised, must comply with all control points and compliance criteria in the EUREPGAP standard, not merely result in the same level of safety. Unlike the equivalence regime in the *SPS Agreement* which depends on the equivalence of *outcomes*, benchmarking relies on the equivalence of *processes*. Committee on Sanitary and Phytosanitary Measures, *Private Sector Standards and Developing Country Exports of Fresh Fruit and Vegetables. Communication from the United Nations Conference on Trade and Development (UNCTAD)*, G/SPS/GEN/761, circulated on 26 February 2007 pars 37-40.

[98]The limited and appropriate nature of such disciplines coupled with the pervasiveness of private standards schemes seems to argue for a stronger interpretation of reasonable measures that may be available as in this case it would be reasonable to take all measures available within the legal system of the Member concerned to ensure compliance.

[99]Art 12.1 of the *SPS Agreement* mandates the SPS Committee to carry out the functions necessary to implement the provisions of the SPS Agreement and to further its objectives. The SPS Committee has used this competence already to adopt guidelines to further the implementation of other articles of the *SPS Agreement*. All decisions of the SPS Committee must be made by consensus. It is important to note that the SPS Committee is not empowered to amend the *SPS Agreement* or to adopt binding interpretations thereof. Instead, its guidelines are voluntary. Nevertheless, as they embody a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the

the SPS Agreement agreed to by the Ministerial Conference under article X of the WTO Agreement,[100] is highly unlikely to be achieved. Powerful lobbies of large retail conglomerates and consumer interest groups in developed-country members can be expected to exert pressure on their governments to oppose any such development.[101]

In such a situation, a next-best solution would be to address private sector standards under the existing TBT CGP, and third party conformity assessment procedures under the disciplines of article 8 of the TBT Agreement, by following the interpretation suggested above. It is to be hoped that a panel confronted by a challenge against the omission by a member to use the measures reasonably available to it to ensure that private bodies comply with the TBT CGP in elaborating and applying private SPS standards, or to ensure that private conformity assessment bodies comply with article 8 of the TBT Agreement, would be willing to hold that such actions fall within the scope of application of the TBT Agreement.

By disciplining the procedural aspects of the activities of the relevant private bodies, including by requiring prior notification and consultation, and by promoting the recognition of equivalence between different private standards regimes, the provisions of a Code of Good Practice, whether that of the TBT Agreement, or in an ideal situation, a new one for the SPS Agreement, may go a long way to reducing the trade-restrictive effect of private sector SPS standards. This would, however, still leave private sector entities free to condition market access, *de facto*, on compliance with standards stricter than those contained in national regulations or international standards, without scientific justification.[102] It is doubtful whether requiring state intervention in this regard would be reconcilable with the free market system, as stricter private standards may be a legitimate response by economic operators to consumer

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meaning of art 31.3(a) of the *Vienna Convention on the Law of Treaties*, they must be taken into account by WTO panels and the Appellate Body when interpreting the relevant provisions of the *SPS Agreement* together with the context.

[100]Simply put, art X:1 of the WTO Agreement provides that, if consensus cannot be reached on a proposal to amend a WTO agreement, the Ministerial Conference may take a decision with a two-thirds majority. However, in practice it is very exceptional for WTO bodies to vote. Instead, the GATT practice of decision-making by consensus has been continued under the WTO.

[101]Gascoine *et al* n 9 above at par 7.

[102]I*d* at par 44 therefore argue that it can be expected that the improvements at procedural level that could be achieved by a Code of Good Practice would 'ultimately not make much difference to the burden of compliance borne by exporters'. However, as is the case for the procedural obligations of the SPS Agreement, it is often procedural rather than substantive rules that achieve most in terms of reducing the trade restrictive effect of SPS requirements and conformity assessment procedures. This is likely to hold true also for procedural disciplines on private sector standards.

demands,[103] and to the shift in liability regimes towards placing the onus for food safety on retailers.[104]

What is needed instead is effective technical assistance to facilitate compliance with private sector standards.[105] Examples already abound of successful adjustment by developing-country producers to private standards where technical and financial assistance has been provided. Most often, this assistance is provided by large export firms that source their products from local producers and therefore have an interest in ensuring that these producers are able to meet the private sector standards of retail conglomerates.[106]

However, the current practice with regard to technical assistance leaves much to be desired. Currently much of the assistance provided is dependent on contractual relationships between vertically integrated companies and their preferred suppliers. These arrangements have negative implications in that they create dependant relationships of producers with dominant buyers, which open the door for abuse. They also result in the further marginalisation of those small-scale suppliers that are not among the 'preferred suppliers'. This has significant implications for poverty

[103]Of course, this freedom is not absolute, but is limited in most countries by consumer protection rules, which prohibit misleading consumers, eg, by false health claims.

[104]Gascoine *et al* n 9 above at pars 35-37 report that among the justifications given by super-market chains for their use of private sector standards are that such standards are a legitimate response to consumer demands for food that is safer than what can be achieved though official regulations; that as the burden of ensuring that food is safe is firmly on retailers, and official regulations may not always be effective, they are justified in applying private standards; and that the large investments they have made in their brand reputation justifies strict measures to protect that reputation from damage caused by food safety problems.

[105]With reference to the challenges of adjustment to the stricter requirements set by private sector standards, Henson *et al* n 44 above at 373-384, 373 note: 'Indeed, the scale of the challenge faced by small-scale producers in complying with stricter food safety and quality requirements invariably requires some form of external support to not only provide the required expertise and resources, but also to bring about the necessary changes to supply chain organisation and operation. In many cases, this is provided by the exporters, … while in others non-governmental organisations (NGOs) may play a leading role'.

[106]A case study that illustrates this point is provided *ibid*. Henson *et al* examine the practices of the large Zimbabwean fresh produce exporter, Hortico Fresh Produce Ltd, which supplies high-value fresh vegetables to supermarkets in the UK, the Netherlands and South Africa. This exporting company relies on small-scale producers for labour intensive products such as fine beans and baby corn. It has established standards and procedures that the producers it contracts with must meet, in order to comply with the private standards applied by the foreign supermarkets it supplies. In order to ensure that small-scale producers can meet these standards, Hortico provides (through its subsidiary Agrisystems) training and on-going advice regarding production process requirements, pest control, fertiliser application, crop handling etc. It also provides the required inputs on credit to its contracted producers and maintains strict systems of inspection and control at its own cost. Despite an initial steep learning curve, small-scale producers have performed as well as large-scale producers in meeting the exacting private sector standards applied by Hortico due to the financial and technical assistance provided by Hortico.

alleviation in rural areas.[107] For example, a recent report by the Danish Institute for International Studies with regard to the organic spice trade in Tanzania, points out that although almost all spice production in Tanzania is organic (due to farmers' inability to meet the costs of pesticides and fertilisers)[108] *certified* organic farming entails high compliance costs.[109] In the absence of government services to support organic farming and ensure conformity with organic certification requirements, small spice producers rely on two major vertically integrated companies which buy organic spices for export. These companies undertake organic certification and meet all certification and inspection fees.[110] However, these companies often do not observe their contracts with the spice farmers, buying less than the agreed volume of production so that the rest has to be sold at low prices on the domestic market.[111] In addition, the dominant companies engage in opportunistic behaviour and buyer collusion, with adverse consequences for the spice producers.[112] The price premium for organic production currently goes to the vertically integrated companies rather

[107]Uruguay reports that 80% of agricultural production in Uruguay is in the hands of small, family-run enterprises. Private standards are too burdensome for such producers, thereby excluding them from export markets. Uruguay argues that since economies of scale are necessary for producers to be able to absorb the costs of private standards, these standards result in an imbalance in favour of large-scale producers, thereby displacing small-scale agriculture. Comite De Medidas Sanitarias y Fitosanitarias, *Normas Privadas. Declaracion De Uruguay En La Reunion De Los Dias 2 - 3 De Abril De 2008*, G/SPS/GEN/843, circulated on 21 May 2008 par 6. This document has not yet been translated.

[108]In addition, there is little need for fertilisers and pesticides due to the high fertility level of the soil and the fact that many spices are natural insect repellents. Akyoo and Lazaro *The spice industry in Tanzania: General profile, supply chain structure, and food standards compliance issues*, DIIS Working Paper no 2007/8 (2007) at 8, available at: http://www.diis.dk/graphics/Publications /WP2007/WP%202007-8%20final.web.pdf visited on 23 May 2008.

[109]*Id* at 22-24. In order to be certified as organic production, rigorous control of the production process is required, including by ensuring the use of untreated seed, training farmers with regard to organic requirements, carrying out internal and external inspections and ensuring segregation and traceability of organic produce. Farmers are required to keep careful records.

[110]Cultivation of spices in Tanzania is smallholder-based, almost entirely comprising farms of under one acre. Two major companies, M/S Tazop Ltd and Zangerm Ltd dominate the organic market for spices and all smallholders that wish to sell certified organic spices do so through one of these two companies. M/S Trazop contracted 320 certified farmers and Zangerm contracted 700 certified farmers in 2005. Both these companies have foreign sister companies (in Germany and Switzerland) with large shareholdings in the local company. The local company ensures conformity with organic certification requirements and availability of a steady volume of the product, whereas the foreign partner meets inspection and certification fees, markets the spices abroad and secures favourable prices. *Id* at 6, 9, 11.

[111]Since local buyers have little interest in organic certified spices, on the domestic market organic producers have to compete with low-cost producers of spices that do not comply with the certification requirements. Akyoo and Lazaro report that the two dominant spice buying companies have often reneged on contract provisions requiring them to buy the farmers' entire crop. Eg, only 65-70% of certified organic ginger crop is bought by the relevant company. There is no enforcement of contractual obligations. *Id* at 10 and 28.

[112]*Id* at 14.

than to the spice producers.[113] Therefore, while the technical and financial assistance provided by the export companies for compliance with the requirements for organic certification allows smallholders to gain access to the European market, this assistance is based entirely on self-interest. The dependence of smallholders on dominant companies makes them vulnerable to opportunistic behaviour. Clearly, this is not the kind of technical assistance that is needed.

Improvements are necessary to ensure that technical assistance is provided by donors in a coherent and effective manner and results in enabling small-scale producers to participate in export trade in a sustainable manner. An example of such a scheme is the Export Promotion of Organic Products from Africa (EPOPA) programme established by the Swedish International Development Agency (SIDA). One of its projects aims to establish internationally recognised local organic certification bodies in Tanzania and Uganda, by working closely with local stakeholders to create systems that are locally accepted and also compatible with international standards.[114] One important difference between capacity building programmes such as EPOPA, and technical assistance through vertically integrated companies, is the objective of the assistance given, which is often determinative for its development impact. Unlike the assistance provided by the two dominant exporting companies in Tanzania, the overall objective of EPOPA is poverty alleviation, rural development, and economic growth in favour of the poor.[115] This objective affects the choice of export projects, where they are located, and how they are structured to ensure sustainability and inclusivity of marginalised groups. More of this type of capacity building programme is called for, but on a wider scale and with more coordination between donors and within projects.[116]

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[113]*Id* at 24.

[114]See the website of EPOPA, available at: http://www.grolink.se/epopa/ visited on 30 June 2008. Another example of a successful technical assistance project is that in Kenya, where assistance from the government, non-governmental organisations and producers associations have enabled small scale producers of fruit and vegetables to apply for EUREPGAP certification. Committee on Sanitary and Phytosanitary Measures, *Executive Summary of a Study on Agri-Food Safety and SPS Compliance in Guinea Conakry, Mozambique and Tanzania. Communication from UNCTAD*, G/SPS/GEN/567, circulated on 17 June 2005 par 48.

[115]These objectives are set out in the evaluation of the second phase of implementation of EPOPA. Forss and Lundström *An evaluation of the program 'export promotion of organic products from Africa' – phase II* 15 October 2004 at 50, available at: http://www.grolink.se/epopa/Publications/EPOPA-Phase-2-Evaluation-04.pdf visited on 30 June 2008. This evaluation report further notes that SIDA policy emphasises market-led growth and development. It argues that markets must be made to work for the poor, notes the need for a 'holistic view of development cooperation in relation to economic growth, and particularly for the role that aid can play in creating an enabling environment, not least through institutional development'.

[116]The evaluation of EPOPA notes that delays in projects were mostly caused by SIDA, and relate to uncertainties around finance sources, lack of policy coordination between units, and

In the meantime, a pragmatic and immediate strategy to address private sector SPS standards is essential. It is suggested that this strategy take the form of using the available, and effective, possibility for multilateral discussion and sharing of experiences that is provided by the forum of the SPS Committee.[117] Since it was first raised in 2005, there have been two years of 'exploratory discussions' in the SPS Committee on this issue. Various WTO members and observers have made use of the opportunity provided by the SPS Committee to report on their experiences with private sector standards and to air their concerns.[118] Some members suggested that private sector standards were best discussed in other fora, such as UNCTAD or the WTO Committee on Trade and Development.[119] This idea was rejected by many other members who expressed appreciation for the 'rich debate' at the SPS Committee, and noted that in view of the important trade implications of the issue, it should not only be examined in development fora.[120] An information session was organised by the WTO and UNCTAD in 2007 to familiarise members with various private sector standard schemes.[121] After an impasse was reached on the question of

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the inability to take the necessary tendering and contracting decisions. *Id* at 48.

[117]The SPS Committee has as one of its functions under art 12.2 of the SPS Agreement, the provision of a forum for *ad hoc* consultations and negotiations among members on specific SPS issues.

[118]For instance, in February 2007, Saint Vincent and the Grenadines submitted a communication pointing to the problems faced by private sector standards for small farmers, and recommending that 'consideration should be given to compliance with the SPS Agreement' when private sector standards are being developed. Committee on Sanitary and Phytosanitary Measures, *Private Industry Standards. Communication from Saint Vincent and the Grenadines*, G/SPS/GEN/766, circulated on 28 February 2007 at par 6. In June 2007, Ecuador noted the adverse effects posed by private standards to developing-country producers, mentioning the example of traditionally organic production in Ecuador which now has to bear the high costs of certification as such or lose market access. Committee on Sanitary and Phytosanitary Measures, *Private and Commercial Standards. Statement by Ecuador at the Meeting of 27-28 June 2007*, G/SPS/GEN/792, circulated on 5 July 2007. At the SPS Committee meeting in April 2008, highly critical remarks were made by a group of developing-country members, led by Uruguay and Egypt, on the impact of private sector standards on developing-country trade. The report of this meeting is not yet publicly available. The information on the discussion at the meeting of 2-3 April 2008 is taken by the WTO News Item 'Members set to agree on regionalization, improved SPS transparency', available at: http://www.wto.org/english/news_e/news08_e/sps_apr08_e.htm visited on 26 May 2008. The OIE Director-General Bernard Vallat noted that private sector standards could undermine the science based and multilaterally agreed standards set by the 'three sisters'. This statement was made by way of introduction to the OIE submission on private standards. This submission noted that private sector standards are 'developed to meet the needs of commercial parties (especially supermarkets) and consumers and tend towards a non-scientific, zero risk, marketing approach that is not consistent with the disciplines of the SPS Agreement.' Committee on Sanitary and Phytosanitary Measures n 43 above at par 2.

[119]Committee on Sanitary and Phytosanitary Measures n 51 above at par 139.

[120]*Id* at pars 143 and 153. All the developing-country members who participated in the discussion at this meeting stated unequivocally that the issue should be kept on the agenda of the SPS Committee. *Id* at pars 142-172.

[121]This information session was held on 25 June 2007, and involved presentations on various private sector standard schemes and case studies on national experiences with private sector

whether the SPS Agreement has a role to play in disciplining private standards, members agreed in April 2008 to consider setting up a small group to work on the issue of private sector standards.[122] This initiative was discussed at an informal meeting of the SPS Committee meeting in June 2008, on the basis of a proposal by Uruguay on the terms of reference for such a working group.[123] In the meantime, due to the overwhelming support for keeping the issue on the agenda of the SPS Committee, it will remain there.[124]

At the SPS Committee meeting of 18-19 October 2007, the chairman noted that discussing private standards in general terms was not a fruitful approach. Instead he proposed that future discussions should address proposals on how to deal with the challenges posed by private sector standards, and should focus on concrete experiences and examples by members of problems they face with private SPS standards.[125] This proposal was supported by many members, representing both developed and developing countries.[126] However, some developing-country members expressed concerns that this approach risked losing sight of the big picture, and did not resolve the issue of the role of the

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standards. The presentations made are available at: http://www.wto.org/english/tratop_e/sps_e/private_standards_june07_e/private_standards_june07_e.htm visited on 26 May 2008.

[122]The information on the discussion at meeting of 2-3 April 2008 is taken from the WTO News Item 'Members set to agree on regionalization, improved SPS transparency', available at: http://www.wto.org/english/news_e/news08_e/sps_apr08_e.htm visited on 26 May 2008.

[123]Committee on Sanitary and Phytosanitary Measures, *Terms of Reference for the Working Group on Private Standards. Proposal by Uruguay*, G/SPS/W/225, circulated on 18 June 2008. At the informal meeting of the SPS Committee on 23 June 2008, the Uruguayan proposal and other ideas were discussed. The chairperson reported to the formal SPS Committee meeting that there was support by members for the whole document or certain parts of it. Differences remained on the size of the working group and who should chair it; whether the proposed terms of reference would prejudge the results of the working group's work by seeing private standards as mainly negative; whether the group should focus on concrete examples, examine where private standards deviate from the standards of international governmental bodies, or analyse the legal position of private standards under WTO agreements. To initiate the work, the chairperson and Secretariat will send a list of questions to members and their replies will be used to discuss how to proceed in informal consultations in October. This information on the discussion at the informal and formal meetings of the SPS Committee in June 2008 is taken from the WTO News Item 'Members turn attention to improving SPS mediation', available at: http://www.wto.org/english/news_e/news08_e/sps_24june08_e.htm visited on 26 June 2008.

[124]Committee on Sanitary and Phytosanitary Measures n 9 above at par 15. See also Committee on Sanitary and Phytosanitary Measures n 51 above at par 172.

[125]*Id* at pars 140-141.

[126]The view that discussions at the SPS Committee on private standards should be concrete and specific was expressed by Australia, the EC, Japan, Canada, and the US. This approach was also regarded as useful by Senegal, Uruguay, Barbados, Bolivia, Bangladesh, Zimbabwe and Argentina although some of these members felt hat a global systemic debate, in parallel, could be useful. *Id* at pars 145, 149, 150, 152, 153, 156, 157, 158 and 165.

SPS Agreement in addressing private sector standards.[127] While the frustration of these members is understandable, in view of the slim chance that agreement can be reached on the legal framework within which private standards could be addressed at the WTO, it seems advisable to exploit fully the existing mechanism provided by the SPS Committee to bring about gradual change through the sharing of experiences at technocratic level, and drawing critical attention to problems. As noted by Gascoine *et al*, large retailers 'acknowledge that there is a business risk associated with the negative reaction of developing countries to their private standards'.[128] Similarly, the EC noted at the relevant SPS Committee meeting, that the discussion at the Committee on the issue of private standards had sensitised the private sector bodies to the impact of their measures on developing countries, and that real efforts were being made by these bodies to address the issue.[129]

Several members that participated in the discussion at the November 2007 meeting, pointed to the need for technical assistance to improve capacity for compliance with private standards. It is to be hoped that placing private bodies in the limelight by subjecting their actions to critical attention in a multilateral forum, will have the effect of stimulating them to improve their procedures to make them more transparent and inclusive, and will spur them and other donors to provide effective technical assistance.[130]

An example of a concrete issue related to private sector standards was promptly raised by Ecuador at the first SPS Committee meeting of 2008. This related to the interplay between the EC's regulatory standard for a plant growth regulator, Ethephon, and the private quality standards set by GLOBALGAP and applied by European retailers, which together have the effect of excluding Ecuadorian pineapples from the European market.[131] It will be interesting to see what the

[127] *Id* at pars 143, 155, 165 and 170. In addition, Ecuador noted that obtaining information on concrete examples may prove difficult as producers may be reluctant to share information regarding non-compliance with private standards and thereby lose market share. *Id* at par 162.

[128] Gascoine n 9 above at par 5.

[129] Committee on Sanitary and Phytosanitary Measures n 51 above at par 149.

[130] An example of technical assistance by a non-private sector donor in this regard was reported in the information session on private standards organised by the Standards and Trade Development Facility. This was the World Bank grant of US$750,000 for a three year period to establish the Trade Standards Practitioners Network (TSPN), which aims to build a community of practice to actively promote the adoption of food safety and environmental standards in developing countries and to share experiences and increase learning. The TSPN has as its objectives to better enable developing countries to participate in and take advantage of standards-based markets; to arrange research policy dialogues and create a standards information clearing house; and to facilitate the identification of best practices in standards management. Committee on Sanitary and Phytosanitary Measures n 9 above at pars 12-13.

[131] In 2008, Ecuador submitted a statement to the SPS Committee in which it expressed its concern that a proposed reduction in the EC's maximum residue levels of Ethephon, a plant growth regulator,

response of members will be to this specific example, as it may provide insight into the possibilities available through the forum provided by the SPS Committee to address concerns with private sector standards, pending the outcome of discussions regarding the elaboration of disciplines in this area.

in pineapple, would preclude Ecuador from using this substance to control the pineapple ripening process. This was particularly problematic for Ecuador in view of the fact that GLOBALGAP quality standards are applied by purchasers on the EC market, requiring particular quality attributes that would be impossible for Ecuador to meet without the use of Ethephon. Committee on Sanitary and Phytosanitary Measures, *MRL for Pineapple - Ethephon*, G/SPS/GEN/841/Rev 1, circulated on 9 May 2008. Note that in this case the private sector standard referred to addresses quality requirements, such as the stage of ripeness of fruit, rather than safety requirements. Nevertheless, this example illustrates the fact that when coupled with a mandatory food safety standard, in this case an MRL for chemical residues in food, a private sector quality standard can have the effect of closing off a market for developing-country exports. In view of the debate regarding the role of *SPS Agreement* in disciplining private standards and the fact that in any case quality standards are not standards falling under the *SPS Agreement*, in its submission, Ecuador challenged the conformity of the EC's proposed reduction in the MRL for Ethephon rather than the private standards of GLOBALGAP.