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LIST OF ACRONYMS AND ABBREVIATIONS

AB	Appellate Body [WTO]
ACC	Administrative Committee on Coordination [UN]
ACP	African, Caribbean and Pacific countries
ACTA	Anti-Counterfeiting Trade Agreement
ADI	Acceptable daily intake
AIB	American Institute of Baking
APS	Assured produce scheme
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
BRC	British Retail Consortium
BSE	Bovine spongiform encephalopathy
BSE-vCJd	BSE-variant Creutzfeldt-Jakob disease
B2B	Business-to-business
B2C	Business-to-consumer
CAC	Codex Alimentarius Commission
CCP	Critical control point
CEB	Chiefs Executive Board of Coordination [UN]
CEN	European Committee for Standardisation
CGCSA	Consumer Goods Council of South Africa
CGP	Code of good practice
CIES	Food Business Forum
COCERAL	*Comité du commerce des céréales, aliments du bétail, oléagineux, huile d'olive, huiles et graisses at agrofournitures* [French association representing trade in cereals, rice, feedstuffs, oilseeds, olive oil, oils and fats and agro-supply]
COOL	Country of origin labelling
CPSS	Committee on Payments and Settlements Systems
CSA	Corporate social accountability
CSR	Corporate social responsibility
CTE	Committee on Trade and Environment [WTO]
DDA	Doha Development Agenda
DDR	Doha Development Round
DFID	Department for International Development [UK]
DSU	Understanding on Rule and Procedures Governing the Settlement of Disputes [WTO]

EA	European Co-operation for Accreditation
EAC	East African Community
EAOPS	East African Organics Products Standard
EC	European Community *or* European Communities
ECE	Economic Commission for Europe
ECOSOC	Economic and Social Committee [UN]
ECR	European Court reports
ECJ	European Court of Justice [EU]
EEC	European Economic Communities
EFSA	European Food Safety Authority [EU]
EITI	Extractive Industries Transparency Initiative
ECOSOC	Economic and Social Committee [UN]
EPOPA	Export Promotion of Organic Products from Africa
ETI	Ethical Trade Initiative
EU	European Union
EUREP	Euro-Retailer Produce Working Group
EUREPGAP	Euro-Retailer Produce Working Group Good Agricultural Practices [then GlobalGAP]
FAO	Food and Agriculture Organization of the United Nations
FCD	*Fédération des entreprises du commerce et de la distribution* [French food retailers and wholesalers organisation]
FCTC	Framework Convention on Tobacco Control [WHO]
FDA	Food, Drug and Insecticide Administration [US]
FDCA	Federal Food, Drug, and Cosmetic Act [US]
FDI	Foreign direct investment
FIAS	Foreign Investment Advisory Service
FLA	Fair Labour Association
FLO	FairTrade Labelling Organisation
FMI	Food Marketing Institute
FMIA	Federal Meat Inspection Act [US]
FPA	Food Products Association
FSANZ	Food Standards Australia-New Zealand Agency
FSC	Forest Stewardship Council
FSIS	Food Safety Inspection Service
FSKN	Food Safety Knowledge Network
FSSC	Food Safety System Certification
FSMA	Food Safety Modernization Act [US]
FSVP	Foreign Supplier Verification Programme [FSMA]

FTA	Free trade agreement
FVA	Foreign value added
GAL	Global administrative law
GAO	Government Accountability Office [US]
GAP	Good agricultural practices
GATS	General Agreement on Trade in Services [WTO]
GATT	General Agreement on Tariffs and Trade [WTO]
GDP	Good distribution practices
GFSI	Global Food Safety Initiative
GHP	Good hygiene practices
GI	Geographical indications
GlobalGAP	Global Good Agricultural Practices [formerly EUREPGAP]
GM	Genetically modified
GMP	Good manufacturing practices
GPFH	General Principles of Food Hygiene [CAC]
GRASP	GlobalGAP Risk Assessment on Social Practices
GRP	Good retail practices
GTP	Good trading practices
GTZ	*Deutsche Gesellschaft für Technische Zusammenarbeit* [German Technical Cooperation Agency]
GVC	Global value chain
G-20	Group of 20
HACCP	Hazard analysis and critical control point
HDE	*Hauptverband des Deutschen Einzelhandels* [Federation of the retail trade in Germany]
HRC	Human Rights Council [UN]
IAF	International Accreditation Forum
IAIS	International Association of Insurance Supervisors
IASB	International Accounting Standards Board
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICM	Integrated crop management
ICO	International Coffee Organisation
ICSID	International Centre for Settlement of Investment Disputes
ICTFY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IEC	International Electrotechnical Commission
IFA	Investment Framework Agreement [GlobalGAP]

IFC	International finance corporation
IFP	Integrated fruit production
IFPS	International Federation for Produce Standards
IFS	International Food Standard
IFSQN	International Food Safety and Quality Network
IHR	International Health Regulations [WHO]
ILA	International Law Association
ILAC	International Laboratory Accreditation Cooperation
ILC	International Law Commission [UN]
ILM	International legal materials
ILO	International Labour Organisation
IMF	International Monetary Fund
INCOTERMS	International Commercial Terms
IOSCO	International Organisation of Securities Commissions
IP	Intellectual property
IPE	International political economy
IPM	Integrated pest management
IPPC	International Plant Protection Convention [FAO]
IPR	Intellectual property right
ISEAL	International Social and Environmental Accreditation and Labelling Alliance
ISO	International Organisation for Standardisation
ISO/IEC	International Organisation for Standardisation & International Electrotechnical Commission
ITC	International Trade Centre
ITO	International Trade Organisation
ITU	International Telecommunication Union
JEFCA	Joint Expert Consultation in Food Additives [FAO & WHO]
JEMRA	Joint Experts on Microbiological Risk Assessment [FAO & WHO]
JMPR	Joint Meeting in Pesticide Residues [FAO & WHO]
LDC	Least developed countries
MAI	Multilateral Agreement on Investment [OECD]
MEA	Multilateral environmental agreement
MFN	Most favoured nation [WTO]
MIGA	Multilateral Agency Guarantee Agency [World Bank]
MNC	Multinational corporation
MQS	Minimum quality standard
MRA	Mutual recognition agreement

MRL	Maximum residue level *or* maximum residue limit
MSC	Marine Stewardship Council
MSGAP	Malaysian Good Agricultural Practice
MTDSG	Multilateral treaties deposited with the UN Secretary General
MTN	Multilateral trade negotiations
NAFTA	North America Free Trade Agreement
NBE-HACCP	The Netherlands National Board of HACCP Experts
NGO	Non-governmental organisation
NSMD	Non-State market-driven
NTB	Non-tariff barrier
NTM	Non-tariff measure
NZGAP	New Zealand Good Agricultural Practice
OECD	Organisation for Economic Cooperation and Development
OIE	*Office International des Epizooties* [World Organisation for Animal Health]
OTA	Ochratoxin-A
PDO	Protected designations of origin
PEFC	Programme for Endorsement of Forest Certification
PGI	Protected geographical indications
PIL	Private international law
PLT	Patent Law Treaty
PLU	Price look up codes
Ppb	Parts-per-billion
PPIA	Poultry Products Inspection Act [US]
PPL	Premium private label
PPM	Process and production method
PPP	Public-private partnership
PTA	Preferential trade agreement
QA	Quality assurance
QAS	Quality assurance system
QMS	Quality management system
QS	*Qualität und Sicherheit GmbH* [Germany]
RASFF	Rapid Alert System for Food and Feed [EU]
SAFE	Supplier Audits for Food Excellence
SAI	Social Accountability International
SARS	Severe acute respiratory syndrome
SDoC	Self-declaration of conformity
SCM	Agreement on Safeguards and Countervailing Measures [WTO]

SCV	*Stichting Certificatie Voedselveligheid* [Dutch Certification Foundation Food Safety]
SG	Secretary-General [UN]
SIDA	Swedish International Development Agency
SMTQ	Standards, metrology, testing, and quality assurance
SPLT	Substantive Patent Law Treaty [WIPO]
SPS	Sanitary and phytosanitary
SQF	Safe Quality Food [US & Australia]
SQFI	Safe Quality Food Institute
STDF	Standards and Trade Development Facility
Synergy PRP	Synergy Pre-Requisite Programme
TBT	Technical barriers to trade
TC	Technical committee
TFEU	Treaty on the Functioning of the European Union [EU]
TRIPS	Trade-related Intellectual Property [WTO]
TS	Technical specification
TSG	Traditional specialities guaranteed
TSPN	Trade Standards Practitioners' Network
UKAS	UK Accreditation Service
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
US	United States
USDA	United States Department of Agriculture
VCLT	Vienna Convention on the Law of the Treaties
VQIP	Voluntary qualified importer programme
VS	Vertical specialisation
WHA	World Health Assembly [WHO]
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WTP	Willingness-to-pay
WWF	World Wild Fund for Nature [UN]
4C	Common Code for the Coffee Community

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ABSTRACT

The last two decades have seen the emergence of an increasing, although not entirely new, array of non-State actors engaged in steering regulatory tasks that were traditionally connected with the sovereign identity of the modern State and that are today exerted in respect of cross-border activities. The norms so produced pretend to be regulative in a way similar to what State-based regulatory and legal systems do. As result of this process private regulation at the transnational and global level blurs the conventional boundaries between voluntary and mandatory regulation, between public and private, and in the end between law and regulation. Such a reconfiguration of the regulatory space towards properly global regulatory governance beyond the traditional State-based 'command-and-control' paradigm is made furtherly complex by the remarkable variation that private regulation exhibits.

The regulatory governance of food safety is a critical case in this respect. Global agri-food value chains are ever more frequently governed by a collection of private standards with which food products have to comply to enter a given supply chain. This raised a series of concerns about market access limitation that have been voiced with the WTO in order to minimise their negative effects on international trade. Yet the increase in number and pervasiveness of non-State mechanisms designed to create authoritative regulation in the global marketplace takes the multilateral trading system into uncharted territory. Additionally, the emergence of private regulation in relation to politically and socially sensitive issues raises relevant concerns about legitimacy.

Analysing the issue of transnational private regulation under the respects of emergence, conceptualisation, consistency, and legitimacy, the present research work claims that the growing 'legalisation' that characterises the economic system today calls for resituating the core and the boundaries of law so as to ensure a measure of internal stability and predictability to the global regulatory system and make this intellegible and, at the same time, effective and legitimate. To this end, it is argued that the challenging character of the interface of transnational private regulation and international economic law understood in terms of complementarity requires an adequately tailor-made conceptualisation. This is found in the extension to international law of the EU-driven 'better regulation' approach, which is built on three main elements: institutionalisation and proceduralisation; consensus-based procedural rationality; and, mutual recognition of equivalence and harmonisation.

INTRODUCTION

FRAMING THE RESEARCH QUESTION, OBJECTIVES AND SCOPE, AND METHODOLOGIES OF ANALYSIS

1. Objectives and scope of analysis

In the age of globalisation many subject matters and issue areas that used to be governed by domestic regulation are increasingly addressed at the global level. The past two decades have seen the emergence of an increasing, although not entirely new, array of non-State actors engaged in steering tasks that were traditionally in the hands of the State. Properly speaking these non-conventional actors have gained steering capacity through the creation, implementation, and enforcement of norms that apply to cross-border activities and that pretend to be regulative of the behaviour of other actors in a way similar to what State-based regulatory and legal systems do. In so doing the emergence of private sites of regulation at the transnational and global level has come to break the traditional State-centred frame in fields of law and regulation, which grew up in the modern Westphalian world made up exclusively of nation-States. Private regulation at the global level blurs the conventional boundaries between 'voluntary' and 'mandatory' regulation, between 'public' and 'private', and in the end between law and regulation. As result of this process, it is no longer clear which regulation count as 'private', the functions it performs, and the potential impacts it has in the global environment.

Such a new context of reconfiguration of the regulatory space towards properly global regulatory governance consisting of a broad range of both public and private actors, sources of regulation, and processes, is made furtherly complex by the remarkable variation that private regulation exhibits with respect to its institutional form (who it is developed by, how it is developed, who adopts it), the objectives it addresses, the forms it takes, and so forth. We add that the emergence of private regulation can be observed in many fields of human activity. Because of these complexities, it is neither possible for a single research work to cover all possible forms of private regulation nor to draw general conclusions. Therefore, we are forced to focus on a specific breed of private regulation.

In this respect, regulatory governance of food safety represents a highly relevant and critical case in the study of governance that transcends the State. In fact, "[w]hile national institutional frameworks remain important, the private sector, enterprise and civil society associations, as well as international associations, are increasingly taking the lead in shaping

global standards for food safety […]"[1]. National food safety legislation and regulation is and remains a fundamental part of food safety control systems. Nonetheless, as food is being produced, processed, traded, and finally consumed overall the world, it is no longer realistic for a single State to regulate, on its own, all the safety attributes of food consumed in its territory. Hence, private food safety governance has expanded dramatically, especially in the form of standards included in supply contracts and adopted mostly by the food retailing sector and, although to a less extent, by the food industry. As result, agri-food value chains, which are increasingly global in scope, are currently and ever-more frequently governed by a collection of private regulatory standards with which food products have to comply to enter a given supply chain.

The relevance and significance of private food safety regulatory governance has been brought to the attention of the international community especially since June 2005, when at the World Trade Organisation St. Vincent and the Grenadines – followed by many other developing countries – raised specific concerns about the trade impacts of private standards and their highly ambivalent implications for the sustainability of the agri-food system. That food safety regulatory governance is an interesting case for analysis is proved by the lack of consensus among the WTO Members in finding ways to deal with that in the current WTO legal framework.

In light of this background, the objective of our research work is to add coherence to the legal discourse of the interface between State law and transnational private regulation through a legally-grounded analysis of regulatory governance in the food safety area. We aim at discussing and analysing the major issues associated with the increasing regulative role of private actors at the global level, which has been hitherto examined from an empirical or policy-oriented perspective. In so doing we attempt to fill some of the gaps in critical thinking with regard to the issue under consideration. Albeit crucial for understanding the multiple facets of global regulatory governance, political, economic, social and any other considerations fall outside of the scope of the present research work, which is meant to remain faithful to the legal perspective.

2. Research question

For too long the legal discourse has focused on law and State regulation only. International (economic) law does not take sufficient cognisance of non-conventional actors and sources, while limiting itself to State-centred hard law. The interconnectedness of the multiple subjects and actors, and sources of norms that characterises global economic regulatory governance is one of the most contentious topics currently discussed in the legal literature. In this respect, our research largely revolves around the following core question:

[1] L. Fulponi, *Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries*, (2005) Food Policy 30: 115-128, at 119.

How should international economic law be configurated to provide global regulatory governance with a measure of internal coherence and predictability, so as to found a rules-based governance system that would be both effective and legitimate for the benefit of any actors participating in it?

Our aim is to develop a conceptual framework where international economic law is deemed to provide the 'rule of law' to global economic governance. The Oxford English Dictionary defines the term 'rule of law' as "[t]he authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; the principle whereby all members of a society are considered equally subject to publicly disclosed legal codes and processes"[2]. Accordingly, we will investigate how international economic law can provide such a principle of order and legitimation for the global economic system, in which currently several different sources of regulation coexist in the absence of a hierarchical authority.

3. Relation to the literature: Resituating the core and boundaries of law

A large body of academic literature including an increasing number of empirical studies on specific sectors and countries, and cutting across the disciplines of, *inter alia*, political science, international relations, sociology, political economy, and law, has accumulated to analyse the functional, systemic, democratic and normative challenges posed by the emergence of private sites of governance. In particular, a solid body of legal literature exists on the creation of international law on the one hand, and on non-State actors, on the other. The traditional doctrine of the sources of international law focused exclusively on the production of international norms. Nonetheless, recent scholarship has paid some attention to the role that non-State actors play in international processes; in parallel, some international lawyers have studied the legal role of market actors as norms-makers in the traditional field of law merchant, which re-emerged to the attention in the 1990s in the context of the debate on globalisation. Overall, it appears to be a paucity of analyses that focus private actors as sites of regulation on their own.

The body of work relating specifically to private food safety standards is extensive, although it concerns mostly the analysis of these standards within the WTO framework. There are especially two points on which the literature is at variance: on the one hand, the impact of private standards on international trade; on the other, whether a legal analysis of the WTO covered agreements supports the finding that private standards fall under the WTO jurisdiction. Much of the debate about private food safety standards has been in fact fuelled by a glaring paucity of a body of evidence that has too much circumstantial evidence and too little rigorous analysis, such that it is difficult at least to some extent to get a clear picture of the market penetration of many private standard schemes. In addition, the debate above shows a number of misunderstandings of the actual significance and peculiarities of the development of such standards, and about the sustainability or, conversely, reversibility of this phenomenon. In particular, key here is a failure to recognise that, although at times private

[2] Oxford English Dictionary, 2015 edition.

standards do extend beyond the official regulatory requirements, the former are quite closely attuned to the latter, such that an approach of institutional complementarity can be explored.

Any legal theory that wishes to explain norm-making at the transnational level faces theoretical challenges and questions, and cannot provide for comprehensive answers about the nature, form and scope of global regulatory governance. In particular, in traditional understanding the norms governing the international economic system can, depending on their origin, be categorised as either of domestic law or of international law. Such thinking leads to the controversy as to whether the scope of international law is limited to norms of public international law dealing with trans-boundary activities or whether it also covers domestic law having effect on cross-border activities. The debate on the relationship between international economic law and today's realities of economic activities needs deepening to resituate and reconceptualise the core and boundaries of law in the context of global economic governance, even in areas that were once exclusively tied to State sovereignty. Contemporary problems are highly interdependent, such that cannot be categorically allocated to one or the other institutional framework. In turn, conventional principles and devices of private and contract law offer the framework for private action, provided that it is carried out at and whose main effects can be localised at the domestic level; conversely, they appear to be inadequate to address issues of global scope and significance.

The legal literature has identified and comprehensively analysed the law merchant (*lex mercatoria*) as a largely homogeneous and autonomous body of law created and independently enforced by private market actors to govern their cross-border trade relations without the involvement of the public authority. Yet, although the law merchant has been described as being "[…] a laboratory for the exploration of private contractual governance in a context, in which the assertion of public or private authority has itself become contentious"[3], it appears to be insufficient and inadequate to describe the legal rules governing trans-national economic relations in today's world.

Theories and instruments of private international law (PIL) are recognised as playing an important background role in the regulation of cross-border activities. As a legal-technical discipline mostly developed against explicitly public backgrounds, PIL is the primary means by which State legal systems confront with cross-border private activity and shows how State law is still relevant for norm creation and enforcement beyond the State. PIL is in many ways a "law of laws"[4]. That transnational private regulation is still in many ways connected to State law through PIL "opens the possibility that the constitutional law of states retains a degree of complementarity to the transnational law of commerce"[5], as well as of other cross-border

[3] P. Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"*, (2012) German Law Journal 13: 1269-1281, at 1269.

[4] J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, (2011) Journal of Law and Society 38: 138-162.

[5] R. Michaels, *The True Lex Mercatoria: Law Beyond the State*, (2007) Indiana Journal of Global Legal Studies 14: 447-468, at 467. In the same sense see, *Id.*, *The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, (2006) Wayne Law Review 53: 1209-1259.

private activity with potentially important ramification for the legitimacy of transnational private regulation. In this respect, PIL is defined as the oft-turned to "queen mother of all transnational legal though"[6]. Yet, traditional PIL approaches investigate the extent to which regulatory norms can be 'privatised', that is, applied within private regimes and to private conduct. PIL embodies an almost exclusively State-law oriented and court-based perspective that relies on a belief that "effective regulation or democratic control […] [are] best protected through domestic law and institutions"[7]. Also, PIL is generally very reluctant about admitting a role for non-State norms, including the law merchant.[8] These are the reasons why, in turn, analysts of transnational private regulation have, on the whole, shown little interest in PIL and in incorporating any regulatory perspective on law, which commonly emphasise the ways in which law and enforcement through courts coexists and conflicts with other mechanisms of social orderings.[9]

Also, the emerging body of literature on global administrative law (GAL) can be seen as a "quest for principles and values"[10] in view of "transforming our collective sense of the meaning and normative significance of the new juridical objects by recording them in old terms"[11]. GAL is largely attributed to two key-factors: on the one hand, the inability of any single State to effectively address global issues through its domestic administrative system; on the other, the increase in number of international agreements aimed at regulating interdependent issues of global significance. Additionally, the growth of transnational regulation has contributed to the further rise of GAL. This focuses largely on how increasing amount of delegation, both at the national and supra-national level, affects accountability mechanisms in the new 'global administrative space', i.e., whether global governance is accountable to a variety of relatively independent actors. Thus it proposes ways to apply administrative principles to promote accountability of both State and private actors. Nevertheless, the complexities of transnational private regulation are such that on a practical level the transplantation of domestic legal or regulatory concepts can certainly be helpful, but there is no reason to take inspiration exclusively from administrative law. In addition, GAL does not incorporate network logic, since administrative law is traditionally less than

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[6] C. Joerges, *Rethinking European Law's Supremacy*, EUI LAW Working Papers no. 2005/12, at: http://cadmus.eui.eu/bitstream/handle/1814/3332/law05-12.pdf;jsessionid=C731775664A294DEA34198F66730DB94?sequence=1, at 7.

[7] R. Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, (2002) Columbia Journal of Transnational Law 40: 209-244, at 239.

[8] For instance, under the Rome I Regulation for choice of law in contracts (*Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, 4 July 2008, OJEU L 177/6) the parties can only choose a domestic system of contract law; a proposal from the European Commission to allow choice for non-State law was rejected during the negotiating process of the regulation. For analysis see, J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, Oxford: Hart Publishing, 4th edition, 2010, at 505.

[9] See J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit.

[10] See C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, (2006) European Journal of International Law 17: 187-214.

[11] N. Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, (2008) International Journal of Constitutional Law 6: 373-396, at 376.

comfortable with horizontal structures. In typical GAL approaches, transnational private regulation would need to be turned into something like administrative law bodies.[12]

In turn, the regulation school was developed "mainly to understand the crisis of the post-war model of development, Fordism"[13]. More recently, as Busch and Bain argue, it has evolved in a neo-regulationist form, thereby showing a peculiar concern with "the shift to quality as a basis for economic competition"[14]. On the other hand, regulation theories tend to take an essentially historical approach, which appears to be less useful for assessing – empirically and legally – specific phenomena, such as transnational private regulation as articulated in a given field. As Busch and Bain conclude, "[regulation theories] help[…] explain the broad conditions under which certain processes occur but tell[…] us very little about the specifics"[15].

For the sake of our analysis a more useful theoretical framework can be found in the literature on governance in political science and, particularly, in international relations. A huge number of studies on global governance begun to consider regulatory authority beyond the State, including the private sector, as well as governance in the context of cross-sectoral partnerships at the global level.[16] On the other hand, while this literature could offer some insights into the conceptualisation of governance with respect to specific private standards, its focus remains largely on "the influence of private actors on intergovernmental decision-making processes as an intervening variable between state interests and international policy outcomes"[17].

In the end, the analysis cannot be confined to the substantive law governing specific forms of economic activity, but has to turn to the dynamics that are unfolding between different levels and sites of norm-making from a regulatory perspective. Our research work aims at being an attempt to develop a conceptual and analytical setting where international economic law is deemed to provide the 'rule-of-law' to the global economic system; to this end it focuses on the complexities and peculiarities of the modes of interaction between private regulatory regimes and State-based law and regulation. In so doing, it does overlap neither with traditional State-centred conceptions nor with more recent legal conceptual and methodological approaches to the study of transnational regulation.

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[12] For analysis of major critics to the GAL approach see, J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit.

[13] See J. Jenson, *Rebel Sons: The Regulation School. An Interview with Alain Lipietz*, (1987) French Politics and Society 5: 17-26.

[14] L. Busch and C. Bain, *New! Improved? The Transformation of the Global Agrifood System*, (2004) Rural Sociology 69: 321-346, at 324.

[15] *Ibidem*.

[16] See, e.g., M. Hemmati, *Multi-Stakeholder Processes for Governance and Sustainability*, London: Earthscan, 2002; and, T. Benner, W.H. Reinicke, and J.M. Witte, *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability*, (2004) Government and Opposition 39: 191-210.

[17] P. Pattberg, *Private Governance and the South: Lessons from Global Forest Politics*, (2006) Third World Quarterly 27: 579-593, at 580.

4. Methodology of analysis and sources

The approach adopted in the present research work is at time descriptive, analytical, and prescriptive. A huge effort has been done to collect existing and mounting empirical research, which differs widely in its scope and quality, so as to present a coherent and consistent analysis of why private transnational sites of regulation, particularly in the food safety area, have emerged and what the implications of this for public regulation are.

Our analysis is also based on a reading of relevant international and national legal instruments, acts of the international organisations, and international and national case law; extensive literature review on the subject matter; interviews with officials from the WTO, FAO, CAC, and EU, as well as with representatives from a number of food safety managers of retail chains; and legal analysis. We additionally analysed websites and documentation published by standards owners and other relevant private sector actors so as to gather supporting evidence.

5. Structure of the research

Chapter One will address in a theoretical way the issue of *emergence*: Why and how did private sites of regulation emerge? It will describe the changing structure of international economic law in the age of globalisation. Specifically, it will analyse the normative weaknesses of the international economic system and the parallel increase in influence of non-conventional actors, sources, and patterns of regulation, aside traditional State-based 'command-and-control'. Following the discussion of whether such systems of governance beyond the State may be considered law merchant or an updated form of law merchant, a specific focus will be provided on the challenges that the increasing 'legalisation' of the global system poses to international economic law in terms of its conventional conceptualisations. Finally, the prospects for continued growth of the influence of private regulation in the long term will be discussed, together with the need to reconceptualise the role and forms of regulation in the broader context of global regulatory governance made up of both the public and the private domains.

Chapter Two will introduce the issue of *conceptualisation*, by questioning how private sites of regulation should be intended, both on their own and in their interface to public regulatory authorities, in a specific sub-sector. Particularly in the food safety area, aside the role of domestic authorities and relevant international institutions, food safety regulatory governance sees the ever-more prominent role of private controls established by retail corporations and, to a less extent, by the food industry, most notably in the form of private standards included in supply contracts. For an advanced understanding of this phenomenon this chapter will discuss the contextual conditions of transition in food safety regulation and the drivers behind that. Then, it will analyse the nature and complexities of private food safety regulation by examining their attributes, functions and objectives, and the different elements that make private standards functional. The chapter will conclude by questioning which 'law'

global food safety regulatory governance is founded on in such a multi-actor and multi-process framework that challenges traditional conceptions of regulation.

The increase in number and pervasiveness of non-State mechanisms designed to create authoritative regulation in the global marketplace takes the multilateral trading system into uncharted territory. Chapter Three therefore will address the trade-related effects of private food safety standards and the issue of the *consistency* of such standards with the multilaterally-agreed system of trade rules, particularly in terms of market access. In the framework of the on-going debate taking place at the WTO level, this chapter intends to investigate to what extent, if at all, the WTO disciplines – particularly, the SPS and TBT Agreements – apply to the development, adoption and implementation of private standards and to non-governmental standards-setting organisations in order to minimise their negative effects on international trade. The relevant problem which the WTO Members are confronted with is the lack of a clear language in the SPS Agreement, especially as far as Article 13 thereof is concerned, which has never been addressed directly either in dispute settlement or in authoritative interpretation. Lastly, the chapter will ask whether the WTO Members are required to act in respect of private standards and whether they are responsible for the acts of private entities within their jurisdiction just as they are responsible for the acts of their central governments.

The emergence and proliferation of private regulation in relation to politically sensitive issues raises relevant theoretical and legal concerns about *legitimacy*. Thus Chapter Four will deal with the issue of whether private sites of regulation are legitimate and what effect legitimation could have on their development. To this end, it will produce an analysis of the democratic legitimacy of private food safety regulation on the basis of a conceptual framework built around the concepts of ‘output legitimacy’ and ‘input legitimacy’ elaborated by the European scholarship, the former focusing on effectiveness, the latter on participation, governance and accountability.

Chapter Four concludes with the question of whether it is possible for transnational private regulation to be both effective and accountable at the same time. After summarising the main findings of our research, the Conclusions will seek to provide with a systematic answer to this last question and, more generally, to the core question of our work, which concerns possible ways of interaction between State-based international economic law and non-conventional actors and sources of regulation in global economic governance. Implications and directions for further research will be finally illustrated.

CHAPTER ONE

SETTING THE SCENE: THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW IN THE AGE OF GLOBALISATION

> "The policy path through the many facts and circumstances which have good or bad effects on world economic situations, and thus on international economic law, is extraordinarily complex and unclear.
> This 'landscape' truly needs some roadmaps, but few of these exist and those that are used are often misleading"[18].

6. The normative weaknesses of the international economic system and the increasing influence of non-conventional actors, sources, and patterns of regulation

Since its inception in the XVII century, the international community of territorial States has been founded on the overarching principle of sovereignty. This paradigm, which laid its foundations in the Westphalia peace treaties of 1648, is based on the idea that each State *rex superiorem non recognoscens in regno suo*. This means that the State has exclusive and self-determined jurisdiction in centralising authority in a national government, setting the rights and obligations of people confined in its territory, and making and enforcing laws for the benefit of its constituents. The State "could with substantial confidence assert itself as the holder (and collectively as members of the community of states) of a (at least theoretical) monopoly of governance effectuated through the institution of government as the embodiment of the highest form of political, social and economic authority operated through law"[19]. Thus sovereignty reveals itself as the fundamental ordering principle of the "hierarchically and self-contained system of states […] the ends of which, its *telos*, is the structure and maintenance of the law-state system itself"[20]. As consequence, the international architecture of the Westphalian order relies on the transitivity of both coherence and legitimacy: as States are coherent and legitimate *per se*, the international State-based system is coherent and legitimate as well, although not *per se* but in a derivative manner.

Remained substantially unchanged for centuries, the international system has undergone profound transformations in the XX century following two paradigmatic turning points. The

[18] J.H. Jackson, *International Economic Law: Complexity and Puzzles*, (2007) Journal of International Economic Law 10: 3-12, at 7-8.

[19] L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, (2012) Tilburg Law Review 17: 177-199, at 183.

[20] *Ibidem*, at 181.

first was the extraordinarily innovative process of 'internationalisation' and 'institutionalisation', initiated in the second-half of the XIX century and then essentially materialised in the first-half of the XX century. The purely State-based model gave way to the establishment of inter-governmental, treaty-based instances of cooperation that, contravening the territorially-defined concept of sovereignty, were characterised by a development along functional lines. An increasing number of traditionally domestic matters were made the subject of bi- or multi-lateral cooperation mostly in an institutionalised framework that, in the "overall shift from the law of international co-ordination to the law of international co-operation"[21], replaced *ad hoc* mechanisms with permanent arrangements based on legal authority. As institutionalist theories elucidate, States cooperate with each other so as to satisfy the national interest in areas where they are incapable of doing so on their own, and particularly to provide effectively those public goods they cannot create individually.[22] The institutionalisation of international cooperation came to its major expression in the mid-XX century, when the United Nations (UN)' system and the Bretton Woods institutions at the multilateral level, and the European Communities (EC) at the regional level, were founded. In a time characterised by dramatic technological and social changes that made States aware of their structural inability to satisfy by themselves the economic and security needs of their people, those institutions played a key supplementing role in facilitating collective action among States.

A second, even more dramatic, turning point occurred in the 1990s where a new term entered the vocabulary of scholars and practitioners, i.e. 'globalisation'. With the end of the Cold War and the declining salience of its associated security issues, the international community became acknowledged of the emergence of a number of trans-boundary concerns that affect humankind everywhere regardless of national boundaries. Most notably, these concerns included – and still include – global threats to peace and security, environmental protection, climate change mitigation and adaptation, and the global challenge of intra- and trans-continental mass migration flows. What we are concerned more here is the integration of markets becoming increasingly interdependent and interconnected at the global level. This process of 'economic globalisation' has been certainly supported by the multilateral foundations of a non-discriminatory and free trade-oriented economic system centred around

[21] W. Friedmann, *The Changing Structure of International Law*, London: Stevens, 1964, at 60.

[22] This explains, for instance, the reason why many treaties that establish international organisations include so-called 'escape clauses', which, as "a bow to the principle of sovereignty", accord States the right to give priority to national interests over international obligations (see J. Delbruck, *Globalization of Law, Politics, and Markets: Implications for Domestic Law. A European Perspective*, (1993) Indiana Journal of Global Legal Studies 1: 9-36, at 23). In the literature it is especially the international political economy (IPE) theories that explain why and how States cooperate with each other through international institutions: see most notably, R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton: Princeton University Press, 1984; D. Epstein and S. O'Halloran, *Sovereignty and Delegation in International Organizations*, (2008) Law & Contemporary Problems 71: 77-92, at 89; and, K. Abbott and D. Snidal, *Why States Act through Formal International Organizations*, (1998) Journal of Conflict Resolution 42: 3-32.

the General Agreement on Tariffs and Trade (GATT 1947)[23], which created the material conditions for the emergence and functioning of globally integrated markets.

As has been observed, "an earlier era of 'internationalization', characterized by the simple geographic spread of economic activities across national boundaries, is giving way to an era of 'globalization', which involves the functional integration of these internationally dispersed activities"[24]. The heightened complexity of cross-border economic relations, which has been sustained by an even more inconceivable pace of technological advances favouring the international mobility of people, goods, services, and capital, demands deeper disciplines than in the past. Nevertheless, globalisation as a legal phenomenon does not appear to support the integration of domestic markets with the monopolisation of the regulatory authority. In traditional legal discourse law is still largely perceived as State product. Neither national nor international law-making has been basically dissociated from the State-centred unitary order. In this sense, the new context of global interdependence and interconnectedness tests the limits of the normative structure underpinning the international economic system in at least two respects.

On the one hand, the territorially-bound jurisdiction of the State is no longer aligned to the global geographical reach of many contemporary issues.[25] In the neo-classical political economy literature the foundational role and the very *raison d'être* of the State is to provide market-facilitating institutions, i.e., a favourable legal framework for the "provision of a set of public (or semi-public) goods and services designed to lower the cost of specifying, negotiating, and enforcing contracts which underlie economic exchange"[26]. Yet a lack of the technical expertise, financial resources, and flexibility that are required in a context of growing integration and interdependence to deal expeditiously with complex and fast-

[23] General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 187 (Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 308) [hereinafter 'GATT 1947']

[24] P. Dicken, *Global Shift: The Internationalisation of Economic Activity*, London: Paul Chapman Publishing, 1992, at 5. On the distinction between 'internationalisation' and 'globalisation' see, R.O. Keohane and H.V. Milner (eds.), *Internationalization and Domestic Politics*, Cambridge: Cambridge University Press, 1996; and, J. Chevalier, *Mondialisation du droit ou droit de la mondialisation?*, in: C.A. Morand (ed.), *Le droit saisi par la mondialisation*, Brussels: Bruylant, 2001, 36-61, at 37 (claiming that, "*[l]a mondialisation correspond en effet à une étape radicalement différente de l'internationalisation qui s'était développée après la Seconde guerre mondiale: alors que l'internationalisation prenait appui sur les États-Nations, qui continuaient à s'imposer comme des dispositifs nécessaires de médiation, la mondialisation échappe largement à leur emprise […]*").

[25] In this regard, "*[l]es États-nations sont des ordres juridiques qui ont notamment pour caractéristique d'être souverains […] mais aussi relatifs dans l'espace et dans le temps. […] la puissance souveraine est limitée à un territoire et sur un peuple. Cela signifie que les institutions publiques et les règles juridiques ont classiquement un enracinement territorial qui limite leur validité* ratione loci *[…]*" (P. Coppens, *La fonction du droit dans une économie globalisée*, (2012) Revue Internationale de Droit Économique XXVI: 269-294, at 273-274). Consequently, "*[l]es relations entre des ordres étatiques délimités par des frontières ne représentent plus adéquatement les rapports entre le droit et l'économie dans un monde globalisé, un monde où s'efface progressivement l'héritage westphalien. On peut soutenir que les relations internationales résultaient d'une manifestation volontaire des États souverains de s'unir en vue d'un but commun – classiquement par le biais d'un traité international – tandis que les interdépendances qui caractérisent l'économie globalisée paraissent aujourd'hui s'imposer à eux*" (*ibidem*).

[26] D.C. North, *Structure and Change in Economic History*, New York: W.W. Norton, 1981, at 24.

changing regulatory tasks is considerably constraining the previously almost unchallenged regulatory authority and steering capacity of the State.[27] Issues that had been traditionally addressed at the domestic level are now understood as phenomena that are linked to economic globalisation, including concerns of political and societal relevance such as the environment, labour and human rights issues, as well as health care and consumer protection. Due to their transnational and increasingly global character, these issues can no longer be tackled in a satisfactory manner within and by individual States through traditional 'command-and-control' regulation, which appears as "unduly rigid, cumbersome and costly; […] is patchwork in character, focusing in an uncoordinated fashion on different […] problems […] and often ignoring functional and ecosystem interdependencies; and relies on a remote centralized bureaucratic apparatus that lacks adequate democratic accountability"[28]. Thereby, in the face of the inability of State-based regimes to cope with global issues, "*les nouveaux espaces économiques construits par la globalisation s'imposent aux États souverains et fragilisent leurs frontières. Aussi, il n'est pas si surprenant de voir émerger des espaces juridiques nouveaux qui se détachent des frontières étatiques pour mieux appréhender les bassins économiques*"[29].

On the other hand, facing the impact of economic globalisation institutionalised international cooperation has proven to be ineffective, as well. The post-World War II approach to international cooperation based on "functional deconcentration"[30] was conducive to erratic and growingly diversified inter-governmental legal regimes attempting to cover virtually every aspect of international relations and competing for influence in areas that may, at least potentially, overlap.[31] In the absence of a central hierarchically-superior authority, international law evolved into semi-autonomous functional 'regimes', i.e., sets of norms and institutions created under public international law,[32] such that it can no longer be conceived of

[27] On the reduced steering capacity of the State see, S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge: Cambridge University Press, 1996, at xi (pointing out that, "the powers of most states have declined still further, so that their authority over the people and their activities inside their territorial boundaries has weakened").

[28] R. Stewart, *A New Generation of Environmental Regulation*, (2001) Capital University Law Review 29: 21-182, at 21.

[29] P. Coppens, *La fonction du droit dans une économie globalisée*, cit., at 273.

[30] C. Tietje, *Global Governance and Inter-Agency Co-operation in International Economic Law*, (2002) Journal of World Trade 36: 501-515, at 510. As the International Court of Justice (ICJ) observed, the UN Charter (signed 26 June 1945, entered into force 24 October 1945, 1 UNTS 16) had the ambition to lay down "a 'system' designed to organize international co-operation in a coherent fashion by bringing the [UN], invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the '[UN] system' is co-ordinated, notably, by the relationship agreements concluded between the [UN] and each of the specialized agencies" (ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996, ICJ Reports 1996: 66-85, at para. 26). Pursuant to Articles 7(1) and 61-72 of the UN Charter, the task of coordinating the work of the UN specialised agencies with the UN itself and among each other was assigned to the UN Economic and Social Committee (ECOSOC).

[31] See B. Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day*, Abingdon: Routledge, 2009 (estimating that international institutions rose in number from 37 in 1909 to 246 in 2005).

[32] On the origin and development of the concept of 'regime' see, most, notably, B. Simma, *Self-Contained Regimes*, (1985) Netherlands Yearbook of International Law 16: 111-136.

as a unity.[33] This has resulted in a 'regulatory commons' situation, where the regulatory authority is so fragmented that no inter-governmental effort is properly effective. This is, of course, not only true with regard to the international legal system in general, but in the field of international economic law in particular. Functional deconcentration informed the institutional architecture of the Bretton Woods system both horizontally, by dissociating the originally planned International Trade Organisation (ITO) and then the World Trade Organisation (WTO),[34] the International Monetary Fund (IMF),[35] and the World Bank,[36] from the UN system, and vertically, by separating international trade from the financial and monetary regimes.[37] Globalisation and its quest for deeper disciplines come to exacerbate further these coordination challenges.

Along with this "partially globalised world"[38] that shows a "*governance deficit* of considerable magnitude"[39], changes arise as to the way the norms addressing issues of global

[33] See, in this sense, J. Pauwelyn, *Optimal Protection of International Law: Navigating between European Absolutism and American Voluntarism*, Cambridge: Cambridge University Press, 2012, at 198 (identifying the lack of centralised law-making and enforcement as "the core weakness or original sin of the international legal system"). See also M. Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, 2005, at: http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf.

[34] Despite the lengthy discussion along the Uruguay Round of multilateral trade negotiations (1986-1994) such horizontal separation was also reaffirmed for the WTO, with its Members deciding not to establish it as a UN specialised agency. For discussion see, W. Benedek, *Relations of the WTO with Other International Organizations and NGOs*, in: F. Weiss, E. Denters, and P. de Waart (eds.), *International Economic Law with a Human Face*, The Hague/Dordrecht/London: Kluwer Law International, 1998, 478-495; and, J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, London: Royal Institute of International Affairs, 1998, at 52.

[35] Articles of Agreement of the International Monetary Fund [hereinafter 'IMF Agreement'], 27 December 1945, 2 UNTS 39.

[36] Articles of Agreement of the International Bank for Reconstruction and Development [hereinafter 'IBRD Agreement'], 27 December 1945, 2 UNTS 134; Convention Establishing the Multilateral Investment Guarantee Agency [hereinafter 'MIGA Convention'], 11 October 1985, 1508 UNTS 99; Articles of Agreement of the International Finance Corporation [hereinafter 'IFC Agreement'], 25 May 1955, 164 UNTS 117, 439 UNTS 318; and, Articles of Agreement of the International Development Association [hereinafter 'IDA Agreement'], 26 January 1960, 439 UNTS 249.

[37] Each one of the agreements establishing the three international economic organisations above refer to the need for cooperation with each other, as well as with other international organisations: see, Article X of IMF Agreement; Article V(8) of IBRD Agreement; Article 35 of MIGA Convention; Article IV(7) of IFC Agreement; and, Article VI(7) of IDA Agreement. In fact the GATT 1947 did not cover a broad macroeconomic dimension of monetary and financial policies; it was loosely linked to the IMF in the field of balance-of-payment restrictions (see Articles XV, XXXVI:6-7, and XXXVIII:2) and the normative relevance of these cross-references has been overtaken by events. For instance, Article XV:4 of GATT, which stipulates that the GATT Contracting Parties – and today the WTO Members – "shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the [IMF]", made a lot of sense under a fixed exchange rate regime. Similarly, the fragmentation of the international institutional framework did not produce a working relationship of trade policies pursued by the GATT 1947 and within the World Bank in fostering social and economic development.

[38] See R.O. Keohane, *Governance in a Partially Globalized World*, in: D. Held and A. McGrew (eds.), *Governing Globalization: Power Authority and Global Governance*, Cambridge: Polity Press, 2002, 325-346; and *Id.*, *Power and Governance in a Partially Globalized World*, London: Routledge, 2002.

[39] See G. Gereffi and F. Mayer, *The Demand for Global Governance*, Duke University Terry Stanford Institute of Public Policy Working Papers Series no. SAN04-02, at: https://www.researchgate.net/publication/228750407_The_demand_for_global_governance, at 2 (emphasis in the original). Similarly, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to*

concerns are being made. Because of the dilution of the State asserted monopoly of regulatory authority, the concept of 'regulation' as the mode for "allocating resources and exercising control and co-ordination"[40] has been broadened in such a way that it poses challenges to traditional State-based legal theory and to the existing body of international law that relies on the State as both its subject and its object. Across a range of issue-areas the *locus* of authoritative regulation has shifted away from governmental and inter-governmental forums towards many other regulatory sites beyond the reach of the State, which are characterised by a fast-growing diversity of non-conventional actors actively engaged in a variety of non-conventional and more cost-effective norm-making and enforcement processes.[41] Specifically, such reallocation of regulatory authority can be identified along three distinct directions:

(i) From national to supranational level;

(ii) From formal to informal and soft ways of norm-making; and

(iii) From national to transnational level, and consequently from public to private domain.

Next paragraphs will analyse in sequence each of these shifts, which provide a telling illustration of the significant changes occurring in traditional State regulation and State-originating international law-making in favour of an increasingly decentralised process of norm production with regards to both the actors involved and the nature of the norms produced.

6.1. The rise of inter-agency cooperation and global administrative law

Theoretically, the strengthening of international law-making could imply an adjustment of the role of inter-governmental, treaty-based instances of cooperation to the emergence of global issues. Within the limits of their functionally-defined competence, international institutions may be used by member States as frameworks for effective law-making so as to address

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Other Rules of International Law, Cambridge/New York: Cambridge University Press, 2003, at 441 (observing that it is quite a paradox that in those areas that we would frame as being 'constitutional' at the domestic level, such as human rights, less enforceable international cooperation takes place than in areas that at the same level we would portray as of economic interest, like trade rules).

[40] R.A. Rhodes, *The New Governance: Governing without Government*, (1996) Political Studies 44: 652-667, at 653. The concept of 'regulation' has become over-used in recent years. At its most general level it may be said to refer to "the means by which any activity, person, organism or institution is guided to behave in a regular fashion, or according to rule" (S. Picciotto, *Introduction: Reconceptualizing Regulation in the Era of Globalization*, (2011) Journal of Law and Society 29: 1-11, at 1). While, in principle, reference may be made to the regulation of any kind of social behaviour, which gives the term a very wide scope, it is more particularly used in relation to the economic activity. In this respect, 'regulation' embraces broadly all kinds of norms and connotes the involvement of both State authorities and non-State actors in the norm generation process, as opposed to 'law', which strictly identifies norm-setting and policy-making by public authorities exclusively. In this sense, 'regulation' comes to include standard-setting, the adoption of codes of conduct and guidelines, harmonisation, and information-sharing, that creates legally relevant effects.

[41] For a perspective considering the developments taking place in the international legal system as a whole see, J. Delbruck, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, (2003) Indiana Journal of Global Legal Studies 10: 29-43.

adequately problems whose reach transcends the territorial scope of State jurisdiction.[42] Nevertheless, international institutions are the child of that Westphalian community of sovereign States that has traditionally shown significant reticence in transferring parcels of their sovereignty to international bodies. In fact many of the regulatory functions at the international level are instances where "the principal considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal"[43]. In the traditional institutionalist logic, rooted in a conception of 'institution' as solution to collective action problems and emphasising cost-benefit analysis, diversity of interests within States, and issue-specific bargaining power as the main reasons for cooperation, States delegate authority to an agent because "that agent will reduce the transaction costs of policy-making either by producing expert information for the principals or by allowing the principals to commit themselves credibly to their agreed course of action"[44]. In this sense, international institutions characterise themselves as a means to facilitate the administration and implementation of international treaties concluded by States and between States, as well as to further their objectives.

Despite over sixty years of remarkably successful cooperation, inter-governmental institutions risk now becoming decreasingly useful for important areas of global concern. This is particularly the case of international economic institutions that were created essentially to address various structural aspects of the 1929 crisis but that do not represent adequately the current state of the world. Economic globalisation challenges the very foundational paradigm of functional deconcentration referred to earlier, which is no longer able, at least alone, to explain the structure of inter-governmental cooperation in contemporary age. Highly interdependent and interconnected issues cannot be neatly allocated to one or the other institutional framework. International economic law has come to affect a huge amount of non-economic concerns, such as the environment and climate change, human health, product safety, as well as the protection of core human rights, which demand for a consistent balancing of different and even conflicting economic and non-economic interests and values to be addressed from multiple perspectives. This explains the reason why, in the face of

[42] See, e.g., J.E. Alvarez, *International Organizations as Law Makers*, 2006; D. Sarooshi, *The Essentially Contestable Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, (2004) Michigan Journal of International Law 25: 1108-1120; and, P.G. Cerny, *Globalization and the Changing Logic of Collective Action*, (1995) International Organization 49: 595-625.

[43] T.M. Moe, *The New Economics of Organization*, (1984) American Journal of Political Science 28: 739-777, at 756. Derived from economics, the 'principal-agent' paradigm, together with traditional theories of delegation, has been utilised by political scientists to examine relations between branches of government and, more recently, to explain the relationship between States and international organisations. These theories present generally three distinct modes of the principal-agent relationship: first, a single principal delegates a single agent; second, multiple distinct principals delegate a single agent; third, a collective principal delegates a single agent, that is, several principals jointly agree upon the arrangement that will govern the agent. For analysis see, C.A. Bradley and J.G. Kelley, *The Concept of International Delegation*, (2007) Law and Contemporary Problems 71: 1-36; and, D.G. Hawkins, D.A. Lake, D.L. Nielson, and M.J. Tierney, *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press, 2006, at 13.

[44] M. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU*, Oxford: Oxford University Press, 2003, at 21.

interrelated and even overlapping jurisdictions, international institutions have strengthened and fostered more effective inter-agency (or inter-institutional) cooperation so as to effectively pursue their assigned tasks.[45] In this respect, building on the growing awareness that "the problem of linkage between 'nontrade' subjects and the [WTO] is […] one of the most pressing and challenging policy puzzles for international economic relations and institutions today"[46], the Geneva Consensus calls for deeper cooperation among the Bretton Woods institutions so as to avoid 'regime collisions'[47] by following consistent and mutually supportive activities in global economic policy-making and related policy areas.[48] Pursuing this objective, after some unsuccessful attempts at the time of the work on the failed ITO and later on in the history of the GATT 1947, formal cooperation agreements were finally concluded between the WTO, IMF and World Bank,[49] as well as between each of them and other organisations actively engaged in non-economic related fields.[50]

Theoretically, these and other[51] instances of inter-agency cooperation still stress the primacy of States as collective principal against the agent. In fact they are profoundly

[45] Public international law does not provide any clear criterion for inter-agency cooperation. In the literature Christian Tietje describes it as a *duty* to cooperate in analogy to a *pactum de negotiando*. In this sense, an agreement to negotiate does not imply necessarily the obligation to reach an agreement; rather, it is a far-reaching legal obligation for each party to conduct meaningful, good faith efforts on the subject concerned to come to a mutually-agreed solution, and not merely to go through a formal negotiating process. For review see, C. Tietje, *The Duty to Cooperate in International Economic Law and Related Areas*, in: J. Delbruck and U.E. Heinz (eds.), *International Law of Cooperation and State Sovereignty*, Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law, 23-26 May 2001, Berlin: Duncker & Humblot, 2002, 45-65; *Id.*, *Global Governance and Inter-Agency Co-operation in International Economic Law*, (2002) Journal of World Trade 36: 501-515, at 515. On the same subject matter see also, U. Beyerlin, *Pactum de Contrahendo, Pactum de Negotiando*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 7, Amsterdam: Elsevier, 1997, at 371-376.

[46] J. Jackson, *Afterword: The Linkage Problem. Comments on Five Texts*, (2002) American Journal of International Law 96: 118-125, at 119. The WTO Appellate Body first recognised the need for effective inter-agency cooperation as one aspect of balancing competing interests in cases of conflicts of jurisdiction on global public goods (see United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body circulated 12 October 1998, WT/DS58/AB/R, at paras. 166-169).

[47] See WTO, *World Trade Report 2013: Factors Shaping the Future of World Trade*, Geneva: WTO, 2013, at 15 ("limiting the likelihood of a clash of regimes").

[48] See P. Lamy, *The Geneva Consensus: Making Trade Work for All*, Cambridge: Cambridge University Press, 2013.

[49] These formal cooperation arrangements (WTO/L/195, 18 November 1996) are in line with Article III:5 of WTO Agreement, Article X of IMF Agreement, and Article V:8(a) of IBDR Agreement, respectively. For analysis and discussion see, D. Ahn, *Linkages between International Financial and Trade Institutions: IMF, World Bank and WTO*, (2000) Journal of World Trade 34: 1-38.

[50] The WTO maintains extensive relations with a number of other international institutions under the banner of 'coherence', a term originating in the Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policy-Making (see WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva: WTO, 2007, at 387). In particular, a call for effective institutional cooperation was made with reference to the WTO with the ILO, on the one hand, and the bodies established by the multilateral environmental agreements (MEAs), on the other, so as to prevent possible conflicts in the challenging fields of trade and labour rights, and trade and environment, respectively. Equally, in the current discussions on the new international financial architecture the IMF is thinking new ways to make effective its relationships with regional monetary and financial institutions, as well as its cooperation with other relevant international institutions.

[51] It could be mentioned also the case of the UN system's Chiefs Executive Board of Coordination (CEB), which under the chairmanship of the UN Secretary-General brings together twice a year the heads of 29 member

changing the dynamics of regulatory authority transfers from the State to international institutions. Indeed, they appear to occur outside of any delegation framework and mainly at the level of secretariats, this way coming to establishing forms of administrative (or executive) inter-institutional cooperation.[52] In light of the increasing interdependence of international institutions with assigned tasks in areas of direct or indirect economic relevance, and of the difficulties undertaken by international negotiations in areas where significant room for inter-State discipline at least theoretically exists, the role played by international administration in institutional cooperation has been seen as a major driver of the emergence of principles and values of 'global administrative law' (GAL), which operate across national borders and shape an international administration growingly independent from States.[53] This means that, although they are created and controlled by States in a classical principal-agent

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organisations including all UN agencies, the World Bank, the IMF, and the WTO, so as to improve inter-institutional coherence and effectiveness in social, economic and other related matters. The origins of the CEB date back to 1946 when the Administrative Committee on Coordination (ACC) was established as a subsidiary body of the UN ECOSOC (see UN ECOSOC Resolution no. 13(III), 21 February 1946, and Resolution no. 166(VII), 29 August 1948). Joint initiatives have flourished in the CEB, such as the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (WT/LDC/HL/1/Rev.1, 23 October 1997), which followed the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries adopted at the First WTO Ministerial Conference held in Singapore in 1996 (WT/MIN(96)/14, 7 January 1997). More generally, in line with the UN General-Assembly Resolution no. 49/97 (A/RES/49/97, 19 December 1994), the WTO committed itself to take up an active part in the global governance structure of inter-agency cooperation so as to strengthen the cooperation efforts in the field of international trade. In such institutional framework, the WTO works together with a multilateral Advisory Group so as to deliver technical assistance to developing and least-developed countries through the 'Aid for Trade' initiative (WT/MIN(05)/DEC, 22 December 2005). Nonetheless, the CEB's overall effectiveness in addressing its constitutive goals is questioned.

[52] The WTO Appellate Body made it clear that the WTO-IMF cooperation agreement provides for specific means of 'administrative' cooperation between the two organisations that in no way affect the WTO Members' rights and obligations under the respective founding agreements (see Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Report of the Appellate Body circulated 27 March 1998, WT/DS56/AB/R, at paras. 71-72). Additionally, in the face of some WTO Members expressing serious concern with regard to the autonomous executive structure of the cooperation among WTO, IMF and World Bank, the WTO Director-General reassured the WTO Members on their remaining sovereignty and authority (see WT/L/194/Add. 1, 18 November 1996). Of course, this is without prejudice to Article XV of GATT 1994, titled 'Exchange Arrangements', which provides that each WTO Member must seek co-operation with the IMF so as to pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the WTO.

[53] GAL, the study of which was initiated by the New York University School of Law in mid-2000s, has been largely referred to two main key-factors: on the one hand, the inability of any single national government to effectively address issues of global scope and to carry out important regulatory functions through its domestic administrative system; on the other, the proliferation of international agreements aimed at regulating interdependent issues of ever-growing global significance. Specifically, GAL focuses on how these processes affect accountability mechanisms in the new global administrative space. See, most notably, B. Kingsbury, N. Krisch, and R.B. Stewart, *The Emergence of Global Administrative Law*, (2005) Law and Contemporary Problems 68: 15-61; A. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, (2005) Journal of International Law and Politics 37: 663-694; N. Krisch and B. Kingsbury (eds.), *Global Governance and Global Administrative Law in the International Legal Order*, (2006) European Journal of International Law 17: 1-13; C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, (2006) European Journal of International Law 17: 187-214; and, O. Dilling M. Herberb, and G. Winter (eds.), *Transnational Administrative Rule-Making: Performance, Legal Effects, and Legitimacy*, Oxford: Hart Publishing, 2011, at 23-38.

framework, the role and status of international institutions have developed beyond that of being States' agents so as to come to have an agency of their own.[54]

6.2. The softening and de-formalisation of international law making

On a different dimension the complexities and linkages of the issues raised by economic globalisation seriously call into question conventional modes of State-based international law-making. It is common view in international legal scholarship that international law is a field expanding exponentially.[55] In fact, if the 1990s still represents the apex of formal international law and organisation, the turn of the century, in contrast, represents a strong breaking point. Empirical evidence proves a large tendency relating to the decline in the number of signed treaties, as well as of decisions by international institutions.[56] Some of this slowdown may be certainly explained by the fact that treaties now cover many of the major issue-areas. Yet, interdependence continues to increase and with it new issues arise. Thus, other aspects of inter-governmental governance stand out in relation to what has been called the "stagnation of international law"[57], which is significant not only in terms of quantity but

[54] The evolution of the delegation practice induced some scholars in the international relations field to categorise international institutions as properly 'non-State actors' that play their role alongside States and that are interrelated in matters of international regulation and coordination. In this sense, see, e.g., B. Reinalda (ed.), *The Ashgate Research Companion to Non-State Actors*, Aldershot: Ashgate Publishing, 2011; R. Collins, *Non-State Actors in International Institutional Law: Non-State, Inter-State or Supra-State? The Peculiar Identity of the Intergovernmental Organization*, in: J. d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law*, Oxon: Routledge, 2011, 311-325; and, A. Peters, L. Koechlin, and G. Fenner Zinkernagel, *Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion*, in: A. Peters, L. Koechlin, T. Forster, and G. Fenner Zinkernagel (eds.), *Non-State Actors as Standard Setters*, Cambridge: Cambridge University Press, 2009, 1-32, at 14, footnote no. 66.

[55] See, e.g., A. Peters, *The Growth of International Law between Globalization and the Great Power*, (2003) Austrian Review of International and European Law 8: 109-140, at 109 (claiming that, "International Law is not only growing fast, but is virtually exploding"); and, J. Alvarez, *The New Treaty Makers*, (2002) Boston College International & Comparative Law Review 25: 213-234, at 216 (stating that, "[t]here is little doubt that recent decades have witnessed a striking proliferation in treaties, including multilateral agreements").

[56] The UN Treaty Collection database (Multilateral Treaties Deposited with the Secretary General – MTDSG, at: http://treaties.un.org/pages/DB.aspx?path=DB/MTDSG/page1_en.xml&menu=MTDSG) shows that since the 1950s the number of new multilateral treaties deposited with the UN Secretary-General was around 35 for each decade (36 in the 1950s; 35 in the 1960s; 36 in the 1970s; 34 in the 1980s, and 37 in the 1990s, rispectively). In the ten years between 2000 and 2010 this number dropped quite dramatically to 20. This downward trend is even more evident when looking at the last 20 years (20 treaties in the period 1990-1995; 17 in the period 1995-2000; 12 in the period 2000-2005, and 9 in the period 2005-2010). These figures are furthermore confirmed when counting not only new multilateral agreements deposited but all entries (including amendments, protocols or annexes to existing multilateral agreements) into the UN Treaty database (102 entries in the 1970s; 99 in the 1980s; 109 in the 1990s; and a decline to 77 in the 2000s). Lastly, such a downward trend finds confirmation in the broader UN Treaty Series database (at: http://treaties.un.org/pages/UNTSOnline.aspx?id=1), which includes not only the multilateral treaties deposited with the UN Secretary-General, but also those not deposited with the UN Secretary-General for both bilateral treaties (12,566 in the 1990s; 9,484 in the 2000s) and multilateral treaties (406 in the 1990s; 262 in the 2000s). Looking at single sub-branches of international law and at individual countries, treaty records display a marked slowdown in numbers, as well. For elaboration and discussion of these figures see, J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, Leuven Centre for Global Governance Studies Working Paper no. 97/2012, at: http://doc.utwente.nl/86725/1/SSRN-id2271862.pdf.

[57] *Ibidem*.

also of quality. Among these other aspects that affect the inability of international law to implement an effective legal regime is, most prominently, the fact that reaching the consensus required to produce legally binding norms is a complex, cumbersome, and lengthy process that brings with it huge negotiation and sovereignty costs, veto or opt-out powers for each individual State, and lengthy ratification processes.[58] In addition, the treaty structure exhibits signs of rigidity and inflexibility that are difficult to adapt to changing circumstances; also amending is often a very long and difficult process that requires consensus-building on multilaterally agreed solutions. As result of this, treaty language can be easily out of date and treaty provisions can fall out of step with practice. This is even more stressed by the fact that international treaties generally lack effective enforcement mechanisms. Along with the above, finally, come decision-making processes that in many international institutions are often ponderous, inefficient and substantially ineffective, and that exhibit significant trade-offs between effectiveness and legitimacy.[59]

As result of these developments novel approaches to international law-making have emerged. On the one hand, inter-governmental cooperation increasingly takes the form of 'soft law'. The international legal order is increasingly characterised by the use of a variety of instruments that have no legally binding effect *per se*, such as resolutions, declarations, and recommendations of inter-governmental bodies, as well as codes of conduct and standards. The increasing use of soft law is traditionally seen as reflecting the progressive inadequacy of traditional sources of international law ('hard law') in regulating effectively fast-evolving and sometimes schizophrenic economic and social phenomena, with international institutions finding a broad area of intervention particularly by enacting instruments of soft law. The diffusion of soft law is facilitated by the manifold nature of the functions it can fulfil both as end mechanism in themselves and as precursor to the development of hard law. In particular, its flexibility makes it able to react rapidly to the current challenges of the international economic system. Still, in a cost-benefit analysis, soft law reduces the perceived 'sovereignty costs' of producing norms, facilitates compromise among different actors, helps balance

[58] With regard to the WTO's Doha Round of multilateral trade negotiations and, particularly, the most very recent WTO Ministerial Conferences it has been questioned: "Does it remain reasonable to prioritize global trade liberalization in the WTO as a 'first-best policy' as long as WTO rules enable non-democratic countries […] to block the legally required 'consensus' on mutually beneficial trade regulation agreed among 158 WTO members after 12 years of multilateral negotiations covering more than 90% of world trade?" (ILA, *Eleventh Report of the Committee*, International Trade Law Committee (E.U. Petersmann, F.M. Abbott, S. Bhuiyan, T. Cottier, and P. Mavroidis), Washington Conference, 2014, at para. 7).

[59] Particularly, the increasing scope of membership and a more complex global negotiating environment, together with the growing complexity of issues no longer confined to border measures, seriously call into question the WTO's decision-making, which relies upon consensus and is bound by the 'single undertaking' requirement set out in Article X of the WTO Agreement. The deadlock of the Doha Development Round after fifteen years of negotiations is evidence of the difficulty to negotiate at the multilateral level binding agreements that are acceptable to all Members. For an overview of the WTO 'constitutional structure' and difficulties see, P.D. Sutherland *et al.*, *The Future of the WTO, Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi ('Sutherland Report'), Geneva: WTO, 2004. Critically on that see, J. Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, (2005) Journal of International Economic Law 8: 329-346: and, R. Wolfe, *Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?*, (2005) Journal of International Economic Law 8: 631-645.

conflicting objectives, and accommodates bargaining power differentials.[60] In all these respects, soft law offers greater scope for the involvement of international actors other than States and for the inclusion of pertinent technical and scientific expertise in a law-making process conducted in less politicised contexts. Besides, it is worth to observe that a number of States as well have manifestly expressed policy preferences in favour of the use of softer forms of law, which confirms the stagnation hypothesis and is likely to strengthen it further in the future.[61] In this respect, it has been critically remarked that, "soft law is one emanation of the commodification of international law: it suggests that we use law when useful, and use something else […] when somehow using law would be disadvantageous or ineffective or illegitimate"[62].

On the other hand, deep societal changes are prompting a move "from societies of individuals (at the national level) and a society of territorial states (at the international level) to an increasingly transnational society of networks"[63], which "cannot be governed by a single monolithic unit, that is, politics or state, but instead depends on a multitude of capacities for self-governance and 'centers of expertise'"[64]. An increasingly diverse, networked and knowledge-based society requires thereby more flexible and pragmatic regulatory instruments, which involve multiple sources of knowledge and which can be continuously corrected to take account of new developments. In this respect, Willke refers to a "shift from power-based to knowledge-based decision-making"[65] and to a concomitant "shift from a

[60] For reasons why soft law is sometimes preferred to hard law see, G. Shaffer and M.A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, (2010) Minnesota Law Review 94: 706-799; J. Alvarez, *International Organizations as Law-Makers*, Oxford/New York: Oxford University Press, 2005; R. Wolfrum, *The Inadequacy of Law-Making by International Treaties: "Soft Law" as an Alternative?*, in: R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Berlin: Springer, 2005, 39-52; and, D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford/New York: Oxford University Press, 2003.

[61] For instance, German federal ministries are instructed, before international treaties are elaborated on and concluded, to check whether a binding contract under international law is irrefutable or whether the same goal may be attained through other means that are below the threshold of binding international law. Similarly, the Canadian government is required to act in a sense that, "if a matter is of a routine or technical nature, or appears to fall entirely within the existing mandate and responsibility of a department or agency, and if it does not contain substantive matter which should be legally binding in public international law, it is often preferable to deal with the matter through the use of a non-legally binding instrument" (Canada Treaty Information, *Policy on Tabling of Treaties in Parliament*, (2011), at: http://www.treaty-accord.gc.ca/procedures.aspx, at Annex C). In turn, the 2010 US National Security Strategy called on US authorities "to spur and harness a new diversity of instruments, alliances, and institutions" (National Security Strategy, 27 May 2010, at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, at 3). The argument has been made that also some of the 'emerging market' countries, particularly China, have an inherent preference for more informal modes of cooperation (see, in this sense, M. Kahler, *Legalization as Strategy: The Asia-Pacific Case*, in: J.L. Goldstein, M.O. Kahler, R.O. Keohane, and A.M. Slaughter (eds.), *Legalization and World Politics*, Cambridge: The MIT Press, 2001, 165-188). To the extent this is correct the stagnation of international law may go hand in hand with the rise of these new powers.

[62] J. Klabbers, *Reflections on Soft International Law in a Privatized World*, (2006) Lakimies 104: 1191-1205, at 1194.

[63] J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, cit., at 10.

[64] H. Willke, *Governance in a Disenchanted World: The End of Moral Society*, Cheltenham/Camberley/Northampton: Edward Elgar, 2009, at 7.

[65] *Ibidem*, at 15.

normative to a cognitive mode of decision-making"[66] based upon "an instructive discourse between regulators and regulated instead of trying to enforce rigid norms […]"[67]. These developments concern public international law in general, but especially – once again – international economic law.

Economic, and most particularly trade, relations are still regarded as a field of foreign affairs that is dominated by the executive branch that, if at all, is subject to only very limited legal constraints and participation by other branches. Yet the inability to speedily deal with and/or to successfully reach agreement on global matters through multilateral treaties or within international institutions has undermined purely inter-governmental, consensus-based law-making in many areas of international economic law.[68] In this respect, while the approval by domestic legislatures attributes legitimacy to international treaties and implies the consent of the governed, it is often "a mere rubber-stamping of a *fait accompli* anyhow"[69]. It is because of the dissatisfaction with the rigidities and inadequacies of traditional sources of international law that "[t]oday, we need to be clear-eyed about the strengths and shortcomings of international institutions that were developed to deal with the challenges of an earlier time. […] [S]trengthening bilateral and multilateral cooperation cannot be accomplished simply by working inside formal institutions and frameworks. […] We need to spur and harness a new diversity of instruments, alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability"[70].

In such context, since the late 1990s cross-border cooperation has increasingly taken a rich compilation of novel, mostly informal forms shifting from hierarchical to network principles, which replace or, at least, supplement the more traditional way to create international (hard) law. Indeed, for most challenging trans-boundary issues regulators have began looking for less institutionalised forms of norm-making. Different constellation of actors and processes are involved, ostensibly outside of the conventional confines of formal inter-governmental law-making and rather taking the form of "informal international law-

[66] *Ibidem*.

[67] *Ibidem*, at 16.

[68] One may object that an exclusive focus on international treaty-making fails to take into account other dynamics of international law, such as the continuing evolution of customary international law and the growing case-law by international courts and tribunals. As to customary law, although intensified international cooperation may lead to a more rapid formation of customary rules in specific instances (see, M.P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, (2011) Cornell International Law Journal 43: 439-469, discussing the significance of some UN General-Assembly resolutions during times of fundamental change), States' today's preference for non-binding arrangements impacts upon customary law, as the essence of their *opinio juris* component relates precisely to the legally binding character of an obligation. Moreover, with the declining tendency in the number of multilateral treaties adopted we have considered earlier it becomes harder to find strong evidence of an *opinio juris* confirmed by practice. For discussion see, J.K. Levit, *A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, (2005) Yale Journal of International Law 30: 125-209. In turn, although international courts and tribunals continue their steady output, they contribute mainly to the interpretation and clarification of existing international law rather than to developing new legal norms and principles.

[69] J. Pauwelyn, R. Wessel, and J. Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, (2014) European Journal of International Law 25: 733-763, at 751.

[70] National Security Strategy [United States], cit., at 3, 40-41, 46.

making"[71]. A number of public policy areas associated with regulation increasingly rely on "trans-governmental regulatory networks"[72], whereby non-governmental State actors such as regulatory agencies, central bankers, and even courts and legislatures interact across borders directly with their counterparts. Informal trans-governmental mechanisms have been also established by private regulators, professional organisations, and experts, that seek informal mechanisms either to by-pass deadlocks in inter-governmental cooperation or to address more speedily rapidly-evolving issues they are concerned with. These actors are not legitimated by democratic elections, in many cases not even delegated to take decisions on behalf of governmental authorities, and such decisions are not subject to approval by governments.

Key to the success of these networks is the idea that "within the[m] […] decision-making is not so much vested in the hands of uninformed political elites, but is instead guided by a stable of skilled technocrats who develop shared expectations and trust allowing them to dispense with time-consuming treaties and formal international organizations"[73]. This diversification of actors, processes and norms produced means not only moving away from the State monopoly as the sole subject of international law, but also that the State as the sole law-maker is itself disaggregated, so that it can "act in many arenas at once without necessarily coordinating these actions"[74]. This is even truer if one considers the nature of the norms so produced. Indeed, while these norms exhibit less formal, soft law nature, nevertheless they depart from the traditional international law conception of informality. In fact they are 'harder' than their soft law quality suggests. As has been observed, "[t]here is nothing 'soft' (or) vague […] about most of the[se] […] norms. If anything, the process of

[71] See J. Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, in: J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, Oxford/New York: Oxford University Press, 2012, 13-34, at 22 (defining 'informal international law-making' as "[c]ross-border cooperation between public authorities, with or without the participation of private actors and/or international organisations, in a forum other than a traditional international organisation (process informality), and/or as between actors other than traditional diplomatic actors […] (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality)"); A.M. Slaughter, *Governing the Global Economy through Government Networks*, in: M. Byers (ed.), *Role of Law in International Politics. Essays in International Relations and International Law*, Oxford/New York: Oxford University Press, 2000, 177-205, at 202 (describing the international legal system as consisting of collegial "networks" that foster collective problem-solving and innovation through interactions of regulatory peers); and, A. Aust, *The Theory and Practice of Informal International Instruments*, (1986) International and Comparative Law Quarterly 35: 787-812, at 787 (describing an 'informal international instrument' as "an instrument which is not a treaty because the parties to it do not intend it to be legally binding"). For empirical analysis see, A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking: Case Studies*, The Hague: TOAEP, 2012 (presenting extensive empirical evidence from over thirty case studies); P.H. Verdier, *Transnational Regulatory Networks and Their Limits*, (2009) Yale Journal of International Law 34: 113-172; and, K. Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, (2002) Virginia Journal of International Law 43: 1-92.

[72] See A.M. Slaughter, *A New World Order*, Princeton: Princeton University Press, 2014, at 14 (defining 'transgovernmental regulatory networks' as "pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere"). Informal law-making processes can also take place in the context of or under the broader auspices of a formal international organisation, such as the EU.

[73] C. Brummer, *Why Soft Law Dominates International Finance – And not Trade*, (2010) Journal of International Economic Law 13: 623-643, at 634.

[74] K. Nicolaïdis and J.L. Tong, *Diversity or Cacophony? The Continuing Debate over New Sources of International Law*, (2004) Michigan Journal of International Law 24: 1349-1375, at 1358.

their development is highly regulated and strict, based in consensus, and the expectations as to compliance with these norms is extremely high (higher than in respect of many treaties)"[75]. This feature helps explain the reason why these norms, despite their soft character, are relied upon by the parties even in presence of significant distributional effects.[76]

6.3. Emerging patterns of transnational private regulation

The past decades have acknowledged a dramatic reshape of the international economic landscape with substantial implications for trade patterns. The increasingly heavier reliance on cross-border economic activities has in fact raised issues that were rarely found in traditionally one-stage production processes of the type 'made-here, sold-there'. Production processes have become ever-more fragmented vertically into several stages, with each country specialising in particular fragments of the production chain so as to fully exploit comparative advantages. Along with lower trade barriers that have reduced the cost of moving goods, technological advances in transports and communication and long distance information sharing have contributed to make coordination costs of remote activities easier and cheaper. As result of that, globally dispersed production stages have been functionally integrated into

[75] J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, cit., at 13.

[76] One of the most impressive examples of informal law-making is in relation to the international supervision of banking and financial services. Although it appears as being one of the most dense and specialised areas of regulation, there is hardly any international law on the subject. The IMF and the World Bank does not create regulatory standards, although they may promote and monitor the setting and voluntary adoption of standards of 'best practice'. Also, the WTO's General Agreement on Trade in Services (GATS) does not sufficiently consider the issue of international cooperation and possible harmonisation of international supervisory standards. Regulation in this area is to a growing extent devolved upon soft and informal law instruments, with inter-governmental bodies and networks of central banks, monetary authorities, regulatory agencies and supervisors, as well as professional associations, primarily concerned with establishing standards of prudential supervision in the international financial system. The best known examples are the G-20, the only body where Heads of State do participate directly (if somewhat irregularly), and the Financial Stability Board, which is charged with oversight of systemic risks. Other important bodies are: the Basel Committee on Banking Supervision, the International Organisation of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors (IAIS), responsible for setting international standards for banking, securities regulation, and insurance, respectively. Additional standard-setting bodies enjoy more limited mandates in very specific domains. These include international standard-setters for accounting and auditing services, such as the International Accounting Standards Board (IASB), the Committee on Payments and Settlements Systems (CPSS), and the Financial Action Task Force. All these bodies not being grounded by treaty-making are legally non-binding commitments in the form of standards and 'generally accepted' best practices, regulatory reports and observations, and memorandums of understanding. Yet, such norms are being included in national regulation, used as benchmarks, and endorsed and encouraged by international institutions. For presentation and discussion of informal law-making in international financial law see, S. Donnelly, *Informal International Lawmaking: Global Financial Market Regulation*, in: A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking: Case Studies*, cit., 179-220; M.K. Borowicz, *Financial Markets, Regulatory Failures and Transnational Regulatory Safety Nets: The Building of a Policy-Making Metaphor*, in: A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, cit., 221-250; C. Brummer, *How International Financial Law Works (and How It Doesn't)*, (2011) Georgetown Law Journal 99: 257-327 (noting that, international financial regulation is often hampered by a number of reputational, institutional and market disciplines that render it more coercive than traditional theories of international law predict); *Id.*, *Why Soft Law Dominates International Finance*, cit.; and, C. Bradley, *Private International Law-Making for the Financial Markets*, (2005) Fordham International Law Journal 29: 401-453.

sequentially vertical networks that stretch across many countries. 'Vertical specialisation'[77] patterns of global production sharing of the type 'made-everywhere, sold-there' are strictly associated with new business models. Corporations have significantly increased their investments in production facilities abroad (foreign direct investment - FDI) as well as their international contractual relationships (non-equity modes of investment) through which they coordinate and control the activities of partner firms and internalise globally fragmented production processes. In this way, vertical specialisation has driven the emergence of global value chains that intertwine international trade in goods, FDIs, long-term business relationships, intensive use of infrastructure services, and cross-border flows of intellectual property (IP), so as to coordinate geographically dispersed production bases.[78] Such "trade-investment-service-IP nexus"[79] makes trade qualitatively different and radically more complex than in XX century, this latter meaning essentially goods crossing borders.

New business and supply chain management models in global value chains affect the way in which norms are formulated and put into practice. The heightened complexity of production processes and the consequent difficulties inherent in controlling value chains spanning multiple jurisdictions have resulted in a mismatch between the market and its regulation. Whatever the regulatory objective, centralised 'command-and-control' regulation (also in the form of inter-governmental treaties) exhibits its rigidity and ineffectiveness in a global context where the drivers for regulation lay outside of national boundaries. In the face of the remarkably transnational character of business operations, which to a mounting extent dominates the structure of the international economic system, the "demand for rules to govern

[77] Vertical specialisation has been studied quite extensively by trade economists and labelled as differently as: 'international production network', 'international production sharing', 'slicing up the value chain', 'outsourcing', 'great unbundling', 'disintegration of production', 'fragmentation of production', 'multi-stage production' or 'intra-product specialisation'. See, most notably, D. Hummels, J. Ishii, and K.M. Yi, *The Nature and Growth of Vertical Specialization in World Trade*, (2001) Journal of International Economics 54: 75-96, at 77; and, K.M. Yi, *Can Vertical Specialization Explain the Growth of the World Trade?*, (2003) Journal of Political Economy 111: 52-102, at 54.

[78] Various economic measures have been used to characterise 'global value chains' (GVCs), including especially 'vertical specialisation (VS) share of gross exports' – or 'foreign value added (FVA) share in gross exports' – which measures the value of imported contents embodied in one country's exports. Recent empirical research has documented that FVA grew by about 30 percent between 1970 (accounting for 18 percent of countries' exports) and 1990 (21 percent), and accounted for about 30 percent of the growth in the countries' overall export/GDP ratio in the same period. Growth in vertical specialisation, especially associated to regional concentration of trade, has accelerated more recently and increased by more than 20 percent in the period 2000-2010 (accounting for 35 percent of countries' exports). For data analysis and evaluation see, T.J. Sturgeon, *Conceptualizing Integrative Trade: The Global Value Chains Framework*, (2006) Trade Policy Research 6: 35-72; *Id.*, *Mapping Integrative Trade: Conceptualising and Measuring Global Value Chains*, (2008) International Journal of Technological Learning, Innovation and Development 1: 237-257; and, T.J. Sturgeon and G. Gereffi, *The Challenge of Global Value Chains: Why Integrative Trade Requires New Thinking and New Data*, Paper prepared for Industry Canada, 2008, at http://www.cggc.duke.edu/pdfs/GVCmetrics_Nov202008.pdf.

[79] See R. Baldwin, *21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules*, IHEID CTEI Working Papers 2010/31, at: http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2012-04.pdf, at 4. For a different view see, P.L. Ghazalian and R. Cardwell, *Multilateral Trade Liberalization and FDI: An Analytical Framework for the Implications on Trading Blocs*, (2010) The Estey Centre Journal of International Law and Trade Policy 11: 192-212 (arguing that multilateral trade liberalisation may result in reduced incentives for FDIs that have already been included in a multitude of PTAs).

commerce has given rise to a variety of sources of supply, and one of the most significant […] is the private sector itself"[80], which reorganises aspects of the market to better suit its needs. That way, along the move away from formal international law comes a further significant change in the normative structure of the international economic system, which can most accurately be characterised as the emergence of 'transnational private regulation' driven by non-State actors[81] as the most important providers of the 'rule-of-law' for trans-boundary economic relations.

The conditions for the rise to prominence of an increasingly densely intertwined body of regulatory norms and processes that cut across jurisdictional boundaries outside of any governmental and inter-governmental normative framework can be assessed along three interconnected lines of argumentation. First, transnational private regulation essentially aims at filling significant governance gaps due to State regulation and international (economic) law being perceived as either weak or lacking altogether. Second, transnational private regulation aims at engaging the actors that have a direct control over the shape and extent of global production networks so as to construct a uniform normative body, whose intended scale of operations transcends State boundaries and overcome the fragmentation produced by different and even diverging domestic private laws. Lastly, transnational private regulation aims at governing effectively the strong distributional effects generated by global value chains. In this very last respect, the cross-border restructuring of industrial organisation driven especially by FDIs has shifted production processes not only from the domestic domain to dispersed cross-border locations, as argued above, but also from developed to developing countries. Rapidly increasing industrial capabilities in those countries, together with the off-shoring of labour-intensive stages of manufacturing and the intensified international mobility of technology, have produced a significant growth in emerging markets since the early 1970s. This shift has involved a reallocation of market power and a distribution of regulatory authority from developed to developing countries and, within the latter, among different actors, particularly between multinational corporations based in developed countries and small firms based in developing ones. Hence, in a context where "market regulatory shares become slices of global

[80] V. Haufler, *Private Sector International Regimes*, in: R.A. Higgott, G.R. Underhill, and A. Bieler (eds.), *Non-State Actors and Authority in the Global System*, London: Routledge, 2000, 121-137, at 121. See also, C. Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, (2012) German Law Journal 13: 1329-1338, at 1329; H. Willke, *Governance in a Disenchanted World*, cit., at 6 (referring to "a world society which is lacking institutions of central political decision-making and is substituting this deficiency with considerable capacities of self-organization and decentralized governance"); G.F. Schuppert, *The Changing Role of the State Reflected in the Growing Importance of Non-State Actors*, in: G.F. Schuppert (ed.), *Global Governance and the Role of Non-State Actors*, Baden-Baden: Nomos Verlagsgesellschaft, 2006, 203-239; T. Büthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton: Princeton University Press, 2011; and, T. Buthe, *Private Regulation in the Global Economy: A (P)Review*, (2010) Business and Politics 12: 1-38.

[81] 'Non-State actor' is a term and concept that belongs to the vocabulary of political science. Its negative attribute indicates that the entities referred to have in common that they are not States and not governmental in nature. Such a terminology manifests academic helplessness in the face of the great differences that these actors exhibit, and also reveals that scholars are still focused on the State as major regulatory authority. For a general presentation of 'non-State actors' from a legal perspective see the different contributions in J. d'Aspremont (ed.), *Participants in the International Legal System*, cit.

sovereignty"[82], transnational private regulation is designed to internalise such distributional effects.[83]

Of course, private regulation is not a new phenomenon and has accrued, with ups and downs, over time.[84] The State has long become involved in highly complex relations with market actors and civil society in the production and administration of law in purely domestic settings. In at least the last four decades patterns of delegation and decentralisation of regulatory authority to non-State actors have occurred on the impulse of "the structural transformation of the State from the welfare to the regulatory model"[85] induced by the development of market economy, the general retrenchment of public funds and resources, and privatisation opening up spaces for the private production of norms. In such context of "privatized sovereign performance"[86], the State divests itself of the exercise of regulatory authority in favour of private actors with a high degree of autonomy from central government, which thereby act as State's agents precisely so as to operationalise an increasing range of functions that are intimately connected with the sovereign identity of the State. Delegation suggests an essential role for the State in the organisation and enforcement of non-State governance systems, which are either way underpinned by statutory provisions.[87] Conversely, instances of delegation are more limited at the international level, where they serve especially the need to gain access to information and technical expertise that non-State actors can bring in into the process. It is because of such a private expertise that regulation becomes more dynamic and sensitive to global changes.[88] In addition, it is extremely rare for non-State

[82] F. Cafaggi, *New Foundations of Transnational Private Regulation*, (2011) Journal of Law and Society 38: 20-49, at 47.

[83] On the distributional effects of private regulation see, F. Cafaggi and K. Pistor, *Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation*, (2015) Regulation & Governance 9: 95-107.

[84] The increasing influence of private authority at the global level has been observed for long time. In the US this question was debated already in the 1930s with the pioneering work of Louis Jaffe (L. Jaffe, *Law Making by Private Groups*, (1937) Harvard Law Review 51: 201-253) and in the 1940s with Karl Polányi (K. Polányi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Beacon Press, 1944).

[85] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 39.

[86] See F. de Londras, *Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights?*, (2011) Journal of Law and Society 38: 96-118, at 102 (the author refers also to the concepts of "destatification of sovereign performance" to identify "not only privatization – which of course is not a new phenomenon – but the decision, in effect, to delegate the performance of deeply sovereign functions to non-state actors", and of "corporatization of sovereign performance" consisting in "the transfer of at least some implementation mechanisms to corporate entities").

[87] For a detailed analysis of the forms and degrees of regulatory delegation especially in the EU and the US see respectively, F. Cafaggi, *Private Law-Making and European Integration: Where do They Meet? When do They Conflict?*, in: D. Oliver, T. Prosser, and R. Rawlings (eds.), *The Regulatory State: Constitutional Implications*, Oxford: Oxford University Press, 2010, 201-228; G.E. Metzger, *Private Delegation, Due Process and the Duty to Supervise*, in: J. Freeman and M. Minow (eds.), *Government by Contract: Outsourcing and American Democracy*, Boston: Harvard University Press, 2009, 291-309; G. Metzger, *Privatization as Delegation*, (2003) Columbia Law Review 103: 1367-1502; and, H. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, (2010) University of Miami Law Review 65: 507-554.

[88] Already international administrative unions in the XIX century experimented with forms of integrating private expertise into drawing up international standards. Today, the European Commission keeps close working contacts with business associations, scientists, experts, and, on a larger scale, NGOs in the framework of the 'comitology procedure'.

actors to have formal representation within the internal structure of international institutions and even more to take part actively in international law-making.[89]

Overall, on the contemporary map of governance the regulatory authority of non-State actors is no longer a matter internal to the nation-State or to be addressed within hierarchical constitutional frames of (public and private) law, but increasingly a matter for the transnational levels of governance whose scope, intensity and impact deserves in-depth investigation. At the transnational level non-State actors are faced with a very different opportunity-structure and normative context than at the domestic level. Therefore, it is in regard to transnational settings that we may properly talk about the emergence of a 'private authority' in setting rules to which other actors defer, which emanates directly from the market and exists outside of domestic and international law.[90] In doing so, transnational private regulation challenges conventional governmental and inter-governmental models of norm-making by "emphasiz[ing] to a greater extent the role of the state as a rule taker as opposed to a rule maker"[91]. Paradoxically, this reallocation of regulatory authority from the public to the private sphere and the consequent movement from the regulatory State to

[89] One of the most prominent exceptions in this respect is the International Labour Organisation (ILO). ILO has a tripartite structure with its 186 Member States that are represented equally alongside employers and workers' organisations in decision-making. As of its inception in 1919, ILO has adopted international labour standards in the form of 189 conventions (eight of which concerning 'core' labour rights), subject to ratification by Member States, as well as legally non-binding recommendations. Nonetheless, in the last decades ILO has run into problems of representation. As major criticism the number of organised union members worldwide is steadily decreasing, which makes it questionable as to whether ILO is still able to represent workers adequately. At the same time, NGOs are not yet represented in the Organisation.

A similar case is that of the International Organisation for Standardisation (ISO). In 2002 ISO established a multi-stakeholder advisory group on social responsibility to consider whether the reach of the Organisation, traditionally confined to technical standardisation, could be extended to corporate social responsibility (CSR). In this respect, in 2010 it was published a social responsibility standard (ISO 26000 series) developing a series of guidelines and recommendations essentially aimed at corporations. Recognising that expertise and rationalisation as the traditional sources of legitimation of ISO standards were become insufficient in and of themselves to legitimate the new ISO 26000, the Organisation has adapted its standard-setting and opened it to a wider range of stakeholders such as NGOs and consumer groups along with the industry stakeholders. New procedural rules were established so that all stakeholder views could be adequately represented.

[90] See J.F. Green, *Private Standards in the Climate Regime: The Greenhouse Gas Protocol*, (2010) Business and Politics 12: 1-37, at 2 (defining transnational private regulation in an institutionalist perspective as an instance of "private entrepreneurial authority", i.e. as "a set of practices that governs the behavior of actors in world politics without explicit delegation of authority by states"); J. Cohen and C. Sabel, *Global Democracy*, (2005) New York University Journal of International Law and Politics 37: 763-797, at 765 (claiming that, "principal-agent models that deeply shape our ideas about legitimate and effective delegation of authority are 'irrelevant' in global administrative space"). See also, B. Eberlein and E. Grande, *Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State*, (2005) Journal of European Public Policy 12: 89-112; T.J. Biersteker and R.B. Hall (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge: Cambridge University Press, 2002; A.C. Cutler, V. Haufler, and T. Porter (eds.), *Private Authority and International Affairs*, New York: SUNY Press, 1999; M. Koenig-Archibugi, *Transnational Corporations and Public Accountability*, in: D. Held and M. Koenig-Archibugi (eds.), *Global Governance and Public Accountability*, Oxford: Blackwell, 2004, 110-135; and, B. Cashore, G. Auld, and D. Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority*, New Haven: Yale University Press, 2004.

[91] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 21.

"regulatory capitalism"[92] takes place in the framework of an increasing "legalisation of international relations, historically associated with the emergence of state and the public sphere"[93]. Nevertheless, such legalisation is, at least in part, the consequence of increased interdependence, associated with systemic risks, which demands greater coordination and global responses.

6.3.1. Governance systems beyond the State: The case for a new *lex mercatoria*?

Historically, one of the best-known examples of alternative to public regulation has been the law merchant (*lex mercatoria*). This largely homogeneous and autonomous body of norms was created as early as the XII and XIII centuries to serve the needs of cross-border trade relations and to most readily meet the expectation of the relevant business community. The legal tradition essentially characterises the law merchant as strictly separated from public law, with the former confined to the business relationships of the private contracting parties and the latter establishing the mandatory requirements to be dealt with by the public authority. The law merchant successfully evolved throughout the centuries as an effective and really global private normative body consisting of the commercial practices, customs and usages of merchants, as well as of the decisions of special merchant courts that could be allegedly applied without recourse to public law.[94]

The main criticisms directed against this normative body beyond domestic law relate to its blurred nature of "an open-ended list of principles and rules"[95], its lack of authorisation or recognition by the public authority, and the resulting lack of legal certainty and predictability.[96] Whereas the softness of law merchant being "more a law of values and

[92] See D. Levi-Faur and J. Jordana, *The Rise of Regulatory Capitalism: The Global Diffusion of a New Order*, (2005) Annals of the American Academy of Political and Social Science 598: 200-217; D. Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, (2005) Annals of the American Academy of Political and Social Science 598: 12-32; and, *Id.*, *Varieties of Regulatory Capitalism: Sectors and Nations in the Making of a New Global Order*, (2006) Governance 19: 363-366.

[93] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 44. On the concept of 'legalisation' see, notably, J.L. Goldstein, M.O. Kahler, R.O. Keohane, and A.M. Slaughter (eds.), *Legalization and World Politics*, cit.; and, K.W. Abbott, R.O. Keohane, A. Moravcsik, A.M. Slaughter, and D. Snidal, *The Concept of Legalization*, (2000) International Organization 54: 401-419.

[94] This is not the case of "the specific, semi-State, semi-private intermediate position" (W.G. Grewe, *The Epochs of International Law*, (traslation by M. Byers), Berlin: W. de Gruyter, 2000, at 298) that the trading companies asserted in the colonial epoch from the XVII to XIX centuries. These were 'joint-stock companies' based on private capital, on the one hand, and 'chartered companies' operating because of concessions and privileges – including trade monopolies and sovereign rights – granted to them by States, on the other. As Grewe observed, "[i]t was a matter of controversy in international legal theory during the nineteenth century whether the great trading companies were 'subjects' of international law, whether they held a 'sovereignty' of their own, or whether they were merely 'organs' of their parent country" (*ibidem*, at 302).

[95] K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, The Hague: Kluwer Law International, 1999, at 263.

[96] For an overview of all these critiques see, K.P. Berger, *The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law*, in: K.P. Berger (ed.), *The Practice of Transnational Law*, The Hague/London/Boston: Kluwer Law International, 2001, 1-22; and, F. Dasser, *Lex Mercatoria: Critical Comments on a Tricky Topic*, in: R.P. Appelbaum, W.L. Felstiner, and V. Gessner (eds.),

principles than a law of structures and rules"[97] comes to jeopardise any normative aspirations, this same feature turns to be a main strong point, which make law merchant flexible and adapting to changing circumstances. This is the main reason why the role of business actors as producers of global norms has been revitalised at the end of the XX century, when the *problématique* of the law merchant was associated to the idea of a modern 'global law without the State'[98] embodied in the concept of 'transnational commercial law'[99]. On the other hand, the emergence of new governance modes of transnational activities open new avenues and give fresh impetus for the development of a normative body that finds its rationale no longer in the market but, specifically, in globally fragmented value chains. Peter Utting warns that structural factors, specifically "ongoing economic liberalisation", are likely to play an important role in shaping the nature of regulation of private actors.[100] Yet many analyses of transnational private regulation ignore governance in the value chain and the power that different constellations of private sector actors bring to bear as consequence of their being part of global value chains. In particular, some interrelated aspects need to be captured in this analysis, namely: the structural dynamics linked to each specific issue-area; the institutional arrangements for regulation of private actors; and, the normative dimension of the processes by which private regulation is developed, accepted or adopted by different actors.

In this perspective, modern transnational regulation presents very different features from those traditionally associated with the ancient law merchant, as well as any other functionally equivalent forms of private norm production.[101] First, the range of non-State actors engaged in the management and regulation of global value chains is increasingly diverse and polymorphous. Corporations are no longer the only typology of actor that is

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Rules and Networks: The Legal Culture of Global Business Transactions, Oxford: Hart Publishing, 2001, 189-200.

[97] G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in: G. Teubner (ed.), *Global Law without a State*, Aldershot: Dartmouth, 1997, 3-28, at 20.

[98] *Ibidem*.

[99] The law merchant had been revitalised in the 1950s and 1960s following modern efforts towards the codification of trade usages and practices, such as the principles of international commercial contracts (UNIDROIT), as well as the rules on international trade in goods (INCOTERMS) and on international commercial arbitration (UNCITRAL). Among the several contributions on this issue see, most notably, J. Delbruck, *Globalization of Law, Politics, and Markets*, cit., at 34 (claiming "the growth of a global *lex mercatoria* that is mainly informed by the interests and needs of the actual participants in the economic transactions"); K.P. Berger, *The New Law Merchant and the Global Market Place*, cit.; R. Michaels, *The True Lex Mercatoria: Law Beyond the State*, (2007) Indiana Journal of Global Legal Studies 14: 447-468; R.G. Steinhardt, *The New Lex Mercatoria*, in: P. Alston (ed.), *Non-State-Actors and Human Rights*, Oxford/New York: Oxford University Press, 2005, 177-227; C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge: Cambridge University Press, 2003; and, A.S. Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, (2006) Journal of European Public Policy 13: 627-646.

[100] See P. Utting, *Re-thinking Business Regulation: From Self-regulation to Social Control*, UNRISD Technology, Business and Society Research Programme Paper no. 15/2005, at: http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf, at iii.

[101] As has been remarked, "[t]he differences are wider with the so-called European continental view and more limited with the American perspective where differences within merchant law are widely recognized" (F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 31, footnote no. 53).

present in the picture. To simplify, transnational private regulation encompasses, most notably: profit-oriented internationally-active entities such as multinational corporations (MNCs) and the business organisations representing their interests;[102] non-profit-oriented organisations like civil society and non-governmental organisations (NGOs)[103], which have been relevant in advancing social, environmental and consumer interests especially since the late 1990s;[104] and, independent experts and epistemic communities.[105] Additionally, transnational private regulation includes systems of rule that result out of not only traditional cooperation between business actors (self-regulation), but also, and more significantly, of

[102] Legally speaking, the term 'multinational corporation' applies to "[…] companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed" (OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, 31 October 2001, DAFFE/IME/WPG(2000)15/FINAL, at para. 3). Actually the terminology utilised at the international level appears to be inconsistent. Contrary to the ILO and OECD texts, which use the expression 'multinational enterprise', the UN texts make reference to 'transnational corporation', which is, nonetheless, similarly defined as large business company operating in several countries. On these concepts see, P. Muchlinski, *Multinational Enterprises and the Law*, Oxford/New York: Oxford University Press, 2nd edition, 2007.

[103] At the international level there is no generally-accepted definition of 'non-governmental organisation'. According to the UN ECOSOC principles (UN ECOSOC Resolution no. 1296 (XLIV) of 23 May 1968, at paras. 8-14; UN ECOSOC Resolution no. 1996/31 of 25 July 1996, at paras. 1-17), NGOs must strive for welfare aims in conformity with the spirit of the UN Charter; be ideally and financially independent from State organs; and have a formalised organisational structure. At the regional level, the Council of Europe characterises more specifically NGOs as follows: "'1. NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities. […] 2. NGOs encompass bodies established by individual persons (natural and legal) and groups of such persons. They may be national or international in their composition and sphere of operation; 3. NGOs are usually organisations which have a membership but this is not necessarily the case; 4. NGOs do not have the primary aim of making a profit. […] 5. NGOs can be either informal bodies or organisations which have legal personality. They may enjoy different statuses under national law […]' (Fundamental Principles on the Status of Non-Governmental Organisations in Europe and Explanatory Memorandum, Council of Europe, 13 November 2002, FP Final. See also The Legal Status of Non-Governmental Organisations and their Role in a Pluralistic Democracy: Guidelines to Promote the Development and Strengthening of NGOs in Europe, Council of Europe, 25 March 1998, GR-ONG(98)3).

[104] For many observers the quest for a liberal multilateral regime governing international investments, embedded in the controversial and ultimately unsuccessful OECD negotiations of a Multilateral Agreement on Investments (MAI) in the second-half of the 1990s, has epitomised the growing and definite influence of non-State actors in the global economic system. On that occasion, the perception that major developed countries had been captured by special corporate interests bent on imposing a 'charter for global business' and appearing as able to direct the agenda of global economic governance fuelled a remarkable backlash by opponents of this agenda, most notably diverse environmental and consumer NGOs, followed later by labour and developmental NGOs. The MAI story, together with the difficulties that surrounded the WTO Ministerial Conference in Seattle in 1999 and more recently the opposition to the ratification of the Anti-Counterfeiting Trade Agreement (ACTA) in 2013, seem to be "symptomatic of a deeper unravelling of the postwar political economy of liberalization" based on the traditional coalition between pro-liberalisation business and government in setting the liberalisation agenda (A. Walter, *Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment*, in: J. Daphné and W. Wallace (eds.), *Non-State Actors in World Politics*, Basingstoke: Palgrave, 2001, 150-168, at 165).

[105] In the literature on political science, 'epistemic communities' are defined as "network[s] of professionals with expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (P.M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, (1992) International Organization 46: 1-35, at 3).

uncommon hybrid cooperation patterns involving antagonistic private profit and non-profit actors (co-regulation).

Second, transnational private regulation is characterised by the use of a broad range of regulatory devices that have been already tested and legitimated in less controversial regulatory processes and that may be ascribed to soft law, at least in the sense that they would not be recognised as legally binding in traditional conceptions of law. While in domestic settings non-State actors utilise conventional domestic private law instruments, in fast-changing areas where the underlying object of regulation is constantly evolving along technological improvements and changing societal needs, regulation requires norms that are adaptable, grounded in practical experience and expertise, and that can continuously be adjusted in response to new developments and learning. "In such a reiterative bargaining context, […] leadership by [non-State actors] holds considerable advantages. Not only do regulators enjoy technical expertise, but rules and standards can be devised […] jumping the political procedural hurdles associated with treaty ratification"[106]. In this sense, soft law instruments like guidelines and codes of conduct, standards, certification and auditing schemes, and labels, whose compliance is ensured through monitoring systems, peer pressure and market sanctions rather than a central authority, fit better the needs for swift regulatory responses.

Third, transnational private regulation is essentially "designed to embed social and environmental norms in the global marketplace"[107]. To this end, despite consisting of instruments having little coercive power *per se*, private regulation aims at being normatively authoritative in the sense of structuring and directing the behaviour of specific actors by dictating what they must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms), with a sufficient pull toward compliance. Therefore, those norms are important in predicting and creating expectations about actors' behaviour as kinds of affirmative or negative 'covenants'[108] or regulatory contracts. In many instances private regulation becomes *de facto* mandatory where compliance with its norms is the condition for increased market access or for the protection of market share. In all these respects, transnational private regulation has more in common with State-based regulation than norms of voluntary bodies that can be abandoned with little consequence.

Fourth, facing a growing demand for context-sensitive governance, transnational private regulation characterises itself as being sector-specific. It covers a wide number of distinct regulatory systems that are functionally differentiated and organised for specific objectives. In line with this, "[t]he essence of [transnational private regulation] follows from the reality of deterritorialization of governance power that is at the foundation of globalization"[109]. Thus,

[106] C. Brummer, *Why Soft Law Dominates International Finance*, cit., at 637.

[107] S. Bernstein and E. Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, (2008) Journal of International Economic Law 11: 575-608, at 580.

[108] See K.W. Abbott and D. Snidal, *Hard and Soft Law in International Governance*, (2000) International Organization 54, 421-456, at 424-427.

[109] J.G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, (1993) International Organization 47: 139-174.

instead of exhibiting a comprehensive and integrated set of common institutes or general principles, each sector has devised its own regulatory tools. Most sectors are actually populated (and even 'balkanised') by multiple regulatory schemes showing competitive relationships and fluid boundaries between themselves. A common scenario is that of the establishment of an NGO-led scheme that is countered by the creation of one or more industry-based arrangements. Transnational regulation, then, should be better understood as "a dynamic, competitive system, in which multiple regulators compete for business and legitimacy"[110] or, in short, for a share of the transnational 'regulatory space'[111] by evaluating opportunities for collaboration or competition with rival schemes.

Lastly, next to positing the de-centralisation of regulatory authority away from the State by setting authoritative regulatory instruments, non-State actors generally fulfil additional governance functions. Philipp Pattberg identifies three elements of private governance: first, a focus on rules and regulation; second, institutionalisation beyond co-operation between non-State actors; and third, the potential to organise the public space.[112] By providing a forum for deliberation and conflict resolution, securing independent verification of norm compliance, and producing and disseminating valuable information and expertise, they provide an institutionalised response to intertwined economic, social and environmental problems, while at the same time improving market positions and offering reputation gains. In doing so, private governance helps reduce the costs associated with information and uncertainty, negotiation and consensus seeking, and enforcement of norms.[113] It is precisely through these functions that private actors exercise their authority in a given issue-area.

In short, the growing influence of non-State actors in establishing regulatory mechanisms thereby advancing their own authority goes beyond the traditional paradigm of what some call the "privatisation of law"[114] or, in the same vein, "private law beyond the State"[115]. Instead, non-State actors operating at the transnational level form the backbone of a

[110] E. Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, (2008) Chicago Journal of International Law 8: 513-534, at 518, 521 (claiming that, "'competitive supragovernmental regulation' characterizes a novel and expanding mode of governance in which supragovernmental regulatory programs develop competing standards and implementation mechanisms"). See also A. Fischer-Lescano and G. Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, (2004) Michigan Journal of International Law 25: 999-1046 (providing a provocative image of norm-making through "mutual irritation and provocation" between network nodes across regimes).

[111] For analysis of the concept of 'regulatory space' as consisting of the range of regulatory issues subject to public decision see, C. Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, (2001) Public Law: 329-353, at 329.

[112] See P. Pattberg, *Private Governance and the South: Lessons from Global Forest Politics*, (2006) Third World Quarterly 27: 579-593, at 581 (suggesting that private governance is exercised in three different ways: the regulative way; the cognitive/discursive way; and the integrative way, through a process of learning and adoption of private regulation into public one).

[113] *Ibidem*.

[114] See J. Köndgen, *Privatisierung des Rechts.* Private Governance *zwischen Deregulierung und Rekonstitutionalisierung*, (2006) Archiv für die cilivilistische Praxis 206: 477-525.

[115] See R. Michaels, *The True Lex Mercatoria: Private Law beyond the State*, (2006) Indiana Journal of Legal Studies 14: 447-468; and, R. Michaels and N. Jansen, *Private Law beyond the State? Europeanization, Globalization, Privatization*, (2006) American Journal of Comparative Law 54: 843-890.

parallel 'norm-setting administration'[116], which has as its main objective the crafting of cost-effective norms that both provide some coordination for global markets and address the wide-ranging set of externalities associated with globalisation. In line with this last point, some scholars come to assume that "private governance is a functional equivalent of international governance"[117], because "similar to regimes established by States, private institutions might provide collective goods, reduce transaction costs, and decrease uncertainty"[118].

6.3.2. Disentangling the private sphere: Structures and patterns of regulatory governance

While at first sight transnational private regulation may seem to be a homogeneous body of norms and institutions driven by non-State private actors, a closer look reveals how the overall picture is extremely fragmented both across and within sectors. A highly diversified body of transnational norm setting processes shows significant variations in the type of the regulatory instruments adopted, the regulatory approaches followed by different institutions, and the configurations of non-State actors. Still, private actors exhibit different, often conflicting, interests and incentives for the creation and implementation of transnational private regulation. Conflicts of interests are not restricted to different actors' constellations but also within each of them, so that even a single-actor regulatory scheme might involve multiple conflicting interests. As consequence, as remarked earlier, in many issue-areas different private regulatory schemes, each with its objectives and scope, compete, coordinate or ignore one another. Hence, the initial response to domestic private law fragmentation with the creation of uniform rules at the transnational level has changed into a different form of global fragmentation, "the former primarily territorial, the latter predominantly functional"[119].

Despite the above, some peculiar features shared by different transnational regulatory schemes may be identified. In particular, the nature, extent and impact of private modes for exercising regulatory authority at the transnational level may assume various characterisations along three almost distinct models:

(i) Business self-regulation;

(ii) Global supply chain-contracts; and

(iii) Multi-stakeholder regulatory schemes.

[116] See H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing, 2005. For a recent survey of examples see, O. Dilling, M. Herberg, and G. Winter (eds.), *Transnational Administrative Rule-Making*, cit.

[117] P. Pattberg, *The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules*, (2005) Governance 18: 589-610, at 593.

[118] *Ibidem*.

[119] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 23.

Business self-regulation is a regulatory process whereby a firm- or industry-level organisation sets norms and standards relating to the conduct of firms in the industry.[120] Traditional schemes of transnational private regulation are part and parcel of the mainstream corporate social responsibility (CSR) agenda with its emphasis on voluntary business-friendly self-regulation. Self-regulation is typically framed as a socially responsible firm or industry practice that has consumer welfare as its central feature. Along with the striking growth of international trade and investment as well as the increase in public awareness of the social and environmental impact of economic liberalisation, the conduct of MNCs responsible for supplying consumers in developed countries with goods and services produced in developing countries has come under growing scrutiny by NGOs and consumers groups since the 1970s. Where industry objectives and societal concerns conflict, an industry has incentives to create a public image of concern. It is against this backdrop that a growing number of firms and industries investing in 'reputational capital'[121] have sought to balance their profit-maximising interests with the provision of global public goods. Even in the absence of government-imposed disciplines, firms and industries have thereby voluntarily committed themselves to integrate social and environmental concerns in business operations, this way embracing CSR as the defining attribute of their *modus operandi*.[122]

Operationally, MNCs have adopted firm-specific or industry-wide codes of conduct that lay down norms and standards designed to guide corporations in their operations across global value chains and especially to prohibit behaviours having adverse social and environmental impacts on local communities. These codes provide as much credible information as possible to consumers about not only the physical attributes of goods and services, but also some invisible attributes of the production process. In this respect, they differ considerably in terms of their content and degree of detail, this reflecting the underlying diversity of each firm and industry, the nature of their business, and the diversity and dispersion of their supply chain.[123]

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[120] See N. Gunningham and J. Rees, *Industry Self-regulation: An Institutional Perspective*, (1997) Law and Policy 19: 363-414, at 364-365.

[121] See C. Fombrun, *Reputation: Realizing Value from the Corporate Image*, Boston: Harvard Business School Press, 1996. The growing "market for virtue" (D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, Washington DC: Brookings Institution Press, 2005) associated with the incentives to preserve reputation has put pressure on firms to maintain their market positions by differentiating one another through *ad hoc* regulatory strategies. This is especially true in situations where firms' reputation is interdependent. In fact, when the reputation of some firms is targeted and other firms in the same industry find themselves touched by the same concern, some may attempt to 'free ride' on the effort of others to improve industry reputation. There may even be problems of 'adverse selection', wherein the worst – socially or environmentally – performing firms are the most attracted to programmes for improving the overall industry reputation. In this respect see, A.A. King, M.J. Lenox, and M.L. Barnett, *Strategic Responses to the Reputation Commons Problem*, in: A.J. Hoffman and M.J. Ventresca (eds.), *Organizations, Policy, and the Natural Environment*, Stanford: Stanford University Press, 2002, 393-406.

[122] Despite the increasing emphasis on CSR strategies, there is no internationally accepted approach to CSR or a single way to incorporate CSR into global business operations. At the European level see, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility, 25 October 2011, COM(2011) 681 final, at para. 3.2 (providing a broader definition of CSR as "the responsibility of enterprises for their impacts on society"); and, Promoting a European Framework for Corporate Social Responsibility, 18 July 2001, COM(2001) 366 final.

[123] Environmental protection and labour norms and standards are the two most frequently covered areas in the codes, regardless of the sector concerned. Consumer protection and corruption, together with questions of internal control and protection of shareholder value, management of liability risks relating to compliance with

Industry-based CSR governance systems represent an ideal type of structure where the regulator and the regulated coincide. Since the interests of the regulator and the regulated are *de facto* aligned, incentives to monitor in the interest of third-parties might be weak. More effective codes back provisions up with first-party reporting and disclosure schemes, whereby oversight and enforcement are a matter for corporations themselves. Anyway, firms' behaviour is, in a sense, 'assessed' by the market in terms of the acceptability of their performance.

While CSR initiatives aim essentially at legitimating cross-border business operations with providing firms and industries with an implicit 'social licence'[124] to operate, industry-based forms of regulation have been put in place to serve as market-enabling institutions for overcoming coordination and collective action problems along global value chains and managing competition on the global marketplace. Two questions are of particular significance in this respect. On the one hand, consensus lacks at the multilateral level on issues perceived to be particularly relevant for the business community, as the stall of the negotiations of a substantive patent law treaty within the World Intellectual Property Organisation (WIPO) proves.[125] On the other, global value chains generate problems of management and coordination, and limit the firms' ability to uphold reputation, produce credible information for their claims, and retain their position in the market. The international negotiation environment is such that global norms cannot be easily addressed, especially when most trade distortions are the result of non-border measures and domestic regulations. In this respect, the negotiation of a number of new preferential trade agreements (PTAs) since the 1990s, together with uncoordinated developments in bilateral investment treaties (BITs) and autonomous reforms in emerging market economies, may potentially provide those 'deeper integration' disciplines concerning 'behind-the-border' issues that could facilitate efficient practice of global production sharing.[126] Yet the plethora of such agreements and, more

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law in such areas as competition and environment also receive extensive attention. For a general survey in the field see, OECD, *Codes of Corporate Conduct: An Expanded Review of their Contents*, Paris: OECD Publications, 2000, at 14, 26 (showing that the overall picture "illustrates diversity of and lack of consistency in treatment of issues in the labour codes", such that "[n]o conclusions about actual practices can be drawn from the findings"); J.K. Jackson, *Codes of Conduct for Multinational Corporations: An Overview*, Washington DC: Congressional Research Service, 2013; E. Verney, *Codes of Conduct in the Multinational Workplace*, (2003) Journal of International Trade Law and Policy 2: 25-42; J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge: Cambridge University Press, 2006; and, J. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, (2008) American University International Law Review 23: 451-558.

[124] See N. Gunningham, R. Kagan, and D. Thornton, *Social Licence and Environmental Protection: Why Businesses Go Beyond Compliance?*, (2009) Law and Social Inquiry 29: 307-341.

[125] In contrast with the Patent Law Treaty (PLT, signed in 2000 and entered into force in 2005), which relates to formalities, the Substantive Patent Law Treaty (SPLT) was proposed in 2000 as a means to harmonising substantive points of patent law such as novelty, inventive step and non-obviousness, industrial applicability and utility, as well as sufficient disclosure, unity of invention, or claim drafting and interpretation. Because of the Members' failure to reach an agreement as to the modalities and scope of the future work of the WIPO's Standing Committee on the Law of Patents, the negotiations were put on hold in 2006. Only in 2010 Members agreed on the first work programme for the Committee.

[126] New generation PTAs cover deeper disciplines on 'behind-the-border' issues relating to protection of investor's assets against unfavourable situations and business conduct, market access restrictions, and trade

generally, the growing number of international legal instruments impinging on trade flows result in a change in the global configuration of trade and are not exempted from creating a 'spaghetti bowl'[127] of disciplines and administrative complexities as the old generation PTAs did. Additionally, whereas PTAs embody "the creation of a series of 'mini-engines' of growth that are driving the global economy to greater heights"[128], their scope deteriorates policy preference for multilateralism. Putting it differently, the real threat is that deeper PTAs may undermine the WTO as the forum for agreeing the legal norms necessary to foster the 'trade-investment-services-IP nexus' referred to earlier and, consequently, the WTO as the main *locus* of global trade regulation.[129]

In such context, a central tool of contemporary regulatory governance is commercial contracts that set technical standards and other types of norms, including CSR rules, with which the contractors (partner firms along the supply chain) must comply. Depending on the market structure, corporate governance may be based on: individuated business contractual relations, as when norms are included in supply-chain contracts; or associational contractual relations, as when members of a business organisation agree to be bound by the organisation's code. In particular, firm-specific or industry-wide standards-based regulatory frameworks, produced directly by the private regulator or elaborated by third-party standard-setters (usually private non-profit organisations or epistemic communities) are designed to standardise business practices and make rules of corporate behaviour uniform along dispersed value chains, regardless of the disparity in economic conditions between locations, local customs, differences in local business practices, or legislation.

Standards have long been produced by non-State actors at the international level. Nevertheless, the proliferation of transnational regulatory standards-setting schemes as governance tools is one of the central trends that have risen steadily in developed countries since the early 1990s. While in the past standards were mainly developed to address technological and compatibility issues and operated as tools of simplification, specification and facilitation of cross-national transactions, they now perform key functions of governing conduct of actors and institutions (including governments) within an increasing number of

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facilitation ensuring simpler, reliable, and more harmonised procedures on trade and movement of production factors. These disciplines concern mainly competition policy, capital movement, services market access commitments, and IPRs. The resulting package of these deeper disciplines is what Richard Baldwin calls "21st century regionalism" (see R. Baldwin, *21st Century Regionalism*, cit.). For a general background of the emergence of new generation PTAs see WTO, *The WTO and Reciprocal Preferential Trading Agreements*, World Trade Report 2011, Geneva: WTO, 2011 (estimating the existence of over 300 PTAs notified, up from less than a hundred in the early 1990s).

[127] See J. Bhagwati, *US Trade Policy: The Infatuation with FTAs*, in: J. Bhagwati and A.O. Krueger (eds.), *The Dangerous Drift to Preferential Trade Agreements*, Washington DC: American Enterprise Institute for Public Policy Research Press, 1995, 1-20, at 4.

[128] F.M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, (2007) Journal of International Economic Law 10: 571-583, at 576.

[129] See R. Baldwin, *21st Century Regionalisms*, cit., at 3 ("21st century regionalism is not primarily about preferential market access […] [rather it] is about disciplines that underpin the trade-investment-service-IP nexus. Because of this, 21st century regionalism is a threat to the WTO's role as a rule writer, not as a tariff cutter").

domains.[130] In addition, because fragmentation of supply chains has expanded the arena of competition beyond final products to the vertical segments and business functions within and across industries, standardisation has increased its influence on regulation moving from product standards (criteria and specifications for product attributes) to process standards (criteria and practices for the way products are made, which may relate to performance criteria or management criteria that do not alter the physical characteristics of the product) to quality management standards (criteria relating to documentation and monitoring).[131] This appears most evident in the areas of social, labour and environmental issues ('sustainability standards'), where in quantity and importance private standards are rapidly taking over the role of public norms.[132]

Lastly, the weaknesses and inadequacies exhibited by business CSR-related self-regulation in fostering effective lasting change in business culture and the question of whether corporations had embraced CSR as a mere reputation-improving and profit-maximising strategy,[133] called for harder regulatory approaches making corporations really accountable to different stakeholders. In addition, the broader scope of the multilateral trading system following the Uruguay Round and the shift from a trade regime essentially based on non-discrimination (focusing on 'at-the-border' barriers) to one based, at least partly, on positive harmonisation (focusing on 'behind-the-border' barriers), offered opportunities for non-State actors to take relevant interest in the multilateral trading system and its own institutional framework.[134] In particular, the rise in prominence of non-trade related concerns on the

[130] In an historical perspective see, S. Ponte, P. Gibbon, and J. Vertergaard, *Governing through Standards: An Introduction*, in: S. Ponte, P. Gibbon, and J. Vertergaard (eds.), *Governing through Standards: Origins, Drivers and Limitations*, Hamburg: Palgrave MacMillan, 2011, 1-24, at 1.

[131] Standards are especially useful in presence of information asymmetry such as in the case of 'credence goods' whereby buyers and consumers cannot easily judge certain quality aspects of products or the conformity of process and production methods (PPMs) without additional costly information. In this respect, private standards may be 'business-to-business' (B2B) arrangements (assuring buyers that the supplier is in compliance with the standards) or 'business-to-consumer' (B2C) arrangements (enabling final consumers at point-of-sale to make informed choices often through the medium of a mark or label attached to the product).

[132] In this sense see, H. Schepel, *The Constitution of Private Governance*, cit. at 176; N. Brunsson and B. Jacobsson, *The Contemporary Expansion of Standardisation*, in: N. Brunsson, B. Jacobsson and associates (eds.), *A World of Standards*, Oxford/New York: Oxford University Press, 2000, 1-17; and, J. Black, *The Role of Non State Actors in Standard Setting*, Expert paper presented to UNCTAD's Panel Discussion on 'Implementing the Future WTO Committments on Trade Facilitation', Geneva, 5 July 2010, at: http://eprints.lse.ac.uk/36118/1/Disspaper37.pdf.

[133] Business CSR-related initiatives have generally shown a proliferation of unconnected and often competing schemes, unclear contents, weak implementation procedures, ineffective first-party compliance assessment, lack of credibility and legitimacy, a largely Northern-driven agenda, and limited attention to a number of key development issues. On the other hand, it is worthy observing that the CSR agenda has a limited scope, since poverty reduction is not a goal of corporate responsibility, even though many business operations may have positive impacts on certain people in developing countries, for example, through employment or skill development. Also it is rare for CSR to tackle any of the structural causes of poverty, as opposed to issues of capacity or access. For discussion see, D. Vogel, *The Market for Virtue*, cit.; S.A. Aaronson, *Global Corporate Social Responsibility Pressures and the Failure to Develop Universal Rules to Govern Investors and States*, (2002) Journal of International Investment 3: 487-505; and, R. Jenkins, *Globalization, Corporate Social Responsibility and Poverty*, (2005) International Affairs 81: 525-540 (criticising the potential for private sector CSR activities to have a positive impact on poverty reduction).

[134] For discussion see, V. Heiskanen, *The Regulatory Philosophy of International Trade Law*, (2004) Journal of World Trade 38: 1-36; M. Trebilcock, R. Howse, and A. Eliason (eds.), *The Regulation of*

international trade agenda raised the fears that the criterion of trade liberalisation would have served "an outdated and failed economic paradigm […] favour[ing] the corporate sector at the expense of public policy goals"[135]. Confronted with both market and government failures, new actors have thereby entered the regulatory arena. In particular, NGOs with increased economic power and higher level of professionalisation have started to create their own standards and codes of conduct for MNCs. Generally speaking, it is apparent that, while business regulatory schemes focus more on norm generation, NGO-led regulatory schemes are concerned with monitoring firms' compliance and frequently deploy certification.

Lastly and more remarkably, the last decade of the XX century has been referred to as an "era of partnership"[136], because of the emergence of innovative forms of cooperation in a range of different organisational settings and issue-areas. The essentially adversarial relationship between business corporations and civil society organisations has been complemented by broader and more integrated sector-wide partnerships consisting of "coalitions of non-state actors which codify, monitor, and in some cases certify firms' compliance with labor, environmental, human rights, or other standards of accountability"[137]. By buying-in all relevant stakeholders in a specific issue-area for providing valuable predictability regarding CSR requirements and thus supporting their effective uptake and successful implementation, multi-stakeholder partnerships operate in a participatory and inclusive way so as to build consensus and leverage the power of the private sector towards public-interest goals.[138] A striking degree of diffusion of this model is particularly evident in sectors that face significant social or environmental challenges, from sustainable forest management to the ecological impacts of overfishing and fish farming, from health care and food safety to labour and human rights, where multi-stakeholder organisations are engaged in

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International Trade, New York: Routledge, 4th edition, 2013. For a summary account of the history of the multilateral trading system see, e.g., J. Pauwelyn, *The Transformation of World Trade*, (2005) Michigan Law Review 104: 1-70.

[135] M. Halle, *New Approaches to Trade Governance*, in: WorldWatch Institute, *2008 State of the World: Innovations for a Sustainable Economy*, Washington DC: WorldWatch Institute, 2008, 196-209, at 204.

[136] See most notably, J. Bendell, *Evolving Partnerships: A Guide to Working with Business for Greater Social Change*, Sheffield: Greenleaf Publishing, 2011; D.F. Murphy and J. Bendell, *In the Company of Partners: Business, Environmental Groups and Sustainable Development Post Rio*, Bristol: The Policy Press, 1997; P.V. Rosenau (ed.), *Public-Private Policy Partnerships*, Cambridge: The MIT Press, 2000; and, T. Börzel and T. Risse, *Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?*, in: E. Grande and L. Pauly (eds.), *Complex Sovereignty: Reconstituting Political Authority in the 21st Century*, Toronto: University of Toronto Press, 2005, 195-216.

[137] T. Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, (2007) American Journal of Sociology 113: 297-351, at 298. See also, J. Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes, and Citizen Action*, New York: Zed Books, 2001 (pointing to the fact that the term 'partnership' represents a policy paradigm based on the assumption of trust, shared benefits, and an underlying win-win situation, concealing the fundamentally different goals and power resources of the actors involved); and, M. Yaziji and J. Doh, *NGOs and Corporations: Conflict and Collaboration*, Cambridge: Cambridge University Press, 2009 (demonstrating empirically how NGOs and corporations, as two very different types of organisations, are playing an increasingly important role in shaping our society, yet they often have very different agendas).

[138] See J. Bendell, *Evolving Partnerships*, cit., at 4.

standards-setting and/or third-party certification compliance as a proxy for credibility and truthful information.[139]

There are two major variants of this model.[140] In the organisational variant the regulatory body consists of multiple constituencies, which may take the form of the federation or a functional multi-stakeholder structure where both individuals and organisations participate. Depending on the distribution of power among constituencies, in some cases a leading constituency may shape the choice of regulatory regime and its enforcement mechanism, while in others a symmetric distribution of power may produce a more principle-based regulation, which is later specified and completed at the stage of implementation. The second variant is the contractual model. It operates through regulatory contracts (in the form of bilateral contracts, network contracts, and master agreements) along the supply chain especially in such areas as financial markets, environmental protection and, most notably, food safety, where the specific endorsement of the supply-chain approach demonstrates the regulatory function of regulatory contracts.

7. International economic law in contemporary regulatory governance: The challenge of the increasing 'legalisation' of the international system

The international legal system has developed over time through "specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice"[141], which typically tend to apply a presumption in favour of a complete and exhaustive regulation therein. In the absence of any hierarchically superior law-making and law-enforcing authority, all these autonomous self-referenced regimes come to jeopardise the systemic coherence of international law along both horizontal and vertical dimensions of functional fragmentation.[142] On the one hand, fragmentation is the result of horizontal collisions or overlaps among regimes of sometimes equal force in terms of memberships, which exhibit diverse and competing goals, rationales, and normative foundations. On the other,

[139] Examples of multi-stakeholder regulatory frameworks include the Marine Stewardship Council (MSC) for labelling sustainably harvested fish; the Forest Stewardship Council (FSC) for labelling sustainably harvested forest products; the Fair Trade Labelling Organisation (FLO) for setting labour and development standards; and, the Fair Labour Association (FLA) setting standards for labour and human rights conditions.

[140] For in-depth analysis see, F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 35-38; *Id.*, *Les nouveaux fondements de la régulation transnationale privée*, (2013) Revue Internationale de Droit Economique 1:129-161; *Id.*, *New Foundations of Transnational Private Regulation*, (2011) Journal of Law and Society 38: 20-49; and, F. Cafaggi and P. Iamiceli, *Private Regulation and Industrial Organization: Contractual Governance and the Network Approach*, in: S.M. Grundmann, F. Möslein, and K. Riesenhuber (eds.), *Contract Governance: Dimensions in Law and Interdisciplinary Research*, Oxford: Oxford University Press, 2015, 341-374.

[141] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Study Group of the International Law Commission ('Koskenniemi Report'), 18 July 2006, A/CN.4/L.702, at para 6.

[142] See, generally, B. Simma and D. Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, (2006) European Journal of International Law 17: 483-529; and, A. Fischer-Lescano and G. Teubner, *Regime-Collisions*, cit., at 1018. On international trade law see, A. Lindroos and M. Mehling, *Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO*, (2006) European Journal of International Law 16: 857-877, at 859.

fragmentation can occur vertically in the form of collisions among different layers of regulation inside the same regime, each with its own legal, economic, and societal standing. The difficulties arising from these developments grow even bigger if one considers the erosion of normative hierarchy in international law, especially with reference to the problem of choice-of-law among conflicting norms of equivalent status stemming from distinct regimes. Such context compromises not only legal security, but also the effectiveness and, ultimately, the coherence of the international legal system.[143]

This picture of blurring normative hierarchy has been all the more exacerbated and diversified in the age of globalisation. Trans-boundary economic activities are shaped by a variety of norms and institutions resulting from the efforts of both State and non-State actors, which define a 'global regulatory space' extending "from the establishment of international authorities with *ex ante* 'legislative' and *ex post* 'repressive', liability enforcement powers, to consensual coordination of globalization efforts and to decentralized market-oriented approaches"[144]. If we accept that a normative order exists in presence of a set of relatively independent actors, not subject to a superimposed authority, which are, nonetheless, linked in their relationships through norms that are accepted as constraining behaviour,[145] we come to affirm that those non-conventional actors, normative processes and instruments referred to earlier come to "create [their] own international order"[146] outside of the charted territory of international law. The emergence and consolidation of such multifaceted global regulatory space overlaps and further challenges the fragmentation of the international legal system.[147]

[143] Fragmentation in international law has been the subject matter of an intensive debate among legal scholars as of 1983, when in the face of the irreducible plurality of self-contained regimes Prosper Weil denounced fragmentation as a pathological development weakening international law as a normative system intended to perform certain functions (see P. Weil, *Towards Relative Normativity in International Law*, (1983) American Journal of International Law 77: 413-442, enlarged version of P. Weil, *Vers une normativité relative en droit international?*, (1982) Revue Générale de Droit International Public 86: 5-47, highlighting the inherent structural differences between domestic and international law, such as inadequate enforcement and indefinite norms, and identifying in the ideas of comity and *erga omnes* law the sources of legitimacy of international law). Since then, the international debate has been centred on consistency, predictability and unity of international law. These concerns underlie the agenda of the UN International Law Commission (ILC)'s work on the fragmentation of international law, which denies in principle any possibility of creating specialised legal regimes outside of the framework of general international law, since each of them would come to impose its own rationality on the entire system. See ILC, *Analytical Study of the Study Group of the International Law Commission (Finalised by Martti Koskenniemi) on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682; and, *Id*., *Fragmentation of International Law*, cit. For a partly different position see, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press, 2009, at 38 (claiming that agreements creating special institutionalised regimes "form part of the wider body of international law" and therefore the question of self-contained regimes becomes one of degree).

[144] J. Delbruck, *Globalization of Law, Politics, and Markets*, cit., at 19.

[145] See J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, cit., at 16.

[146] The Board, *Forging the Public and the Private Sector in the Legal International Order*, (2004) Legal Issues of Economic Integration 31: 77-79, at 77.

[147] See, e.g., G. Teubner and P. Korth, *Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society*, in: M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Oxford/New York: Oxford University Press, 2010, 23-54; and, T. Broude, *Fragmentation of International Law: On Normative Integration as Authority Allocation*, in: T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, Oxford: Hart Publishing, 2008, 99-120.

Indeed, transnational private regulation is the result of regulatory functions whose exercise is no longer reserved to the State. The forms and degrees of such an exercise vary across issue-areas with each of them carving out its own rationality as reflection of a growing demand for context and issue-sensitive regulation and, more generally, broader processes of fragmentation taking place in the global society.[148] It results from that the construction of a loosely intertwined universe of autonomous regulatory frameworks operating dynamically across borders and grounded in functional differentiation. This is "less a model derived from the ideology of the law-state and hierarchies of law than a *system of systems*, teeming with sub-systems, each autonomous, […] existing side by side and stacked in a constantly changing governance universe"[149].

In light of the above, the increasing legalisation of international relations comes to define a new context that could be most accurately characterised as a case of 'pluralisation' rather than fragmentation of the international legal system, with the rise of multiple normative orders whereby "two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual)"[150]. As result of that, in a world that has become a global marketplace and increasingly serving functionalist needs of contemporary complex society, "one of the key problems […] is that it is no longer self-evident who governs, or how governance takes place"[151].

7.1. The reconfiguration of the public-private divide between complementary and competitive reflexive regulation

Apparently, the rise of transnational private regulation marks a fundamental shift in the nature of institutions, in the sense of a (re)turn to a pre-modern or neo-medieval world before the nation-State characterised by a diffusely distribution of regulatory authority amongst a patchwork of public and private normative frameworks.[152] Actually, a closer look makes it evident how contemporary patterns of cross-border economic regulation are more complex than an outright transfer of regulatory authority from the public (national and international) to private domain. The global regulatory space may be better understood as being structured around a number of, to some extent, issue-specific regulatory spaces consisting of "the full set

[148] In this sense see, J. Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, (2004) Michigan Journal of International Law 25: 903-927.

[149] L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century*, cit., at 197-198 (emphasis in the original).

[150] R. Michaels, *Global Legal Pluralism*, (2009) Annual Review of Law and Social Science 5: 1-35. See also, P. Pattberg, *The Institutionalization of Private Governance*, cit., at 592 (talking of "different systems of rule on different levels of human activity as an organizing social principle beyond hierarchical steering and the sovereign authority of nation-states").

[151] J. Klabbers, *Reflections on Soft International Law in a Privatized World*, cit., at 1196.

[152] In this line of reasoning see, H. Willke, *Governance in a Disenchanted World*, cit., at 6 (observing the existence of "a dramatic tension between the postmodern dynamic of globalization and a pre-modern state of global decisionmaking"). See also W.G. Grewe, *The Epochs of International Law*, cit., at 12 (for a discussion of "diffuse authority" in the Middle Age when, despite the absence of the modern 'State', underneath the universal superimposing authority of the Holy Roman Emperor and the Pope there were other "autonomous communities capable of engaging in legal relations with one another" and tied up in complex feudal relationships).

of actors, institutions, norms and rules that are of importance for the process and the outcome […] of regulation in a given sector"[153]. Each "set of actors, institutions, norms and rules" is, thus, populated by governmental and inter-governmental actors as well as non-State actors, has its own public and private normative and institutional frameworks, and is subject to modification over time and, at least potentially, in relation to other regimes.[154] In this line of thought, there is a trade regime, an environmental protection regime, a public health regime, etc.

As such, a regulatory regime is neither exclusively international nor transnational. A clear-cut separation of public and private, which builds on "the image of a sovereign, knowledgeable state presiding over a fragmented market society"[155] and seeks to demarcate two distinct and autonomous norm making orderings, cannot adequately grasp the intricate forms of a global regulatory space where public and private actors as 'norm entrepreneurs' not only coexist, but also interact and influence mutually each other in many different ways. In other words, the global regulatory space is no longer committed to a public-private construction in which States and international institutions reside in public orderings and non-State actors reside in private ones. Therefore, rather than an outright transfer of regulatory authority from the public to private domain as part of an overwhelming process of de-regulation or "retreat of the regulatory State"[156], it is more appropriate to see the current configuration of the global economic system as part of "a process of re-regulation, or more precisely a 're-articulation of regulatory authority'"[157]. In light of that, regulatory regimes may be understood as instances of "global assemblage"[158] or, from a legal theoretical perspective, as examples of "global legal pluralism"[159], which challenge any neatly allocation

[153] B. Eberlein and E. Grande, *Beyond Delegation*, cit., at 91.

[154] See G. Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in: K.H. Ladeur (ed.), *Public Governance in the Age of Globalization*, Aldershot: Dartmouth, 2004, 71-87, at 78-79.

[155] P. Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralistic Perspective*, (2011) Journal of Law and Society 38: 50-75, at 67.

[156] See, most notably, S. Strange, *The Retreat of the State*, cit.

[157] S. Ponte, P. Gibbon, and J. Vertergaard, *Governing through Standards*, cit., at 7.

[158] For this concept see, S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages*, Princeton: Princeton University Press, 2006.

[159] See R. Michaels, *Global Legal Pluralism*, cit.; and, P. Schiff Berman, *Global Legal Pluralism*, (2007) Southern California Law Review 80: 1155-1237. Traditional literature on legal pluralism challenges both the monist conception of the relationship between domestic and international law and legal centralism, that is, the ideas that only the State makes law and that non-State norm production is hierarchically inferior to and dependent upon State law. Legal pluralism has developed through three different phases. The 'classical legal pluralism' was confined in two ways: geographically, it concerned only the interplay of Western and non-Western laws in colonial and postcolonial settings; conceptually, it treated the indigenous non-State law as subordinate to the official law of the State as introduced by the colonising powers. The 'new legal pluralism' concerned the interplay between official and unofficial law more generally. Finally, the 'global' (or 'post-modern') legal pluralism has an even broader focus beyond individual States and toward the transnational sphere. For a general account on legal pluralism in economic relations see, F. Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, (1999) European Law Journal 5: 334-374; and, J. Trachtman, *The Economic Structure of International Law*, Cambridge/London: Harvard University Press, 2008. For an overview and critical approach on pluralistic reading of international law see, M. Koskenniemi, *Global Legal Pluralism*, cit.

of regulatory authority to one side or another. The traditional public-private divide is so replaced by what political science literature calls the 'governance triangle'[160] that makes it evident how "the law of international commerce more likely constitutes an amalgam of state and non-state rules and institutions and does not differentiate between the two"[161]. That way, a model of 'reflexive' (or 'responsive') regulation can be deployed to explore the interplay between the public and private spheres.

Theoretically, the emergence and consolidation of well-grounded regulatory regimes may serve to overcoming normative fragmentation within each regime by harmonising public and private regulation. Different and even diverging sources of regulation may affect the level of compliance with norms and, ultimately, the effectiveness of the regime itself. A question thus arises: to what extent is the role of States and international institutions being complemented or substituted by non-State actors in such regulatory regimes? The answer to this question depends on the degree of functional assimilation between the public and private spheres.[162] In many issue-areas public and private regulation exhibit an 'evolutionary' relationship, with the latter elaborating and filling in the blanks of the former in view of overcoming weak or lacking State-based regulation and obtaining regulatory outcomes that are unavailable from governmental and inter-governmental institutions. In this sense, transnational private regulation pre-empt State regulation and accommodates existing one. This "coming together of different regulatory approaches in ways that are complementary, mutually reinforcing and synergistic"[163] potentially begins a new arena of 'collaborative

[160] See K.W Abbott and D. Snidal, *The Governance Triangle: Regulatory Standards Institutions in the Shadow of the State*, in: W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, Princeton: Princeton University Press, 2009, 44-88. The 'governance triangle' is a powerful analytical tool constructing a three-sector model covering State actors (both governments and inter-governmental institutions), market actors (MNCs and business organisations), and civil society organisations (social, environmental and consumer interest groups), to which are associated different, sometimes diverging, interests: respectively public policy interests; private profit-maximising interests; and broadly speaking societal interests. This is a useful tool for analysing the balance among the three types of actors involved in comparative perspective both historically (considering changes in regulation over time) and in different fields of regulation and countries.

[161] R. Michaels, *The True Lex Mercatoria*, cit. See also L. Hancher and M. Moran, *Organizing Regulatory Space*, in: L. Hancher and M. Moran (eds.), *Capitalism, Culture and Economic Regulation*, Oxford: Clarendon Press, 1989, 271-299, at 274 ("Questions about who participates in and benefits from regulation are certainly important: explaining the complex and shifting relationships between and within organizations at the heart of economic regulation is the key to understanding the nature of the activity. But little can be gained by depicting the relationship in the dichotomous language of public authority versus private interest"). An influential theory of global legal pluralism suggests that law is not generated by State, rather it creates itself by *autopoiesis*; in addition, the centre of law-making has moved away from the State into the periphery of transnational actors. The result is a global legal pluralism defined more from the top than from the bottom as an internal differentiation of global law, not a multitude of varied local laws. In this respect see, G. Teubner *Law as an Autopoietic System*, Oxford: Blackwell, 1993; *Id.*, *Global Private Regimes*, cit.; A. D'Amato, *International Law as an Autopoietic System*, in: R. Wolfrum and V. Roeben, *Developments of International Law in Treaty Making*, Berlin: Springer, 2005, 335-399.

[162] On this complex interaction see, G. Shaffer and M.A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, cit.

[163] P. Utting, *Rearticulating Regulatory Approaches: Private-Public Authority and Corporate Social Responsibility*, in: V. Rittberger and M. Nettsheim (eds.), *Authority in the Global Political Economy*, Basingstoke/New York: Palgrave MacMillan, 2008, 241-275, at 249. It is worth to observe that political scientists still disagree on the degree of influence and importance of non-State actors in regulation. It is controversial whether in some fields they come close to replacing the State as a source of regulation or whether

economic governance'[164] that further blurs the traditional distinction between the State and non-State actors' role in market regulation. This 'regulatory complementarity', which considers a significant consonance of interests between State and non-State actors, materialises in public-private interaction at various levels of governance, this way establishing genuine hybrid regulatory regimes. In some instances norm making and enforcement are organisationally distinct functions, with the former being carried out at the transnational level and the latter at the domestic level. In some other instances, private regulation may complement international regulation by specifying and tailoring international norms to specific sectors, with formal or informal delegation usually taking place. Traditionally, governments engage with transnational private regulation where the latter provides a way to deliver on intended public policy objectives. The motivations that drive this engagement are diverse and vary in relation to the specific characteristics of each domestic legal order, that is, as regards the established decision-making process and operational practices. Generally speaking, however, governments engage with private regulation, as opposed to developing any in-house delivery mechanisms, because they can benefit from a system that is already in place and that could reduce their own burden and save costs. Often the benefits that governments perceive relate to governance (e.g., alignment to international norms or multi-stakeholder regulatory governance) or operational practices (e.g., independent verification, sharing resources, reputational risk management) inherent to private regulation. Evidence shows a sort of 'multiplier effect'[165] whereby, if a government engages with private regulation once, it is not uncommon that it will use private regulation also in other policy and regulatory areas.

From a systemic perspective, nevertheless, State implementation of transnational private regulation risks to be biased. A lack of coordination among different domestic legal orders enforcing the same regime risks bringing about diverging, and even conflicting results that end to contradict the fundamental rationale of transnationalising private regulation.[166] In addition, despite the tendencies toward convergence and complementarity, the complexities of regulatory regimes lacking any overarching hierarchy may be condition favourable to regulatory competition and continued differentiation. More particularly, if existing national and international regulation usually provides a sort of regulatory minimum, because of its voluntary nature private regulation tends to be more 'aspirational' in nature in the sense that it

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they are simply complementing State regulation. In this sense, Robert Keohane and Joseph Nye formulated a theory of "complex interdependence" for explaining this phenomenon both at the national and transnational levels (see R.O. Keohane and J. Nye, *Power and Interdependence: World Politics in Transition*, Harlow: Pearson Longman, 4th edition, 2000).

[164] See J. Bendell, *Evolving Partnerships*, cit. From the government perspective this is also a "collaborative model of policy delivery" (C. Carey and E. Guttenstein, *Governmental Use of Voluntary Standards: Innovation in Sustainability Governance*, ISEAL Alliance & TSPN, 2008, at: http://www.isealalliance.org/sites/default/files/R079_GUVS_Innovation_in_Sustainability_Governance_0.pdf, at 6).

[165] *Ibidem*, at 24.

[166] For in-depth analysis of the biased implementation critique see, F. Cafaggi (ed.), *Enforcement of Transnational Private Regulation: Ensuring Compliance in a Global World*, Cheltenham/Camberley/Northampton: Edward Elgar, 2012.

puts in place incrementally stricter 'counter-regime norms'[167] that 'go beyond' State-based regulation. Evidence for a 'ratcheting up' of private regulatory norms can be observed especially as far as industry-driven regulation is concerned. How such challenges unfold will depend, at least in part, on the degree of dissonance between public and private regulation. From a utilitarian perspective, this is not a problem so long as the costs of regulatory divergence are outweighed by the benefits of regulatory competition and innovation. But from a legal theoretical perspective, that private norms go beyond what is required by law may decrease the legitimacy of public regulation and take leadership without being subject to formal requirements that apply to regulatory regimes informed by international law. Also, where State agencies are active in the same domains as private regulators, they may feel some pressure to play a regulatory and policy catch-up game with non-State actors and consequently adjust their regulatory instruments in response to private regulation. Also in this case evidence proves a biased public regulatory process, which is usually captured by industry private interests over NGO-led societal ones.

7.1.1. A typology of institutional arrangements in governmental use of transnational private regulation

If States and international institutions are not prime movers in the development of transnational private regulation, public-private regulatory interaction may, nevertheless, take many different forms depending on the operational or institutional arrangements set up, the specific regulatory function or the policy objective aimed for, and the implementation tools used. Whilst these patterns are fairly common in developed countries, they apply even though to a lesser extent to developing countries as well, where many observers believe that "one conclusion of this evolutionary process is that private sector standards may be wholly or partly adopted to form part of the future regulatory framework of exporting developing nations"[168]. It is quite difficult to present in one single picture the full spectrum of opportunities for creative synergies between private and public regulation, since "flexibility is a potential asset for governments who may tailor their relationship with voluntary [norms] to best meet their own institutional set-ups and policy requirements"[169]. Nevertheless, we will try to draw a possible typology of the different ways public and private forms of regulation interact and influence mutually each other, while acknowledging that this only covers part of the story.

First of all, governments can 'prefer' transnational private regulation for their own operations by introducing preferential clauses in public procurement policies or requiring

[167] See L.R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, (2004) Yale Journal of International Law 29: 1-83, at 14-15.

[168] N. Garbutt and E. Coetzer, *Options for the Development of National/Sub-regional Codes of Good Agricultural Practice for Horticultural Products Benchmarked to EurepGAP*, Consultation Draft, Presentation to UNCTAD, September 2005, at: http://r0.unctad.org/trade_env/test1/meetings/inmetro2/EurepGAP_benchmarking_UNCTAD_November-NG.pdf, at 28-29.

[169] C. Carey and E. Guttenstein, *Governmental Use of Voluntary Standards*, cit., at 21.

certification to a private standard for the issuing of a license. A commitment towards sustainable procurement policies targeted on socially and environmentally certified products is especially significant given the ability of large States to affect markets through their purchases, which on average amount to 15 to 25 percent of GDP. Building on this commitment, many governments have issued public procurement guidelines that define responsible business criteria to be taken into account when making purchasing decisions as well as certification to voluntary standards (or equivalent) as a requirement needed for the award criteria. Some governments have even gone further by integrating sustainability criteria into national public procurement law.[170]

Governments may also 'promote' the development of private regulation by creating or improving a favourable regulatory environment and providing input into the development process. Especially in those fields where reaching an inter-governmental agreement proves to be difficult, it is not uncommon for individual States to support the use of private standards and certification systems as a means of promoting environmental and social standards at the international level, while shying away from the burdensome negotiation of international hard law.[171] Specifically, governments may promote the uptake of private regulation by providing support in the form of fiscal incentives (e.g., material and financial support, subsidies, tax relief), fiscal disincentives (e.g., fines and penalties) and/or non-fiscal incentives (e.g., technical assistance/information, training, promotion/marketing), more often a combination of the three, to firms that adopt given private standards in their production processes or to buyers/consumers that purchase certified products.[172] Additionally and more generally,

[170] The 2009 American Recovery and Reinvestment Act (Public Law 111-5, 123 Stat. 115, 17 February 2009) requires US federally funded building projects to adhere to 'green building' standards alongside the Programme for Endorsement of Forest Certification (PEFC), even though the dominant 'green building' standard itself currently only permits certification from FSC. In Canada, several federal and national authorities specify the FSC standard in their public procurement policies. In the EU, in 2004 the European Commission advised Member States on how to develop and implement green procurement policies (see *Buying Green! A Handbook on Environmental Public Procurement*, Luxembourg: Office for Official Publications of the European Communities, 2004). The European Commission defines "green public procurement" as "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured" (*Public Procurement for a Better Environment*, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 16 July 2008, COM(2008) 400 final, at 4). In this context, individual European governments, including most notably Denmark, the Netherlands, France and Germany, have developed sustainable public procurement policies for timber, specifying the need for all timber suppliers to be FSC-certified as proof of legality and sustainability in their public procurement policy.

[171] Following scandals highlighting sweatshops and child labour in the 1990s the US federal authorities supported the development of NGOs, such as Social Accountability International (SAI) and FLA. By promoting social standards these NGOs should have limited the risks of offshoring to countries with fewer social and environmental regulations, particularly Mexico, further to the entry into force of the North American Free Trade Agreement (NAFTA) on 1st January 1994.

[172] Several case studies illustrate the useful role of international donor agencies and international institutions in building the awareness together with the financial and technical capacity of governments in developing countries to actively promote the emergence of private sector provision of services – previously the domain of government – and to engage with private standards. International development agencies "hold the potential to perform a distinctive value-adding role in the continued evolution and impact of collaborative standards initiatives" (A. Litovsky, S. Rochlin, S. Zadek, and B. Levy (eds.), *Investing in Standards for*

governments can help increase public interest and demand for sustainable development standards through funding public advocacy campaigns and convening power to mobilise the participation of relevant stakeholders.

Furthermore, governments may 'prescribe' the use of previously designed private regulation by requiring compliance through *ex post* incorporation in legislative or administrative acts or by enacting private processes as legislative or administrative procedures. Among the potentially most powerful State-based legal mechanisms for incorporation is international trade law, which uptakes the international standards produced by recognised semi-private bodies such as the International Organisation for Standardisation (ISO), the International Telecommunication Union (ITU) and the International Electrotechnical Commission (IEC) as internationally accepted standards.[173] Governments can incorporate standard compliance as a commitment or requirement in outward investment promotion schemes or in preferential trade agreements. In these cases, compliance with private regulation is considered as functionally equivalent to government regulation and becomes a condition of market participation. Additionally, private standards have become a key instrument for satisfying increasingly general legislative requirements for products. The so-called 'new approach to technical harmonisation' pioneered in the EU in the mid-1980s is a core example of this trend that combines public law-making and private standard-setting and assumes that products manufactured in compliance with private standards benefit from a presumption of conformity with applicable legislation.[174] In that way, by contributing to satisfy a growing demand for more pertaining norms in specific issue-areas, transnational private regulation amounts to "[o]ne of the most belaboured fields, […] [which] has gained the status of a *poster child*, as it represents a laboratory for the exploration of private

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Sustainable Development: The Role of International Development Agencies in Supporting Collaborative Standards Initiatives, London: AccountAbility, 2007, at 2). Particular efforts have been made by the World Bank's Foreign Investment Advisory Service (FIAS) to actively examine the potential for alignment between private regulatory initiatives and public sector monitoring and enforcement functions in different approaches to co-regulation. For instance, the World Bank now requires all forest harvesting and management operations financed by its own resources to be monitored through independent assessment and certification (see World Bank, *Sustaining Forests: A Development Strategy*, Washington DC: World Bank Publications, 2004, at 7).

[173] See Article 2.4 of the Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organisation - Annex 1A, 15 April 1994 (into force 1st January 1995), 1867 UNTS 120 (1994) [hereinafter 'TBT Agreement'].

[174] Council Resolution on a New Approach to Technical Harmonisation and Standards, 85/C 136/01, 7 May 1985, 1-9. Such new approach to technical harmonisation consists of legislative measures (directives) that are worded precisely enough so as to create legally binding enforceable obligations but limited to essential (safety) requirements, and that delegate to standardisation bodies the task of drawing up technical specifications. To this end the European Commission issues 'standardisation mandates' to the European Committee for Standardisation (CEN), the private European federation of national standards bodies, finances large part of the work, leverages its political and financial clout so as to improve decision-making within the CEN, and finally publishes the references to the standards adopted in response to these mandates in the EU Official Journal. As has been observed, "in the bitter debates of Community competences versus Member States' sovereignty, the idea of European-wide industry self-regulation disarms both sides by introducing the notion that bottom-up integration generates its own normative frameworks. European standardization dissolves the tension between negative and positive integration" (J. Stuyck, *Book Review of Harm Schepel 'The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets'*, (2006) Common Market Law Review 10: 600-603, at 601). See also L. Senden, *Soft Law, Self-Regulation and Co-Regulation, in European Law: Where Do They Meet?*, (2005) Electronic Journal of Comparative Law 9: 1-27.

contractual governance in a context, in which the assertion of public or private authority has itself become contentious"[175]. In this respect, transnational private regulation can be a kind of transitional stage in the development of legally binding norms, a synonym for *pre-droit* or *droit vert*,[176] which suggests institutional designs that can permit and anticipate a variety of approaches to global issues.

In all the previous cases State regulation is drawn into closer alignment with transnational private regulation, but the two remain distinct in significant ways. Nonetheless, in many areas State and non-State actors give actively way to innovative modes of governance that blur the narrow compartimentalisation of voluntary *versus* mandatory regulation and create hybrid forms of regulatory capacity sharing. Co-regulation can take place through regulatory contracts or within multi-stakeholder bodies encompassing both State and non-State actors. In particular, it is notable the case of 'public-private partnerships' (PPPs) that establish "[v]oluntary and collaborative relationships between various parties, both State and non-State, in which all participants agree together to achieve a common purpose or undertake a specific task and to share risk and responsibilities, resources and benefits"[177]. Unlike the business-NGOs multi-stakeholder regulatory schemes referred to earlier, such tripartite model integrates more effectively different components of the regulatory process, including norm design, promotion, implementation, monitoring, certification, and complaints procedures. It is frequently associated with 'corporate social accountability' (CSA) approaches, which connect voluntary business CSR strategies with public policies in holding corporations accountable, but it is also diffused in many public safety regimes that integrate a supply-chain approach.[178] Interestingly, international institutions as well have shown over time an increasing interest in engaging in partnerships with non-State actors as a means of implementing effectively human rights as well as universally-recognised social and environmental standards and principles.

[175] P. Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"*, cit., at 1269.

[176] See A. Peters and I. Pagotto, *Soft Law as a New Mode of Governance: A Legal Perspective*, NEWGOV New Modes of Governance Project no. CIT1-CT-2004-506392, at: http://www.polsoz.fu-berlin.de/polwiss/forschung/international/atasp/media/downloads/antrag_arguing_and_persuasion.pdf, at 360; and, C. Ingelse, *Soft Law?*, (1993) Polish Yearbook of International Law 20: 74-90.

[177] Report of the UN Secretary-General on Enhanced Cooperation between the United Nations and All Relevant Partners, in particular the Private Sector, 15 August 2013, A/68/326, at para. 8.

[178] An innovative and successful example of PPP is the Extractive Industries Transparency Initiative (EITI). EITI brings together a broad array of stakeholders (governments, international institutions, corporations, civil society groups, investors and any other actors involved in the agricultural and clothing supply chains) so as to improve governance in resource-rich countries by monitoring business operations as well as government revenues from oil, gas and mining. On EITI see, L. Koechlin and R. Calland, *Standard Setting at the Cutting Edge: An Evidence-Based Typology for Multi-Stakeholder Initiatives*, in: A. Peters, L. Koechlin, T. Forster, and G. Fenner Zinkernagel (eds.), *Non-State Actors as Standard Setters*, Cambridge: Cambridge University Press, 2009, 84-112.

7.2. A crisis of legitimacy for international economic law?

The map of the global economic system looks gradually more as a 'heterarchical environment'[179] characterised by a plurality of public and private normative orders and actors. Using an artistic metaphor, we can image a theatre stage where "not only do we have too many instruments in the orchestra but the simultaneous participation of many orchestras, all following subtle variants of the international law score – itself a *symphonie inachevée* constantly being affected by the interpretation of the music by these many orchestras"[180]. This mosaic of many different disconnected pieces risks to undermine the way law is traditionally presented as a comprehensive, rational and systematic set of norms ensuring intelligibility and predictability of the international order, and consequently the effective integration of the international economic system itself in response to which transnational private regulation actually raised. Thus, a global, polycentric and network-based, regulatory space, which challenges legal centralism and requires a more pluralistic conception of both norm making and norm enforcement, generates demands for effective global governance encompassing "a broad, dynamic, complex process of interactive decision-making that is constantly evolving and responding to changing circumstances"[181].

In traditional legal understanding, the norms governing cross-border economic relations can, depending on their origin, be neatly categorised as belonging either to the domestic (public and private) law or to international economic law. Private and contract law offers the framework for private action, provided that it is carried out at and whose main effects can be localised at the domestic level, while being inadequate to perform regulatory functions at the global level. In this last respect, private international law plays an important background role in conditioning cross-border private regulation by determining the applicable law and solving conflict of laws. Yet it is generally very uncertain or even defensive about admitting a role for non-State norms.[182] As we have observed earlier, even traditional law merchant does not completely fit the new features of regulation in contemporary global governance. Notwithstanding their analytical and conceptualising functions, any legal conceptual framework that wishes to explain the norm making processes at the transnational level faces theoretical challenges when confronted with the nature, form and scope of regulation in a global context. Contemporary problems are indeed so highly interdependent in reality that cannot be neatly allocated to one or the other normative and institutional frameworks, this

[179] See J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit., at 138.

[180] K. Nicolaïdis and J.L. Tong, *Diversity or Cacophony?*, cit., at 1357.

[181] Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance*, Oxford/New York: Oxford University Press, 1995, at 4. In this report 'governance' is broadly defined as "[…] the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative actions may be taken" (at 2).

[182] For instance, under the Rome I Regulation (Regulation (EC) no. 593/2008, cit.) on the law applicable to contractual obligations in the EU the parties are allowed to choose exclusively a domestic system of contract law. A proposal from the European Commission to allow choice for non-State law was rejected during negotiations. For discussion see, J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, Oxford: Hart Publishing, 4th edition, 2010, at 505.

way making the traditional mode of classifying different areas into different fields substantially and methodologically inadequate.

Nevertheless, a quest for effective governance poses formidable challenges also to international economic law, and, from a theoretical perspective, to traditional thinking about the sources of international law and the methods by which they are created and enforced. Jan Klabbers goes as far as stating that "[g]lobalization seems to have bypassed the discipline of international law completely"[183]. Such a strong position may be understood if we consider the two main structural features that the Westphalian international order has exhibited since its inception. It traditionally focuses on the nation-State as a unitary actor and as the sole subject of rights and obligations. From this logically derives a dichotomy between legally binding norms ('hard law') and non-binding legal instruments ('soft law'), where, in principle, only the former can be held and enforced against States. Since only sovereign and equal States dispose of international legal personality, norms of international law only emerge when States consent to them as being legally binding. In fact globalisation takes the international legal system into uncharted territory by propelling a wide variety of non-conventional actors as both creators and subjects of an increasingly broad spectrum of non-conventional but still authoritative sources of regulation. These developments impact simultaneously on the three recognised axes of actors (governmental and inter-governmental institutions), processes (formal law-making) and outputs (international treaties and decisions of international institutions). In this respect, both a State-centred approach to international law and the limitation of sources exclusively to hard law are outdated concepts that cannot fit adequately the heightened complexities of contemporary regulatory governance.

Concerns over diversification are intrinsic to international economic law, because of the possible legal conflicts which multiple regulatory actors and sources may induce. Traditional positivist legal discourse is summoned to discuss the consequences of legal pluralism as an ill threatening the standing of international law through incompatibility or irrelevance. This is still more the case of the pluralisation of normative orders in contemporary age, which results from and, in turn, prompts a move away from an embedded system of law, represented by the territorial State and the derived international legal system, to global decentralised regulatory governance. By throwing up challenges of coordination and regulation along global value chains, globalisation unsettles and undermines in many ways the basic 'State-law' nexus, i.e. the assumption that law emanates exclusively from authoritative institutionalised processes grounded in a State-based system of norm making, implementation and adjudication. While State law will certainly continue to have "the Westphalian ambition to set the law for its citizens"[184], in practice law has come under considerable pressure by having to reassess its role in a more complex normative environment. In turn, this breaking-up of the State-law nexus redirects the attention to the 'context' as playing a crucial part in the assessment of the legal nature of norms and their processes of creation and implementation. Whereas State-

[183] J. Klabbers, *The Idea(s) of International Law*, in: S. Muller, S. Zouridis, M. Frishman, and L. Kistemaker (eds.), *The Law of the Future and the Future of Law*, The Hague: TOAEP, 2011, 69-80, at 71.

[184] J.M. Smits, *Private Law 2.0: On the Role of Private Actors in a Post-National Society*, The Hague: Eleven International Publishing, 2010, at 11.

centred legal theories were able to scrutinise the nature of legal orderings without regard to the environment or taking the environment for granted, this being confined within the boundaries of the State's territorial jurisdiction, legal globalisation challenges such practice in a fundamental way. The result is that, "[o]nce the reference framework, illustrated by assertions of the 'rule of law', 'legal unity', 'normative hierarchy' or the 'separation of powers', becomes questionable in a global setting, law's relation to its 'outside', its context, as it were, moves into the center of analysis"[185].

With the Westphalian order transforming into one of multiple rationales, such decentralisation and relativisation of the priory assumed monopoly of State-based institutions in norm production demands an adjustment of models to understand diversification processes and keep both traditional international law and new forms of regulation in check. This raises some fundamental questions: how can global economic governance be reconciled with the founding principles of international economic law? Or, conversely, what role should or could international economic law play in the global economic governance? Does the toolbox of international economic law take sufficient cognizance of those non-traditional actors and (softer) normative sources? Are the norms and institutions of the community of States ready to address today's global socio-economic reality in view of controlling, legitimising or, as the case may be, regulating non-traditional patterns of regulation?

Intuitively, it seems that "the orthodox Westphalian international legal order is not receptive of the postmodernism or of the ever changing scene in the international arena"[186]. Because of a concept of State sovereignty being more and more abstract in its scope and content and no longer as absolute as it traditionally was, this "asymmetry between theory and practice is becoming more acute, portending a crisis of legitimacy"[187]. The actors, processes and sources theorised as determinative by the dominant approaches to the study of international law and organisation have ceased to be of singular importance. Westphalian-inspired positivist conceptions of State-centricity and public definitions of authority are incapable of capturing the significance of non-State actors, informal normative structures, and private regulatory authority in global economic governance.

7.2.1. The subjects of the international economic system: On the way to a functionally-limited international legal personality?

Because of its Westphalian origins limiting its constituents to States as the sole subjects of rights and obligations, the international legal order does not have the capacity to govern directly the conduct of increasingly relevant non-State actors. Nevertheless, the evolving nature of the international system in the age of globalisation requires reconsidering or scoping

[185] P. Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance*', cit., at 1270.

[186] A.F. Maniruzzaman, *Global Governance, International Political Economy and the Global Legal Order: The Challenge Ahead*, (2004) Manchester Journal of International Economic Law 1: 4-14, at 6.

[187] A.C. Cutler, *Private Power and Global Authority*, cit., at 242.

differently the issue of the subjects of international (economic) law.[188] While it is indisputable that MNCs and internationally-active NGOs as essential engines of economic regulation are full actors of the international system, it is still common thinking that, "[e]ven though non-state actors exist, and, in some cases, […] have entered into international agreements, these actors do not enter into the process of creating general international law in an unmediated fashion"[189]. Thus non-State actors are ascribed no subjectivity in international law, the legitimacy of which remains intrinsically Westphalian. This is the reason why for many decades international law tried to dealing with the emergence of non-State actors by strengthening reliance on domestic legal orders. In this sense, it essentially clarified States' obligations in controlling private entities primarily under domestic law and expanded the scope of State responsibility to include the conduct of those entities.[190]

Nevertheless, in the face of non-State actors exhibiting more and more regulatory authority in themselves at a level transcending territorially-defined jurisdictions, State-based approaches have proven to be largely unsuccessful or, at best, to provide only partial answers. But, while there appears to be a widespread consensus towards the need for an international system addressing, first and foremost, MNCs in respect of their business operations across global value chains,[191] attempts to reach an agreement on specific standards of conduct have proven to be less promising.[192] A convention regulating the conduct of MNCs and defining the terms of their relations with host countries, mostly in the developing world, had been on the agenda of the UN since the 1960s and of the WTO more recently, without nevertheless ever materialising.[193] As consequence of this inability to reach consensus on hard law, much

[188] See, e.g., R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law: From the Traditional State Order towards the Law of the Global Community*, Berlin: Duncker & Humblot, 1999; and, G. Schuppert (ed.), *Global Governance and the Role of Non-State Actors*, Baden-Baden: Nomos, 2006.

[189] A.C. Arend, *Legal Rules and International Society*, Oxford/New York: Oxford University Press, 1999, at 176.

[190] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Official Records, Fifty-sixth Session, Supplement no. 10 (A/56/10), Chp.IV.E.1, 2001, Articles 4-11.

[191] Crucially, if domestic scrutiny and control over NGOs remains extremely limited, not a single inter-governmental instrument has so far disciplined their conduct. NGOs have faced criticism of lack of accountability matching their influence in the marketplace, as made readily apparent in successful NGO-instigated consumer boycotts. Despite that, NGOs are not subject to any international regulation other than their own internal rules or some third-party monitoring mechanisms that have recently put in place as a means for increasing their transparency and accountability to members, contributors and consumers at large.

[192] The efforts to reach an international agreement concerning the regulation of business operations worldwide have fostered competition among countries in attracting FDIs and created differences in the objectives of negotiations between developed countries on the one hand, and developing countries on the other. The former favours the adoption of norms promoting a level playing field, whreby investment decisions are based solely on competitive market factors; the latter often criticise developed countries to hoard FDIs for themselves and to deny the means to be internationally competitive. Actually, the context today is completely different from the late 1990s, when the OECD's MAI crashed and burned. Emerging economies, led by China, Brazil and India, have become in fact major investors, so that the North-South divide on investment issues is gradually closing. These changes make the WTO, not the OECD, the right forum for the possible negotiation of an Investment Framework Agreement (IFA).

[193] Concerns about a misperception of the WTO as being driven by and for MNCs and as actually providing incentives to them to act irresponsibly in developing countries induced the WTO Director-General to launch in 2002 the idea to extend the Doha Development Agenda (DDA) to include negotiations of a code of conduct for MNCs. Yet the idea gained no traction. For discussion see, S.A. Aaronson, *A Match Made in the*

effort was invested in creating a 'compliance pull' by pointing softly to the corporations' social, environmental and human rights responsibility. Following the very first adoption of the OECD's Guidelines for Multinational Enterprises[194] in 1976 and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[195] in 1977, the way in which the international legal system deals with matters of corporate responsibility entered a new stage in the late Nineties. In 1999, indeed, the UN Secretary General Kofi Annan launched the UN Global Compact[196] bringing on a voluntary basis the world's business community together with UN specialised agencies and major international NGOs in a multi-stakeholder effort to provide sustainable global economy with a social pillar. The Global Compact crystallises ten universally recognised principles and good practices concerning the protection of internationally proclaimed human rights, social and labour rights, and the environment, which MNCs are required to act on in their respective corporate domains.[197] Additionally, in 2003 the UN ECOSOC Sub-Commission on the Promotion and Protection of Human Rights adopted a set of Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, which formulates international human rights principles pertaining to such diverse areas as labour, health, environmental protection, non-discrimination and safety.[198] These Norms can be said to be the first comprehensive international human rights set of norms that specifically address corporations.[199]

Although remarkably successful in demonstrating how seriously non-State actors' involvement in global economic governance is being taken, in many respects these inter-

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Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO, (2007) Journal of World Trade 41: 629-659; and, E. de Brabandere, *Non-State Actors and Human Rights: Corporate Social Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, in J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 268-283.

[194] OECD Guidelines for Multinational Enterprises, cit. The Guidelines were further updated in 2011 to include additional recommendations on corporate responsibility for human rights protection and for supply chain management, the first such agreement in this area.

[195] Updating of References Annexed to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, March 2000, GB.277/MNE/3 (2000).

[196] See UN, *A Compact for a New Century*, Note by the UN Secretary General, 31 January 1999, SG/SM/6881.

[197] These principles were later on incorporated into the OECD's Guidelines and the ILO's Tripartite Declaration. For discussion see, V. Engström, *Realizing the Global Compact*, Helsinki: University of Helsinki, 2002; L. Whitehouse, *Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?*, (2003) Global Social Policy 3: 299-318; S. Hughes and R. Wilkinson, *The Global Compact: Promoting Corporate Responsibility?*, (2001) Environmental Politics 10: 155-160; A. Kuper, *Redistributing Responsibility. The UN Global Compact with Corporations*, in: T. Pogge and A. Follesdal (eds.), *Real World Justice. Grounds, Principles, Human Rights and Social Institutions*, Dordrecht: Kluwer Law International, 2005, 359-381; and, E.U. Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, (2002) European Journal of International Law 13: 621-650.

[198] UN ECOSOC Resolution no. 2003/16, 26 August 2003, E/CN.4/Sub.2/2003//12/Rev. 2.

[199] In this same regard on 16 June 2011 the UN Human Rights Council (HRC) endorsed the Report of the Special Representative of the Secretary-General John Ruggie (Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, A/HRC/17/31). On that see, R. Mares (ed.), *Business and Human Rights at a Crossroads: The Legacy of John Ruggie*, Leiden/Boston: Martinus Nijhoff, 2011.

governmental instruments have little in common with the traditional public-private mixes established in purely domestic settings. They are in fact "non-binding and, in an important sense, source-less, with the UN merely functioning as a clearing-house for corporations that voluntarily wish to subscribe to the principles […] enunciated"[200]. With the possible exception of the UN Norms, which make MNCs "subject to periodic monitoring and verification by [UN] and other international mechanisms already in existence or yet to be created"[201], these obligations are imposed only indirectly on corporations. International obligations rest upon the States. Overall, international law at present offers very limited possibilities to discipline or control the conduct of non-State actors when exercising norm making functions. It remains highly debatable whether non-State actors are more than just indirect addressees of international norms that are instead directly addressed to States.

This restrictive approach to international legal personality becomes more and more relative especially taking account of the most recent developments in the field of international investment law, which testify how MNCs increasingly carry rights of a more precise and enforceable nature than their alleged obligations.[202] Indeed, MNCs have been granted specific rights under a long series of regional and bilateral investment treaties. Unlike MNCs' obligations, those rights are, in most cases, of a hard law nature and can be directly enforced in compulsory investor-State dispute settlement procedures, such as NAFTA Chapter 11[203] or the International Centre for Settlement of Investment Disputes (ICSID)[204]. States and corporations being considered equal parties to a dispute, this necessarily implies an international legal standing of corporations. However, these developments do not result in a general acknowledgement to constitute the foundations of a separate subjectivity in international law.

Yet the need to extend the scope of legal personality when times are changing has been acknowledged by many. Already in 1949 the International Court of Justice (ICJ) took cognizance of the emergence and consolidation at that time of international organisations as relevant actors in the international legal system. In its famous advisory opinion on reparation for injuries the ICJ observed that, "[t]he subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States […] Such new subjects of international law need not necessarily be States or possess the rights and obligations of

[200] J. Klabbers, *Reflections on Soft International Law in a Privatized World*, cit., at 1197.

[201] UN ECOSOC Resolution no. 2003/16, cit., at para. 16.

[202] See P. Dumberry and E. Labelle-Eastaugh, *Non-State Actors from in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration*, in: J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 360-371.

[203] North America Free Trade Agreement, 8 December 1993 (into force 1st January 1994), 32 ILM 289 (1994), Chapter 11 ("Investments").

[204] Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (into force 14 October 1966), 575 UNTS 159 (1966).

statehood"[205]. In this line of reasoning, besides States as the original subjects of international law, international organisations are legally presumed to possessing the capacity of being *per se* subject of rights and duties under international law,[206] which entails treaty-making power and recognition of responsibility for any internationally wrongful act.[207] In a similar way, following one of the most significant legal developments of the XX century, international legal personality now embraces individuals as well, even though in the confined fields of international human rights law and international criminal law. In these same fields, international and regional treaties have assigned NGOs certain rights, such as own formal rights of complaints in quasi-judicial monitoring processes concerning human rights.[208]

Thus, in light of these judicial and normative developments, Lauterpracht pointed out that, "the range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the will of States and the requirements of international intercourse"[209]. Thereby, in the absence of any definitive, set in stone list of subject of international law, new legal personalities (both subjects and creators of law) may emerge with changing times based on the primary source of international law, that is, practice and recognition. In this same line of reasoning, in the 1950s the New Haven school attributed ever less importance to the doctrine of personhood by proposing to blur the distinction between

[205] See ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174, at 174. Even though the ICJ made these statements only with respect to the UN, they are today widely recognised as being valid for any international organisation: see ILC, *Draft Articles on the Responsibility of International Organizations - Report of the International Law Commission*, Fifty-fifth UNGA Session, 2003, A/58/10 (in: Yearbook of the International Law Commission, 2003, Vol. II - Part II, A/CN.4/SER.A/2003/Add.1).

[206] *Ibidem*, Article 2.

[207] *Ibidem*, Article 3. While there is no formal definition of 'international organisation' under international law, there is a common understanding that for a body to being qualified as such it must: (i) be found by some form of international agreements (ii) concluded between States; (iii) show autonomy or will on its own; and (iv) possess international legal personality. For analysis see, H.J. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden/Boston: Martinus Nijhoff Publishers, 2003, at 29.

[208] See Article 3 of Additional Protocol to the European Social Charter, 9 November 1995, 34 ILM 4457 (granting the right to collective complaints). See also Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, Council of Europe, 24 April 1986, ETS 124 (1986); Fundamental Principles on the Status of Non-Governmental Organisations in Europe and Explanatory Memorandum, cit.; Participatory Status for International Non-Governmental Organisations with the Council of Europe, cit.; Status of Partnership Between the Council of Europe and National Non-Governmental Organisations, Council of Europe, 19 November 2003, Res(2003)9. It is broadly accepted that the construction of an international human rights regime results in the erosion of the domestic jurisdiction (*domain reservé*) of the State. The consequent recognition of the individual as subject of international law is a central element in realising that "[i]t is no longer possible, as a matter of positive law, to regard States as the only subjects of international law" (R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edition, Oxford/New York: Oxford University Press, 2008, at para. 375). As noted by the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in the *Tadic* case, "[d]ating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies" (ICTFY, Prosecutor v. Dusko Tadic, Judgment of 2 October 1995, Case IT-94-1-AR72, 35 ILM 32, at 55).

[209] H. Lauterpacht, *The Subjects of International Law*, in: E. Lauterpacht (ed.), *International Law: The Collected Papers of Hersch Lauterpacht. Volume I: 'The General Works*, Cambridge: Cambridge University Press, 1970, at para. 48.

international legal 'persons' and other 'actors'. International law was conceived as a 'process' of decision in which, in addition to the representatives of States, a much wider range of 'participants' is engaged, this allowing for a more accurate picture of actual participation. While this approach was not espoused by other legal theories,[210] more recently some strands of the legal doctrine have begun assuming that, although non-State actors are not *de jure* or full subjects of international law, their inclusion in the international legal system can still be paraphrased in terms of a 'confined', 'secondary', 'indirect', or 'limited' subjectivity.[211]

In conclusion, the question of legal personality is primarily to be found at two levels: first, whether non-State actors possess international rights and obligations in themselves and are directly subject to substantive international law; second, whether those same actors can be held responsible for international wrongful acts. If one accepts a set of independent obligations for non-State actors along with accompanying responsibilities, these will most likely co-exist with States' obligations and responsibility. The relationship between these independent responsibilities will have to be determined case-by-case but, arguably, also as matter of principle in a coherent and systematic way. The question thus arises: when (if at all) should international law impose obligations directly on non-State actors instead of getting a commitment from States that they will ensure compliance under domestic law? In this respect, a couple of observations need to be made. On the one hand, as we have repeatedly observed, the global reach of non-State actors can no longer be controlled by the bound jurisdiction of domestic law. Even the fall-back of enforcement of international legal obligations directly before domestic courts is fragile and exhibits many limitations.[212] On the other, although

[210] For a recent re-assessment of the New Haven School's thought see, A. D'Amato, *Non-State Actors from the Perspective of the Policy-Oriented School: Power, Law, Actors and the View from New Haven*, in: J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 2011, 64-75.

[211] See in this sense, J. d'Asprement, *Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law*, in: J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 23-40; and, C. Walter, *Subjects of International Law*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, Oxford/New York: Oxford University Press, 2008, 634-643. The emergence of non-State actors as regulators well beyond the domestic arena has been reflected in the work of the ILC. Since the primary addressees of its work are States, in its early years the ILC gave little (if any) attention to non-State actors. It is only in more recent years that it has started to pay some attention to the role and status of non-traditional actors especially when their activity affects directly inter-State relations and the growing need for creating or improving the necessary legal framework to regulate this phenomenon. Thus, the ILC included in its work programme a list of potential topics, which would be relevant to non-State actors, such as: State responsibility for non-State actors whose conduct can be attributed to a State (culminated in the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts); responsibility for non-State actors, namely individuals, for violations of international law; and non-State actors as direct addressees of rights and obligations under international law (this category concerning mainly human rights issues). See G. Zyberi, *Non-State Actors from the Perspective of the International Law Commission*, in: J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 165-178.

[212] Recent US case-law under the 1789 Alien Torts Claim Act shows a reluctance to subject MNCs' statements or conduct in the social field to the disciplines of unfair competition laws or the Alien Torts claims act. Specifically, an interesting development in respect of domestic control over CSR is the 2003 *Nike, Inc. v. Kasky* case ((2003) US Supreme Court 539: 654 n. 02/575). This case tested the limits of domestic unfair competition and consumer protection laws as a means to control CSR, in particular, to check whether MNCs really comply with codes of good conduct or international norms when they claim to do so. The reach of the US Alien Torts Claim Act was even more restricted by the landmark *US v. H. Alvarez-Machain et al.* case ((2003) US Supreme Court 539: 485 n. 03/339). In its very first opinion on the more than 200 years old Alien Torts

jumping the State level may make non-State actors more directly accountable, it does away nevertheless with the main source of legitimisation of international law, namely State consent and recognition. It follows from those observations that, in the current state of development of international law, "the emancipation of non-State actors from partakers in the international legal system whose conduct could be attributed to a state, giving rise to state responsibility to them becoming participants in their own right with ensuring rights and obligations"[213] would require a true paradigm shift.

7.2.2. The legal nature of transnational private regulation: Towards a pluralist concept of international economic law?

The fact that non-State actors are not generally deemed to enjoy international legal personality means that they cannot create but only, if anything, catalyse the formation of international hard law.[214] By themselves, they can produce other different sorts of authoritative norms, which in a traditional conception of law are strictly voluntary and therefore legally non-binding. A central assumption here is that economic globalisation is the primary cause of a 'diversification' of sources of regulation, that is, the move away from the traditional international law 'core'. Many of the sources governing cross-border economic relations are said to circumvent the formalities of international law and, consequently, be "devoid of the guarantees that come with law"[215]. Such a 'de-formalisation'[216] of norm production that results from the emergence of non-conventional actors in the global regulatory space, together with the asymmetric treatment of States and non-State actors as subjects of international law, ultimately radicalises the tension between formal law and other spontaneously evolving norms. The legal discourse on the sources of international economic law is today confronted

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Claim Act, the Court ruled in favour of a restrained conception of the discretion a federal court should exercise in considering domestic enforcement of international law. In particular, the Court held that federal courts should not recognise claims under federal common law for violations of any international law norm with less definite content than the XVIII century paradigms familiar when the Alien Torts Claims Act was enacted. See the analysis of these cases before the US Supreme Court carried out in J. Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat'?*, in: C. Joerges and E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Oxford: Hart Publishing, 2nd edition, 2011, 199-227.

[213] G. Zyberi, *Non-State Actors from the Perspective of the International Law Commission*, cit., at 165.

[214] On MNEs as makers of international hard law see, notably, S. Tully, *Corporations and International Law-Making*, Leiden/Boston: Martinus Nijhoff, 2007. NGOs' contribution to or influence on international law-making has traditionally occurred in the fields of human rights and humanitarian law and more recently in the environmental field, as well; conversely, only to a lesser extent this has happened in the economic area. On that see, e.g., S. Charnovitz, *Nongovernmental Organizations and International Law*, (2006) American Journal of International Law 100: 348-372; A.K. Lindblom, *Non-Governmental Organisations in International Law*, Cambridge: Cambridge University Press, 2005; P. Dupuy and L. Vierucci (eds.), *NGOs in International Law*, Cheltenham/Camberley/Northampton: Edward Elgar, 2008; and, G. Breton-Le Goff, *L'Influence des Organisations Non Gouvernementales (ONG) sur la Négociation de Quelques Instruments Internationaux*, Brussels: Bruylant, 2001.

[215] J. Klabbers, *The Idea(s) of International Law*, cit., at 79.

[216] See J. d'Aspremont, *La déformalisation dans la théorie des sources du droit international*, in : H. Dumont, P. Gerard, I. Hachez, and F. Ost (eds.), *Les sources du droit revisitées. Volume IV: La théorie des sources du droit*, Brussels: Anthémis, 2013.

with questions that go far beyond the traditional functional explanations for soft law (e.g., the relative costs and benefits of hard *versus* soft law).[217] Rather, the correct perspective from which addressing law in contemporary age is no longer a matter of law's limits, i.e. whether non-conventional forms of regulation are legally relevant by and in themselves, but whether their relevance requires us to treat them as they were law in a legal system originally defined by the international legal core. In this respect, how much flexibility, i.e. deviation from the core, ought to be allowed or tolerated or even encouraged?

Cross-border economic relations are a prime example of normatively relevant activities that cannot be explained by reference to the classic sources of international economic law as conventionally identified by the list provided in Article 38(1) of the ICJ's Statute.[218] This provision has become so deeply rooted into the theory and practice of international law that, instead of just providing a tool for the adjudication of disputes before the ICJ, embodies what the doctrine calls the 'source thesis' for the "configuration of formal ascertainment of international law"[219]. The source thesis brings an appearance of formalism understood as "an exhaustive, strict, objective, clear and predefined standard of law ascertainment, this is a

[217] 'Soft law' is a vague and elusive concept that identifies substantively a residual or negative category in the absence of hard law. See in this respect, K.W. Abbot and D. Snidal, *Hard and Soft Law in International Governance*, cit., at 422 ("[t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation […] and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions"); P.M. Dupuy, *Soft Law and the International Law of the Environment*, (1991) Michigan Journal of International Law 12: 420-435, at 420 (defining 'soft law' as "a paradoxical term for defining an ambiguous phenomenon. Paradoxical, because, from a general and classical point of view, the rule of law is usually considered 'hard', e.g., compulsory, or it simply does not exist. Ambiguous because the reality thus designated, considering its legal effects as well as its manifestation, is often difficult to identify clearly"); and, C. Ingelse, *Soft Law?*, cit., at 79 ("There should either be law or non-law; law is not soft. It would be a contradiction *in terminis*").

[218] Statute of the International Court of Justice, annexed to the UN Charter, 26 June 1945 (into force 31 August 1965), at: http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0. Article 38(1) reads as follows: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[219] J. D'aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, Oxford/New York: Oxford University Press, 2011, at 148-194. Following the most part of the international doctrine, Article 38(1) (that actually reflects the very same text contained in the Statute of the former Permanent Court of International Justice) embodies what is believed the customary international law governing the sources and, consequently, law ascertainment of international law. In fact "[…] since the function of the Court is to decide disputes submitted to it in accordance with international law and since all member states of the UN are *ipso facto* parties to the Statute by virtue of article 93 of the UN Charter, there is no serious contention that the provision expresses the universal perception as to the enumeration of the sources of international law" (M. Shaw, *International Law*, Cambridge: Cambridge University Press, 6th edition, 2008, at 67; similarly, D. De Velasco, *Manuel. Instituciones de Derecho Internacional Público*, 15th edition, Madrid: Tecnos, 2005, at 113). On the other hand, a minority of international legal scholarship claims that, "[t]hese provisions [referring also to Article 59] are expressed in terms of the function of the Court, but they express the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law. Yet the article itself does not refer to 'sources' and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources" (I. Brownlie, *Principles of Public International Law*, Oxford/New York: Oxford University Press, 7th edition, 2008, at 23).

seemingly simple way to distinguish law from non-law"[220]. This is the reason why the declarative list in Article 38(1) is said to identify the 'formal' sources of international law (namely, international conventions, international custom, and general principles of law recognised by civilised nations) that freeze the boundaries of international law making to States as 'the' makers and enforcers of law.[221] In that way, Article 38(1) underlies the argument that law owes much of its utility to its 'simplifying rigor'[222], that is, its ability to turn the complexities of reality into workable dyads of legally bindingness and non-bindingness, hard and soft law, or, otherwise, law and non-law (the 'binary nature of law'[223]). A clear-cut categorisation distinguishing law from non-law and reducing international law to only those legal developments that are underpinned by State consent would inevitably constrain a multitude of socio-economic phenomena into potentially distorting categorisations. By admitting sources that *prima facie* fall outside the traditional scope of international economic law, the global regulatory space makes it evident that the "formalism is alien to the foundation of global law (though central to the ideology of the law-state)"[224] and that "[t]he focus is on function rather than form"[225]. Such a reconceptualisation of law leads to move from an *ex ante* perspective concerning the formal criteria of validity and normativity to an *ex post* perspective foremost concerned with the regulatory function of norms and the way in which norms operate. While non-conventional regulatory actors and processes lack the requisite forms and do not meet the threshold required by international law, they nonetheless may matter, that is, may be able to produce certain practical and even legal effects, such as affecting formal law making and restricting individual freedom. In other words, a norm developed outside of international law may be just as effective, or quite possibly even more effective, as formal international law. In this sense, since in its effects it is often indistinguishable from hard law, transnational private regulation may still qualify as a legally relevant normative phenomenon. A norm does not necessarily become less binding as the need for State consent lessens. Jan Klabbers convincingly coined the concept of 'presumptive law' arguing that "in international affairs, emanations that are of normative significance and that are based on some form of consent by the relevant actor, must be

[220] F.A. Cárdenas Castañeda, *A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin*, (2013) Anuario Mexicano de Derecho Internacional 13: 355-403, at 362.

[221] This understanding of Article 38(1) as addressing exclusively inter-State relations was undertaken by ICSID, *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm, at para. 40 ("[t]he term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the [ICJ], allowance being made for the fact that Article 38 was designed to apply to inter-State disputes"). In addition, Ian Brownlie critically acknowledges that, "the use of the term 'formal source' is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law […]" (I. Brownlie, *Principles of Public International Law*, cit., at 23).

[222] See P. Weil, *Towards Relative Normativity in International Law?*, cit.

[223] See J. D'aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford/New York: Oxford University Press, 2011, at 128.

[224] L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century*, cit., at 180 (defining 'global law' as "the law of non-state governance systems").

[225] *Ibidem*, at 184.

presumed to be legally binding"[226]. Gunther Teubner goes as far as characterising transnational private regulation as 'law' that does not belong to the competence of State-based law-making, but is the result of a "self-reproducing, worldwide legal discourse"[227], the centre of which is a "self-regulatory contract that establishes a whole private legal order with a claim to global validity"[228].

To sum up, what characterises transnational private regulation is not so much that it is legally non-binding under traditional conceptions of international economic law, but rather that it is outside of traditional international economic law altogether.[229] Therefore, it cannot be identified with soft law, at least in its traditional conception. Underlying the soft law debate is, indeed, the assumption that, despite its legally non-binding character, it nonetheless still clearly aims at the exercise of public power by public authorities. Thus, it is usually identified as being international soft law with inter-governmental institutions primarily involved in fashioning international soft norms. On the other hand, following the fading out of the public-private distinction in the global regulatory space, in the last few years the wording, if not the concept, of soft law has been extensively used in legal literature to denote any kinds of regulation that would not qualify as formal sources of international law, including modes of regulation adopted by non-State actors.[230] After all, the very first origins of soft law are rooted in the age of the medieval legal pluralism, when the diffusion of law merchant was the principal cause of the vulgarisation of law as recognition of multiple norm making processes

[226] J. Klabbers, *International Courts and Informal International Law*, in: J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, cit., 219-240, at 220.

[227] G. Teubner, *Global Bukowina*, cit., at 12.

[228] *Ibidem*, at 16-17. In this respect, pursuant to Article 38(1) of the ICJ's Statute and in light of Articles 2.1(a) and 3 of VCLT, treaties must be recognised by States or other subjects of international law. This apparently excludes any other actors. Conversely, for custom and general principles of law there is no explicit reference to States. Custom is defined as "evidence of a general practice accepted as law", without specifying explicitly who must have accepted this practice as law. General principles of law, in turn, must be "recognized by civilized nations", where the word 'nation' could be understood more broadly than State alone. Both "custom and general principles thereby leave the door open to new actors as well as new types of processes and outputs" (J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, cit., at 34-35). See also S.J. Toope, *Formality and Informality*, in: D. Bodansky, J. Brunnée, and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford/New York: Oxford University Press, 2007, at 108.

[229] See J. d'Aspremont, *From a Pluralization of Norm-making Processes to a Pluralization of Our Concept of International Law*, in: J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, cit., 185-199; and, P. Schiff Berman, *A Pluralist Approach to International Law*, (2007) Yale Journal of International Law 32: 301-329, at 302 (referring to "multiple normative communities, some of which impose their norms through officially sanctioned coercive force and formal legal processes, but many of which do not", and adding that "it has become clear that ignoring such normative assertions altogether as somehow not 'law' is not a useful strategy").

[230] One of the most comprehensive definitions of 'soft law' is that of a set of "[i]nstruments ranging from treaties, but which include only soft obligations (legal soft law), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations (non-legal soft law), to statements prepared by individuals in a non-governmental capacity, but which purport to lay dawn international principles" (C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, (1989) International and Comparative Law Quarterly 38: 850-866, at 851). In a similar way see, K. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in: T.J. Biersteker, P.J. Spiro, C.L. Sriram, and V. Raffo (eds.), *International Law and International Relations: Bridging Theory and Practice*, London: Routledge, 2007, 166-178.

creating a recognisable tension between unity and plurality.[231] Even more so, in the age of global economic governance the notion of soft law is required to take on different dimensions when placed against the background of multiple normative orders in which a rigid distinction between the public and private domains can no longer be accepted in the face of hybrid and co-regulatory approaches.[232]

7.2.3. Formalism and the diversification of sources: Fragmentation or adaptation?

One of the most notable critiques of legal formalism is the assumption (or the belief) that the whole universe of international law-making relies upon State consent as its constitutive factor and that the intent to be bound by a norm is always present whether explicitly or implicitly. Traditional legal discourse on the binary nature of law is the result of a persisting association of law making authority with the State embedded in the State-law nexus referred to earlier, with private orderings being conversely relegated to the private realm of non-law. After all, this is the parameter set by the Westphalian order, whereby international law is construed as 'a minimum normative standard'[233] to regulate relations between equally sovereign States. Traditional legal positivism, which is attracted to hierarchical approaches and gripped with the Schmittian anxiety of disorder and internal inconsistency of law if one cannot identify who (or what ultimate norm) decides, considers hardness as the quintessence of law.[234] In line with this positivist paradigm, some suggest that international law should maintain a fairly clear dividing line between law and alternative forms of regulation, since "everything that somehow comes to be as providing normative guidance to actors must, somehow, be law, be it hard or soft, to which others can then reply that if the normative effects are what matters, then everything can be law, and if everything is law, then nothing is"[235]. In other words, "[i]f everything is law, law loses its analytical (and possibly also its normative) force"[236]; even more, its mere existence and increasing use "might destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose"[237].

Making consent a prerequisite for norm formation is, nevertheless, a function of whether sovereignty is still deserved or not. States have modelled international law to both serve and

[231] See A. Robilant, *Genealogies of Soft Law*, (2006) American Journal of Comparative Law 54: 499-554; and, T. Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"*, (1985) McGill Law Journal 30: 37-88.

[232] For instance, it has been observed that "[s]tandards hover between the state and the market; standards largely collapse the distinction between legal and social norms; standards are very rarely either wholly public or wholly private; and can be both intensely local and irreducibly global" (H. Schepel, *The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing, 2005, at 3).

[233] F.A. Cárdenas Castañeda, *A Call for Rethinking the Sources of International Law*, cit., at 361.

[234] The conceptualisation of 'hardness' and 'State consent' as the *quintessence* of international law has been qualified as the "apology" in international law (see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge: Cambridge University Press, 2005).

[235] J. Klabbers, *Reflections on Soft International Law in a Privatized World*, cit., at 1194.

[236] M. Koskenniemi, *Global Legal Pluralism*, cit., at 16-17. See also S.E. Merry, *Legal Pluralism*, (1988) Law and Society Review 22: 869-896, at 878 (claiming that, "calling all forms of ordering that are not State law by the term law confounds the analysis").

[237] P. Weil, *Towards Relative Normativity in International Law*, cit., at 423.

constrain the cardinal principle of sovereignty, i.e. to serve "to preserve the state, its territorial integrity and the primacy of the state (and law) as the paramount systems for asserting governance power in a context in which there were no governance gaps between states"[238]. In this respect, advancing one of the most influential ideas of Prosper Weil we can say that, what is changing dramatically today is not only the nature of international economic law but the nature itself of law has becoming more and more 'relative'[239]. Globalisation is confronting the State with a set of problems and concerns which confront the limits of territorial jurisdictions, but which also "defy the limits of law as a mode of governance and regulation"[240]. Thereby, the source thesis appears to be increasingly inadequate, if not insufficient, to grasp the reality of norm formation in contemporary economic governance and to offer a satisfactory blueprint for law ascertainment out-of-the-box of international economic law. The formal sources alone are not equipped either to give consequential voice to complex and increasingly intertwined global issues or to theorise contemporary developments that do not fit within the Westphalian paradigm of authority and law making.

In the light of the above, the increased potential for diversification in the sources of international law away from its traditional core is the by-product of rather fundamental developments in the global economic system and serves as a way of getting around the tension arising from the asymmetry between State, as both subject and objects of international law, and non-State actors. As consequence of that, rather than a sign of schizophrenic fragmentation, the pluralisation of the sources of regulation "should not be considered a 'normative sickness' but rather a symbol of contemporary times and a product of necessity"[241] or, in other words, an indicator for the intrinsic capacity of the international system of effectively adapting to contemporary needs for prompt reaction to fast-evolving global concerns. Diversification is, in the end, the handmaid of the increasing de-formalisation of international economic law, which is prompted by and, in turn, propels the fading out of the public-private distinction and the difficulties in enacting traditional sources of law in a fast-changing global regulatory space. At least in some areas, it entails inherently coherent solutions that ultimately may prove to be outcome superior and lead to more efficient regulation. After all, international law has long accommodated some variation along the legally binding *versus* non-binding spectrum in the form of hard and soft law, the latter being the natural consequence of and adaptation to the development and consolidation of the status of inter-governmental organisations as international legal subjects and forums for law-making.[242]

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[238] L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century*, cit., at 188.

[239] See P. Weil, *Towards Relative Normativity in International Law?*, cit., at 421.

[240] H. Willke, *Governance in a Disenchanted World*, cit., at 17.

[241] P.M. Dupuy, *Soft Law and the International Law of the Environment*, cit., at 421.

[242] The discussion on international soft law raised in the 1970s when newly independent States sought to benefit from and take advantage of the UN General Assembly resolutions. Those States created as result of de-colonisation "[…] speculated on the utilization of 'soft' instruments, such as resolutions and recommendations of international bodies, with a view toward modifying a number of the main rules and principles of the international legal order" (P.M. Dupuy, *Soft Law and the International Law of the Environment*, cit., at 421.

8. Reconceptualising the role and forms of regulation in the age of globalisation

To conclude, in this chapter we have discussed the changing structure of international economic law in the face of globalisation. With issues and issue-domains that increasingly escape to the regulatory capacity of the territorially-bound nation-State, the Westphalian State-based international system exhibits considerable normative weaknesses that find visibility in the increasing influence of non-conventional actors (primarily multinational corporations and NGOs), sources (deformalised and soft law instruments), and patterns of regulation (inter-agency cooperation, trans-governmental regulatory networks, and transnational private regulation in the form self-regulation, co-regulation, management-based regulation, and other private systems of governance). While this calls for reconfiguration of the public-private relationship, the increasing 'legalisation' of the international system raises inevitably the question of the legal nature of the multitude of norms that govern global economic relations.

Actually this question is an echo of much deeper-running concerns about the fundamental transformation of regulation to keep pace with societal evolution and to adapt law to a however interpreted, ever-changing environment. In a broader systemic perspective, we can affirm that, by reflecting the flexibility and adaptability of the international system when the founding principle of sovereignty is itself undergoing considerable recalibration, the diversification of the sources can be regarded as a sign of international law having reached a certain level of maturity and seeking to increase its own societal relevance.[243] The contemporary configuration of the international system is "the result of reality modelling international law, of international practice modelling the sources"[244], instead of the other way around. In the end, the increasing path of international legalisation that characterises present-day international relations comes to strengthen the rule of law and to shape a more egalitarian and pluralistic view of international law.[245]

Similar considerations are expressed in M. Byers, *Custom, Power and the Power of Rules*, Cambridge: Cambridge University Press, 1999).

[243] See M. Koskenniemi and P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, (2002) Leiden Journal of International Law 15: 553-579, at 575.

[244] F.A. Cárdenas Castañeda, *A Call for Rethinking the Sources of International Law*, cit., at 369.

[245] See J. Braithwaite, *Prospects for Win-Win International Rapprochement of Regulation*, in: S. Jacolds (ed.), *Regulatory Cooperation for an Interdependent World*, Paris: OECD Publications, 1994 (suggesting that international regulatory processes may actually enhance democracy where they are open to a wider variety of stakeholders than many domestic processes and where they allow for more open contestation of policies). On the need for more democratic international processes especially by incorporating human rights into the considerations of international economic law see the long-term research work carried out by Ernst Ulrich Petersmann: see, among the others, E.U. Petersmann (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, Oxford: Oxford University Press, 2005; *Id.*, *Constitutionalism and WTO Law: From a State-centered Approach towards a Human Rights Approach in International Economic Law*, in: D.L. Kennedy and J.D. Southwick (eds.), *The Political Economy of International Trade Law*, Cambridge: Cambridge University Press, 2002, pp. 32-67; *Id.*, *European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO*, in: G. de Burca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Aspects*, Oxford: Hart Publishing, 2001, 81-110; *Id.*, *From 'Member-Driven Governance' to Constitutionally Limited 'Multilevel Trade Governance' in the WTO*, in: G. Sacerdoti, A. Yanovich, and J. Bohanes (eds.), *The WTO at Ten: The Role of Dispute Settlement*, Cambridge: Cambridge University Press, 2006, 86-110; *Id.*, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in: C.

Altogether, transnational private regulation taking place in so differentiated areas and forums of different forms and shapes leads to remarkable variances in the way it serves as a common mode of regulation and makes it difficult to daw general conclusions with regard to its role *vis-à-vis* international economic law. The potential of private regulation in improving governance is conditional. It is often hedged and subject to numerous case-specific *caveats*. In this respect, the literature is largely policy-oriented and essentially diagnostic for the management of non-conventional forms of regulation with a concern for internal governance rather than broader analysis. Therefore, in view of making our theory contributing in a noteworthy way to the understanding of significant transformations in regulatory governance, we need to incorporate a high degree of empirical evidence and insightful views on existing private and hybrid forms of regulation that apply to cross-border economic activities. Thereby next chapters will seek to substantiate and operationalise the overarching theoretical framework we come to illustrate by deriving testable hypotheses from a specific transnational regulatory regime. Specifically, we will assess the role and function of private regulation in the food regulatory regime, with a particular emphasis on food safety private standards in global supply chains. We will seek to provide an answer to the question of whether transnational private regulation can be a full-grown regulatory element for effectively tackling global food safety risks and we will look ahead at the likelihood of changes that could occur in the current architecture of the food governance regime.

Joerges and E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd edition, 2011, 5-57; *Id., Challenges to the Legitimacy and Efficiency of the World Trading System*, (2004) Journal of International Economic Law 7: 585-604; and, *Id., International Economic Law in the 21st Century: Need for Stronger 'Democratic Ownership' and Cosmopolitan Reforms*, (2011) Polish Yearbook of International Law 31: 9-46.

CHAPTER TWO

FOOD SAFETY REGULATION IN GLOBAL VALUE CHAINS: EMERGING CONTOURS OF A META-FRAMEWORK FOR A CHANGING LANDSCAPE

> "Global food safety […] will be even more prominent in the future, given the ever-increasing international trade in foods, the rapid advancement of food technology, and the rising concern of consumers about the risk of food products.
> The global governance of food safety issues, with its substantial implications for international trade, public health, institutional design, and regulatory theory, remains an unclaimed territory in the world of legal scholarship"[246].

9. Global food safety management: Public regulation and the prominent role of private controls in the shaping of a global regulatory framework

The regulatory governance of agricultural and food markets was subject to dramatic changes in the turn of the XXI century.[247] In line with a general trend, food systems worldwide experienced significant levels of integration and cross-border expansion, which have greatly changed traditional patterns of production, distribution and consumption of food on a global scale. Expansive value chains allow a continuous stream of high-volume, low-price, greatly diversified both commonplace and exotic fresh products to be provided for on a year-round basis; similarly, most processed food is made up of a variety of ingredients that are not just locally obtained but drawn from multiple countries and then exported to distant locations for consumption or further processing. Such globalised trade structures raise formidable regulatory challenges when they come to the safety of food.

Food safety is an issue that has been for long intensely local, because it is local conditions and preferences that have in practice markedly affected the ways in which a territorial community regulates its own food supply and perceives food safety risks. That is why for more than a century now it has been the role of domestic authorities to take the lead

[246] C.F. Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, (2011) Virginia Journal of International Law 51: 637-696, at 695.

[247] For the purposes of this work, 'food' means any substance, whether processed, partially processed or unprocessed, intended to be or reasonably expected to be ingested by humans. It follows from this definition that 'food' does not include feed, live animals, plants prior to harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic and psychotropic substances, residues and contaminants.

in norm making and enforcing compliance with food regulations aimed at protecting human health from foodborne risks for the benefits of their own citizens. Following the establishment of the Food, Drug and Insecticide Administration (FDA) in the US in 1927, virtually all countries established their own agencies entrusted with the task of protecting and promoting human health, with specific focus on food safety and consumer protection.

Conversely, global sourcing of food, together with advances in the use of technology in food production and processing, creates new sources of risk as food is subject to greater transformation and transportation and supply chains are globally fragmented, with importing countries made unable to control effectively violations taking place in exporting countries. Although increasingly exact methods of detecting actual or potential sources of foodborne hazards have been deployed, imported food can in fact either introduce in domestic systems new non-endemic risks or re-introduce risks that were previously controlled, and rapidly spread contamination across borders. That way, regulatory failures in food safety management in one country can pose substantial risks to other countries and affect consumers well beyond the local source. In other words, foodborne hazards are more and more global in nature and scope, such that food safety has become a matter of ever-increasing global concern and the enhancement of health security a 'global public health challenge'[248].

In such context, legal requirements for food safety controls – inspection, surveillance and monitoring – intended to prevent or eliminate food safety hazards or to reduce these to an acceptable level are increasing considerably along the entire food chain, from primary production through food processing and the distribution system to final consumers. Nevertheless, differently from the past the role of domestic authorities in framing these controls is subject to enhanced scrutiny. The trans-boundary dimensions of food safety in contemporary age come in fact to challenge the territorially-bound jurisdiction of the nation-State. With increasingly global food value chains, along which foodborne hazards are able to rapidly affect a considerable number of countries, traditional 'command-and-control' regulation – i.e., State governments enacting food legislation and enforcing compliance with domestic law – proves to be ineffective and inflexible, as well as financially unsustainable and leaving too much responsibility for public authorities.[249] In this respect, while the

[248] WHO, *Foodborne Disease Outbreaks: Guidelines for Investigation and Control*, Geneva: WHO, 2008, at v. Based on the effects of cumulative exposure and impacts on sensitive populations, epidemiological data from many countries around the world showed substantial increases in the rate of foodborne infectious disease from the 1970s to the 1990s: see, e.g., F.K. Käferstein, Y. Motarjemi, and D.W. Bettcher, *Foodborne Disease Control: A Transnational Challenge*, (1997) Emerging Infectious Disease 3: 503-510; and, WHO, *The Present State of Foodborne Disease in OECD Countries*, (edited by J. Rocourt, G. Moy, K. Vierk, and J. Schlundt), Geneva: WHO, 2003 (recognising that the current levels of disease reflect the story of investments in foodborne hazards surveillance and institutional safeguards). In addition, public health scientists recognised that newly emerging foodborne pathogen hazards linked to disease in humans or to a specific food exhibit increased microbiological strength, resistance, and adaptation, so that they have more serious health consequences relative to the past: in this sense see, R. Tauxe, *Emerging Foodborne Diseases: An Evolving Public Health Challenge*, (1997) Emerging Infectious Disease 3: 425-434. Overall, the impact of foodborne illness is undoubtedly higher in developing than in developed countries.

[249] In this sense see, e.g., C. Ansell and D. Vogel, *The Contested Governance of European Food Safety Regulation*, in: C. Ansell and D. Vogel (eds.), *What's the Beef? The Contested Governance of European Food Safety*, Cambridge: The MIT Press, 2006, 3-32; and, M. Everson and E. Vos, *European Risk Governance in a*

coordination of governmental sanitary measures has proven to be by no means possible without international regulatory cooperation, ensuring food safety is in fact considered "a basic requirement to doing business in the food sector"[250] and "a must in nowadays globalised food market"[251]. Hence, global food safety challenges call for global food safety governance. Global sourcing might put at risk the brand reputation of food chain actors that made heavy investments in "reputational capital"[252], – that is, the production and preservation of a brand throughout the value chain in a consistent manner over time – such that the negative consequences of even a single food safety failure in terms of loss of reputation and hence market share tends to breed high levels of risk adversity. That is why the early Nineties saw the stead emergence and proliferation – in quantity and importance – of alternative forms of safety-related norm making, conformity assessment, and enforcement, whereby non-governmental, private actors are assuming larger pivotal roles than ever before by taking the initiative to develop good practices for food safety and by integrating the whole chain into their quality concepts. It is especially in the EU – the world's largest export market for fresh and processed agri-food products and the most sophisticated environment in international markets for food safety and quality standards – that non-conventional constellations of actors and forms of regulation have become key elements of contemporary food safety regulatory governance, compared with the past when national and international institutions regulated, for better or for worse. The increasing relevance of private relative to public regulation and a particularly developed supply-chain approach intended to overcome the limits of State regulatory capacity at the global level contribute significantly to characterise food safety as "the most dynamic field in international product safety regulation"[253].

The above referred alternative norm setting, conformity assessment and enforcement institutions include, most notably, an ever-growing set of private standard setters, auditors and certification bodies that operate alongside official regulatory regimes. While standards are ubiquitous to any market sector and serve a fundamental role in the organisation of value chains for most products and services, global food systems enhance the role of standards in the management of food safety and food supply chains than ever before. A survey conducted

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Global Context, in E. Vos (ed.), *European Risk Governance: Its Science, Its Inclusiveness and Its Effectiveness*, The CONNEX Report Series no. 06/2008, 7-36, at: http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/BookSeries/Volume_Six/NEU%20Chapter%201%20Everson-Vos.final.pdf.

[250] OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, (edited by L. Fulponi), 31 July 2006, AGR/CA/APM(2006)9/FINAL, at para. 50. For discussion see, generally, J. Clap and D. Fuchs, *Corporate Power and Global Food Governance: Lessons Learned*, in: J. Clapp and D. Fuchs (eds.), *Corporate Power in Global Agrifood Governance*, Cambridge: The MIT Press, 2009, 285-296.

[251] GTZ, *Food Quality and Safety Standards as Required by EU Law and the Private Industry. With Special Reference to the MEDA Countries' Exports of Fresh and Processed Fruit & Vegetables, Herbs and Spices - A Practitioners' Reference Book*, (edited by M. Will and D. Guenther), Eschborn: GTZ, 2nd edition, 2007, at xii.

[252] C.J. Fombrun, *Reputation: Realizing Value from the Corporate Image*, cit., at 81. See also, C. Shapiro, *Premiums for High Quality Products as Returns to Reputation*, (1983) Quarterly Journal of Economics 98: 659-679.

[253] E. Meidinger, *Private Import Safety Regulation and Transnational New Governance*, in: C. Coglianese, A.M. Finkel, and D. Zaring (eds.), *Import Safety: Regulatory Governance in the Global Economy*, Philadelphia: University of Pennsylvania Press, 2009, 233-253, at 235.

by the UN Conference on Trade and Development (UNCTAD) estimated the number of private food standards currently in operation as being 400 and rising.[254] Proliferating private standards raise critical questions that extend well beyond the traditional arguments centred on the notion of 'market failure', which have traditionally been used to conceptualise regulation in this area; specifically, why are enhanced food safety controls over agri-food value chains expressed in the form of private B2B standards, as opposed both to public regulation and to private self-regulation? And, how does the wide variety of public and private sources of regulation shaping the food safety regulatory regime coexist – each with its own rationale, form and scope? In order to give a comprehensive answer to all these questions and define the global risk governance structure that is emerging to manage food safety, this chapter is intended to:

(i) Understand the *determinants* of the emergence of private food safety standards and that make up a fertile ground for transition in food safety regulatory governance;

(ii) Define private food safety standards and identify *patterns* of development and evolution; and

(iii) Outline the ways in which private food safety standards interact with official sources of regulation at both the domestic and the international level and major *legal issues* that such standards raise in the framework of international economic law.

10. Contextual conditions of transition in food safety governance

Much of the current debate on private food safety standards has been fuelled by misunderstandings of the incentives for firms to implement enhanced food safety controls in the food chain. Arguably at any point in time the incentives bearing on individual firms may differ markedly according to the legal jurisdiction in which they are engaged, market conditions, size, etc. Additionally, food safety regimes are characterised by considerable diversity worldwide. Our discussion thus begins with the analysis of the underlying factors that drive both the emergence of private standards and the adoption of a 'whole-chain' approach to food safety designed to promote greater coordination of food safety management at all stages of the chain. The adoption of enhanced food safety control systems and, specifically, the use of private standards in the food sector have been determined by an

[254] See WTO, *Private Standards and the SPS Agreement - Note by the Secretariat*, 24 January 2007, G/SPS/GEN/746, at 1; and, *Id.*, *Private Sector Standards and Developing Country Exports of Fresh Fruits and Vegetables - Communication from UNCTAD to the SPS Committee*, 26 February 2007, G/SPS/GEN/761. Interestingly, an inventory compiled for the European Commission in 2010 counted 441 private standards and certification schemes for agri-food products marketed in the EU-27 (see Areté Research and Consulting in Economics, *Inventory of Certification Schemes for Agricultural Products and Foodstuffs Marketed in the EU Member States: Data Aggregations*, 2010, at: http://ec.europa.eu/agriculture/quality/certification/inventory/inventory-data-aggregations_en.pdf). These figures, which find confirmation also in other research works, have been nonetheless disputed and are under revision.

increasingly common array of 'push' and 'pull' factors that reflect both the competitive environment in which firms operate and the nature and scope of public regulation. Namely, these factors are:

(i) The occurrence of a series of high-profile food safety system failures, which has prompted a widespread perception of the insufficient scope and effect of State regulation and heightened consumers' concerns about food safety risks;

(ii) The globalisation of food production and distribution patterns associated with the restructuring of agri-food markets around growingly complex food chains, which create new risks and challenges for chain coordination and control while defining new factors of competiveness; and

(iii) The reform of domestic food safety regulatory systems, which contributes to an evolving relationship and a changed distribution of responsibilities between governmental and non-governmental actors with a clear assignment of legal responsibility to food chain operators for demonstrating 'due diligence' in the prevention of food safety risks.

The following paragraphs will examine each of these underlying processes of change that influence the private sector in establishing its own structures of food regulatory governance, making it evident that, while the relative importance of each of these trends differs and/or varies geographically, each is becoming of increasing significance globally.

10.1. Heightened consumer concerns about food safety risks and increased emphasis on credence attributes

Food is typically a much more immediate concern to the wider public than production and distribution of any other product; in addition, it is always capable of eliciting emotional responses, regardless of whether these responses are or are not supported by scientific evidence. This explains the reason why, despite significant advances in scientific understanding of the risks associated with food and food production, public anxiety about food safety and the management of food safety systems still persists. A succession of high profile food-related health and safety 'scares' in a number of industrialised countries,[255] which found a wide echo in international media as a source of major concern for the whole international community, has brought food safety back in the spotlight of public opinion.

[255] Major high-profile food safety crises that posed significant threats to public health and consumer protection at both domestic and international level include: beef hormones (Italy, 1987-1988); salmonella outbreak in poultry and eggs (UK, 1988); alar in apples (US, 1989); increased incidence of verotoxin-producing *E. coli* in meat and dairy products (US, 1993); BSE-vCJd and *E. coli* outbreak in cooked meat (UK, 1996); microbiological contamination of berries (US/Canada, 1996-1997); avian flu spreads to humans (Hong Kong/Taiwan, 1995-1997); dioxin contamination of animal feed (Belgium, 1999); large-scale food poisoning from dairy products (Japan, 2000); contaminated olive oil (Spain, 2001); melamine-contaminated dairy products (China, 2008-2009); *Salmonella Typhimurium* outbreak (US, 2008); *Lysteria Monocytogenes* outbreak in deli meat (Canada, 2008); dioxin-positive milk and buffalo mozzarella samples (Italy, 2008); *Salmonella Agona* outbreak (UK and Ireland, 2008); dioxin contamination of animal feed (Germany, 2010); and, adulteration of horse meat (UK, 2013).

Generally speaking, foodborne diseases encompass a broad spectrum of illnesses that may be caused by a variety of agents that enter the body through ingestion of food, namely: physical agents, such as splinters, ground glass, metal fragments; biological agents, including most notably, bacteria, viruses, fungi, naturally occurring toxins, and other micro-organisms; and non-conventional transmissible agents, specifically anthrax and the agent causing bovine spongiform encephalopathy (BSE or 'mad-cow disease'), often associated in humans with the variant Creutzfeldt-Jakob disease (BSE-vCJd). In addition, foodborne diseases may be caused by chemical food contamination, such as deliberate use of animal drugs, food additives, agents leading to environmental pollution like pesticides, and toxic metals. Some of the most recent food safety incidents relate to the persistence of well-established safety concerns (e.g., microbial pathogens and pesticide residues); some have been fuelled by new emerging hazards (e.g., BSE-vCJd); some others concerned hazards that became of heightened importance on the political 'radar screen' (e.g., avian influenza) or that have long raised recognised but previously less regulated safety concerns (e.g., mycotoxins); some others, finally, originated from purposeful misconduct and from deliberate adulteration carried out by the food industry. Significantly and specifically, some of these food safety scares have been driven by the (alleged) side effects of agricultural production and food processing technologies. The last three decades, indeed, have seen significant technological advances, first in the life sciences (irradiation and bio-technologies for genetic modifications), then in the use of growth-enhancing hormones, and more recently in materials sciences (nano-technologies). The resulting novel products and practices have met with huge consumer resistance, because of the 'modern technological risk'[256] that such products and practices may

[256] See U. Bech, *Risk Society: Towards a New Modernity*, Santa Monica: Sage Publications, 1992. The use of bio- and nano- technologies in food production and processing is currently one of the most controversial issues in respect of which empirical research shows clear patterns of disparities of consumer attitudes across countries. For instance, in respect of food that is modified genetically through the use of biotechnologies (GM food) the proponents of biotechnologies typically emphasise the ability of GM food to deliver improved food supply and to increase environmental quality because of the reduced need for pesticides. Although the attitude of American consumers is traditionally supportive of new technologies, they show a more natural willingness to accept GM plant products than GM animal products, that way remaining concerned about the potential risks of GM animal food on human health. On the other hand, those who contrast biotechnologies argue that the use of such technologies is an interference with nature with unknown and potentially disastrous effects on human health and the environment.

Such a negative perception of environmental and biodiversity risk, health risk, as well as ethical and equity concerns, dominate completely European consumers' attitude towards GM food. An extensive chicken-and-egg argument is about whether differences in government policy toward GM food across countries are the result of different consumers' views toward biotechnology or whether government policies lead consumer acceptance/rejection. In particular, the long-running WTO dispute brought by the US against the EU policy toward GM foods (European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Panel report circulated 29 September 2006, WT/DS291/R - WT/DS292/R - WT/DS293/R) reflects different perceptions of the effect of a European policy that has been inhospitable to the introduction of GM foods on the European market. The US argument was that GM products would have been accepted in the EU if the European institutions – which focus mostly on the process of genetic modification rather than on the final GM product – had not put up barriers to them. For discussion and comparison see, among the others, J.J. McCluskey, K.M. Grimsrud, and T.I. Wahl, *Comparison of Consumer Responses to Genetically Modified Foods in Asia, North America, and Europe*, in: R.E. Just, J. Alston, and D. Zilberman (eds.), *Regulating Agricultural Biotechnology: Economics and Policy*, New York: Springer/Kluwer Academic Publishers, 2007, 1-14; and, M.R.

present. In other words, science and technology are seen as augmenting the portfolio of food safety risks to which consumers are exposed.

The above, together with broader demographic and social trends, came to alter the expectations and preferences of consumers, which – especially in wealthier countries – are ever-more demanding greater and reliable information about the food they eat and assurances that food production and processes are adequately regulated, so as to shelter from the potential risks of food products passing through global supply chains. Consumers have put greater focus on safety attributes over traditional determinants of food choice, such as taste, price, available alternatives, etc. which lose their traditional monopoly as informational devices; what is more, they are readier to sanction any actor whose behaviour they perceive as being at the origin of a food safety issue. At the same time, over the recent years consumers have shown increasingly rising expectations, preferences and attitudes no longer confined to issues of safety and health risks. Nowadays consumers care not only about 'experience' attributes, i.e. physical features of the final product, but also some 'credence' attributes, i.e. non-identifiable and non-testable features that are extrinsic to the product.[257] In particular, credence attributes encompass not only the absence or the presence of acceptable and safe levels of any substance that is perceived as unsafe – especially those purposefully used in food production (e.g., pesticides and hormones) and contaminants – but also the manner in which food is produced (most notably, sustainable food production, organic versus conventional agricultural production methods, environmental impact of agricultural practices, fair trade, animal welfare, plant health, and labour rights). Most of these credence characteristics may not be readily apparent to consumers through direct examination of the product at the point of purchase – as in the case, e.g., of microbial pathogens – or even after consumption – as in the case of, e.g., the carcinogenic effects of pesticide residues; in addition, the information asymmetries that exist between producers/processors/retailers and consumers make the information costs associated with assessing whether a food safety risk is deemed unacceptable very high. Because of that, the safety of food is determined not only by the sets of product and process attributes, but also by how these attributes are communicated to the consumer. Most recent economic research on demand for a variety of quality attributes found that, looking for greater and reliable assurance about both the content of a food product and the conditions under which this is produced, consumers are willing to pay varying amounts for enhancement of food safety or the absence of other attributes, and importantly for trustful information they believe provides safety assurance.[258] In this regard, consumers have

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Grossman, *Protecting Health, Environment and Agriculture: Authorisation of Genetically Modified Crops and Food in the United States the European Union*, (2009) Deakin Law Review 14: 257-304.

[257] See D.W. Stearns, *On (Cr)edibility: Why Food in the United States May Never Be Safe*, (2010) Stanford Law and Policy Review 21: 245-275, at 256-262 (discussing how consumers cannot efficiently distinguish between safe and unsafe food products because of the complexities of today's food markets); G.K. Hadfield, R. Howse, and M.J. Trebilcock, *Information-based Principles for Rethinking Consumer Protection Policy*, (1998) Journal of Consumer Policy 21: 131-169, at 136; and, M.J. Trebilcock, *Rethinking Consumer Protection Policy*, in: C.E. Rickett and T.G. Telfer (eds.), *International Perspectives on Consumers' Access to Justice*, Cambridge: Cambridge University Press, 2003, 68-98.

[258] A number of valuation studies – mostly for meat and meat products – attempted to measure consumer willingness-to-pay (WTP) for specific food attributes or combinations of attributes. While recognising that

to rely on corporate information disclosure or on governmental measures that inform of those attributes.

In light of all that, food safety can no longer be defined as simply 'fit for human consumption', that is, as an attribute concerning food that consumers can eat without adverse health consequences; rather, by encompassing a wider array of both product- and process-related attributes, and requiring reliable assurances that food production and processes are adequately regulated, food safety moves away from a predominantly neutral and technical issue being the preserve of food experts into a contested societal concern.[259]

10.2. The restructuring of agri-food markets around buyer-driven global value chains

Over the last two decades economic globalisation and market integration drove profound transformations in agri-food markets, with food production shifting away from local and domestic production toward large-scale industrial processing and commercial marketing; at the same time, such different structure of agri-food markets comes to hand a premium to large global actors. A rapidly expanding body of literature in agricultural economics[260] and rural sociology[261], and more recently GVC[262], highlights the ways in which these new patterns are

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change in consumer demand for safety (and quality) is a major determinant of contemporary agri-food markets, these studies found that the size of the premiums consumers would be willing-to-pay for products with particular attributes varies by food product, attribute, country, and consumer demographics, apart from the study design. Some market segments, such as organic food, have been growing very rapidly in many countries like the EU and have strong demand for what they perceive to be higher quality products. Conversely, consumers in the US and Canada are found to be more willing-to-pay for information on animal treatment and food safety assurance and for a country-of-origin-labelling (COOL), because they use this information as both safety cues and as a means of product differentiation between domestic and imported goods. Across countries, additionally relevant variables such as consumer awareness, differences in the income and price elasticity, and demographics (education, income, and age) may affect WTP estimates. As common trends, better educated and employed consumers, and higher income groups are more aware of food safety (and quality) concerns and exhibit willingness-to-pay a premium for these. In the event of an outbreak consumers who are younger are more susceptible to negative media; also, consumers show substitution aptitudes and a WTP more for tested and labelled products relative to products that do not. For general discussion see, J. Nayga, R.M. Woodward, and W. Aiew, *Experiments on the Divergence between Willingness to Pay and Willingness to Accept: The Issue Revisited*, (2005) Economics Bulletin 17: 1-5.

[259] On the concept of 'food safety' see, T. Marsden, R. Lee, A. Flynn, and S. Thankappan, *The New Regulation and Governance of Food: Beyond the Food Crisis?*, New York/London: Routledge, 2010, at 9; A. Alemanno, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO*, London: Cameron May Publishing, 2007; and, Id., *Food Safety and the Single European Market*, in: C. Ansell and D. Vogel (eds.), *What's the Beef: Contested Governance of European Food Safety*, Cambridge: The MIT Press, 2006, 237-248.

[260] See L. Fulponi, *Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries*, (2005) Food Policy 30: 115-128; T. Reardon, J.M. Codron, L. Busch, J. Bingen, and C. Harris, *Global Change in Agri-Food Grades and Standards: Agribusiness Strategic Responses in Developing Countries*, (2001) International Food and Agribusiness Management Review 2: 421-435; and, T. Reardon and C. Barrett, *Agroindustrialization, Globalization, and International Development: An Overview of Issues, Patterns, and Determinants*, (2000) Agricultural Economics 23: 195-205.

[261] See, e.g., N. Fold and B. Pritchard (eds.), *Cross-Continental Food Chains*, New York/London: Routledge, 2005; L. Bush and C. Bain, *New! Improved? The Transformation of the Global Agrifood System*, cit.; L. Busch, *The Moral Economy of Grades and Standards*, (2000) Journal of Rural Studies 16: 273-283; and, D. Goodman and M.J. Watts (eds.), *Globalising Food: Agrarian Questions and Global Restructuring*, New York/London: Routledge, 1997.

emerging along geographically dispersed and functionally integrated value chains. Firstly, rapid advances in food science and agriculture-related technology have massively increased food production, while developments in communication and transport technologies, as well as food processing, packaging and preserving, have facilitated long-distance trade in food. As result, both fresh and processed agri-food products are able to travel unfettered across many national borders for consumption or further processing.[263] Secondly, the establishment of a multilateral trading system under the aegis of the WTO in 1994, together with a plethora of bilateral and regional preferential trade agreements, have largely served to create a policy environment that encourages more liberal international trade and foreign investment, which has further accelerated the speed and volume of cross-border flows of agri-food products.[264] Thirdly, competing with imports in both the domestic and regional/international markets requires marketable products that are safe for human consumption and that meet further market requirements, such as quality, nutritional value, taste, appearance and presentation, and continuous and reliable supplies. Yet, globally fragmented supply chains create in practice complex coordination and monitoring problems that limit firms' abilities to produce credible information on their own about conditions in transnational production networks. In this respect, since firms' reputations along any supply chain are interdependent, consumer loss of confidence in a particular food product affects in fact all firms involved in that particular chain, not only those that are to blame for the problem. As has been rightly remarked, "safe and good quality products are the result of adequate processes and control at

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[262] Initially developed to examine the international structure of production particularly with respect to trade in manufactured goods, GVC conceptualisations (see *supra*, para. 6.3.) have been more recently extended to analysis of agricultural commodities. Recent conceptual developments within the political economy branch of GVC literature – instigated by the firm-level theory of global governance developed in G. Gereffi, *The Organization of Buyer Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks*, in: G. Gereffi and M. Korzeniewicz (eds.), *Commodity Chains and Global Capitalism*, Westport: Praeger, 1994, 95-123 – have facilitated greater understanding of the use and nature of standards within agri-food value chains. A number of studies use GVC analysis to explain the relationship between the value chain governance structure and food safety standards: see, most notably, R. Kaplinksy and M. Morris, *A Handbook for Value Chain Research*, University of Sussex Institute of Development Studies, 2002, at http://www.prism.uct.ac.za/papers/vchnov01.pdf; J. Lee, G. Gereffi and J. Beauvais, *Global Value Chains and Agrifood Standards: Challenges and Possibilities for Smallholders in Developing Countries*, (2012) Proceedings of the National Academy of Sciences 109: 12326-12331; G. Gereffi, J. Humphrey, and T. Sturgeon, *The Governance of Value Chains*, (2003) Review of the International Political Economy 12: 78-104; G. Gereffi and M. Christian, *Trade, Transnational Corporations and Food Consumption: A Global Value Chain Approach*, in: C. Hawkes, C. Blouin, S. Henson, N. Drager, and L. Dubé (eds.), *Trade, Food, Diet and Health: Perspectives and Policy Options*, Oxford: Wiley-Blackwell, 2010, 91-110; and, J. Humphrey and H. Schmitz, *Governance in Global Value Chains*, IDS Bulletin no. 32(3)/2001, at: http://www.ids.ac.uk/files/dmfile/humphreyschmitz32.3.pdf.

[263] See generally, B.M. Popkin, *Technology, Transport, Globalization and the Nutrition Transition Food Policy*, (2006) Food Policy 31: 554-569; and, FAO, *Towards 2015/2030: An FAO Perspective*, London: Earthscan Publications, 2003, at 232-330 (examining the effects of technology, as well as trade policies and globalisation, on food and agriculture).

[264] Over the last about 40 years international trade in food grew from US$ 22 billion in 1960 to 224 billion in 1972 to 438 billion in 1998; the global value of trade in food continued to rise along the first decade of the XXI century, reaching US$ 1,375 billion in 2012 and accounting for 83 per cent of trade in agricultural products and for 12 percent of international trade in goods. For further details see, WTO, *International Trade Statistics 2014*, Geneva: WTO, 2015.

all stages of the food chain rather than collective action taken late in the process"[265], such that "[t]he safety status of the final product corresponds to the capacities of the weakest link of the value chain"[266]. Reputational concerns are especially relevant for those actors – namely, food retailers – that are at the end of the value chain and that are directly exposed to consumer claims. This alone generates an interest in controlling the attributes of their offerings across extensive supply chains. On the other hand, the construction of trust and reputation around the visible symbol of a largely recognised brand name arguably relies upon rigorous vertical coordination that can be costly to achieve; indeed, solving the information problem usually requires the establishment of cross-border long-term contractual relationships based on systems of monitoring, verification, and/or certification, whose primary objective is to reducing the transactions costs and the safety risks that multiple-stage production processes imply.[267]

Associated with these developments are changes in the economic structure and *modus operandi* of agri-food value chains. Ownership in global agri-food markets is becoming more and more concentrated with a remarkable growth and continuing consolidation of agri-food companies into large food MNCs. Because of that, the number of key actors in the food chain has reduced as their size grew; hence, a diminishing number of 'lead firms' in the chain appears to be powerful and resourceful enough to exercise great degrees of control over the shape and extent of global production networks and to be able to influence the operations of their affiliates and trading partners. Once again, it is particularly leading food retailers and retailer groups that expand through vertical integration both within and across borders and become the 'gatekeepers' of food markets, so that they come to govern the entire process of the producing, processing and distributing of food by buying or contracting with other food companies on a global scale. This concentration in food retailing has huge implications for food chain governance, because it reverses the way in which market power flows along the chain. Although traditional markets are still characterised by fragmented production and distribution with numerous small-size producers and retailers and with little explicit demand and supply coordination, food retailing consolidation is driving a shift from supplier- to buyer- driven chains. The first corporate retail outlets ('supermarkets') appeared in the US in the first half of XX century to sell to consumers what was available from producers and processors, who were the dominant actors in the food system at that time.[268] Conversely, as

[265] GTZ, *Food Quality and Safety Standards as Required by EU Law and the Private Industry*, cit., at 141.

[266] *Ibidem*, at 0.

[267] See L.M. Young and J.E. Hobbs, *Vertical Linkages in Agri-food Supply Chains: Changing Roles for Producers, Commodity Groups, and Government Policy*, (2002) Review of Agricultural Economics 24: 428-441.

[268] Producer-driven chains are characterised by concentrated production and fragmented distribution. Large midstream actors – manufacturers, processors and wholesalers – have a direct impact on primary producers and therefore play a major role in organising the supply chain. Production and trade of key commodities, such as high-value bean crops (e.g., coffee, cocoa), specialty varieties, and key ingredients for a wide variety of processed foods, are still controlled by few and large branded food manufacturers that utilise contracts with out-growers. A specific case is that of geographical indications (GI), where the producers themselves develop their own product specifications. For analysis see the seminal works on patterns of governance in agri-food: G. Gereffi, *The Organization of Buyer Driven Global Commodity Chains*, op. cit.; and

result of two decades of ever faster consolidation, vertical integration and a series of mergers and take-overs in the retail sector, a small number of large-scale corporate retailers have a huge amount of clout among their suppliers and are able to exercise great degrees of control over the shape and extent of both domestic and global food value chains.[269] A high proportion of market share for many export-driven chains, such as those for groceries, fresh fruit and vegetables, meat and dairy products, is sold today in supermarkets; in the US and Europe the five largest retailers account for between 50 to over 70 percent of retail food sales ('five-firm concentration ratio').[270] Still more, concentration in the retail sector is on the rise; there is evidence that, reflecting the globalisation of agri-food value chains, agri-food markets in low- and middle- income countries – especially in Latin America and Asia – are increasingly evolving towards the same trajectory as industrialised countries and adopting the modern supermarket format for food shopping.[271] That way, food retailing increasingly resembles a global oligopoly. In a bid to become more responsive to consumer concerns and to avoid damage to brand reputation, while ensuring continuity and reliability of delivery, food retailers have improved the management of backward linkages especially by becoming ever-more demanding as regards suppliers' commitment to and reliability in high standards of food safety.

The changes occurred in the structure and *modus operandi* of agri-food value chains have also been key factors underpinning innovation in the food industry. Dominant market actors have adapted the ways in which they compete among themselves in response to increasing consumer demand for safety as well as for quality. Unlike traditional agricultural commodities such as coffee, grains, sugar, cocoa and tea, for which the primary basis for international competitiveness is still price, with little or no brand recognition, for high-value chains competitive advantage increasingly lies in products that allow lead firms to distinguish themselves from competitors and to cater to premium-paying consumers with more sophisticated preferences. The significant and growing share of retailers' own branded

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C. Dolan and J. Humphrey, *Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticulture Industry*', (2000) Journal of Development Studies 37: 147-176.

[269] Buyer-driven chains are characterised by fragmented production and concentrated distribution. Fewer yet more capable large traders and wholesalers play an instrumental role as intermediaries between – especially small- and medium- size – producers and buyers whose procurement decisions are highly centralised. Apart from collecting products from farmers and supplying large retailers, intermediaries are often responsible for ensuring that products meet the requirements and specifications set by the buyer. To this end they transmit demand specifications to all producers and frequently oversee production and certification.

[270] See GTZ, *Food Quality and Safety Standards as Required by EU Law and the Private Industry*, cit., at 106 (arguing that, in the future, about 15 huge retail conglomerates in Europe will control 80 percent of the fresh produce sales to an expanded European population of over 500 million consumers); see also OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit.

[271] See, e.g., T. Reardon, P. Timmer, and J. Berdegue, *The Rapid Rise of Supermarkets in Developing Countries: Induced Organizational, Institutional, and Technological Change in Agrifood Systems*, (2004) Electronic Journal of Agricultural and Development Economics 1:168-183; T. Reardon and J.A. Berdegeue, *The Rapid Rise of Supermarkets in Latin America: Challenges and Opportunities for Development*, (2002) Development Policy Review 20: 371-388; D. Boselie, S. Henson, and D. Weatherspoon, *Supermarket Procurement Practices in Developing Countries: Redefining the Roles of the Public and Private Sectors*, (2003) American Journal of Agricultural Economics 85: 1155-1161; and, T. Reardon, J.M. Codron, L. Busch, J. Bingen, and C. Harris, *Global Change in Agri-Food Grades and Standards*, cit.

products,[272] which tie firms' reputation and performance to given quality attributes, has increased emphasis on quality differentiation and prompted a shift away from commodification towards quality as basis for market competition.[273] While such quality-based competition, which is most critical in the case of a wide array of credence attributes rather than the intrinsic characteristics of the product itself, serves primarily to foster innovation in the food industry and to protect and/or gain market share, it also contributes to mitigate further reputational and/or commercial risks along the supply chain.

10.3. Moving beyond 'command-and-control' regulation in the EU and US systems

In today's agri-food markets the need to respond to ever faster changing consumer preferences, to manage food safety risks in lengthened value chains, and to maintain consistent brand reputation are the factors driving the widespread use of private food safety standards. While it is helpful to think about the propensity of a food firm to implement or not to implement more effective food safety management systems in terms of the associated private costs and benefits, including how much firms are adequately 'rewarded' for their establishing enhanced food safety controls notably through impacts on their net revenue – which is the traditional mantra of the economists – nonetheless a range of non-economic factors curtail the choices that are open to firms. These additional factors are especially associated with the regulatory and liability environment in which firms operate. For a long time food safety regulation has not been an issue of concern for market actors; rather, it has historically been the preserve of 'command-and-control' governmental regulation with the primary aim of "controlling harm in the public interest in order to protect consumers, citizens and the environment"[274]. Market failures (information asymmetries, transaction costs, imperfect competition, etc.), which prevent consumers at point-of-sale to judge if a food product is safe, and negative externalities (primarily, the economic costs of food illnesses falling on national healthcare systems) have traditionally been the *prima facie* case and the most robust rationale for public authorities to take a lead in promulgating regulation that is intended to achieve the desirable socially-optimum levels of protection against food safety risks that markets are unable to deliver by themselves.[275]

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[272] Private brands (or private labels), i.e., trademarks serving as a marketing aid by offering specific product characteristics linked to quality, performance, safety and/or health aspects, accounted for 14 percent of total retail food sales at global level in 2000 and roughly 22 percent in 2010. In Europe private retailer labels have become a dominant issue in creating strong consumer loyalty; on average 45 percent of food products are sold via private labels. Data are sourced from OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit.

[273] See L. Busch and C. Bain, *New! Improved? The Transformation of the Global Agrifood System*, cit., at 324.

[274] B.M. Hutter, *Managing Food Safety and Hygiene: Governance and Regulation as Risk Management*, Cheltenham/Northampton: Edward Elgar, 2011, at 10.

[275] While rational and efficiency-based arguments go a long way in explaining the augmentation of public regulatory systems, also a significant political dimension needs to be outlined, that is, with increased consumer concerns about food safety it was important that public regulators were 'seen to be doing something' in the eyes of their constituents. On the contention that market failures are the predominant reasoning and *a priori* justification for public regulatory action in the sphere of food safety see, S. Henson and W.B. Traill, *Economics*

Almost universally governments have made it a criminal offence to prepare or sell food that: "(a) has in or upon it any poisonous or harmful substance; (b) is not wholesome or is otherwise unfit for human consumption; (c) is adulterated; or (d) is injurious to human health"[276]; in addition, governments have implemented a range of regulations dictating what food companies at various levels of the supply chain could or could not do in terms of food safety-related behaviour.[277] Specifically, first-generation regulations relied heavily on visual line inspection, which was conducted mainly through domestic surveillance of food manufacturers and distributors and through border inspections. Reflecting industrial safety management practices of the early 1900s, this method proved to be an effective means of detecting visible signs of diseases such as trichinosis or tuberculosis. A century later, those traditionally practiced controls of final products appear no longer an adequate response to growingly global health and consumer protection concerns. Although risk-reducing measures for disease control were seen – at least in industrialised countries – as being set with substantial margins of safety on the best available scientific findings and compliance with them was estimated to be reasonably high,[278] extensive production systems and globalised trade patterns expose dramatically food to greater safety risks and make it harder to verify safety attributes at multiple stages than in mono-location (national) production systems. In fact, "[m]any hazards are expensive to test for and may enter food products at several points in the production process. […] While testing and verification are essential for establishing good process controls, testing can never be practical as the only means of monitoring safety"[279]. In addition, it has become much more difficult for official authorities whose competence is bound by the territorial character of State jurisdiction to keep track of the range of products present on their markets and to keep up with the assessment of all the risks associated therewith. In an area such as food safety where regulatory reform has an incident-driven nature, the string of high profile food safety scares referred to earlier was seen as

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of Food Safety, (1993) Food Policy 18: 152-162; J.M. Antle, *Choice and Efficiency in Food Safety Policy*, Washington DC: AEI Press, 1995; and L.J. Unnevehr and H.H. Jensen, *The Economic Implications of Using HACCP as a Food Safety Regulatory Standard*, (1999) Food Policy 24: 625-635.

[276] FAO, *Perspectives and Guidelines on Food Legislation, with a New Model Food Law*, (edited by J. Vapnek and M. Spreij), FAO Legislative Study no. 87, Rome: FAO Publications, at: http://www.fao.org/3/a-a0274e.pdf, at 224.

[277] Although each country chooses its own regulatory approach based on societal values and the estimated appropriate level of protection, the requirements that apply to food chain actors can be generally classified as follows: (i) science-based food safety and plant and animal health regulations, which are designed for food control management (including standards for additives, contaminants, residues of veterinary drugs and pesticides, and microbiological hazards, as well as traceability systems, production facilities and imports inspections, and food control laboratories); (ii) environmental regulations (compliance with sustainable environmental management practices halting biodiversity loss and ensuring the protection of environmental and genetic resources, as well as reducing green-house gases emissions); (iii) marketing regulations (appearance, conservation methods, packaging, labelling and advertising); (iv) labelling regulations (indication of product characteristics such as ingredients, composition, country of origin, nutritional values, health claims, etc.); and (v) regulations for specific categories of products (e.g. organic food, GM food, novel food, etc.).

[278] See F.K. Käferstein, Y. Motarjemi, and D.W. Bettcher, *Foodborne Disease Control*, cit.; and, WHO, *The Present State of Foodborne Disease in OECD Countries*, cit.

[279] L. Unnevehr, *Food Safety Issues and Fresh Food Product Exports from LDCs*, (2000) Agricultural Economics 23: 231-240, at 235.

'signals' of system-wide failures and resulted in such a "crisis of trust"[280] that came to significantly erode consumer confidence in the efficacy of prevailing mechanisms of food safety management. Indeed, those institutions that were established to manage risks in mono-location production and distribution systems found themselves to be increasingly unable to prevent some major food safety crises and to provide adequate levels of protection in increasingly global food value chains. The clash between the global nature of food production and distribution networks and the territorial boundaries of national State jurisdiction highlights and further compounds a number of vulnerabilities of domestic food safety regulatory systems that have not always been adjusted to globalisation of supply chains. In many countries food safety regimes still operate under regulatory frameworks that have remained in large part unchanged since their adoption well before the advent of globalisation. A telling example is the US system, which until very recently was centred on the Federal Food, Drug, and Cosmetic Act (FDCA) of 1938,[281] while meat and meat products were specifically subject to the Federal Meat Inspection Act (FMIA) of 1906.[282] In addition, the traditional State 'command-and-control' paradigm of regulation proved to be largely ineffective, inflexible and neglecting the responsibilities of food business operators.

All this put the need for effective governance of global value chains high on the agenda of national and international institutions and renewed pressures on policy makers for enforcing improved food safety controls addressing critical issues in regard to all aspects of the food system, from production throughout to consumption. The window of opportunity for a comprehensive and integrated regulatory and institutional reform was opened by the BSE crisis in 1996, which is often mentioned as a telling illustration of both the incapability of public authorities to deal effectively with today's food safety risks and how critical international cooperation on food safety is across legal jurisdictions.[283] In the aftermath of the crisis many European countries tightened their regulatory food safety regimes and implemented more rigorous enforcement systems linked to tougher penalties for

[280] S. Hoffmann and W. Harder, *Food Safety and Risk Governance in Globalized Markets*, Resources for the Future Discussion Paper no. RFF DP 09/44, at: http://rff.org/RFF/Documents/RFF-DP-09-44.pdf, at 1.

[281] Federal Food, Drug, and Cosmetic Act of 1938, 21 US Code, Title 21, Chapter 9 (as amended through Public Law 107-377, 107th Congress, 19 December 2002).

[282] Federal Pure Food and Drug Act of 1906, 21 US Code, Title 21, Chapter 12 (as amended through Public Law 113-163, 113th Congress, 19 December 2008). For an historical analysis see, R.A. Merrill, *The Centennial of US Food Safety Law: A Legal and Administrative History*, in: A.S. Hoffman and M.R. Taylor (eds.), *Toward Safer Food: Perspectives on Risk and Priority-Setting*, Washington DC: Resources for the Future, 2005, 23-43.

[283] BSE is a transmissible, neuro-degenerative, fatal brain disease of cattle. Transmission among cattle was due to the practice of feeding them with animal offal and bone meal as a protein supplement. By the time of their ban in 1988 the feeding practices were so widespread in the UK that they led to an epidemic with more than 180,000 diseased animals by 2004. At the same time epidemiologic and laboratory evidence began to reveal the BSE transmission to humans. A causal association was particularly found between BSE and vCJd, another type of transmissible spongiform encephalopathy that causes brain deterioration and death in humans. The British authorities continued to maintain that BSE was not transmissible to other species until March 1996, when it announced that the best explanation for new cases of vCJD was exposure to beef from cattle with BSE. Once the extent of the crisis became public, the EU institutions issued a blanket ban on British beef exports, in response to which the UK adopted a policy of non-cooperation with the EU institutions and sought to deny the extent and seriousness of the BSE problem.

infringements. In fact, the BSE crisis was a turning point in the European food safety system as a whole, whose regulatory failures became vividly apparent.[284] After more than four decades in which food safety had developed in an uncoordinated and inharmonious way as largely a Member States' matter, such new context worked as catalyst so as to implement a fundamental restructuring of the EU food safety legislation and institutional set-up in a general shift toward a common food safety regime applicable to all food products.[285] Finally, from a systemic point of view, the BSE crisis had the merit of initiating a new "risk-based, scientifically supported, integrated farm-to-fork"[286] regulatory paradigm. This new paradigm greatly relies on a global consensus – mostly shaped by developments in the EU through discussions in the Codex Alimentarius Commission (CAC) – on the basic components that a modern and effective food safety regime should exhibit.

10.3.1. Getting to risk-based food safety management regulation

The foundational element of this second-generation regulatory approach to food safety is a huge emphasis not only on timeliness and effectiveness of alert and reaction, but also on

[284] Major investigations in the aftermath of the BSE crisis revealed the role that conflicts of interest between scientific analysis and agricultural interests played in prolonging the crisis and in deepening its impact on human health. The 'Medina Ortega report', committed in July 1996 by the European Parliament, found that the structure of EU food safety governance at that time contributed to the inability of the European institutions to respond to the crisis quickly. In particular, the European Commission was criticised for putting industry interests ahead of consumer safety, for inadequacies in monitoring and surveillance on food safety issues, for politicisation of science and lack of scientific support, and for lack of transparency. See the Report of the Temporary Committee of Inquiry into BSE on the Alleged Contraventions or Maladministration in the Implementation of Community Law in Relation to BSE, without Prejudice to the Jurisdiction of the Community and the National Courts, 7 February 1997, A4-0020/97/A, PE220.533/fin/A. For discussion see, E. Vos, *EU Food Safety Regulation in the Aftermath of the BSE Crisis*, (2000) Journal of Consumer Policy 23: 227-255; *Id.*, *The EU Regulatory System on Food Safety: Between Trust and Safety*, in: M. Everson and E. Vos (eds.), *Uncertain Risks Regulated*, London: Routledge/Cavendish Publishing, 2009, 250-267; and, B. van der Meulen and M. van der Velde, *European Food Law Handbook*, Wageningen: Wageningen Academic Publishers, 2008, at 240-242.

[285] From the formation of the European Communities in 1957 to the mid-1980s a common food policy developed incidentally as part of both the common agricultural policy and the European common market. Relying on the principle of mutual recognition – introduced by the European Court of Justice (ECJ) in the Cassis de Dijon case (Rewe-Zentral, Judgment of 20 February 1979, Case 120/78, ECR 1979, 649) – the major focus was on controlling and reducing barriers created to intra-Community trade and the creation of a common market for foods by the diversity of national requirements on food content and safety. The likelihood that differing national food laws addressing adulteration and fraud became obstacles to the smooth functioning of the common market led to the harmonization of domestic food safety regulations through the creation of common standards on the food composition at the European level. Consumer safety and confidence progressively gained recognition and paramount importance as key policy objective in the EU after many decisions of the ECJ and finally the introduction of Article 129(a) by the 1992 Maastricht Treaty, now Article 169 of the Treaty on the Functioning of the European Union (TFEU): "In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests". For further discussion see especially, E. Vos, *The EU Regulatory System on Food Safety*, op. cit. (claiming especially that, in the aftermath of the BSE crisis it was hard to determine which sector or policy level was to blame for it); A. Alemanno, *Food Safety and the Single European Market*, cit. (providing an insightful perspective on the evolution of European food law from a cultural, legal, and political perspective); and *Id.*, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO*, cit.

[286] S. Hoffmann and W. Harder, *Food Safety and Risk Governance in Globalized Markets*, cit., at 2.

effectiveness of systematic preventive systems based on scientifically-based risk analysis. As rightly remarked, "[t]he idea of risk, the technique of risk analysis […] form the core of the contemporary concept of food safety and how to put it in practice through law"[287]. Risk analysis relies now on a functional and institutional separation among risk assessment, risk management, and risk communication, as a means of protecting the integrity of scientific analysis and restoring public confidence in food safety governance.[288] Precisely, risk assessment consists of the scientific evaluation, based on the available scientific evidence, of known or potential adverse health effects resulting from human exposure to foodborne hazards; the risk assessment process[289] provides an estimate of the probability and severity of illnesses attributable to a particular food and food-related hazard. In turn, risk management is the process of weighing policy alternatives taking account of the results of risk assessment and other legitimate factors relevant to the matter, in order to accept, minimise or reduce assessed risks and to select and implement appropriate options. Finally, risk communication is the interactive exchange of information and science-based opinions concerning risk – including the explanation of risk assessment findings and risk management decisions – with interested actual or potential stakeholders and the general public.

The tendency towards increases in stringency and scope of risk-based food safety regulation has been shown, first of all, by a major focus on technology and performance-based standards applied at various levels of the chain. In particular, technology-based standards prescribe the use or non-use of particular procedures and/or practices – such as heat treatment and/or cooling regimes – that span the characteristics of end-products and/or production processes. In turn, performance-based standards require certain outcomes to be achieved, usually in terms of the characteristics of the end-product; for instance, it may be required that a food product is free from particular microbial pathogens. Nevertheless, claims of a "regulatory overload"[290], whereby the position held by many public regulators in the face of food safety challenges tends to be to promulgate and enforce more and new legal norms, went together with contentions that overly-strict regulation can stifle innovation, degrade international competitiveness and impede trade, while competing for scarce government

[287] F. Snyder, *Toward an International Law for Adequate Food*, in: A. Mahiou and F. Snyder (eds.), *La sécurité alimentaire/Food Security and Food Safety*, Leiden/Boston: Martinus Nijhoff Publishers, 2006, 79-163, at 119.

[288] For reference see, Food and Agricultural Organisation [FAO], *Food Safety Risk Analysis: A Guide for National Food Safety Authorities*, FAO Food and Nutrition Paper no. 87, Rome: FAO Publications, 2006. While coalescing in the face of the food safety crises in the 1990s, these regulatory and institutional innovations embody roots going back almost half a century. The post-World War II period was in fact characterised by a drive for greater rationalisation in decision-making in a twofold direction: on the one hand, rationalised management-based approaches were part of the broader post-war paradigm for public governance of health, safety, and environmental hazards; on the other, total quality management regimes were introduced in manufacturing sectors as conceptual frameworks for process engineering controls systems.

[289] The risk assessment process consists of: (i) hazard identification; (ii) hazard characterisation; (iii) exposure assessment; and (iv) risk characterisation.

[290] See N. Gunningham and J. Rees, *Industry Self-Regulation: An Institutional Perspective*, (1997) Law and Policy 19: 363-414, at 363.

resources.[291] At the same time, a number of concerns about rates of compliance with public regulations reflected – at least in part – implicit problems with employing legal modes of enforcement. This created an impetus for public authorities to seek out new or 'smart' modes of regulation, which are essentially intended to achieve more efficiently the desired level of protection. To put this differently, public regulators found themselves in the need to move towards new blends of incentives for firms to address failures in food safety controls.[292] Past regulatory approaches provided *ex ante* incentives to employ the appropriate food safety controls, which consisted mainly in laying down the conditions under which food must be produced and handled; that way, chain actors had to implement the specified food safety controls so as to avoid enforcement action on the part of official authorities or to maintain certification by a recognised public or private entity. Conversely, current food safety regulation tends to put in place *ex post* incentives that are designed to 'punish' those chain actors that are deemed responsible of food safety failures. Such kinds of incentives take essentially the form of:

(i) Management-based standards; and

(ii) Liability standards against food safety failures.

In parallel with technology- and performance- based standards, there is growing adoption in the food industry of management practices that focus on prevention and control of food safety hazards: "many hazards […] may enter food products at several points in the production process. Therefore, documented production practices, that are verified to prevent and control hazards, are becoming accepted as the most cost-effective means of reducing food safety hazards"[293]. These management-based process standards, which increasingly draws attention to the integrity of the entire supply chain, requires firms to engage in a systematic and integrated way in planning and internal norm making so as to anticipate food safety risks and to eliminate or reduce these risks to an acceptable level; the ultimate aim of management-based standards is to achieve the specified regulatory goals in a preventive rather than reactive way.[294] Usually these meta-requirements present considerable latitude in terms of the management of the firm's operations; they usually consist of general frameworks and guiding principles that describe what an entity has to do to meet customer's quality requirements and

[291] In this sense see, D. Sinclair, *Self-Regulation versus Command and Control? Beyond False Dichotomies*, (1997) Law and Policy 19: 529-559; and, J. Black, *Critical Reflections on Regulation*, (2002) Australian Journal of Legal Philosophy 27: 1-35.

[292] Despite finding a variety of applications in food safety regulation, risk analysis has been nonetheless subject to much criticism. It is said to ignore the relative cost-effectiveness of alternative control options, i.e., reducing one risk relative to another, reducing health risks relative to other outcomes that may be achieved, and acknowledging how consumers feel about different risks. This is why some legal scholars argue that much of the regulation currently in place is purely an overreaction to risks that involve low probabilities that cannot be supported by conventional cost-benefit analysis. See, most notably, W.K. Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk*, Oxford/New York: Oxford University Press, 1995, at 149-159. For broader discussion see, L.A. Jackson and M. Jansen, *Risk Assessment in the International Food Safety Policy Arena: Can the Multilateral Institutions Encourage Unbiased Outcomes?*, (2010) Food Policy 35: 538-547.

[293] L. Unnevehr, *Food Safety Issues and Fresh Food Product Exports from LDCs*, cit., at 235.

[294] For discussion see, J.A. Caswell, M.E. Bredahl, and N. Hooker, *How Quality Management Meta-Systems Are Affecting the Food Industry*, (1998) Review of Agricultural Economics 20: 547-557.

to achieve continual improvement of performance, regardless of the size or type of the entity, the sector of activity and/or the product concerned. The predominant focus of management-based standards has largely been on the implementation of Hazard Analysis and Critical Control Point (HACCP) systems and of traceability in food processing operations, which have become virtually 'buzz-words' in contemporary food safety regulation. In particular, HACCP systems[295] provide for a systematic way to implementing preventive food safety management strategies that identify foodborne hazards, assess their criticality and control weak points – 'critical control points' (CCP) – directly in the chain where they are most likely to enter a food production system. In HACCP systems, therefore, while the compulsion for enhancing food safety controls is not taken away, firms are nonetheless granted considerable latitude in designing how they go about enhancing such controls; in other words, HACCP systems are whether a functional food chain control system is in place rather than whether specified controls are adopted, as was typical under conventional State hygiene regulations. At the same time, the scope for flexibility leads firms to confront the risks and costs they face while investing in new ways of doing business and to implement the most cost-effective controls. Nevertheless, there is considerable variation across legal jurisdictions in the degree of flexibility afforded firms in designing and implementing their controls. In the US, for instance, while the HACCP plans for meat and poultry processing facilities do not require the explicit approval of the Food Safety Inspection Service (FSIS), in any other cases detailed guidelines are provided for and public regulators have the power to 'veto' plans that are not considered effective; conversely, in the EU the more general concept of 'due diligence' affords considerable more latitude to firms in designing their own food safety management systems. HACCP systems are an adaptable risk management tool and a cost-effective way to prevent system failures, such that they can be used by any segment of the food industry and at every step of the value chain: nonetheless, at present they are a widely-held industry norm only in the food processing and manufacturing sectors.[296] In turn, traceability means the ability to trace and track a food, food-producing substance and any other substance intended or expected to be incorporated into food, through all stages of production, processing,

[295] HACCP systems were developed in the late 1950s by a major US food processing firm, Pillsbury in the attempt to adapt to the food industry those failure prevention and criticality analysis techniques that had been elaborated by the US NASA in World War II to assess the reliability of equipment and procedures so as to meet the very high safety reliability needs of space flight.

[296] While founding fairly quick acceptance among national and international institutions, HACCP systems met with more mixed response from industry and consumers. In particular, for large firms HACCP systems require relatively sophisticated administration and management and can create a barrier to participation of smaller firms in the food industry. In turn, consumer groups have generally supported HACCP systems, although they voiced their concern that, without enforceable performance standards these systems provide no way to hold industry accountable for producing safe food. For discussion see, J. Caswell, M.E. Bredahl, and N. Hooker, *How Quality Management Meta-Systems Are Affecting the Food Industry*, cit.; K. Huelebak and W. Schlosser, *Hazard Analysis and Critical Control Point (HACCP) History and Conceptual Overview*, (2002) Risk Analysis 22: 547-552; S. Henson and G. Holt, *Exploring Incentives for the Adoption of Food Safety Controls: HACCP Implementation in the UK Dairy Sector*, (2000) Review of Agricultural Economics 22: 407-420; S. Hoffmann, *Getting to Risk-Based Food Safety Regulatory Management: Lessons from Federal Environmental Policy*, in: S. Hoffmann and M. Taylor (eds.), *Toward Safer Food: Perspectives on Risk and Priority Setting*, New York/London: Routledge, 2005, 3-22; and, C. Coglianese and D. Lazer, *Management-based Regulation: Prescribing Private Management to Achieve Public Goals*, (2003) Law and Society Review 37: 691-730.

distribution and marketing; that way, traceability systems contribute to promote integrated approaches throughout the supply chain from raw material production and processing throughout to the retail trade in the target markets.

The emergence of management-based standards represents a key moment in technical standardisation, which for the first time standards requires evidence for a series of managerial controls instead of for conformity to substantive procedures and outcomes. This supports the contention that outcome-focused public regulation allows industry to find the optimal way of achieving food safety goals within their own operations. This change in approach from controlling the final product to risk-based process-oriented management systems proves to be beneficial for all operators. As many stakeholders report, investments into good practices and management systems result in many cases in a more than reasonable return on investment, namely: reduced input costs through implementation of integrated crop management (ICM) and integrated pest management (IPM); higher labour productivity; improved market access through communication of the good practices applied; and improved long-term supplier-buyer relationships.[297]

10.3.2. Stricter liability in an integrated 'farm-to-fork' value chain approach

While being a characteristic of the increasing focus on risk-based approaches to food safety regulation and while reflecting scepticism over the efficacy and economic efficiency of technology- and performance- based standards, this trend towards flexible management-based regulation is also a characteristic of the drive to push responsibility for food safety onto food chain actors. Although food safety has historically been an area of public policy and the establishment of food safety controls a preserve of public authorities, it is increasingly acknowledged that food safety is the result of adequate processes and controls that are put in place directly in the food chain and hence that it is the food business that is best placed to evaluate the safety risks associated with its operations along global value chains and to devise in the most efficient way the most effective controls at the most appropriate points. Thus, this new regulatory paradigm ultimately places primary and direct responsibility for ensuring food safety along the entire chain on those who produce, process and trade food.[298] Specifically,

[297] See S. Henson, *Public and Private Incentives to Adopt Enhanced Food Safety Controls*, University of Guelph International Food Economy Research Group, 2008, at: http://www.iamo.de/uploads/media/henson.pdf, at 5 (arguing that, "the firm-level impact of improvements in food safety controls can be regarded as comparable to adoption of any new technology, with the expected change in firm profitability dependent on the characteristics of the firm, the number of other adopters and the firm's position in the order of adoption among its competitors"). For review see, L. Fulponi, *Private Voluntary Standards in the Food System*, cit.

[298] The multitude of actors involved in the different stages of the agri-food value chain are the following: farm input suppliers at pre-farm level; farm producers (soil preparation, crop and pest management, harvesting methods, sorting, grading, packing, etc.) and primary collectors and food processors (handling and control of raw material of local and imported origin, product and process management and control, etc.) at on-farm level; and food ingredient and packaging manufacturers, operational service providers (produce handling, transport and storage, laboratory services, etc.), traders (importers, wholesalers and retailers) and food service companies (fresh and processed food distribution) at post-farm level; and finally, consumers. Chain actors include also providers of some support services, such as research & development, education, training, trade promotion, and advocacy.

food business operators become primarily responsible for developing, implementing and monitoring their own risk management systems from the input level to the front end retail and for ensuring these systems work effectively; in turn, public authorities are responsible for creating and maintaining the inspection and enforcement systems needed to verify the adequacy of private risk control mechanisms and for monitoring that the relevant mandatory regulations are fulfilled by business operators in food production, processing, distribution and marketing.

In such integrated whole-chain 'farm-to-fork' – or 'farm-to-table' – control regime, marketing of unsafe food becomes a breach of product liability law. Demonstrating liability has come to play a prominent role especially through the 'due diligence' required of food businesses with respect to their food safety obligations. Operationally, this means that chain actors must exercise due care to avoid any personal injury, property damage, or other harm to third parties caused by unsafe food and be able to demonstrate that their products and operations meet relevant regulatory requirements. A preventive function is generally recognised to liability law, which serves a twofold function: on the one hand, acting as an economic 'signal' that deters firms from producing unsafe food;[299] on the other, acting as indirect regulator that creates an environment leading to reduced breaches of safety.[300] A 'due diligence' defence was for the first time introduced into a food law under the UK Food Safety Act of 1990,[301] which provided the first major impetus for the development of private enhanced food safety controls. Prior to then, national food legislation in Europe and in other industrialised countries generally allowed for a so-called 'warranty defence' whereby a person accused of an offence would escape conviction if he could prove that, when he bought the product, he obtained a written warranty from his supplier that a food product could be lawfully sold or dealt with and that this did not enter into a country which contravened legal

[299] There are two main ways in which liability law serves as an incentive for firms to implement enhanced food safety controls and preventive measures. These are namely: (i) civil liability claims, whereby the threat of claims from injured consumers or damaged business relations and the enforceable duty to pay damages for negligence may influence firms' preferences and costs and serve as a stimulus to firms to improve their practices; (ii) liability insurance, whereby food companies may cover the risks of liability claims by insuring themselves against risks. See M. Ferrari, *Risk Perception, Culture, and Legal Change: A Comparative Study on Food Safety in the Wake of the Mad Cow Crisis*, Franham/Burlington: Ashgate, 2009, at 89 (identifying three goals of liability law: compensation, corrective justice, and deterrence); and, A.M. Polinsky and S. Shavell, *The Uneasy Case for Product Liability*, (2010) Harvard Law Review 123: 1437-1492, at 1443-454 (observing that market forces and regulation are sufficient to form deterrence in product liability cases).

[300] Legal liability has general effects on business management. Even in the absence of any economic incentive to avoid actions that may violate law or pose risks for human health and consumer protection, shifting legal responsibilities is expected to have a positive effect on the development of a 'culture' where firms take voluntarily their responsibility for food safety. See T. Havinga, *The Influence of Liability Law on Food Safety on Preventive Effects of Liability Claims and Liability Insurance*, Nijmegen Sociology of Law Working Papers Series no. 2010/02, at: http://www.ru.nl/rechten/rechtssociologie/onderzoek/nijmegen-sociology-0/; B. Roe, *Optimal Sharing of Foodborne Illness Prevention between Consumers and Industry: The Effect of Regulation and Liability*, (2004) American Journal of Agricultural Economy 86: 359-374; and, A. Brunet Marks, *Check Please: Using Legal Liability to Inform Food Safety Regulation*, (2013) Houston Law Review 50: 724-785.

[301] See, most notably, Humber Authorities Food Liaison Group, *Food Safety Act 1990: Guidelines on the Statutory Defence of Due Diligence*, at: http://www.eastriding.gov.uk/corpdocs/foodservices/Food_Advice_Notes/due_dilligence_guidelines.pdf.

requirements while under their control.[302] That way, the supplier assumed legal responsibility for ensuring that the 'warranted' food conformed to the standards at the time of supply. The Food Safety Act brought about a reversal of legal liability for food safety along the supply chain, such that any food business operator can escape liability for non-compliance with food safety requirements if he can demonstrate that 'all reasonable precautions' have been taken (duty of care) to ensure that the food he handled and any food obtained from upstream suppliers conformed to legal requirements.

Such a shift from *ex ante* regulation to *ex post* liability took place also at the EU level. In the aim of recognising the primacy of the general interest of public health and consumer protection over any right of economic operators, Regulation (EC) No 178/2002[303] – referred to as 'General Food Law Regulation' because it lays down the general principles, requirements and procedures in matters of food safety at the EU level and is full-fledged enough to serve as a model food law – raises the issue of supply chain management. In this respect, the regulation provides that, "[i]n order to ensure the safety of food, it is necessary to consider all aspects of the food production chain as a continuum from and including primary production and production of animal feed up to and including sale or supply of food to the consumer because each element may have a potential impact on food safety"[304]. In particular,

[302] On 'warranty defence' see, S. Henson and J.R. Northen, *Economic Determinants of Food Safety Controls in the Supply of Retailer Own-Branded Products in the UK*, (1998) Agribusiness 14: 113-126; and, J.E. Hobbs and W.A. Kerr, *Costs of Monitoring Food Safety and Vertical Coordination in Agribusiness: What Can be Learned From the British Food Safety Act 1990?*, (1992) Agribusiness 8: 575-584.

[303] Regulation (EC) no. 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, 1 February 2002, OJEU L 31/1. In the aftermath of the BSE crisis, the European Commission initiated an ambitious restructuring programme for the food safety system of the EU and its Member States in order to basically re-establish public confidence in food supply. Regulation (EC) no. 178/2002, which gave concrete form to the majority of priorities put forward two years before in the European Commission's White Paper on Food Safety (12 January 2000, COM(1999) 719), established a comprehensive and integrated farm-to-fork supply chain approach crossing all food sectors, both within the EU and at the EU external frontiers. This new approach is founded on some general principles, namely: (i) science-based risk analysis, which relies on the functional and institutional separation between risk management responsibilities that remain pertinence of the European Commission and national food safety authorities, and scientific risk assessment that is undertaken in an independent, objective and transparent manner by the European Food Safety Authority (EFSA) (Articles 4 to 6); (ii) traceability of food and feed to their sources through a modern system of monitoring and information-sharing called Rapid Alert System for Food and Feed (RASFF), which allows for rapid withdrawal of food and feed from the market where risk to consumer health is posed (Article 18); (iii) the precautionary principle as the guidance of risk management where the possibility of harmful effects on health has been identified but scientific uncertainty as to the existence and extent of health risks persists (Articles 5-7); (iv) protection of consumers interests from fraudulent or deceptive practices and any other misleading and misrepresenting practices (Article 8); and (v) transparency in terms of constant review of food policies and involvement of all stakeholders in the development of food law and policy through transparent decision making, effective public consultation, and efficient evaluation and communication of potential food safety risks. For an introduction to the EU General Food Law see, A. Alemanno, *Trade in Food*, cit.; B. van der Meulen and M. van der Velde, *Food Safety Law in the European Union: An Introduction*, Wageningen: Wageningen Academic Publishers, 2004, at 253-282; and, B. Halkier and L. Holm, *Shifting Responsibilities for Food Safety in Europe: An Introduction*, (2006) Appetite 47: 134-195.

[304] Regulation (EC) no. 178/2002, Preamble para. 12.

by requiring that "food shall not be placed on the market if it is unsafe"[305], the regulation disciplines liability issues and provides for a quite stringent responsibility threshold for commercial actors involved with food products: "Food and feed business operators at all stages of production, processing and distribution within the businesses under their control shall ensure that foods or feeds satisfy the requirements of food law which are relevant to their activities and shall verify that such requirements are met"[306]. In particular, unless otherwise specified, all food businesses are required to be at least able to trace their products 'one step back' and 'one step forth' in the supply chain, up to suppliers in third countries.[307] If food business operators have reason to believe that they have put unsafe food into the market, they must initiate immediately procedures to withdraw that food from the market and inform the competent food authorities; if the products have already reached consumers, the operators must immediately inform consumers and recall the product.[308] It is also important to take due consideration of the direct effect of Regulation (EC) No 178/2002, which, as any other regulations under EU law, enables European citizens to enforce consumer rights both against Member States before European courts (vertical direct effect) and against other individuals and companies in actions before national judges (horizontal direct effect).

The relative importance of *ex ante* and *ex post* systems of incentives tends to differ between countries. Throughout the 1990s and 2000s also the US began to move incrementally toward a farm-to-fork supply chain approach to food safety, even though on a more case-by-case and voluntary basis than in the EU, and in the lack of a comprehensive structural regulatory reform.[309] The series of highly publicised food safety failures over the past years clearly demonstrated the deficits in the US regulatory system and prompted an intensification of legislative reform. In particular, the US has been concerned with the Food Safety

[305] *Ibidem*, Article 14(1). Specifically, "[f]ood shall be deemed unsafe if it is considered to be: (a) injurious to health; (b) unfit for human consumption" (Article 14(2)). Determination of whether a food is unsafe must take into account the normal conditions of production, processing, distribution, and use, as well as information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods (see Article 14 (3)); in turn, a food is unfit for human consumption if it is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay (see Article 14 (5)).

[306] *Ibidem*, Article 17(1).

[307] *Ibidem*, Article 18. Deliveries from retailers to final consumers are excluded from traceability requirements.

[308] *Ibidem*, Articles 19 and 20.

[309] For a comparison of the EU and US risk regulatory systems see, J.B. Wiener, *Whose Precaution after All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, (2003) Duke Journal of Comparative and International Law 13: 207-262 (highlighting the significant differences that can be observed in the EU and US food safety regulatory systems and finding that regulation is stricter and more often mandatory in the EU, where it is linked to rigorous forms of official conformity assessment and enforcement; conversely, in the US implementation focuses more on consumers' willingness-to-pay). See also, M.A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, (1998) Columbia Journal of European Law 4: 525-545; N.A. Brewster and P.D. Goldsmith, *Legal Systems, Institutional Environment and Food Safety*, (2007) Agricultural Economics 36: 23-38; and, FAO, *Private Standards in the United States and European Union Markets for Fruit and Vegetables: Implications for Developing Countries*, FAO Commodity Studies, Rome: FAO Publications, 2007.

Modernization Act (FSMA).[310] Signed into law in early 2011, the FSMA entails the most significant and comprehensive overhaul of the FDA's authority since the FDCA was passed in 1938. The FSMA is a significant effort to strengthen and reorient FDA from a reactive to a preventive stance on food safety issues and to target resources according to risk levels, that way improving the agency oversight over production processes. One of the most significant legal changes is the requirement for the food industry to introduce hazard analysis and utilise science-based preventive controls across the supply chain; in this respect, it prescribes that any facility engaged in manufacturing, processing, packing, or holding food for consumption in the US must put a HACCP-based preventive control system into place.[311] While debate in the US has largely focused on the impacts of FSMA to domestic food operators, the question of how the international food landscape can be affected by the statute and its implementing regulations is equally worth discussion and consideration. The FSMA includes, indeed, a specific section devoted to the inspection of foreign facilities and imported foods at the port of entry, signalling the high level of urgency attributed to ensuring the safety of imported food entering the US market. In the inability to strengthen the FDA's international enforcement capabilities by granting the agency authority to inspect every foreign facility, the legislator's choice was to institutionalise private certification as a formal requirement for imports. In particular, the Foreign Supplier Verification Programs (FSVP) and the Voluntary Qualified Importer Programs (VQIP), which target countries and food items that pose particularly high threats to food safety – namely, foods originating either from countries with inadequate safety protection or from countries where there is a known food safety risk – place accountability in the hands of importers to carry out detailed audits on the foods they introduce into the domestic market.[312]

In conclusion, food safety regulation is moving away from a command-and-control model, which entails mandatory prescriptions and requirements, toward a less pervasive "public-private model of food regulation"[313], which serves the significant purpose of driving food safety backwards throughout the chain. In this respect, we may finally recall that the Beijing Declaration on Food Safety of 2007[314], which recognised that integrated food safety

[310] Food Safety Modernization Act of 2011, 4 January 2011, Public Law 111-353, 111th Congress, 124 Stat. 3885.

[311] Compared to previous legislation FSMA expands considerably the use of HACCP systems to encompass all food facilities – both at the domestic and international levels – that fall under FDA's jurisdiction. In this respect "[t]he owner, operator, or agent in charge of a facility shall […] evaluate the hazards that could affect food manufactured, processed, packed, or held by such facility, identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards and provide assurances that such food is not adulterated […] or misbranded […], monitor the performance of those controls, and maintain records of this monitoring as a matter of routine practice" (para. 350(g)).

[312] For discussion see, E. Fagotto, *Governing a Global Food Supply: How the 2010 FDA Food Safety Modernization Act Promises to Strengthen Import Safety in the US*, (2010) Erasmus Law Review 3: 257-273.

[313] T. Marsden, R. Lee, A. Flynn and S. Thankappan, *The New Regulation and Governance of Food*, cit., at 258.

[314] Beijing Declaration on Food Safety, adopted by Consensus by the High-level International Food Safety Forum - 'Enhancing Food Safety in a Global Community', Beijing, 26-27 November 2007. The declaration was adopted in a multi-stakeholder platform with the participation of senior officials and experts from relevant international organisations and various government authorities, as well as representatives of food industry and consumers.

systems are best suited to address potential risks across the entire food chain from production to consumption, expressed the need to understand food safety as a compelling duty and a primary interest of both the public and the private spheres.

11. Nature and complexities of private food safety regulation

The consumer concerns with the safety attributes of food, the restructuring of increasingly global agri-food supply chains and the 'ratcheting-up' of regulatory requirements with direct responsibility placed statutorily on the chain, combine to create an environment where market actors are confronted with heightened compliance challenges. It is this environment that, fostering ever-more demanding product and process specifications, has provided greater impetus for chain actors to engage in flexible, market-oriented modes of regulation as primary tools of effective food safety management and chain governance. This section is designed to improve our understanding of the reasons why profit-making entities engage in costly systems of private regulation, which have expanded dramatically by moving away from traditional self-regulation such as CSR to take most typically the form of B2B contractual arrangements under which firms are regulated by other firms or by collective private institutions. In addition, this section aims at presenting the complexities and identifying the patterns of development and evolution of private regulation relating to food safety.

11.1. Responding to regulatory and reputational risks through private standards

Chain global fragmentation brings together food production systems that widely differ in terms of chain actor characteristics, environmental conditions, and regulatory frameworks. Integrating such different and geographically distant systems raises significant challenges for the coordination and control of supply chains that cross multiple countries. In addition, addressing safety risks in such context necessitates the adherence to common management frameworks and mutually recognised rules and principles than ever before. A key concern is therefore the governance of the food chain. It is in this context that private standards come to prominence. A standard is a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose. In the private sector, standards are a matter of private contract, which are codified into written statements setting out – for common and repeated use – rules, guidelines and specifications for products and/or related processes and production methods. Different value chain structures generate distinctive constellations of standards; the attributes of chain actors and the degree of market concentration indeed differentiate the incentives and capacities for adopting and implementing standards. Arguably, private standards are of less importance in relation to traditional agricultural commodities, such as coffee, grains, sugar, cocoa and tea, which pose relatively few safety problems; for these products the primary bases for international competitiveness remain largely price and quality, with little or no brand recognition. Conversely, it is the growing importance of buyer-driven

high value export value chains – essentially, for fruit and vegetables,[315] fresh meat and meat products,[316] and fish and fishery products[317] – that has attracted the use of private food safety standards. In this respect, standards are the response of profit-maximising market actors to interlinked problems of risk management, information transmission, reputation protection and liability reduction.[318]

Standards serve primarily as "a risk-reduction strategy for globally-branded firms, a form of insurance against criticism of a firm's practices"[319] by managing the potential risks of safety failure that may occur at multiple nodes of the chain. Put it differently, private standards shield the major food actors from liability in case of a food safety crisis. In this respect, private standards are fundamentally about identifying recognised chain-specific 'good practices' about controls and conformance in production, processing, distribution and marketing of food in order to validate the safety attributes of any food product. In details, food safety standards set by the private sector are about the implementation of:

(i) Good agricultural practices (GAP): GAP standards focus on the best practices to be used at the farm level, such as soil and water management, pest and disease controls, crop management, on-farm processing and storage, etc. in order to minimise food contamination in on-farm cultivation and post-harvest management, and ultimately ensure sustainable agriculture;

(ii) Good manufacturing practices (GMP): GMP standards aim at controlling the many reactions occurring during processing of primary produce and/or raw materials, which cause changes in composition, nutritional value, physical

[315] Although there is still a significant market for uncertified fruit and vegetables, which especially for sub-Saharan producers represents an important market, the overall trend is nonetheless for demand for uncertified produce to decline. For evidence see, FAO, *Market Penetration of Selected Private Standards for Imported Fruits and Vegetables into the EU*, Unpublished Report of the Commodities and Trade Division - Project no. 40365; and, the several contributions in A. Borot de Battisti, J. MacGregor, and A. Graffham, *Standard Bearers: Horticultural Exports and Private Standards in Africa*, IIED Trade Knowledge Network Working Paper 2009, at: http://pubs.iied.org/pdfs/16021IIED.pdf.

[316] See J.M. Codron, E. Giraud-Héraud, and L.G. Soler, *Minimum Quality Standards, Premium Private Labels, and European Meat and Fresh Produce Retailing*, (2005) Food Policy 30: 270-283 (arguing that controls by the competent authorities in importing countries are generally very strict and reduce the perceived need for further – private – controls; nevertheless, fresh meat is among the products most affected by private standard requirements, with major retailers having a premium line of meat products that require certification).

[317] More than half of international trade in fish and fish products by value originates in developing countries, where it represents a significant source of foreign exchange earnings and of employment opportunities. Private certification in this sector, which concerns especially processed fish products and private label fish products, are reportedly growing although it remain behind private certification requirements for other sectors. See in this respect, FAO, *Private Standards and Certification in Fisheries and Aquaculture: Current Practice and Emerging Issues*, (edited by S. Washington and L. Ababouch), FAO Fisheries and Aquaculture Technical Paper no. 553, Rome: FAO Publications, 2009; and, FAO, *The Evolving Structure of World Agricultural Trade: Implications for Trade Policy and Trade Agreements*, (edited by A. Sarris and J. Morrison), Rome: FAO Publications, 2009.

[318] See L.L. Sharma, S.P. Teret, and K.D. Brownell, *The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures*, (2010) American Journal of Public Health 100: 240-246.

[319] M.E. Conroy, *Can Advocacy-Led Certification Systems Transform Global Corporate Practices? Evidence and Some Theory*, PERI Working Paper Series no. 21/2001, at: http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1014&context=peri_workingpapers, at 11.

structure and sensory properties, so as to stop or slow down any deterioration in the food and ultimately ensure the safety of food;

(iii) Good distribution practices (GDP) and good trading practices (GTP): GDP and GTP standards aim at adjusting handling, transport and distribution facilities, conditions and procedures to the requirements of food safety;[320]

(iv) Good retail practices (GRP): GRP standards compile approaches to in-store food safety management, including improved knowledge and skills for increased productivity and food safety and quality, better infrastructure, and increased efficiency of resource usage for improved environmental sustainability;

(v) Good hygiene practices (GHP): GHP standards form an integral part of all food safety management systems as they cover all conditions – such as the design of facilities, control of operations, maintenance and sanitation, personal hygiene and training of personnel – necessary to establish processing, transport, distribution and marketing practices apt to prevent perishing due to micro-organisms, growth of pathogens, or contamination with chemical residues or contaminants; and

(vi) HACCP systems.

Also, standards are critical in enhancing chain efficiency by reducing the costs associated with chain coordination and control. Much of the costs for supply management, i.e. initial investments and sometimes increased operational costs,[321] are in fact displaced and responsibility passed on down to the supply chain to suppliers. For retailers it is indeed much cheaper and easier to commit their suppliers to the strict specifications and control requirements they set instead of implementing or maintaining in-house monitoring systems; in addition, retailers stipulate how these specifications and requirements are to be met and define each chain actor's responsibility in view of meeting consumer expectations in terms of product safety. In turn, in presence of so many suppliers and so few leading buyers it is very difficult for suppliers to pass on such costs; in other words, suppliers are expected to pay the entire cost of implementing enhanced food safety standards and the subsequent follow-up costs for periodic audits: in fact, "[b]eing social responsible would be apparent from developing food safety […] programs for retailers first or together with programs for suppliers. [Some] food safety standards […] are forced upon producers of own-branded products (not on all suppliers). This indicates that retailers embarked on this, not primarily because retailers are social responsible, but because they needed to get hold of the […] safety

[320] For instance, the French association representing trade in cereals, rice, feedstuffs, oilseeds, olive oil, oils and fats and agro-supply (COCERAL) launched the first common European Code of Good Trading Practices. The founding principles of this code are its voluntary nature, certification by independent third parties, and quality management in accordance with HACCP principles.

[321] Safety standards increase production costs because of the necessary replacement of pesticides, herbicides or fertiliser by more expensive raw materials, and the increased management duties and higher labour inputs. Further cost increases are associated with the development and implementation of quality-management systems, stricter testing and documentation, changes in the production processes, and certification requirements. Because of that, compliance with higher safety standards requires higher costs and consequently results in higher prices in the intermediate goods market.

of own-brand products. This are not cases of retailers acting social responsible, but retailers passing the buck to producers"[322]. In so doing, downstream firms in the food chain are forced to make investments in food safety through a system of 'negative incentives' that discipline those that fail to comply with the defined standard and its implicit level of protection against risk;[323] at the same time, retailers' requirements come to raise the level of competence along the value chain, such that retailers increasingly depend on fewer, larger, more sophisticated and dedicated suppliers and establish long-term business partnerships based on mutual trust, reliability and loyalty. In turn, dominant buyers benefit from improved corporate reputation.[324]

Still, standards serve to mitigate information asymmetries in the value chain. Standards make product characteristics and business practices consistent across global supply chains by facilitating information transmission along the chain and by providing "a common understanding, vocabulary, and frame of reference about what they mean by different terms and expect from different procedures […]"[325]. Particularly in those chains where the intrinsic characteristics of food are of credence nature such that they may not be immediately evident to the buyer, higher levels of oversight are required so as to convey credible information to the buyer on the nature of products and the conditions under which they are produced, processed and transported. By making it possible – and more compelling – to streamline buyer-supplier relationships and establish cost-effective linkages, certification of product and process attributes provides the buyer with reliable verification that specified requirements have been complied with at each stage of the value chain, so that the buyer is able to adjust its purchasing decisions.

In sum, private food safety standards are designed to minimise risks and costs associated with expansive value chains, cater to the growing 'safe-consumerism', facilitate compliance with tightened public regulation and manage exposure to product liability, with

[322] T. Havinga, *Actors in Private Food Regulation: Taking Responsibility or Passing the Buck to Someone Else?*, Paper for the Symposium on 'Private Governance in the Global Agro-Food System', Munster, 23-25 April 2008, at: http://www.uni-muenster.de/imperia/md/content/fuchs/agri-foodkonferenz2008/havinga_2008_actors_in_food_regulation.pdf, at 13.

[323] Where a food safety problem arises some responses are likely to be frustrated. Indeed, firms could attempt to 'free ride' on the efforts of other firms in the industry to improve chain reputation. Also, firms may follow what their competitors do through a form of social learning that avoids the time and energy required to undertake their own cost-benefit assessment (this is what is called "imitation heuristic": see K. Laland, *Imitation, Social Learning and Preparedness as Mechanisms of Bounded Rationality*, in: G. Gigerenzer and R. Selten (eds.), *Bounded Rationality: The Adaptive Toolbox*, Cambridge: The MIT Press, 2001, 233-247). That way, the food safety controls that a firm adopts could reflect as much (if not more) what other firms do rather than its own characteristics. There may even be a problem of 'adverse selection', wherein the worst firms in terms of safety performance are the most attracted to programmes for improving the overall chain reputation. On these issues see, A.A. King, M.J. Lenox, and M.L. Barnett, *Strategic Responses to the Reputation Commons Problem*, cit.; and, V. von Schlippenbach and I. Teichmann, *The Strategic Use of Private Quality Standards in Food Supply Chains*, DICE Discussion Paper no. 62/2012, at: http://hdl.handle.net/10419/59579.

[324] See, generally, R. Inderst and N. Mazzarotto, *Buyer Power in Distribution*, in: W.D. Collins (ed.), *Issues in Competition Law and Policy - Volume III*, ABA Section of Antitrust Law, 2008, 1953-1978.

[325] S. Hoffmann and W. Harder, *Food Safety and Risk Governance in Globalized Markets*, cit., at 19. Even if private standards play an outstanding role in suppliers' monitoring, additional criteria for supplier listing or de-listing include most notably reliability, consistency, scale, and continuity of supplies.

the ultimate aim of preserving brand reputation and integrity from potential damage in case unsafe food should find its way to the market. Nonetheless, while the management of regulatory and reputational risks is the predominant focus of private food safety standards, private engagement in food regulation is also intended to maintain a competitive positioning in the market. Private standards provide indeed sufficient scope for a better strategic (re)positioning in highly competitive global agri-food markets by providing the incentives for food companies to make the required asset-specific investments and be rewarded for investing in costly controls on the value chain. Leading buyers have looked to gain a competitive edge either by presenting to consumers, who are generally willing to pay a premium for high quality products, additional guarantees about the quality attributes of the food they supply or by offering high quality food of peculiar characteristics associated with specific localities (protected geographical indications[326] and designations of origin[327]) or with traditional production and/or processing methods (traditional specialties guaranteed[328]) or, finally, with methods that pay special attention to environmental and social sustainability.

In addition, private standards set quality assurance systems (QAS) and quality management systems (QMS), which define the organisational structure, processes and procedures enabling the application of quality standards. This means that private standards, which come "not only to codify but also to define product quality"[329], are not only risk management tools but also have become the predominant basis of product differentiation strategies in agri-food markets. It is worthy observing in this respect that relatively little evidence exists as for private standards achieving differentiation on the basis of safety attributes. Leading food retailers generally agree that food safety is largely a non-competiveness issue, because any potential food safety problem arising at any level of the chain may impact the entire chain; in addition, safety-based competition would be likely to erode consumer confidence, since this would mean to suggest that some food products are 'more' or 'less' safe than others.[330] That is the reason why private food safety standards are usually developed collectively rather than by individual food firms and take the form of B2B requirements; conversely, quality-based standards are usually B2C terms – usually 'signalled' and made 'visible' by means of labels, logos or trademarks on food packaging – that bring business quality-enhancing investments to the attention of consumers at point-of-sale and that support credence claims to consumers about superior food product and process attributes. In

[326] Protected geographical indications (PGI) cover food for which the geographical link must occur in at least one of the stages of production, processing or preparation. PGI can be based on different tools, which refer either to a public scheme or to a private standard, within a trademark approach.

[327] Protected designations of origin (PDO) cover food which is produced, processed and prepared in a legally-identified geographical area using recognised know-how.

[328] Traditional specialities guaranteed (TSG) refer to the traditional character, either in the composition or means of production, rather than to the origin of a food product.

[329] L. Busch and C. Baine, *New! Improved? The Transformation of the Global Agri-Food System*, cit., at 331. See also S. Ponte and P. Gibbon, *Quality Standards, Conventions and the Governance of Value-Chains*, (2005) Economy and Society 34: 1-31, at 3 (arguing that the mode of governance in a supply chain does not depend exclusively on economic attributes, but also on the effectiveness of quality definitions and quality management tools).

[330] See T. Havinga, *Private Regulation of Food Safety by Supermarkets*, (2006) Law and Policy 28: 515-533, at 528.

the limited cases where firms develop product-differentiating standards that encompass also food safety, the food safety element is not presented to the consumer as basis for differentiation, but it is bundled with other claims.[331]

11.2. Trends in the evolution of private standards in the food sector

Behind many discussions of private standards lays the assumption that these standards can be easily defined and be readily distinguished from public regulation. Actually, the private standards landscape in the food sector is multiform and highly dynamic, and continues to rapidly evolve over time; standards proliferate and new forms of standards emerge, which in turn induce changes in the relative importance of some forms of standards and of chain actors engaged in the elaboration and adoption of those standards. In shorthand, private standards remain far from universal, such that any attempts of categorisation are more complex than they appear. In addition to this, a lack of clarity fuelled by a glaring paucity of empirical studies that are too much circumstantial evidence and too little systematic analysis[332] and a failure to appreciate the distinctions and inter-relationships between private and public regulation in the food sector have served to impede a full understanding of the nature and role of private standards and to cloud debates about the impacts of those standards and the trajectory we might expect in their future evolution. Hence, the following paragraphs are an attempt to reduce the complexity and solve at least some of the misunderstandings in the area of private food safety standards by examining the diverse constellation of actors, norms and processes that are engaged in the governance of food supply chains. Several different categorisations and classifications may be provided in view of defining a possible taxonomy of private standards in the food sector. Collectively, these standards are remarkably variable with respect to whom they are developed by and who adopts them, the issues of chain governance they address, the objectives pursued, their geographical and functional scope, and the rules and procedures governing their development and implementation. Three key

[331] On the distinction between 'risk management standards', which include food safety standards, and 'product differentiation standards' see especially, S. Henson and J. Humphrey, *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, (2010) Journal of Development Studies 46: 1628-1646.

[332] An increasing number of studies have sought to review the various types of private food standards, their objectives and characteristics, and the ways they are enforced: see, among the others, OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit.; UNCTAD, *Food Safety and Environmental Requirements in Export Markets - Friend or Foe for Producers of Fruit and Vegetables in Asian Developing Countries?*, 2007, UNCTAD/DITC/TED/2006/8; P. Liu, *Private Standards in International Trade: Issues and Opportunities*, Presentation at the WTO's Workshop on 'Environment-Related Private Standards, Certification and Labelling Requirements', Geneva, 9 July 2009, at: http://www.fao.org/fileadmin/templates/est/AG_MARKET_ANALYSIS/Standards/Private_standards___Trade_Liu_WTO_wkshp.pdf; S. Henson and J. Humphrey, *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, cit.; CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, (edited by S. Henson and J. Humphrey), Paper for CAC Thirty-second Session, Rome, 29 June - 4 July 2009, ALINORM 09/32/9D; and, *Transitions in Food Governance in Europe from National towards EU and Global Regulation and from Public towards Hybrid and Private Forms of Governance*, Nijmegen Sociology of Law Working Papers Series no. 2012/02, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189478.

developments may be identified that have taken place in the last two decades with substantial impacts on food safety management practices, namely:

(i) The evolution from corporate to collective systems of standards' promulgation and enforcement;

(ii) A shift from product content requirements to process specifications and quality management systems, together with an extending 'attribute space'; and

(iii) A shift from predominantly national to transnational standards and the associated attempt of harmonisation at the global level.

The examples that are provided are illustrative and selective; they are far from being exhaustive. They serve to demonstrate some of the diversity of the 400 plus standards that are currently in operation in the food sector. We will conclude with seeking to shape possible future lines of evolution.

11.2.1. Standards' ownership: From corporate to collective standards

The first major impetus for the initial emergence of private food safety standards can be traced back to the UK food retail sector in early 1990s. The introduction of a due diligence defence under the UK Food Safety Act of 1990 forced retailers to enhance their own technical expertise in the area of food safety and to develop their own comprehensive food safety protocols and quality assurance schemes, which suppliers were contractually obliged to comply with.[333] The initial adoption of corporate standards – i.e. standards developed and monitored internally by individual firms for their own exclusive use and whose primary focus is to a large extent determined by the interests of the firms themselves – served to afford the highest level of due diligence against regulatory liability, while providing the greatest scope for product differentiation and competitive advantage. It became nonetheless ever-more evident to food retailers that the transaction and information costs associated with global sourcing were extremely high; that there was a considerable degree of overlap in the requirements set by each retailer, such that food producers and/or processors supplying a number of these firms were subject to multiple audits; and that on the issue of food safety they faced similar consumer and regulatory demands. Hence, in mid-1990s a discourse began to emerge among major food retailers – initially in the UK and then more widely in Europe – over the development of joint industry-wide food safety systems that would permit to standardise safety and operational criteria and to eliminate multiple audits of food producers and processors, while expanding the population of suppliers from which they could procure. The resulting standards, which serve the interests of a wider segment of both commercial and non-commercial stakeholders, are set collectively either by voluntary coalitions of private

[333] UK retailers introduced individual crop protocols especially in the field of fresh produce: this is, for instance, the case of the UK's Red Tractor label in the area of produce-origin standards and the quality standards established for fresh fruit and vegetables by Tesco's Nature's Choice.

commercial entities and related organisations (industry-based standards), or by private standards setting organisations (independent third-party standards).[334]

In particular, all but one of the major British food retailers collaborated in the development of harmonised private food safety standards through the British Retail Consortium (BRC), the leading UK trade association through which food retail operators already interacted on issues of common interest. Initially established to reduce the number of audits for private label products, since mid-1990s the BRC has worked to support retailers' objectives at all levels of the supply chain by coordinating the consolidation and harmonisation of the B2B standards owned by its members as well as third-party organisations in the UK. Established in 1998, the BRC Technical Standard was the first private food safety standard to be developed entirely through the collective action of private firms.[335] The BRC Technical Standard is a comprehensive standard that covers all areas of product safety, including ISO-based documented and effective product and process management systems and HACCP-based hygiene practices; it applies to manufacturers of own brand food products and addresses part of the due diligence requirements of both suppliers and retailers. Initiated as a pure retail initiative without any involvement of the food industry, the scope of the BRC Technical Standard has been reviewed on an ongoing basis.[336] Thus, reflecting the growingly global nature of British retailers' supply chains and the transnational reach got by the standard and the associated conformity assessment infrastructure, in 2008 the BRC Technical Standard was developed in the BRC Global Standard for Food Safety.

The BRC standard is a fundamental requirement of leading retailers in Europe and worldwide.[337] Nevertheless, it did not succeed in becoming the reference standard; indeed,

[334] See A. Casella, *Free Trade and Evolving Standards*, in: J.N. Bhagwati and R.E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Cambridge: The MIT Press, 1997, 119-156; and, *Id.*, *Product Standards and International Trade: Harmonization through Private Collations?*, (2001) Kyklos 54: 243-264 (supporting the contention that collective standards evolve as 'club goods'). The proposed distinction according to the institutional form, i.e., the entity that sets the standard, is the classification provided at the international level by the WTO (see WTO, *Private Standards and the SPS Agreement*, cit.; *Id.*, *Typology of Global Standards - Communication from the United Nations Conference on Trade and Development (UNCTAD)*, 26 February 2007, G/SPS/GEN/760) and by the EU (see EU, *Food Supply Chains Dynamics and Quality Certification*, EC Directorate-General JRC/IPTS Review Report (edited by M. Aragrande, A. Segre, E. Gentile, G. Malorgio, E. Giraud Heraud, R. Robles Robles, E. Halicka, A. Loi, and M. Bruni), 2005, at: http://agrilife.jrc.ec.europa.eu/documents/ReviewReport_000.pdf).

[335] In 1996 the British food retailers joined together and formed an alliance with domestic growers, called the UK Assured Produce Scheme (APS). As the first QAS in the horticultural sector worldwide, APS sought to harmonise the generic elements of a series of commodity-specific QAS (most notably, fresh fruit, salads and vegetables) so as to produce safe food in an environmentally responsible manner. To that end APS relies upon ICM systems and enhances the credibility of the associated certification processes.

[336] A Packaging Standard (used by any manufacturer producing packaging materials for all types of products, including food) was issued in 2002, followed by the Storage and Distribution Standard (addressing retail-organisations storing and/or distributing food, consumer goods and packaging materials) in 2006, and by the Global Standard for Agents and Brokers (providing essential certification for companies that provide purchase, importation or product distribution services in the food and/or packaging supply chain) in 2014.

[337] All but one of the major food retailers in the UK – collectively accounting for around 60 percent of retail food sales – accepts third-party certification to the BRC Global Standard *in lieu* of their corporate standards when sourcing private label products. Also, the adoption of the standard has expanded rapidly with the

retailers in continental Europe saw the utility to develop their own collective food safety standard. Hence, effectively mimicking and developing upon the at that time BRC Technical Standard, in 2002 members of the German Federation of the Retail Trade (*Hauptverband des Deutschen Einzelhandels* - HDE) developed the International Food Standard (IFS) as a common food suppliers' audit standard.[338] In 2003, the French organisation representing food retailers and wholesalers (*Fédération des entreprises du commerce et de la distribution* - FCD) joined the IFS Working group and became involved in further elaboration of the IFS. Expanding also in Austria, Belgium, Italy, the Netherlands, Poland, Spain, and the UK itself, the IFS is today the first pan-European collective private food safety standard. The IFS and BRC standards overlap in their scope and specific requirements in many ways; nonetheless, food retailers in the UK, Germany and France do not accept the two standards as equivalent, such that manufacturers supplying into multiple countries are still required to have certification to both. This is ultimately due to the different rationales that motivate the two standards. Indeed, the BRC Global Standard very much reflects the due diligence defence prevailing in the UK regulatory environment and the need to ensure that suppliers maintain appropriate control on their production sites; in turn, the IFS is based more broadly on EU regulatory requirements and is motivated by the need to have a consistent and comparable high quality audit report for all certified suppliers of retailer branded food products so as to create a high level of transparency throughout the supply chain.

Where there is no pre-existing industry organisation or where existing organisations do not provide an appropriate institutional 'house' for standards development, private third-party standard setting bodies tended to emerge. Strictly speaking, 'private' food standards are thought to originate from non-governmental, market-based actors, especially dominant firms in the food retail sector. Nevertheless, in line with similar tendencies in the fields of environment, labour rights and CSR, a growing number of private standards in the food sector originate from other non-governmental actors, most notably independent not-for-profit entities like NGO and civil society organisations, as well as multi-stakeholder and horizontal alliances among actors that differ in their institutional structure and degree of integration and participation in standard setting. One prominent example of these "amorphous alliances"[339] is the Dutch Code on Requirements for a HACCP-based Food Safety System, which adopted the BRC Global Standard almost 'word-for-word' because of similar regulatory and market-based pressures on food firms to enhance food safety controls. The 'Dutch Code' was compiled in 2006 by the Dutch National Board of Experts HACCP (NBE-HACCP) – a body consisting of governmental authorities, enforcement agencies, food retailers, food manufacturers, trade associations and consumer organisations – and is now operated by suppliers of food safety

number of certified processing facilities increasing from less than 500 in the UK in 1999 to 5,500 in 64 countries in 2005 to over 21,000 in 90 countries in 2013, with certification issued through a worldwide network of accredited certification bodies. For details, see http://www.brcglobalstandards.com/ (accessed 26 June 2014).

[338] For details see, http://www.ifs-certification.com/index.php/en/ (accessed 26 June 2014).

[339] D. Giovannucci and S. Ponte, *Standards as a New Form of Social Contract? Sustainability Initiatives in the Coffee Industry*, (2005) Food Policy 30: 284-301, at 298 (observing that increasingly "[s]tandards are […] being set […] through amorphous alliances of corporations, NGOs, and civil society groups that tend to reach agreements on the model of collective bargaining").

certification services brought together in the Certification Foundation Food Safety (*Stichting Certificatie Voedselveligheid* - SCV). The SCV promotes international compliance and adaptability of food safety standards, develops and maintains certification and inspection systems for food safety, and promotes the international use of these systems. In so doing, the Dutch Code has facilitated mutual recognition of corporate standards of a number of private certifiers, currently totalling 13.[340]

There is emerging evidence that the European experience is serving to 'demonstrate' the efficacy of collective private standards and thus to induce, at least in part, the evolution of similar systems of governance elsewhere. Compared with the EU, the US exhibits considerable differences in the relative importance of the actors involved in the promulgation of food safety standards, which reflect different regulatory systems and structures and *modus operandi* of the supply chain. Most major manufacturers still employ their own corporate standards and use internal systems of audit as limited forms of self-regulation. Arguably, this is the reflex of a system of private food safety governance that is still dominated by large food manufacturer brands and therefore characterised by producer-driven supply chain structures. American retailers have not managed to achieve the leadership position they have in Europe so that they neither developed their own food safety standards nor joined standards owned by platform organisations of European retailers. Instead, despite being much less important than in Europe, long established private third-party certification schemes have played a key role in the US, by providing certification services with respect to regulatory requirements and/or voluntary standards set by the US authorities.[341] On the other hand, collective private food safety standards are beginning to emerge also in the US especially following the decision in 2003 by the American Food Marketing Institute (FMI)[342] to acquire the Safe Quality Food (SQF) standards series. SQF was initiated in 1994 as a collection of public voluntary standards and certification systems – providing a complete and independent programme for supplier auditing for industry- or company- branded products, processes and services regarding food safety and quality management –[343] by the West-Australian Department of

[340] Another significant case of a standard elaborated by private third-party or by multi-stakeholder standards-setting organisations is the German *Qualität und Sicherheit* (QS). QS is a voluntary initiative of domestic organisations and associations from the entire food chain. More than 70,000 companies have joined the QS system in Germany and abroad; at present, 72 percent of vegetables and 60 percent of fruit commercialised by German producer organisations are QS-certified. For information see, http://www.q-s.info/index.php?id=92&L=1 (accessed 29 September 2014).

[341] One of the most prominent examples is AIB International, which was established in 1919 to provide *inter alia* food safety inspections, audits, and certifications. As of 1956 AIB has elaborated its own standards, which are predominantly based on the collective of regulatory requirements set by the FDA and the US Department of Agriculture (USDA). For discussion on AIB International see, D. Cervantes-Godoy, D. Sparling, B. Avendaño, and L. Calvin, *North American Retailers and Their Impact on Food Chains*, in: K.D. Meilke, R.D. Knutson, R.F. Ochoa, and J. Rude (eds.), *Contemporary Drivers of Integration*, NAAMIC Paper Series no. 163893/2007, 113-146, at: http://naamic.tamu.edu/cancun2/sparling.pdf.

[342] FMI represents 1,500 member companies in food retailing and wholesaling in the US and worldwide (amounting to 75 percent of all retail food stores in the US), apart from 200 foreign companies from over 50 countries. FMI conducts programmes in research, education, food safety, industrial relations, and public affairs on behalf of its members.

[343] Specifically, the SQF consists of: a HACCP-based supplier assurance code for primary producers (SQF 1000), which includes – in addition to GAP – food safety and quality plans relating to growing and

Agriculture in order to enhance the international competitiveness of domestic agricultural industries and work with them in meeting the increasingly demanding standards for safety and quality of food and fibre products. Following such acquisition, the SQF series is now operated as a set of private collective standards by the SQF Institute (SQFI), which as a FMI's off-spring is intended to facilitate the independence and integrity of SQF systems and to provide leadership and service for all sectors of global food industry by overseeing the technical aspects of the SQF programme. In addition to SQF, already in 2002 the US Food Products Association (FPA) had established the Supplier Audits for Food Excellence (SAFE) programme with most of the large food companies in North America participating to meet the safety concerns of the food industry. The FPA-SAFE programme consists in a set of voluntary standards committed to promoting excellence in food safety auditing, particularly concerning food safety, primary packaging, aseptic processes, and warehouse/distribution, whereby it provides a comprehensive assessment of a company's food safety and quality systems, while reducing the time and expenses associated with redundant supplier audits.

11.2.2. Conformity assessment: The rise to prominence of third-party certification

The existence of regulatory standards does not guarantee *per se* that food products and processes comply with those requirements. The emergence and proliferation of private food safety standards have been both stimulated and facilitated by the development of a multi-tiered private system of conformity assessment that is based on certification. Certification is a procedure by which a body verifies and gives written or equivalent assurance that a product or process meets the specifications set by the relevant standard – be it publicly mandated or privately adopted;[344] this involves, most notably, product testing (including measurement and calibration), facility inspection, audit and verification, documentation, and tracing non-compliant and undesirable behaviour in view of verifying that those claiming to comply with a standard provide documented evidence to show that this is the case. Certification gives an incontestable added value to the product or process being certified, which opens up markets and improves confidence of the user that that product or process meets the specified characteristics. Conformity assessment has been adapted to the developments that interested food safety governance in the most recent decades; hence, mirroring the platform of public and private regulation governing food safety, firms face multiple and inter-linked regimes of conformity assessment and enforcement. In parallel with the shift from individual to collective standards is indeed a movement from first- and second- party to independent third-

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production of fresh produce and other food categories like animal feeds, grain production and storage, and fish farming; a HACCP-based supplier assurance code for the food industry (SQF 2000), most notably for the manufacturing sector, which includes – in addition to GMP – food safety and quality plans for field harvest services, manufacture of agricultural chemicals and food processing aides, packaging operations, and fruit and vegetable processing; and a HACCP-based supplier assurance code for food distribution (SQF 3000). In addition to food safety management, SQF takes also account of hazards relating to product quality, production and processing, occupation health and safety, the environment, animal welfare, ethical production, and GM status.

[344] In some contexts the terms 'certification' and 'registration' are used interchangeably and they both signify the same. Therefore, depending on the country, the body that issues a conformity certificate to a given standard may be referred to as either 'certification body' or 'registration body' (or 'registrar').

party certification of compliance with a given standard. Specifically, first-party certification consists of self-declaration of conformity (SDoC); this relies ultimately on self-monitoring and self-reporting, i.e. internal audit performed by the standard setter itself upon its own products and processes. Traditional forms of CSR-related self-regulation are typically the case for SDoC. In turn, in a typical B2B contractual arrangement, second-party certification is performed by the company setting a standard upon its suppliers who are required to comply with that or, alternatively, by trade bodies who monitor on behalf of their members; in some cases, compliance is verified by contracting an external certifier that is anyway approved by the standard setter. Conversely, third-party certification, which was introduced in the food sector as an initiative of large retailers especially aimed at protecting their brands, embodies a paradigm of 'delegated governance'. In a third-party certification regime monitoring tasks are transferred to auditors that are independent from both the firm setting the standard and the firm adopting the standard, and that do not raise – at least theoretically – any conflicts of interest; third-party certifiers are indeed entities that are not involved directly in the supply chain, such as firms providing market-based certification services, NGO and other civil society organisations. The independence of certifiers and impartial evaluation of conformity assessment against recognised standards depend mainly on accreditation, that is, the procedure by which an authoritative body gives formal recognition that another body is competent to carry out certification tasks. In some countries accreditation is a legal requirement for conformity assessment bodies; but even in countries where accreditation is not mandatory, conformity assessment is equally increasingly utilised by the private sector as a marketing device in order to gain a competitive edge by having performance evaluated against relevant standards. In particular, regardless of the field of operation, third-party certifiers are required to be accredited on an individual basis to ISO/IEC 17000:2004[345] or EN 45000[346] by the official accreditation agency in the country of operation. This puts in evidence how conformity assessment, as the major enforcement arm of private sector regulation, has a hugely important role in safeguarding the integrity of the system.[347]

Contemporary agri-food systems are therefore governed not only by private standards, but also by private modes of enforcement, such that private standards are the basis of more

[345] ISO/IEC 17000:2004 – *Conformity Assessment - Vocabulary and General Principles*.

[346] EN 45000 – *General Requirements for Accreditation*. Three international accreditation organisations, namely the International Laboratory Accreditation Cooperation (ILAC), the International Accreditation Forum (IAF), and the European Co-operation for Accreditation (EA) – drew up the EN 45000 series of standards, which lay down general requirements for accreditation to be consulted by bodies applying for accreditation, accredited bodies and evaluators in ensuring the application of the standards in the field that interests them. Accreditation bodies are required to comply with appropriate international standards and to operate at the highest standard, such that the certificates issued by bodies accredited by members of the three organisations above are relied upon worldwide.

[347] For discussion see, e.g., M. Hatanaka, C. Bain, and L. Busch, *Third-Party Certification in the Global Agri-Food System*, (2005) Food Policy 30: 354-369; and, M. Hatanaka and L. Busch, *Third-Party Certification in the Global Agrifood System: An Objective or Socially Mediated Governance Mechanism?*, (2008) Sociologia Ruralis 48: 73-91. It is worthy observing that the meaning of the concepts of 'first-party', 'second-party', and 'third-party' is inconsistent in practice and in the literature. Under a different conceptualisation from that used in this work, 'first-party' may identify the supplier, 'second-party' the buyer, 'third-party' independent compliance assessors, and 'fourth-party' may even identify the State or regulatory agency.

complex schemes that consist of the standard *per se* as well as the associated conformity assessment governance structures. The choice among the various regimes of certification we come to describe reflects the balance between costs and risks on the part of the entity that sets the standard and that requires compliance with it. Moving from first-party throughout to third-party certification pushes costs down the value chain; in turn, since the credibility of a standard is to a large extent related to the types of actors engaged in standard setting and in monitoring compliance, the independence of certification and transparent reporting is a proxy for credibility and sufficient guarantee of reliability. In this respect, unless the supplier's reputation is high and the buyer accepts any self-declaratory assurances of safety, first-party certification usually results in the least degree of security and credibility; that is why SDoC are generally accompanied by effective post-market surveillance. In turn, while second-party certification can enhance the credibility of the standard, this may also raise significant conflicts of interest. Hence, although individual firm standards do continue to put in place first- and second- party controls, third-party certification regimes are becoming the norm for many private certification-based standards with the primary aim of providing the buyer – be it a firm or the final consumer – with reliable verification that product and process attributes conform to the reference standard. In shorthand, "[f]or credence goods, one may rely on producer claims, but generally [there is] more trust in an independent third party to provide truthful information […] In this case, either a third-party private certification may be used, or there may be government regulations requiring that certain product characteristics be revealed […] by means of government testing or inspections"[348].

11.2.3. Attributes space: Increased emphasis on process controls

Private standard setting has increased its influence on food safety regulation with reference first to product specifications, i.e. criteria that define the required content characteristics of the final product. Product-content standards take generally the form of numerical standards, terms and definitions establishing maximum residue limits (MRL), i.e. toxicologically-acceptable quantitative tolerances of named active ingredients that can occur in food as a side effect of using pesticides and veterinary drugs, as well as food contaminants and additives; in addition, this type of standards includes methods of sampling and analysis to be applied in the measurement of the specified characteristics. On the other hand, as one of the most defining characteristics of private regulation in the food sector, not only private standards dictate what kinds of food products are to be produced and processed (outcome-based standards) but also specify in detail under what conditions those products are to be produced and processed (process-oriented standards). As result of the increasing consumer awareness about the safety attributes of the food they consume, which served to highlight the role of production and processing methods (PPM), process controls provide the basis for making claims about those credence characteristics which would be otherwise difficult to detect. In light of that, process-oriented standards consist of more complex performance criteria together with tightened

[348] C. Roheim, *The Economics of Ecolabelling*, in: T. Ward and B. Phillips (eds.), *Seafood Ecolabelling: Principles and Practice*, Hoboken: Wiley-Blackwell, 2008, 38-57, at 41.

verification and enforcement procedures than do product-content standards, with the result that they permit to control safety in a way that is more cost-effective than testing the final product. Specifically, especially for fresh fruit and vegetables and primary produce for the processing industry, such standards come to set verifiable requirements with reference to HACCP-based hygiene practices, sanitary and pest-control measures, as well as social accountability, labour rights, environmental impact and sustainable management of natural resources, fair trade, and animal welfare;[349] furthermore, they cover management criteria relating to documentation and monitoring and to some forms of traceability to link food products at some point downstream in the supply chain to the point at which the standard specifies and controls processes. Lastly, both reflecting and supporting the promulgation of private food standards has been the development of a specific type of process-oriented standards concerning quality management meta-systems.

In parallel with such greater emphasis on process requirements, private standards continue to move upward and their scope widens as competition intensifies. Because of a strong consumer movement forcing food industry to react, the domain of private standards shows expanding expectations that include a wide range of issues and target a variety of objectives. Hence, private standards may either lay down codes of practice covering several or even all stages of the food chain farm-to-fork (horizontal standards) or tackle specific issues of the food chain (vertical standards). In this last respect, most schemes are particularly concerned with GAP and so relate primarily to pre- and on- farm activities, while some others are post-farm gate standards concerned with the subsequent stages of food processing, distribution and marketing; equally, private standards may either affect a wide range of products or be product-specific. More importantly, while almost all private standards in the food sector have as their primary focus safety and the integrity of the supply chain on an increasingly global basis, standards concerning product quality are also on the rise; an increasing number of standards include a blend of product and process attributes cutting across a wider spectrum of quality assurance attributes, such as organic food (e.g., Ifoam, KRAV, EKO), vegetarian or biodynamic food (e.g., Vegan, Demeter), or religious food (e.g., Orthodox Union, OK Kosher Certification, and Ifanca, IHI Alliance).

While consumers normally do not differentiate between safety and quality, for scientists and institutions food safety aspects are rather distinct from food quality, which is generally defined as the totality of characteristics of food that bears on its ability to satisfy stated and implied needs.[350] Hence, quality embraces in addition to product quality also: service, organisational, management and particularly process quality; compliance with third-party specifications; adequacy of its usage; and perception of its excellence at a competitive price. That way, quality has changed its notion from product quality that needs to be inspected to

[349] Standards that cover process-oriented requirements are also referred to as 'ethical standards'. On these standards see, P.K. Robinson, *Responsible Retailing: Regulating Fair and Ethical Trade*, (2009) Journal of International Development 21: 1015-1026.

[350] See. e.g., 9000:2015 – *Quality Management – Vocabulary and General Principles*, at para. 3.1.1.

process quality and quality assurance as a mode of thinking that governs firms' behaviour.[351] On the other hand, despite its analytical merit, the distinction between safety and quality attributes is not clear-cut. For instance, standards clearly aiming at product differentiation are presented to consumers in terms of quality and environmental benefits, even though many of their elements may relate to food safety; also, collective and third-party standards are designed to address not only food safety but also environmental and social sustainability implications of supply chain operations, and aim to reward sustainable and ethical practices. In fact, standards combine food safety requirements along with a number of non-food safety specifications and the balance between these different items changes depending on each single standard, so that any possible distinction is based on the relative rather than exclusive emphasis on each aspect.

11.2.4. Harmonisation and benchmarking options: 'Once certified accepted everywhere'

Global agri-food systems are tied to a number of different regulatory systems, such that the evolution of food standards locally may be a lesser driver of investments in food safety by firms. The geographical reach of private food safety standards is therefore expanding transnationally as agri-food chains become globally integrated; in other words, as food chains go global, so do standards. Such global reach is assumed either in the setting process or in the implementation of standards that transcends national borders. Generally, despite most corporate and collective standards have been developed to be used by domestic food companies for their operations at the domestic level, these same standards get in fact transnational reach when they apply to suppliers based outside of the national territory. This is true, for instance, of the BRC Global Standard and the IFS, which paradoxically can even be adopted by suppliers that are not selling into the reference markets if they feel that this presents a competitive advantage. In some cases a standard is applied by multiple subsidiaries of the parent company, which are often located in different countries and regions. In turn, often the case may be for a standard that was born as essentially national and that becomes transnationally available if the governance structure of the standard setting body becomes transnationalised; this is the case, for instance, of SQF which, originated as a collection of public voluntary food safety standards in one country, is now operationalised at the international level as a set of private collective standards by an organisation whose membership is clearly multinational.

As result of the growing number of transnational private food safety standards and the progressive consolidation of food retailing at the global level, some efforts have been made to act collectively in arenas where common interests for standardisation seem to exist. As in the UK in the late Nineties but this time on a global scale, it is widely recognised that the

[351] For discussion see, J.A. Caswell and S. Joseph, *Consumer Demand for Quality: Major Determinant for Agricultural and Food Trade in the Future?*, (2008) Journal of International Agricultural Trade and Development 4: 99-116.

diffusion of standards and certification schemes that are required by different buyers and that operate side-by-side in the same value chain may have the potential to fragmentise the chain, this resulting in the need to comply with and be certified simultaneously to multiple and often overlapping standards, together with the associated costs and inefficiencies. That is why "[m]ost retailers would prefer to have one global standard for food safety"[352]. Being aware that one single auditor is needed through the chain and that food safety is a non-competitive issue, the scope for differing private standards and certification schemes to be 'benchmarked' was largely admitted towards the vision of 'once certified, accepted everywhere'. This means that once a product is benchmarked against a global standard it should be accepted everywhere since it is recognised as equivalent to the benchmarking standard. Arguably, this comes to greatly reduce certification costs for suppliers, relieving them of the need to have separate certifications for each buyer; in turn, this permits retailers to switch suppliers and source across the globe more easily. With global sourcing likely to increase over the medium term, the harmonisation of standard systems is likely to increase efficiency in the food system by promoting largely recognised food safety management principles and rules on a global scale. Ultimately, improving standard consistency means improving consumer confidence.

One major example is represented by EUREPGAP in the primary produce sector.[353] Reflecting the importance of imports in the supply of fresh fruit and vegetables to European countries and the need to extend beyond established private food safety standards that were essentially national in scope, a coalition of 13 major food retailers in the UK and in continental Europe drove efforts to compile a properly-speaking European GAP code. Hence, in 1997 they established the Euro-Retailer Produce Working Group (EUREP), which in 1999 adopted a transnational private GAP protocol, known as EUREPGAP. While providing guidance for continuous GAP improvement, the significance of which extends throughout the supply chain to issues such as minimisation of the use of agrochemical and medicinal inputs, detrimental impact of farming operations on the environment, working conditions and animal welfare, EUREPGAP was specifically intended to set both a framework for benchmarking existing national GAP schemes and a single recognised framework for independent verification about how food is produced on the farm. It is especially this benchmarking option that resulted in the growing dominance of EUREPGAP as a widely accepted standard in supply chains for fresh produce by both national governments and private trade associations, with 30 major food retailers across 12 European countries – controlling an estimated 85 percent of fresh produce retail sales – become involved and over 35,000 producers certified in 80 countries. Reflecting such a growing transnational scope in establishing GAP schemes

[352] OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit., at 27.

[353] In primary produce it is worthy mentioning also the case of the International Federation for Produce Standards (IFPS), previously known as International Federation for Produce Coding. IFPS consists of international fresh produce associations all over the world, which provide a global forum to address issues that affect the produce industry. Originally brought together to address the international harmonisation of the industry-defined price-look-up (PLU) codes – i.e., four (or five) digit numbers that are affixed to the individual pieces of produce sold in bulk/loose at the retail level so as to identify the type of produce – IFPS expanded its mission to the development, implementation and management of harmonised international standards – particularly, GAP and traceability standards – with the major aim of improving the supply chain efficiency of the fresh produce industry.

mutually agreed between multiple retailers and suppliers, EUREPGAP was re-branded as Global Partnership for Good Agricultural Practice (GlobalGAP) along its third revision in 2007. As illustrated in Figure 1, GlobalGAP consists of an all farm base module with control points and compliance criteria that are common to certification of all produce. This general frame is complemented by crop specific modules, the most commercially significant of which is by far that concerning fruit and vegetables, and by specific input-related standards, namely: (i) integrated farm assurance standard (IFA), whose scope covers the production destined for human consumption of crops, livestock and aquaculture; (ii) compound feed manufacturer standard; (iii) plant propagation material standard; (iv) global risk assessment on social practice; and (v) standard on animal transport.

Figure 1: GlobalGAP's structure and scope (as of December 2015)

<table>
<tr><td rowspan="9">Integrated Farm Insurance Standard (IFA)</td><td rowspan="9">All Farma Base</td><td rowspan="5">Crops Base</td><td colspan="3">Fruit & Vegetables</td></tr>
<tr><td colspan="3">Combinable Crops</td></tr>
<tr><td colspan="3">Flower & Ornamentals</td></tr>
<tr><td colspan="3">Green Coffee</td></tr>
<tr><td colspan="3">Tea</td></tr>
<tr><td rowspan="3">Livestock Base</td><td>Cattle & Sheep</td><td>Dairy</td><td rowspan="3">Livestock transport</td></tr>
<tr><td colspan="2">Pig</td></tr>
<tr><td colspan="2">Poultry</td></tr>
<tr><td>Aquaculture Base</td><td colspan="3">Salmon</td></tr>
<tr><td colspan="6">Compound Feed Manufacturer Standard</td></tr>
<tr><td colspan="6">Plant Propagation Material Standard</td></tr>
<tr><td colspan="6">Global Risk Assessment on Social Practices Standards</td></tr>
<tr><td colspan="6">Standard on Animal Transport</td></tr>
</table>

Because of its continued relevance and effectiveness, GlobalGAP is at present adopted by 49 retail and food service members, 191 producer and supplier members, and 152 associate members – mostly, accredited certification bodies – in over a hundred countries worldwide, which agree to the GlobalGAP's Terms of Reference.[354] This rapid growth has stimulated the development of new national private and/or public GAP codes in a number of countries, some of which have been subsequently benchmarked against GlobalGAP.[355] Due especially to the

[354] See http://www.globalgap.org/uk_en/who-we-are/members/ (accessed 26 June 2014).

[355] GlobalGAP offers two levels of benchmarking recognition, namely: 'equivalence' for standards that fully conform to GlobalGAP (at present, AMAGAP (Austria), BANAGAP (Martinique), Certified Natural Meat Programme (Uruguay), ChileGAP, IKB Varken and MPS-GAP (the Netherlands), KenyaGAP International and KFC Silver Standard (Kenya), Mexico Supreme Quality GAP, Naturane and UNE155000 (Spain), New Zealand GAP, QS-GAP (Germany), and SwissGAP Hortikultur); and 'resemblance' for standards that conform to GlobalGAP to a large extent (with the exceptions of Florverde Sustainable Flowers (Colombia), Red Tractor Assurance for Farms Fresh Produce Scheme (UK), and SwissGAP Früchte, Gemüse und Kartoffeln). Standards belonging to the second category may develop add-on modules to bridge the gap and thus enable their producers

large share of fruit and vegetables sales destined to the European market, GlobalGAP is at present the most frequently cited standard demanded by buyers, this supporting the growing global reach of the standard and its importance in sourcing by lead retailers. In a sense, GlobalGAP has become 'the' standard in the governance of fresh produce supply.[356]

The most recent stage in the evolution of private food safety standards has been the Global Food Safety Initiative (GFSI).[357] Launched in 2000 by the Food Business Forum (CIES) – a network of large European and US retailers – the GFSI provides a unique international stakeholder platform for facilitating networking, knowledge exchange and sharing of best food safety practices between standard owners in order to promote continuous improvement in food safety management and ensure confidence in the delivery of safe food to consumers. More importantly for the economy of our discussion, the GFSI brings the chief executive officers and senior management of around 650 leading international food retailers, manufactures, service providers, and other stakeholders across 70 countries into agreement on globally accepted food safety standards on the general acknowledgment that they should join forces rather than compete on food safety issues. In particular, the GFSI pursues a twofold objective: first, promoting convergence between existing food safety management standards and facilitating recognition of their equivalence by maintaining a benchmarking process; second, improving cost efficiency in the food supply chain through the common acceptance of GFSI-recognised standards around the world. As it is in the case of GlobalGAP, the benchmarking process entails comparison of provisions within applicant standards with the principles and criteria for effective food safety management outlined in the GFSI Guidance Document.[358] Initially designed to cover food processing only, in 2004 the Guidance Document was extended to implement a comparable platform for private food safety standards also in primary production; as of June 2014, 13 were the schemes recognised as equivalent to GFSI (Figure 2).[359]

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to obtain full recognition. For further details see, http://www.globalgap.org/uk_en/what-we-do/the-gg-system/benchmarking/.

[356] For discussion see, J. van der Kloet, *Transnational Supermarket Standards in Global Supply Chains: The Emergence and Evolution of GlobalGAP*, in: J. van der Kloet, B. de Hart, and T. Havinga (eds.), *Socio-legal Studies in a Transnational World*, (2011) Recht der Werkelijkheid 32: 200-219.

[357] See GFSI, *Once Certified Accepted Everywhere: Standards, Harmonisation and Co-operation in the Initiative*, 2010, at http://www.anstey-ltd.com/docs/OCAE-final-web.pdf.

[358] See GFSI, *Guidance Document - Sixth Edition*, 2011, at: http://www.mygfsi.com/technical-resources/guidance-document.html.

[359] The GFSI-benchmarked standards concerning pre-farm gate food production are: GlobalGAP IFA scheme and Produce Safety Standard, Global Red Meat Standard (GRMS), and SQF 1000; in turn, the standards covering post-farm gate food processing and handling are: BRC Global Standard for Food Safety, BRC/IoP Global Standard for Packaging and Packaging Materials, CanadaGAP Scheme, Food Safety System Certification (FSSC) 22000, Global Aquaculture Alliance's Seafood Processing Standard, IFS Food Standard and PACsecure, PrimusGFS, and SQF 2000. For details see, http://www.mygfsi.com/gfsi-benchmarking-general/applications-update.html.

Figure 2: Key features of major GFSI-benchmarked private food safety standards

	BRC Global Standard for Food Safety	**IFS Food Standard and PACsecure**	**FSSC 22000**	**SQF 2000**	**SQF 1000**	**GlobalGAP IFA scheme and Produce Safety Standard**
Geographic focus	British market	German and French markets	Europe	US and Australian markets	US and Australian markets	International (mainly Europe)
Owners	British retail members and trade associations	German and French retail associations	Foundation for Food Safety Certification	US retail associations	US retail associations	European retail association
Main members	Tesco, Sainsbury's, Marks & Spencer	Carrefour, Tesco, Ahold, Wal-Mart, Metro, Migros, Delhaize	Standard based on ISO 22000 and BSI PAS 220	Ahold, Carreforur, Tesco, Delhaize, Migros, Metro, Wal-Mart	Ahold, Carreforur, Tesco, Delhaize, Migros, Metro, Wal-Mart	Ahold, ASDA, Coop, Conad, Migros, Metro, Marks & Spencer, Sainbsury's, Tesco, Tegelmann
End users	Food manufacturers	Food manufacturers	Food manufacturers	Food manufacturers	Primary producers	Primary producers
General management provisions (GAP, GMP, GHP and HACCP)	Yes	Yes	Yes	Yes	Yes (GAP)	Yes (GAP)
Certification of food safety systems; audit requirements	Yes	Yes	Yes	Yes	Yes	Yes

Similar trends towards harmonisation on a global scale characterise also certification systems. In this respect, although the GFSI is not involved in auditing and certification, it nonetheless encourages third-party audits against the benchmarked standards. The Guidance Document requires for certification bodies to be officially accredited pursuant to relevant ISO standards and to be subject to peer-monitoring through mutual recognition agreements (MRA), whereby the partners agree to recognise the results of each other's testing, inspection, certification and accreditation. In view of increasing confidence of both private buyers and public regulators in the work of conformity assessment and accreditation bodies in other countries, MRA are intended to facilitate the acceptance of food products everywhere on the basis of 'one single assessment in one country' principle and hence to reduce repeated conformity assessment controls for internationally traded food products and the associated costs to the benefits of suppliers and buyers alike.

Overall, as result of the benchmarking option thereby included, the GFSI has been credited with being the first ever instrument that promotes a whole-chain approach towards harmonisation in food safety and hence with achieving "truly global harmonisation of food safety standards"[360]. This is even more significant if we consider that, despite the apparent lack of a huge private food safety standard setting activity, the US is also becoming more involved in GFSI – as well as in GlobalGAP –, this making it evident how the geographical focus of these standards has spread from Europe to becoming more global.

11.2.5. Future expected developments

Fundamental changes are ongoing in food safety governance at the global level, which pervade both public and private regulation and which bring about shifts in their respective modes and spheres of influence. In particular, "it is arguably private rather than public standards that are becoming the predominant drivers of agri-food systems"[361]. Evidence proves indeed that private food safety standards are fast becoming a global phenomenon and an increasingly dominant mode of regulatory governance in high-value agri-food markets also in developing countries. In all likelihood, coupled with up-warding trends in global sourcing, private standards will continue to increase in scope and stringency over time; there is in fact general consensus that "the implementation of private food standards will become even more widespread in terms of the types of markets to which they apply, the number of countries where use of [third-]party certification systems is important and the product groups affected"[362]. In addition, retailers and manufacturers expect "standards to become more

[360] B. van der Meulen, *The Anatomy of Private Food Law*, in: B. van der Meulen (ed.), *Private Food Law: Governing Food Chains Through Contract Law, Self-Regulation, Private Standards, Audits and Certification Schemes*, Wageningen: Wageningen Academic Publishers, 2011, 75-111, at 105. GFSI is said to represent 70 percent of food retail revenue worldwide.

[361] S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, (2007) Journal of International Agricultural Trade and Development 4: 63-81, at 64. In the same sense see, P. Liu, *Private Standards in International Trade*, cit.

[362] R. Clarke, *Private Food Safety Standards: Their Role in Food Safety Regulation and their Impact*, Paper prepared for FAO for discussion at the CAC Thirty-third Session, Rome, 5-9 July 2010, at:

stringent with more precisely identified processes and control mechanisms. […] [S]tandards would extend more to non-food areas such as social and labour conditions, environment and even health"[363]. The general tendency is likely to be the dominance of a few collective private standards that span transnational rather than national markets. Such trends of collective and transnational action is further expected to be drove by the benchmarking processes referred to earlier, which, in parallel to processes of harmonisation and mutual recognition that take place in the public sphere, have the capacity to erode – at least in part – the differences in private standardisation.

On the other hand, it is highly disputable that one single standard will necessarily emerge as 'the' reference standard because of these processes. As fast as collective private standards are evolving, leading food retailers – in Europe and elsewhere – still require suppliers to meet their own individual corporate standards for particular attributes especially to retain scope for product differentiation and brand recognition. Therefore, while a number of corporate standards have meanwhile been benchmarked against GlobalGAP and GFSI, the distinction between individual firm standards and collective standards can be hazy as many corporate standards borrow from collective standards and *vice versa*, and a company may apply both its own standard and one developed in a collective process.

12. The international food safety regulatory framework

Before advancing our analysis and in view of further improving our understanding of the issue of private standards relating to food safety, it is essential to identify an additional layer of food safety regulation by defining the major features of the international food safety regulatory framework. The food safety regulations adopted by official authorities at the domestic and regional level are often based on standards that are elaborated by consensus at the international level. In the face of globalised patterns of food production and consumption, whereby the occurrence of food-related hazards in one country may become a public health risk to other countries through the rapid spread of diseases, even vigorous domestic regulatory systems can experience significant limits in ensuring overall food safety. That is the reason why, if since the 1960s international standard setting has smoothly grown in importance as an important regulatory tool to ensure worldwide food safety, in recent years we have witnessed a "globalization of SPS standards and standards-setting"[364]. Differently from domestic norm

http://www.fao.org/docrep/016/ap236e/ap236e.pdf (accessed 29 September 2015), at 30 (this working paper responded to requests made by Codex Members during the CAC thirty-second session in 2009 for a more critical analysis of the role, cost and benefits of private standards, especially with respect to the impact on developing countries).

[363] OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit., at 26.

[364] T. Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, (2008) Law and Contemporary Problems 71: 219-255, at 220.

making, international cooperation in the field of food safety exhibits a significant level of 'output informality' as described in Chapter One.[365]

A diverse range of motives explains such clear preference for softness and informality and for not to using hard international law in regulating food safety. Firstly, it is commonly understood that "voluntary compliance provides a stronger basis for public health measures than legal compulsion"[366]; still, "[w]here legal compulsion is necessary, it is more effectively applied by a government against a citizen under domestic law than by [any international organisation] against a government under international law"[367]; this comes "to stress the importance of national health law over international health law"[368]. Secondly, softness affords the possibility to avoid politically sensitive issues, flexibility in responding to rapid scientific developments that require instant reactions, and adaptability to very different and specific circumstances in different countries. Thirdly, the need to harmonise potentially diverging domestic food safety regulations led to establishing international bodies designed to set commonly agreed international standards. Lastly, different interests involved in food safety law and policy need to be accommodated; in particular, international standards seek to protect consumer health while facilitating trade in food and the smooth functioning of global agri-food markets. For all these reasons, none of the created international standards take *ab initio* the form of legally enforceable commitments nor constitute a traditional source of international law. Nonetheless, the impact of these standards has arguably been "to bring about greater discipline, and certainly enhanced transparency, in the use of public food safety and quality measures, while defining a more common vocabulary through which national governments can communicate their food safety and quality objectives"[369].

National food safety authorities cooperate in a number of different bodies at the bilateral, regional and international levels, which are engaged in day-to-day regulation and that tend to be a very effective way to cut costs otherwise associated with formal law making. This section will scrutinise exclusively the mandates, activities and influences of key relevant multilateral standard setting bodies – most notably, Codex and ISO – charged with food safety management issues, before concluding with discussing the configuration of a global food safety regulatory landscape in the last part of this chapter.[370]

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[365] See S. Duquet and D. Geraets, *Food Safety Standards and Informal International Lawmaking*, in: A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking: Case Studies*, cit., 395-433, at 398 (observing that the use of informality at the international level originates from practices at the domestic level, where technical standards-setting is conferred to specialised agencies).

[366] D.P. Fidler, D.L. Heymann, S.M. Ostroff, and T.P. O'Brien, *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, (1997) International Law 31: 773-799, at 786-787.

[367] D.P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, (1998) Vanderbilt Journal of Transnational Law 31: 1079-1126, at 1102.

[368] *Ibidem*, at 1103.

[369] S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit., at 72.

[370] A primary instance of bilateral cooperation in food safety-related standards-setting takes place between Australia and New Zealand. In view of striving a balance between minimising regulatory burden and reducing regulatory barriers to trade, on the one hand, and ensuring public health, on the other, in 1995 the two

12.1. The role of the Codex Alimentarius Commission in developing science-based food safety standards

In the face of the growing demand for global health security, the UN World Health Organisation (WHO) provides a "framework for integrated, flexible and forward-looking governance for addressing serious threats to public health"[371] in the general aim of pursuing "[t]he enjoyment of the highest attainable standard of health"[372] by all peoples. In view of that, the WHO facilitates risk assessment and provides technical assistance to Member States; nonetheless, the WHO's central role is a normative one. The World Health Assembly (WHA) – the WHO's norm making organ that represent all Member States and determine overall WHO's policy – is granted the power to adopt conventions, agreements and regulations, as well as recommendations, guidelines and other non-binding instruments, with respect to any matter lying within the competence of the Organisation.[373] For more than half a century the WHA refrained from exerting its treaty making power enshrined in Article 19.[374] Hence, despite "[r]ecognizing the importance of international agreement on global management of food safety"[375] based on good science and best practices, cross-sectoral collaboration and action at international and national levels, at present no multilateral agreement under the WHO sets legal rights and obligations of Member States regarding international cooperation, technical assistance and/or risk analysis as they might pertain to international food safety. In light of this "thin record of lawmaking"[376], the WHO has clearly proven to prefer a flexible

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countries signed an agreement establishing a system for the development of joint food standards. The impact of such bilateral cooperation expanded on the occasion of the first amendment to the agreement as result of the increasing institutionalisation following the establishment of a joint Food Standards Australia-New Zealand Agency (FSANZ) in 2002; the agency was set up as a bilateral government administration with the purpose of developing and administering the Joint Food Standard Code, and exchanging information. Enforcement and interpretation of the Code remain the responsibility of State departments and food safety agencies in the two countries. Additional reforms in 2010 still brought the system into greater conformance with international standards by separating risk assessment from risk management and by adopting a farm-to-fork approach to supply chain management.

Also, many OECD countries are actively involved in international consultation on technical and policy aspects of food safety through plurilateral forums; one of the most notable is the Quadrilateral Food Safety Group, which provides a forum for food safety experts from Australia, New Zealand, Canada, and the US, to discuss emerging common issues and best practices.

[371] D.P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, (2005) Chinese Journal of International Law 4: 325-392, at 326.

[372] Constitution of the World Health Organisation, 22 July 1946 (into force 7 April 1948), 14 UNTS 185 (as amended by WHA Resolutions no. 26.37, 29.38, 39.6 and 51.23) [hereinafter 'WHO Constitution'], Preamble, at para. 2.

[373] See WHO Constitution, Article 2, paras (k), (o), (s), (t), and (u).

[374] At present the only international treaty administered by the WHO is the Framework Convention on Tobacco Control (FCTC), which was adopted in 2003 following the serious ineffectiveness of the WHO's recommendations for a comprehensive tobacco strategy issued from 1970, as well as the huge inconsistencies in national tobacco control legislations.

[375] *Advancing Food Safety Initiatives*, Executive Board Recommendation to the Sixty-third WHA, 21 January 2010, EB126.R7, at 2.

[376] L.O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health*, (2008) Georgetown Law Journal 96: 331-392, at 375. See also L.O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People*, cit., at 376; and, D.P. Fidler, *The Future of the World Health Organization*, cit., at 1088. Pursuant to Article 21 of the Constitution WHO can exert its own normative power by adopting international regulations. At present the WHA promulgated two

recommendatory approach and to pursue its mission through soft law instruments, such as the dissemination of recommendations, guidelines, expert groups' findings and other non-binding instruments pursuant to Article 23 of the WHO Constitution.[377]

In particular, a core function of the WHO is "to develop, establish and promote international standards with respect to food […]"[378]. This task is mostly accomplished through the Codex, which was established in 1963 as an inter-governmental body as part of a Joint FAO/WHO Food Standards Programme.[379] As a 'science-based organisation'[380] the Codex is meant to guide and promote the elaboration of definitions and requirements for foods, which are based on the principle of sound scientific analysis and which support both domestic norm making and international harmonisation of domestic food regulations.[381] Specifically, much of Codex's effort has gone into producing standards on product content characteristics: in particular, 'general standards' apply to all commodities and consist in quantitative standards for food additives and MRLs for contaminants, pesticides and veterinary drugs in food where evidence is given about food risks for human use; in turn, 'commodity standards' concern specific foods or classes of food, such as cereals and legumes, cocoa products and chocolate, and both fresh and processed fruit and vegetables, and aim at

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international regulations, namely: the World Health Regulations no, 1 ['Nomenclature Regulations'], adopted at the WHA's first session in 1948; and the International Sanitary Regulations, first adopted in 1951, then renamed in 1969 as International Health Regulations no. 2 (IHR), and lastly significantly revised in 2005 to undertake effective responses to global threats posed by the outbreak of severe acute respiratory syndrome (SARS) in 2003. Relative to the IHR 1969, which covered very limited types of infectious diseases (cholera, yellow fever, and plague), the revised IHR offers a much wider scope of application including particularly emerging diseases in a globalised world. Nevertheless, the revised IHR neither is complemented by any regime sanctioning non-compliance with IHR obligations nor applies to non-State actors or creates judicially enforceable private rights.

[377] For instance, following the outbreak of the BSE the WHA Resolution no. 53.15 on Food Safety (53rd WHA Session, 20 May 2000, A53/VR/8) "urged" WHO Members to integrate food safety into their public health functions so as to design systematic preventive measures that would reduce the occurrence of foodborne illnesses and support the development of science in food-related risk assessment.

[378] See WHO Constitution, Article 2(u).

[379] Pursuant to the resolutions adopted respectively by the 11th Session of the FAO Conference in 1961 and the 16th WHA in 1963, CAC was established as a membership-based organisation open to all States that are Members or Associate Members of the WHO and/or FAO (see WHO/FAO, *Codex Alimentarius: Procedural Manual*', Rome, FAO, 22nd edition, 2014, Section VII). As of 30th January 2016, CAC brings together 187 Codex Members – of which 186 Member Countries and one Member Organisation (the EU, pursuant to Council Decision no 2003/822/EC of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, OJEU 2003 L 309/14) – and a number of Associate Members consisting of territories and groups of territories that are not responsible for their international relations; in addition, CAC includes 234 Codex Observers (mostly NGOs, but also IGO and UN agencies). A complete list of CAC Members is available at: http://www.codexalimentarius.org/members-observers/en/ (accessed 30 January 2016). For historical overview and discussion of ongoing reviews see, N.D. Fortin, *Codex Alimentarius Commission*, in: C. Tietje and A. Brouder (eds.), *Handbook of Transnational Economic Governance Regimes*, Leiden/Boston: Martinus Nijhoff Publishers, 2009, 645-653; and, T. Hüller and M.L. Maier, *Fixing the Codex? Global Food-Safety Governance under Review*, in: C. Joerges and E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance, and Social Regulation*, Oxford: Hart Publishing, 2nd edition, 2011, 267-300.

[380] See CAC, *Understanding the Codex Alimentarius*, 3rd edition, 2006, at: ftp://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf (accessed 26 January 2016), at 21-22.

[381] For analysis see, D.L. Post, *Food Fights: Who Shapes International Food Safety Standards and Who Uses Them*, Unpublished Ph.D. Dissertation, 2005, at 42 (providing a rigorous empirical examination of both the influence by groups of nations within CAC deliberations and the influence of Codex standards on national law, especially looking at the adoption of Codex standards by developed and developing countries).

preventing consumer fraud. Additionally, the Codex formulates process-related recommendations (codes of practice) for production, processing, manufacturing, transport and storage, of either individual foods or groups of foods; these include, most notably, recommended methods of analysis and sampling, an international code for good hygiene practice and a voluntary code of ethics for international trade in food, which provides some guidance to stop exporting and dumping poor-quality or unsafe food on to international markets. Lastly, Codex has adopted guidelines and general principles that apply to all products; these guidelines and principles, which are generally drawn from best food safety practices and then codified, serve interpretative purposes and suggest ways in which food safety norms are to be formulated, implemented, and interpreted.[382]

The Codex process is member driven. The Codex Commission, the central body in which Members are represented, works through a system of subsidiary bodies that are charged with the development and revision of Codex standards, recommendations and guidelines. In turn, such Codex Committees are assisted by a series of independent scientific bodies, in which experts from governments and academia assist in specific fields of expertise.[383] Commission and Committees' decisions are taken via a highly structured and institutionalised decision making process, which consists of a constraining eight-step procedure of iterative review by the Commission and the Member States.[384] Codex makes every effort to reach a consensus-based agreement on the adoption or amendment of standards; consensus requires

[382] The list of current norms adopted by the Codex (at: http://www.codexalimentarius.org/standards/list-of-standards/en/?no_cache=1) consists of: 212 standards for commodities (fruits, vegetables, cereals, pulses, legumes, meat, fish, milk, fats, oils, sugars, cocoa and products of all these), foods for special dietary uses, irradiated foods, mineral water, food labelling, claims, nutrition labelling, etc., apart from acceptable daily intake (ADI) for a number of food additives, limits for contaminants, and MRLs for pesticides and veterinary drugs; 49 codes of practice (food hygiene, hygienic practice for milk and milk products, transport of foods in bulk, good animal feeding, etc.); and 71 principles and guidelines (addition of essential nutrients to foods, use of flavourings, organically produced foods, sampling, validation of food safety control measures, etc.).

[383] These independent expert scientific bodies are: the Joint FAO/WHO Expert Consultation in Food Additives (JEFCA), which evaluates the safety of food additives, contaminants, naturally occurring toxicants and residues of veterinary drugs in food; the Joint FAO/WHO Meeting in Pesticide Residues (JMPR), which conducts scientific evaluations of pesticide residues in food and provides advice on the acceptable levels of pesticides in food traded internationally; and the Joint FAO/WHO Experts on Microbiological Risk Assessment (JEMRA), which conducts microbiological risk assessment of specific pathogen-commodity combinations, develops guidelines for the assessment of microbiological risks arising from food and water, and provides assistance for risk management.

[384] Codex standards-setting begins with submission of a proposal for a standard to be developed either by a national government or by a Commission's subsidiary body. The Commission or Executive Committee agrees that a standard is developed as proposed. Formal criteria have been established to assist the Commission or the Executive Committee in such a decision and in selecting or creating the subsidiary body to be responsible for steering the standard through its development. The Codex Secretariat prepares a proposed draft standard, which is then circulated to Codex Members and relevant international organisations for comments. Working drafts of the standards and reports of meetings of Codex subsidiary committees and the Commission are made publicly available on the Codex website. The subsidiary body in charge of the standard development considers these comments in view of producing a draft standard. This is sent to the Executive Committee for review and to the Commission for formal adoption as a draft standard. After review by Codex Members and relevant international organisations, the revised draft standard is sent to the Executive Committee for further review and finally to the Commission for adoption as a Codex Standard. Where standards are relevant only to particular regions or a smaller set of countries only the concerned Codex Members vote. For details see, WHO/FAO, *Codex Alimentarius Commission*, cit., Section II.

the resolution of substantial objections as an essential procedural principle and a necessary condition for the preparation of international standards that are intended to be accepted and widely used. Decisions to adopt or amend standards may be taken by majority vote only at the final stage in the development process and only when efforts to reach consensus have failed. The Codex neither implements its standards, guidelines and recommendations, nor assesses conformity with them; rather, implementation is dependent on adoption by Codex Members, in whole or in part, formally or informally, and/or incorporation into the standards of other bodies.

The Codex has been extremely successful in creating standards that reflect international consensus on food safety management and that "defin[e] a set of rules in which national governments establish regulatory requirements"[385] so as to protect public health.[386] Indeed, although Codex standards are voluntary by character and hence legally non-binding on States, countries nonetheless align their domestic measures with Codex provisions. In practice, the Codex has become 'the' standard against which national food safety laws and regulations are assessed and a key reference point in global food safety standard setting; more generally, the Codex activities have contributed in making international cooperation and scientific assessment 'the' norm in the field of food safety, while helping sensitise the global community to the danger of food hazards.

12.2. The work of ISO in the field of food safety

Aside from Codex, the main international body that develops standards relating to food safety is ISO. While ISO plays a similar and often complementary role to Codex, it is important to recognise the historically rather different mandates of these two organisations, which reflect relevant differences in membership, structure, and operation, and which set the different context in which the two bodies operate. Specifically, in terms of memberships, differently from Codex that is *ab origine* an inter-governmental organisation, ISO is a unique case of hybrid international body that, "while taking on the trappings of a public organization, retains a high degree of private self-governance"[387]. ISO is made up of the most representative national standard setting bodies in each of the 162 member countries, which encompass both actors having a public character and actors with a purely private or not-for-profit character; in particular, developing country members, which represent approximately 70 percent of current ISO membership, are represented by national governmental authorities and standard setting

[385] CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit., at 36.

[386] For instance, in Resolution no. 39/248 setting guidelines for the elaboration and reinforcement of consumer protection policies (16 April 1985, A/RES/39/248) the UN General Assembly stated that, "[w]hen formulating national policies and plans with regard to food, Governments should take into account the need of all consumers for food security and should support and, as far as possible, adopt standards from the Food and Agriculture Organization […] and the World Health Organization Codex Alimentarius or, in their absence, other generally accepted international food standards" (para. 39).

[387] H. Spruyt, *The Supply and Demand of Governance in Standard-setting: Insights from the Past*, (2001) Journal of European Public Policy 8: 371-391, at 371.

bodies, while developed country members are usually represented by non-governmental bodies – like qualified representatives from industry, research institutes and consumer bodies – recognised by governments to have responsibility in standard setting. Hence, ISO cooperates in a participatory way with both public and private stakeholders and in so doing is able to facilitate consensus agreements on relevant specifications and criteria. These differences in composition are reflected in the different mandates and competences of ISO and Codex; while Codex develops consensus-based international standards designed to assist national authorities in establishing food safety regulations, ISO's primary function is "to provide market-driven international standards […] to meet the needs of all relevant stakeholders including public authorities where appropriate without seeking to establish, drive or motivate public policy, regulations or social and political agendas"[388]. Lastly, in terms of scope, while Codex norms are primarily aimed at fostering human health by protecting consumers from health hazards ultimately related to food consumption, ISO seeks to promote the development of standardisation to be applied consistently across an incredibly wider range of areas, from product specifications through to management systems, so as to facilitate the international exchange of goods and services and to develop cooperation in the spheres of intellectual, scientific, technological and economic activity.[389] As far as food safety is concerned, ISO considers that "using its International Standards will assist regulatory authorities in achieving their aims in public health and safety at less cost to manufacturers and consumers, whilst at the same time disseminating new technologies and good practices"[390].

Notwithstanding all these differences, the iterative interaction favoured by the observer status of each body at the other allows both Codex and ISO to regularly report to each other

[388] R. Clarke, *Private Food Safety Standards*, cit., at 4.

[389] ISO standards cover the following fields: terminology; laboratories, accreditations, and inspections; certification of personnel, products, and management systems; environmental management systems; multilateral agreements; suppliers of conformity declarations; quality management systems; and conformity tests. Since its establishment in 1947 ISO has published over 19,500 international standards (a complete list is available at: http://www.iso.org/iso/catalogue_ics.htm, accessed 1st July 2014).

[390] WTO, *Submission by the International Organization for Standardization (ISO) to the SPS Committee Meeting – 28 February, 1 March 2007*, 16 February 2007, G/SPS/GEN/750, at para. 9. Reflecting a far wider scope than Codex, ISO relies on a highly structured and formalised three-stage standard development process that is common to all kinds of standards. The first phase concerns the definition of the technical scope of the standard to be adopted. The input for a new standard usually comes from an industry sector to an ISO national member body. Once the need for an international standard has been recognised and formally agreed within an ISO technical committee (TC), a working group made up of technical experts from interested countries defines the technical scope of the standard. The second phase aims at building consensus on the definition of the standard specifications. Because ISO standards are voluntary in nature, they need to be based on a "general agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments" (ISO/IEC Guide 2:2004 – *Standardization and Related Activities - General Vocabulary*). The third phase is the formal approval of the resulting draft standard by national standard organisations; formal approval is required at each stage from two-thirds of ISO Members participating actively in the development process and from three-quarters of all Members. The final agreed text is then published as ISO international standard. For details see, ISO, *How Does ISO Develop Standards?*, at: http://www.iso.org/iso/home/standards_development.htm (accessed 15 July 2015). Apart from the Organisation's own procedures, ISO's work is regulated also under WTO law by the Code of Good Practice for the Preparation, Adoption and Application of Standards annexed to the TBT Agreement (for analysis see *infra*, para. 19).

when their own activities are relevant for the respective work, this assuring coordination and coherence of standard setting within the two bodies; because of that, for instance, the number of ISO methods endorsed by Codex is over a hundred.[391] In particular, it is through the ISO Technical Committee ISO/TC 34 on Food Products that a long history of collaboration between Codex and ISO has taken place.[392] The scope of this technical committee – which lists primary producers, food manufacturers, laboratories, retailers, consumers and regulators, as its main stakeholders beyond 76 participating countries and 58 observers – extends over "[s]tandardization in the field of human and animal foodstuffs, covering the food chain from primary production to consumption, as well as animal and vegetable propagation materials, in particular, but not limited to, terminology, sampling, methods of test and analysis, product specifications, food and feed safety and quality management and requirements for packaging, storage and transportation"[393]. So far, ISO/TC 34 has published 14 standards under its own direct responsibility, beyond over 800 standards and related documents related in some way to its activities. In addition, in recent years ISO/TC 34 has addressed several new areas in the food sector; most prominently, ISO published ISO 22000:2005 series on food safety management systems,[394] which adapts the generic management systems' standards included in ISO 9000 (quality management systems)[395] and 14000 (environmental management systems)[396] in order to integrate the HACCP hygiene requirements for the food industry. ISO 22000 is the first global and harmonised HACCP-based management system that, in accordance with Codex guidelines,[397] gives sub-sector specific guidance for assuring food safety along the whole food chain, from production to distribution and quantitative ingredient declarations.[398] Through ISO's work, therefore, management standards have become global food safety norms.[399]

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[391] See WTO, *Submission by the International Organization for Standardization (ISO) to the SPS Committee Meeting*, cit., at para. 3.

[392] Other ISO TCs through which technical work in the field of food safety is carried out and *ad hoc* standards have been elaborated are: ISO/TC 54 on Essential Oils; ISO/TC 93 on Starch; and ISO/TC 234 on Fisheries and Aquaculture. For review see, CAC, *Communication from ISO - Report of Activities Relevant to Codex Work*, 15 May 2009, CAC/32 INF/8.

[393] ISO/TC 34 – *Food Products*.

[394] ISO 22000:2005 – *Food Safety Management Systems - Requirements for Any Organisation in the Food Chain*.

[395] ISO 9000:2015 – *Quality Management Systems - Fundamentals and Vocabulary*.

[396] ISO 14000 – *Environmental Management*. ISO 14000 family addresses several distinct aspects of environmental management. It provides practical tools for companies and organisations looking to identify and control their environmental impact and constantly improve their environmental performance. Specifically, ISO 14001:2004 and ISO 14004:2004 focus on environmental management systems, while the other standards in the family focus on specific environmental aspects such as life cycle analysis, communication and auditing.

[397] CAC, *Hazard Analysis and Critical Control Point (HACCP) System and Guidelines for Its Application*, Annex to CAC/RCP 1-1969, Rev. 3, 1997.

[398] In ISO 22000 series food safety is pursued on the basis of four generally recognised elements, namely: (i) interactive communication (a structured two-way information flow up- and down- stream the value chain as an essential tool for risk management); (ii) system management (efficient and effective interaction, coordination and cooperation of chain operators); (iii) good practices (GAP, GMP, and GHP, maintenance programmes and procedures, pest control programmes); (iv) HACCP principles and plans for the continuous improvement and updating of the management system. ISO/TS 22004:2005 – *Food Safety Management Systems - Guidance on the Application of ISO 22000:2005* explains the 'process approach' fostered by the standard. Besides, in addition to the generic ISO/IEC 17021:2006 – *Conformity Assessment - Requirements for Bodies Providing Audit and*

As ISO itself puts it, "the agency neither regulates, nor creates laws"[400]; rather, the aim of the Organisation is to promote the development of standardisation and harmonisation at the international level in order for largely recognised standards to be used in production processes. This means that ISO does not assess conformity to its standards: once a standard is established, ISO relies heavily on domestic institutions for enforcement, which intrinsically is voluntary; nevertheless, because the majority of products in industrialised countries require testing for compliance with technical specifications, safety requirements and other regulations before they are eligible to be marketed, ISO together with the International Electrotechnical Commission (IEC) developed a number of guidelines on the operation of conformity assessment systems and nomenclatures to assist stakeholders along the food chain in meeting the existing regulatory requirements.[401] In compliance with these same guidelines, also certification is carried out independently from ISO by more than 800 certification or registration bodies – be they private, public or quasi-public bodies – that are active at the national or international levels.

Certification of Management Systems, ISO/TS 22003:2007 – *Food Safety Management Systems - Requirements for Bodies Providing Audit and Certification of Food Safety Management Systems* includes specific guidance for accreditation and certification to ISO 22000. Still, ISO 22005:2008 – *Traceability in the Feed and Food Chain - General Principles and Basic Requirements for System Design and Implementation* is intended to assist food companies to document the history, application and location of a product or its components. This latter standard complements the Codex work on traceability as it explains the design of a suitable system to enable organisations to comply with Codex's regulations. About a hundred companies worldwide – mostly located in the EU and the US, but also in other OECD countries and even some non-OECD countries – have now been certified by third parties to ISO 22000. For more details see, WTO, *Submission by the International Organization for Standardization (ISO) to the SPS Committee Meeting*, cit., at para. 4.

[399] In this sense see, S. Henson and S. Jaffee, *Understanding Developing Country Strategic Responses to the Enhancement of Food Safety Standards*, (2008) The World Economy 31: 1-15, at 13.

[400] Quoted in S. Duquet and D. Geraets, *Food Safety Standards and Informal International Lawmaking*, cit., at 420.

[401] Major ISO/IEC standards related to conformity assessment are: ISO/IEC 17000:2004 – *Conformity Assessment - Vocabulary and General Principles* (describing the functional approach to conformity assessment to facilitate common understanding among users of conformity assessment, conformity assessment bodies and their accreditation bodies, in both voluntary and mandatory environments); ISO/IEC 17011:2004 – *General Requirements for Bodies Providing Assessment and Accreditation*; ISO/IEC 17020:1998 – *General Criteria for the Operation of Various Types of Bodies Performing Inspection*; ISO/IEC 17021:2006 – *Conformity Assessment - Requirements for Bodies Providing Audit and Certification of Management Systems*; ISO/IEC 17024:2003 – *Requirements of a Body Certifying Persons against Specific Requirements, including the Development and Maintenance of a Certification Scheme for Personnel*; ISO/IEC 17025:2005 – *General Requirements for the Competence of Calibration and Testing Laboratories*; ISO/IEC 17050:2004 – *Suppliers' Declaration of Conformity*; ISO/IEC Guide 28:2004 – *General Rules for a Model Third-Party Certification System for Products*; ISO/IEC Guide 53:2005 – *Approach by which Certification Bodies Can Develop and Apply Product Certification Schemes*; ISO/IEC Guide 60:2004 – *Code of Good Practice*; ISO/IEC Guide 62:2004 – *General Requirements for Bodies Operating Assessment and Certification/Registration of Quality Systems*; ISO/IEC Guide 65:1996 – *General Requirements for Bodies Operating Product Certification Systems*; ISO/IEC Guide 66:1999 – *General Requirements for Bodies Operating Assessment and Certification/Registration of Environmental Management Systems*; ISO/IEC Guide 67:2004 – *Guidance on Product Certification Systems Facilitating to Understand, Develop, Establish or Compare Third-Party Product Certification Systems*; and ISO/IEC Guide 68:2002 – *Arrangements for the Recognition and Acceptance of Conformity Assessment Results*. For a country-based case-study see, L. Dzifa Mensah and D. Julien, *Implementation of Food Safety Management Systems*, (2011) Food Control 22: 1216-1225 (assessing the implementation of food safety management systems, including ISO 22000, in the UK).

13. Regulating food safety in a multi-actor and multi-level framework: Which 'law' global food safety regulatory governance is founded in?

Following our analysis of the nature, role and evolution of private standards in the agri-food sector, we conclude this chapter with an analysis of the major issues those standards have risen in the legal discourse. Without any doubt, national regulations and international consensus-based standards still matter as sources of food safety regulation. Aspiring to benefit from globalisation of supply chains, exporters to any country are required to meet the specific requirements set by each importing country, some of which necessitate prior approval at the country and/or facility level before gaining access into the market concerned; in some agri-food markets – especially, broad commodities into food processing – public regulation is still the sole or, at least, the dominant source of regulation. Nonetheless, it is true that public regulation has a considerable 'existence value' in terms of 'signalling' that firms are in fact regulated, aside from its actual effectiveness at promoting greater levels of human health and consumer protection; in addition, next to traditional patterns of top-down command-and-control, private standards seems to follow the opposite pattern of bottom-up regulation, where "rather than business practice following from norms and rules, often mechanisms of modeling delivers globalization of practice which is subsequently codified in rules"[402]. Such shifts in food safety governance result in a complex regulatory landscape populated by multiple actors at multiple levels and characterised by a broad range of overlapping and inter-related standards and associated systems of conformity assessment and enforcement.[403] The analysis conducted in the previous sections makes it evident the existence of essentially four levels of food safety regulation, namely:

(i) Multilateral standard ruling institutions (WHO and WTO) and standard setting bodies (mainly, Codex and ISO);

(ii) Regional and supranational standard setting organisations (trading blocs like the EU);

(iii) National food safety authorities and standard setting organisations; and

(iv) Individual and collective market actors and third-party organisations both inside and outside of the supply chain;

which are variously interconnected in establishing, monitoring and enforcing food regulation and which together play a leading role in governing contemporary agri-food markets. In most industrialised countries and also increasingly in low and middle-income countries, all four types of standard and the associated incentives to implement enhanced food safety controls

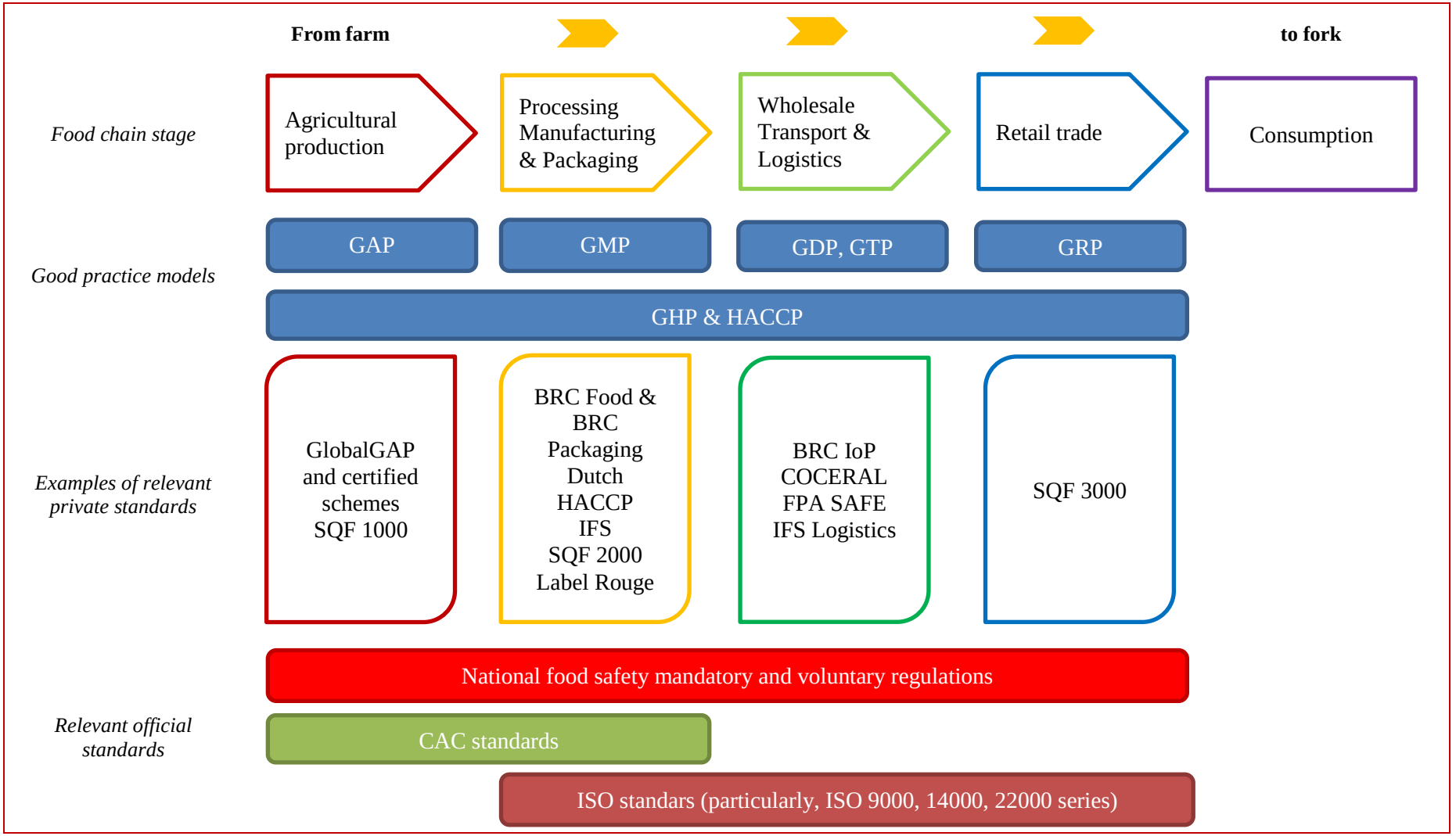
[402] J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge: Cambridge University Press, 2000, at 554. See also F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., at 29 (arguing that in the face of global supply chains "[t]he boundaries between normative and technical standards have blurred and, even if they can still be kept distinct, the impact of technical standardization on private regulation is strong").

[403] The evolution of food regulatory governance over time can be illustrated taking the 'governance triangle' model we have discussed in Chapter One (see *supra*, para. 7.1), which illustrates the tendency towards an increasing number of standards that engage non-State actors, and especially the private sector.

exist, although with wide variations in their specific forms and relative influence. Figure 3 illustrates these multiple sources of food safety regulation along the food supply chain farm-to-fork.

Key for our understanding of the role of private standards in global food safety regulatory governance is a failure to explicitly and largely examine the highly dynamic interface and mutual influence of these different levels of regulation and to recognise that private standards not only have evolved predominantly in response to regulatory changes and reputational risks, but at times are quite closely attuned to official regulatory requirements. The changing and fast evolving architecture of global food safety regulation raises inevitably prominent questions about the role of State and non-State actors; specifically, in a systemic perspective, are different sources of regulation complementary or conflicting in developing a global food safety regime? Additionally, can effective global food safety regulatory governance rely exclusively on either public or private forms of regulation of cross-border supply chains? Finally, how should it be possible to take advantage of both approaches? The next paragraphs seek to provide a comprehensive and exhaustive response to each of these questions.

Figure 3: Sources of food safety regulation along the food supply chain



13.1. Overcoming conventional distinctions

Traditional paradigms of food safety regulation rely on the use of legal rules, with market-based incentives to the establishment of enhanced food safety controls being seen as non-legal; this equates implicitly the actions of public authorities with legally binding norms and leaves the territory of voluntary standards to non-governmental entities, such that non-compliance with the former is backed by a portfolio of legal sanctions going from administrative fines to criminal penalties, while non-compliance with the latter has no legal consequence. As evidence of this common assumption that private standards can be readily distinguished from public regulations, the wording 'voluntary standard' and 'private standard' are frequently used interchangeably. In practice, however, conventional dichotomous distinctions between public and mandatory regulation on the one hand, and market-based and voluntary regulation on the other, are no longer so straightforward and cannot hold any longer as adequate conceptualisations for analysing the reconfiguration of the relationship among the actors involved in food safety regulation in the contemporary era;[404] these come to present rather perverse views of "informal or pseudo-formal food markets"[405] in countries that are assumed to be virtually devoid of food safety controls in the context of weak government regulation.

13.1.1. Mandatory *versus* voluntary regulation

As has been rightly remarked, generally speaking, in contemporary global economic governance "[s]tandards hover between the state and the market; standards largely collapse the distinction between legal and social norms; standards are very rarely either wholly public or wholly private; and can be both intensely local and irreducibly global"[406]. In light of that, a

[404] See S. Picciotto, *Introduction: Reconceptualizing Regulation in the Era of Globalization*, cit., at 1-4 (explaining modern network society as having a complex relationship between the public and the private economic spheres); M. Ollinger and D. Moore, *The Interplay of Regulation and Marketing Incentives in Providing Food Safety*, USDA Economic Resources Service, Washington DC: Bibliogov, 2009, at: http://webarchives.cdlib.org/sw1vh5dg3r/http://www.ers.usda.gov/publications/err75/ (analysing the interplay of marketing incentives and public regulation); C. Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, (2002) Journal of Law and Society 29: 56-76, at 59-66 (describing methods and consequences of private sector regulation on the public sector); D. Sinclair, *Self-Regulation versus Command and Control? Beyond False Dichotomies*, cit., at 533-537 (highlighting the inadequacies of both the traditional 'command-and-control' regulatory paradigm and purely voluntary systems, and advocating for a multi-instrument application able to accommodate a wide range of policy variables).

[405] S. Henson, *Public and Private Incentives to Adopt Enhanced Food Safety Controls*, cit., at 8.

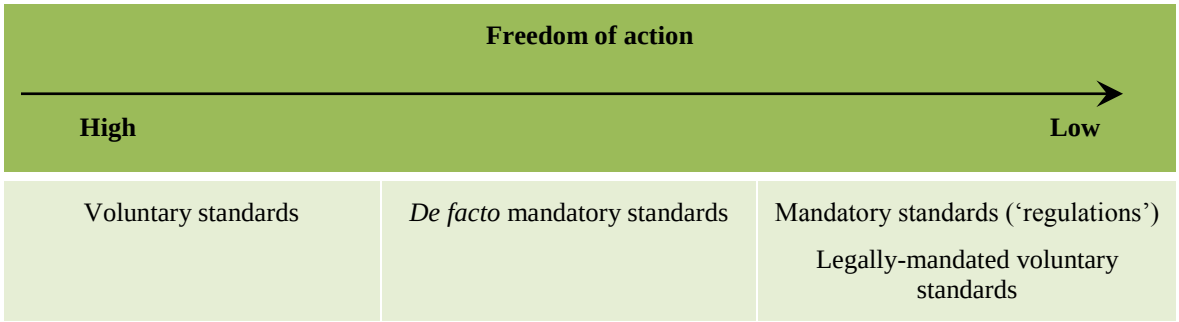
[406] H. Schepel, *The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets*, cit., at 3. In a similar sense see, N. Brunsson and B. Jacobsson, *The Contemporary Expansion of Standardization*, in: N. Brunsson and B. Jacobsson (eds.), *A World of Standards*, cit., 1-17 (finding that the term 'standard' is often used in legal documents and scholarly writing but with different meanings). Meaningfully, in common law tradition there is a specific understanding of standards (or principles) as opposed to legal norms: on such a distinction see, P. Schlag, *Rules and Standards*, (1985) UCLA Law Review 33: 379-430; E. Riedel, *Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?*, (1991) European Journal of International Law 2: 58-84; and, L. Kaplow, *Rules versus Standards: An Economic Analysis*, (1992) Duke Law Journal 42: 557-629.

more inclusive view of regulation that is arguably of greater relevance to contemporary food safety regulatory governance is one that assumes regulation as being

> "the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification"[407].

Adopting this definition we can see traditional roles in chain governance and the public-private distinction in food safety regulation blurring, which actually suggests the emergence of a *continuum* between public and private modes of regulation.[408] This is particularly evident when looking at the extent to which users have freedom of choice and action regarding compliance with food safety standards and regulations (Figure 4):

Figure 4: Regulatory effects of food safety standards



On the one side of this spectrum, food safety has traditionally been the preserve of command-and-control mandatory governmental standards, which are the first-best instruments to serve legitimate public policy objectives and pursue non-economic goals such as preventing human health risks and providing a socially-desirable level of human health and consumer protection against foodborne hazards. As seen earlier, mandatory standards are set in the form of technical regulations and are enforced by liability rules in case of non-compliance; hence, compliance with such standards is compulsory in a legal sense. On the other side of the spectrum, standards can be voluntary in nature, this meaning that adoption and compliance are not legally mandated; potential users can decide whether to comply or not and take the economic consequences associated with such decision, mainly erosion of established supplier-buyer relationships and ultimately exclusion from a given supply chain. This is especially the case of those standards that are promulgated by private actors, which by definition lack any legally binding character *per se*. Nevertheless, it is worth observing that also governmental authorities are involved in the promulgation and enforcement of voluntary standards, which

[407] J. Black, *Critical Reflections on Regulation*, cit., at 20.

[408] See, S. Henson and J. Humphrey, *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, cit.; S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit.; and, K. Segerson, *Mandatory versus Voluntary Approaches to Food Safety*, (1999) Agribusiness 15: 53-70.

therefore can be both public and private; in other words, official authorities can establish both mandatory regulations and standards with which compliance is voluntary.[409] Therefore, when we refer specifically to 'private (voluntary) standards' we are talking about standards that are developed either by individual companies (corporate standards) or by industry bodies or coalitions of firms through formal coordinated approaches actions (collective or 'consensus' standards) or by independent standard setting bodies or other non-governmental entities (third-party standards).

Differently from public regulation where norm making is followed directly by implementation, in private regulation drafting and promulgating a norm is not sufficient in making that norm operational. Because of their non-legally binding force, private standards are not effective unless they are adopted. Since most food companies are for-profit and their commercial success is dependent on the adoption of the standards they elaborate in the value chain, any decision of accepting a given standard and aiming at compliance is, in a sense, the judgement provided by the market of the acceptability of compliance. To put it differently, "[w]hilst the origins of many of these business standards were self-regulatory, in the sense that particular businesses cooperated in establishing the standards to apply to their markets, the growth in scale of the activity increasingly detaches the standard setting from the businesses who may adopt the standards. In such cases the testing point for the standard will lie in decisions by businesses, for market reasons, to adopt standards"[410]. Hence, adoption is an important driver of the spread and influence of private standards. This emphasis on adoption as clearly distinct from standard setting clarifies the issue of compulsion and obligation.[411] By and large, adoption can take various forms: there are situations where firms freely adopt private standards either because they see this as a 'signal' to potential buyers or because this is considered beneficial for the company's development in terms of, for instance, competitive advantage, company values and strategy definition, improving reputation, market share, or price. Nevertheless, in concentrated and consolidated buyer-driven food supply chains, which rely increasingly on a small number of retailers accounting for a high proportion of sales, the extent to which a particular set of products and/or process

[409] See N. Brunsson and B. Jacobsson, *The Contemporary Expansion of Standardization*, cit. (referring to voluntary public standards as "optional laws" or "soft laws").

[410] C. Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, cit., at 1331.

[411] The procedural core of private standardisation consists of five main stages: (i) standard setting (agenda setting, negotiation of content and form, drafting, and promulgation); (ii) adoption; (iii) implementation; (iv) monitoring and conformity assessment; and (v) enforcement (see S. Henson and J. Humphrey, *Codex Alimentarius and Private Standards*, in: B. van der Meulen (ed.), *Private Food Law*, cit., at 155-156). Some scholars provide a different categorisation of the private standardisation function without any specific focus on adoption: see, e.g., K.W Abbott and D. Snidal, *The Governance Triangle: Regulatory Standards Institutions in the Shadow of the State*, cit., at 63 (identifying the following main stages with the acronym 'ANIME': (i) agenda-setting; (ii) negotiation; (iii) implementation; (iv) monitoring compliance; and (v) enforcement); P. Utting, *Introduction: Multistakeholder Regulation from a Development Perspective*, in: P. Utting, D. Reed, and A. Mukherjee-Reed (eds.), *Business Regulation and Non-State Actors: Whose Standards? Whose Development?*, New York/London: Routledge, 2011, 1-21, at 1 (describing private standardisation as covering "agenda-setting, design, implementation, enforcement, oversight, assessment, review and redress"). This same approach to standardisation is taken at the institutional level: see, e.g., WTO, *Typology of Global Standards*, cit., at para. 2 (identifying in the policy cycle for standard development four steps: "standard setting, standard monitoring, assistance on achieving standard compliance, and sanctions for non-compliance").

specifications is really voluntary depends on the market power wielded by the buyer that requires a standard be adopted by another entity. It is not so hard to say that, despite lacking any legal compulsion to comply with, in practice private standards are often pre-conditions for doing business; even more, they are fast becoming primary determinants of establishing long-term supplier-buyer relationships and therefore securing access to both domestic and international markets. That way, lead market forces make compliance with private standards, which are not legally required *per se*, mandatory in practice as 'the' norm for all actors involved in a given chain.[412] In such case, the options for suppliers who do not adhere to any such standard are considerably reduced; the choice of whether or not to comply with a voluntary standard becomes a choice between compliance and exit from the market. Food producers/suppliers that do not comply with dominant standards will be economically sanctioned through their products being not bought. By definition, being voluntary and legally non-binding, purely private standards cannot be considered as engaging in law making; nevertheless, since many of these have achieved quasi obligatory character and become *de facto* the industry norm in the supply chain, some have argued in favour of the existence of a 'private food law' in which non-State actors do engage in law making.[413] This is even more the case of 'legally-mandated private standards', whose reference in national laws and/or mandatory regulations makes them legally binding and compliance with them legally compulsory.

Of course, in a highly dynamic standards landscape such as that we are describing in this chapter, the position of each single standard along the *continuum* mandatory to voluntary may change over time. The most emblematic case is the SQF standard, which was originally developed by the Western Australian government as a public voluntary standard and then acquired by the American FMI, this implying reclassification as a private voluntary standard.

13.1.2. Public *versus* private regulation (or regulator *versus* regulatee)

The blurring of the public-private distinction in food safety regulation is also evident when looking at the role of the public and private sector in setting and enforcing standards. With pure public regulation, the different functions involved in food safety standardisation are all performed by governmental bodies, while market-based actors and other non-governmental entities are engaged in these various functions in the case of purely private regulation. Based on the *continuum* between public and private regulation (Figure 4), not only market-based regimes exist alongside traditional command-and-control systems, but food safety standardisation itself is in fact a hybrid process of norm making, conformity assessment and

[412] In this sense see, S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit.; CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit.; S. Henson and J.R. Northen, *Economic Determinants of Food Safety Controls in the Supply Retailer Own-Branded Products in the UK*, (1998) Agribusiness 14: 113-126; and, L. Fulponi, *Private Voluntary Standards in the Food System*, cit.

[413] See, most notably, B. van der Meulen (ed.), *Private Food Law: Governing Food Chains through Contract Law, Self-Regulation, Private Standards, Audits and Certification Schemes*, cit.

enforcement. Figure 5 provides an overview of the key functions associated with food safety standardisation:

Figure 5: *Continuum* between public and private modes of food safety regulation

	Mandatory regulations	Legally-mandated private standards	Public voluntary standards	Private voluntary standards
Standards Setting	Legislature and/or public regulator	Commercial or non-commercial private body	Legislature and/or public regulator	Commercial or non-commercial private body
Adoption	/ /	Legislature and/or public regulator	Private firms or third-party organisations	Private firms or third-party organisations
Implementation	Private firms and public bodies	Private firms	Private firms or third-party organisations	Private firms
Conformity assessment	Official inspections	Public/private auditor	Public/private auditor	Private auditor accredited through official standards
Enforcement	Criminal or administrative courts	Criminal or administrative courts	Public/private certification body	Private certification body

The benefits of public standard schemes are related not only to the added level of protection associated with the standards themselves, but also to the assurance of regular and rigorous audits. Nonetheless, governmental authorities may outsource some of their regulatory prerogatives either by 'privatising' some of these functions or by using mechanisms deployed by the private sector; for instance, public authorities may decide to delegate inspection and traceability of food products to private certification bodies to be secured against having a suspected protectionist agenda in their trade policy. In turn, most documented instances of private standards are not purely 'private', because they are under some kind of surveillance of governmental agencies, such that there is often "the implicit threat of imposed government regulation in case this 'associational' [private] regulation would become derailed"[414]. That is why, although private schemes are able to implement systems of conformity assessment that provide for a higher level of oversight than is afforded by prevailing public systems of enforcement, transnational private standards such as GlobalGAP and GFSI involve selected national certification bodies in benchmarking national standards to global standards. All this given, standardisation relating to food safety may be

[414] T. Havinga, *Actors in Private Food Regulation*, cit., at 4.

seen as an instance of multi-level process where the different functions may be carried out by a variety of public and/or private entities.[415]

13.2. The public-private interface in regulating the supply of safe food

Adopting the *continuum* illustrated in Figures 4 and 5 allows us to represent global food safety regulatory governance as the product of a blend of public and private modes of regulation that operate simultaneously and that may be tightly interconnected. Thus, public regulation may 'stand back' if it is considered that private modes of regulation can largely achieve social food safety objectives, implicitly permitting private regulation to enforce food safety standards or, at least, to induce actions that work towards the social *de minimus*. Alternatively, official requirements can be subsumed into private standards, which act to reduce the costs associated with compliance with tightened legal norms, while also promoting food safety controls that go beyond the legal *de minimus*. It follows that, if private regulation brings about adoption of desirable food safety practices too slowly and/or fails to do that, then official food safety authorities may choose to intervene, perhaps promoting the very same practices that private standards initially promoted, as in the case of HACCP.

13.2.1. Filling 'voids' in domestic regulatory capacity

Arguably, firms have the greatest and most immediate incentive to put in place food safety stipulations either where no mandatory regulatory requirement exist or where minimum governmental standards are perceived as inadequate to meet heightened consumer demands for food safety. Law making in the area of food safety involves in fact "large scientific uncertainties regarding what is 'safe', public perceptions of safety at odds with professional perceptions, various public values expressed through the political process, and difficult judgments of equity given that risk and benefit are borne by different groups"[416]. Because of such complexities and the high threshold requirement for technical expertise in food science, despite several substantive steps made in reforming domestic food safety institutions and in strengthening monitoring and surveillance systems, national food safety regimes – in developing as well as developed countries – still suffer from a number of regulatory failures. These include essentially: the structural fragmentation of the domestic regulatory framework, which results in different spheres of regulatory authority over food safety existing alongside each other and determining both overlapping mandates and inadequate multi-agency coordination;[417] and fragmented and often outdated regulation, inconsistent implementation

[415] See S. Picciotto, *Introduction: Reconceptualising Regulation in the Era of Globalization*, cit.

[416] C. Starr and C. Whipple, *A Perspective on Health and Safety Risk Analysis*, (1984) Management Science 30: 452-463, at 452.

[417] Structural fragmentation is particularly evident in the US, whose food safety regulatory system exhibits two main serious deficiencies. On the one hand, reflecting the same fragmentation that characterised the EU food safety regime before the adoption of Regulation (EC) no. 178/2002, the US system still relies on a 'balkanised', inconsistent, and dysfunctional multi-agency food safety governance architecture, where responsibility for food safety is administratively dispersed. At the federal level FDA was established in 1927 and

and ineffective enforcement.[418] Developing and emerging economies – accounting for a large and ever-increasing share of global food supply – suffer from additional shortcomings and

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was initially part of USDA, where it investigated food adulteration; it was not until 1940 that FDA became a separate science-based regulatory agency within the US Department of Health and Human Services. Today FDA takes primary responsibility in overseeing 80 to 90 percent of US food supply by enforcing the general prohibitions against adulteration and misbranding provided in FDCA, and by promulgating GMP standards and *ad hoc* regulations for specific categories of food. In turn, the USDA regulates the remaining 10 to 20 percent of the US food supply, in particular through its exclusive jurisdiction and oversight control over the safety of most meat, poultry and processed eggs products as provided under FMIA and the Poultry Products Inspection Act (PPIA). Nevertheless, food safety is regulated by 15 other federal agencies, including the Environmental Protection Agency (pesticide tolerances in foods and requirements for drinking water), the Centres for Diseases Control and Prevention (prevention of illnesses due to foodborne diseases), the Department of Commerce's National Marine Fisheries Service (seafood), the Federal Trade Commission (prevention of false advertising in food), the Department of Homeland Security (food security), and the Customs and Border Protection (import safety), which together administer some 30 food safety-related laws. On the other hand, the US import safety control system is still largely reactive (rather than preventive) and border inspection-based (rather than risk-based). In spite of an ever-increasing share of US food supply imported from third countries, the US regulatory system is severely hampered by the inability of domestic authorities to perform effective and comprehensive border inspection. FDA examines only a minimal fraction of imports: in 2014 only about 1 percent of the roughly 3.7 million imported food entries under the FDA's jurisdiction underwent physical inspection. In addition, the nature and scope of border inspections varies from State to State as result of such factors as economic resources, administrative costs, technical expertise, and political willingness. Lastly, the FDA lacks the capacity to verify how accurate and updated data provided by importers are.

In all these respects, although FSMA is a comprehensive reform bill promising to modernise significantly the FDA's approach through a strong emphasis on preventive-based controls and science-based standards, a number of scholars and food regulators criticise the FSMA ability to do the work that it is meant to do. This is likely to happen for three major reasons. First, in the attempt to incorporate flexibility for small producers, FSMA provides for too many exemptions that result in approximately 80 percent of produce growers being contingently exempted from instituting preventive-based controls or from adhering to the science-based standards promulgated by FDA. Second, FSMA provides for not enough implementation funding, which can curtail the FDA's ability to increase the frequency of food facility inspections and add confusion as to the provisions' applicability both for enforcement authorities and food companies, finally discouraging innovation. Third, FSMA does not address the parcelling of jurisdiction and coordination problems among different agencies and does not go far enough toward an integrated and consolidated food safety system that combines comprehensive federal regulation with local flexibility. For discussion see, US GAO, *Revamping Oversight of Food Safety*, in: US GAO, *High-Risk Series: An Update*, 14 February 2013, GAO-13-283 (still putting food safety on GAO's 'high-risk list' as result largely of the structural fragmentation of the US food safety regulatory system and calling for more inter-agency coordination and for "comprehensive, uniform, risk-based food-safety legislation or amend[ing] FDA's and USDA's existing authorities"); *Id.*, *Oversight of Food Safety Activities: Federal Agencies Should Pursue Opportunities to Reduce Overlap and Better Leverage Resources*, 30 March 2005, GAO-05-213; and, R. Johnson, *The Federal Food Safety System: A Primer*, *Congressional Research Service*, Paper for Members and Committees of Congress of the United States of America, 2012, at: http://www.fas.org/sgp/crs/misc/RS22600.pdf.

[418] In the US not only federal standards are haphazardly enforced by varying levels of authority, but are also accompanied by a sporadically enforced patchwork of State and local regulations that supplement federal ones and that have a different scope of application. For instance, some 3,000 health and agriculture agencies at the State and local levels are responsible for retail food establishments. Still more, the FSMA provision of enforcement activities to be carried out abroad raises concerns of extraterritorial jurisdiction, such that several provisions depend on agreements with foreign countries and their willingness to accept the US regulatory intervention to build their capacities.

Similarly in the EU, while the intended objective of the massive reform inaugurated in early 2000s was to make EU food law more comprehensive and enforcement in Member States more consistent, Regulation (EC) no. 178/2002 seems to suffer from significant shortcomings. In particular, inconsistent implementation comes from the inadequate capacity of new Member States to enforce the requirements set by the regulation, including the control of intra-Community trade and imports from non-EU countries. More generally, evidence proves the existence of inconsistencies among Member States in terms of implementation and enforcement of the regulation

concerns, such as, most notably: lack of institutional and technical capacity of both governments and industry in food safety control and compliance with food safety systems;[419] social and political emphasis on issues of food security, such that developing countries may not be able to reject unsafe food given concerns about food shortages, nutritional intake, and a mismatch of *per capita* food production with population growth;[420] and huge difficulties in assuming responsibility for food safety and consumer health protection, especially by not being able to participate adequately in Codex activities. All these weaknesses generate blind

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above, which have their roots in the different national and local food traditions that produce a huge diversity of judgment about what constitutes acceptable risk and different approaches to health protection. As Alberto Alemanno writes: "A claim by a domestic food authority that a certain good is safe or unsafe is likely to involve not only an assertion about science, but also the willingness of this country to bear or not bear the level of risk considered acceptable in order to continue or reject a certain local tradition. In contrast, the assertion made at the EC level about the safety of a product to be marketed throughout the EU is both a claim about its risk component and a political claim aimed at favoring economic integration and free trade within Europe" (A. Alemanno, *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO*, cit., at 254).

[419] As pointed out by FAO, "[f]ood safety standards in developing countries may actually attain those of international standards, but the lack of technical and institutional capacity to control and ensure compliance essentially makes the standards less effective. Inadequate technical infrastructure – in terms of food laboratories, human and financial resources, national legislative and regulatory frameworks, enforcement capacity, management and coordination – weakens the ability to confront these challenges" (FAO, *FAO's Strategy for a Food Chain Approach to Food Safety and Quality: A Framework Document for the Development of Future Strategic Direction*, 4 April 2003, COAG/2003/5, at para. 22). See similarly, A. Ouaoich, *A Review of the Capacity Building Efforts in Developing Countries - Case Study: Africa*, in: D. James, L. Ababouch, and S. Washington (eds.), *Sixth World Congress on Seafood Safety, Quality and Trade*, FAO Fisheries Proceedings no. 7, 2007, 101-112 (assessing food safety systems in 25 African countries and finding that half of the assessed countries do not have adequate legislation and/or regulation in the food safety area, and lack the requisite scientific support for food monitoring programmes and for food contamination risk assessment). Such structural deficiencies are further exacerbated by often poor resource management systems, lack of overall strategic planning, and underdeveloped compliance policies. As result of all that, food safety systems in developing countries are largely "reactive rather than proactive" (G.N. Gongal, *International Food Safety: Opportunities and Challenges*, in: S.P. Singh et al. (eds.), *Food Safety, Quality Assurance and Global Trade: Concerns and Strategies*, Lucknow: International Book Distributing Co., 2009, 25-91, at 89).

[420] 'Food security' is defined as "[t]he condition when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life […]" (FAO, *Report of the World Food Summit*, Rome, 13-17 November 1996, WFS 96/REP, at para. 1). Food security is in fact a multifaceted concept that relies upon four pillars, namely: (i) physical and economic access to food; (ii) food availability; (iii) stability of supply and access; and, of particular interest for our discourse; and (iv) food utilisation, including safety, manufacturing practices, and hygiene. In other words, food safety is recognised as an important element of food security: see, e.g., FAO/WHO, *FAO/WHO Regional Conference on Food Safety for Africa - Final Report: Practical Actions to Promote Food Safety*, Harare, 3-6 October 2005, at: ftp://ftp.fao.org/docrep/fao/meeting/010/a0215e/a0215e00.pdf, at iii ("[…] practices aimed at improving food safety also reduce food losses, thus increasing food availability"); and *Id.*, *FAO/WHO Regional Conference on Food Safety for the Americas and the Caribbean - Final Report: Practical Actions to Promote Food Safety*, San José, 6-9 December 2005, at: ftp://ftp.fao.org/docrep/fao/meeting/010/a0394e/a0394e00.pdf, at i ("[...] food safety is foundational to all other issues in the area of nutrition and food security […]"). This means that unacceptable standards of food safety render food unfit for human consumption and thus impair food security. The view that "[f]ood safety and food security are inseparable" acknowledges that these two items "jointly contribute to progress toward the attainment of the Millennium Development Goals, particularly the reduction of hunger and poverty" (FAO/WHO, *FAO/WHO Regional Conference on Food Safety for the Americas and the Caribbean - Final Report*, cit., at para. 3). On the link between food safety and food security see E. Boutrif, *Balancing Food Safety and Food Security: FAO Perspective*, Presentation at Dubai International Food Safety Conference, 24-26 February 2009, at: http://www.foodsafetydubai.com/prevconf/files/Day1_Plen_EB.ppt (discussing on the following question: "When food is in shortage, can policy makers accept lower food safety standards to protect food security?").

areas that become loopholes in routine food safety control and that hamper prompt responses to acute food safety crises.[421] The (re)emergence of problems such as intentional adulteration of food products for economic gain – 'economic adulteration' – as in the case of the melamine-tainted milk in 2009 following the melamine outbreak the year before,[422] demonstrates how globalised food production patterns and increased global trade, coupled with weak food safety institutions and the difficulty of observing and detecting food safety risks, create incentives for consumer fraud. This is even more exacerbated by the fact that "international law can still count on a limited set of legal instruments in order to enhance […] strict compliance with generally accepted international standards and guidelines, agreement on more stringent and clear international obligations in matter of food safety regulation at the universal level, and last, but not least, creation of enforcement mechanisms"[423]; particularly, at present there is no international binding instrument that targets food safety as such in a comprehensive and integrated manner and that facilitates effective global governance of such risks.

In all these cases, private food safety standards act as commensurate response to perceived weaknesses in prevailing public regulatory systems and therefore as direct substitutes for missing or inadequate public regulation. That way, private standards might be expected to extend food safety regulatory requirements and to afford an enhanced level of food safety protection in response to a growing consumer demand. The effectiveness of private standards and certification schemes in establishing enhanced food safety controls is increasingly 'recognised' by governments and governmental agencies. In some cases, the structural shortcomings manifested by domestic food safety regulatory systems have forced governments to play an 'enabling role' in promoting the elaboration and/or implementation of private standards; in particular, while GAP schemes are generally owned and led by the private sector, especially in those countries that aspire to catch up with international standards the public sector has taken a proactive role in providing direct and indirect support to the private sector for the establishment, development and/or implementation of national voluntary GAP schemes that are benchmarked against GlobalGAP; a similar involvement of the public

[421] For general conclusions see, B. van der Meulen, *Development of Food Legislation around the World: Concluding Observations*, in: C.E. Boisrobert, A. Stjepanovic, S. Oh, and H. Lelieveld (eds.), *Ensuring Global Food Safety: Exploring Global Harmonization*, Elsevier: Academic Press, 2010, 63-70, at 65-66.

[422] Because of the dispertion of responsibility in a multilevel government structure and the absence of any legally-sanctioned prohibition of exporting unsafe food, together with pervasive corruption problems and the generally underdevelopment of the domestic legal system, the problem of food safety law enforcement in China is serious and widening. While replacing the largely ineffective previous food hygiene legislation, the new Chinese Food Safety Law of 2009 does permit neither to address effectively enforcement issues nor to fully clarify the related problems of overlapping competencies among food safety authorities and of ambiguity in the designation of responsibilities to multiple agencies. For broader investigation see, A.V. Roth, A. A. Tsay, M.E. Pullman, and J.V. Gray, *Unraveling the Food Supply Chain: Strategic Insights from China and the 2007 Recalls*, (2008) Journal of Supply Chain Management 44: 22-39; D. Thompson and H. Ying, *Food Safety in China: New Strategies*, (2007) Global Health Governance 1: 1-19; and, B. Yongmin, *Current Chinese Law on Food Safety: An Overview*, in: A. Mahiou and F. Snyder (eds.), *La sécurité alimentaire/Food Security and Food Safety*, cit., 167-186.

[423] S. Negri, *Food Safety and Global Health: An International Law Perspective*, (2009) Global Health Governance 3: 1-26, at 16.

sector has concerned the adaptation of GlobalGAP to domestic and local conditions in view of preventing products from being denied access to foreign markets.[424] Even in countries that exhibit well-developed government-owned GAP schemes, where governments are reluctant to incorporate any private specifications into their own schemes,[425] demonstrating equivalence of national standards with private collective standards such as GlobalGAP is the approach taken so as to withstand the imposition of costly food safety management measures, which do not necessarily contribute to improve food safety outcomes. While this tends admittedly to facilitate the harmonisation of national food safety standards, in all cases a successful outcome cannot rely but on collaboration and coordination between the public and private sectors; in this respect, the shift from mandatory regulation to wider voluntary forms of food regulatory governance has opened the way both for voluntary standards developed by public authorities in close collaboration with the food industry and for hybrid forms of public-private governance, especially in the form of PPP.[426]

In addition to that, while international food safety incidents created enough market pressure that self-policing by market actors has gained strength, as food firms consolidate and

[424] For instance, the Consumer Goods Council of South Africa (CGCSA) is working in collaboration with the relevant national authorities to develop a single harmonised food safety audit scheme that fits the local food chain and that assures an appropriate level of public health protection. Also the implementation of Mexico Quality Supreme GAP and Malaysia GAP is carried out by export promotion bodies owned by the national Ministries of Agriculture. Where governments do not take responsibility for private standards-setting activities, they can promote the adoption and implementation of private food standards through: (i) policy analysis (facilitating conceptual clarity on enhancing the developmental contribution of GAP, especially small and medium-sized companies' concerns, and optimising the balance between benefits and costs); (ii) assuring effective control of some aspects covered by the reference standard control points (seed quality, registration of agrochemicals, developing national legislation in the areas of environmental protection and workers' health and safety, etc.); (iii) assuring policy coherence among governmental agencies on GAP development and implementation; (iv) facilitating investment in infrastructure for standards, metrology, testing, and quality assurance (SMTQ) systems; and (v) facilitating and engaging in stakeholder dialogue on GAP development and implementation.

[425] This seems to be the attitude of governments in some developed countries: see, e.g., T. Havinga, *Transitions in Food Governance in Europe from National towards EU and Global Regulation and from Public towards Hybrid and Private Forms of Governance*, cit., at 10, 12 (arguing that, "[g]overnments do not participate in most private standards […] at least in The Netherlands. […] Only recently Netherlands departments or the food authority cautiously are getting involved in private standard setting. They still have to find their way").

[426] One major example of PPP in the food safety area is the East African Organic Products Standard (EAOPS). Developed by the State Members of the East African Community (EAC), EAOPS is the second regional organic standard in the world after the EU's and the only one to have been developed through a PPP. Despite being voluntary, EAOPS was adopted by EAC and launched together with the associated East African Organic Mark in 2007. The adoption of EAOPS was an important signal that, although the standard remains voluntary and jointly managed by the region's organic agriculture organisations, EAC Member governments wished to provide a supportive policy environment for its uptake. Considering some other examples, in Morocco a joint integrated programme for quality improvement was initiated in 2005 in view of simplifying food safety control and promoting industry's self-responsibility based on ISO 9000 and HACCP principles and, hence, improving the confidence between State control services and processing companies. Still, in 2000 a PPP allowed to implement a mandatory pesticide dealer certification scheme in Egypt in view of improving retailers' knowledge on crop protection products safety and to support principles of GAP, IPM and environmental protection. Interestingly, a Common Code for the Coffee Community (4C) was developed as a voluntary multi-stakeholder initiative in many Mediterranean countries in order to promote production, processing, and trading of green coffee in a socially-responsible and environmentally-sustainable way.

become larger and larger in scale, there are signs that public authorities are considering ways of integrating private sector perspectives and mechanisms into mandatory regulatory requirements. Voluntary standards are indeed an area for producing and testing innovations that governments can then integrate into law making, which hence would benefit from the expertise lagging behind the food industry in terms of regulatory innovation. Once again, it is especially in those countries that aspire to catch up with national and international standards that there is huge opportunity for public authorities to learn from the adaptations occurring along those value chains that are successfully meeting private products and process specifications in view of a strengthened compliance with national and international standards.[427] Arguably, a good case of such inclusion of originally private food safety systems into mandatory requirements is HACCP.[428] Additionally, also standards concerning organic agriculture were initiated as private standards before being largely overlaid by national voluntary standards in line with Codex guidelines in most developed countries, where certification to official standards is mandatory if the product is to be labelled as 'organic';[429] similarly, fair trade standards initiated by NGO have been more recently covered by governmental regulations so as to promote uniform application of fair trade practices as part of government policy on sustainable development; also standards relating to geographical indications and traditional processes are often initiated by private organisations and then encouraged or even formally adopted by government as national voluntary standards in view

[427] A report of the World Organisation of Animal Health (OIE) on a questionnaire on private standards on sanitary safety and animal welfare showed that among a large proportion of developed country respondents there was a strong belief that private standards and certification can be a useful aid to the implementation of official standards (89 percent agree, zero percent disagree), whereas this point of view was less marked among developing country respondents (53 percent agree, 27 per cent disagree): see OIE, *Final Report of the 78th General Session - OIE Questionnaire on Private Standards: Executive Summary*, 2010, at: http://www.oie.int/fileadmin/Home/eng/Internationa_Standard_Setting/docs/pdf/en_executive_20summary.pdf.

[428] In 1993 Codex included HACCP guidelines in its recommended international code of practice (CAC, *Hazard Analysis and Critical Control Point (HACCP) System and Guidelines for Its Application*, cit.). Shortly thereafter, the introduction of HACCP-based systems in the EU by Regulation (EC) no. 178/2002 was aimed at securing safe food through preventive process controls especially for primary produce. Also, the EU Hygiene Package (Regulation (EC) no. 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules on the hygiene of foodstuffs, 30 April 2004, OJEU L139/55; Regulation (EC) no. 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption, 30 April 2004, OJEU L139/83; and Directive 2004/41/EC of the European Parliament and of the Council of 21 April 2004 repealing certain directives concerning food hygiene and health conditions for the production and placing on the market of certain products of animal origin intended for human consumption and amending Council Directives 89/662/EEC and 92/118/EEC and Council Decision 95/408/EC, 2 June 2004, OJEU L 195/12) lays down the 'farm-to-fork' approach to hygiene policy in accordance with HACCP and traceability requirements. Lastly, Regulation (EC) no. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, 28 May 2004, OJEU L 191/1, reorganises official controls of food so as to integrate food hygiene controls at all stages of production and in all sectors.

Also US food safety agencies shifted to mandated use of HACCP as the basic regulatory approach to controlling microbiological hazards (especially for meat and meat products). In particular, under FSMA both FDA and USDA are reorienting their food processing rules around HACCP and preventive control requirements for major foodborne pathogens and leading development of microbiological risk assessment methods.

[429] See S. Lutz, T.P. Lyon, and J.W. Maxwell, *Quality Leadership When Regulatory Standards are Forthcoming*, (2000) Journal of Industrial Economics 48: 331-348.

of preserving traditions and/or creating opportunities for rural development through strategic product differentiation. In some other cases, governments promote certification to private standards as a useful driver for implementing public policy objectives and for leading food chain operators to improve their practices and operations. In this respect, in 2014 New Zealand passed the Food Act 2014[430] that, in the attempt to make it easier and less costly doing business in the food sector while ensuring the food produced is safe and suitable for sale, gives food businesses the tools to manage food safety themselves based on the level of risk associated with the kinds of food produced and in a way that suits their business; in view of that, the Food Act recognises private national food safety programmes as a means of demonstrating compliance with public requirements. Similarly, the US FSMA institutionalises some safety measures introduced by the food industry and delegates significant power to non-governmental actors, from importers to producers and third-party certification bodies; in addition, the FSMA recognises voluntary third-party certification schemes as part of official food import controls. Also, the European Commission adopted some Guidelines for the operation of certification schemes relating to agricultural products and foodstuffs,[431] which are "designed to describe the existing legal framework and to help improving the transparency, credibility and effectiveness of voluntary certification schemes and ensuring that they do not conflict with regulatory requirements"[432]. In particular, recognising that "in the light of developments and initiatives in the private sector, legislative action was not warranted to address the potential drawbacks in certification schemes at this stage"[433], these guidelines highlight best practice in the operation of such schemes, thereby offering guidance on how to avoid consumer confusion and increase the transparency and clarity of the scheme requirements; reduce the administrative and financial burden on farmers and producers, including those in developing countries; and ensure compliance with EU internal market rules and principles on certification.

In all the cases where private standards are in some way adopted and/or compliance with them is required in mandatory regulations, private bodies of norms are invested with official regulatory power; hence, compliance with such 'legally-mandated private standards' becomes mandatory under domestic law.

13.2.2. Reinforcing and pre-empting public regulation

Private standards do not confine themselves exclusively to areas where there is a regulatory *vacuum*. In practice, even where mandatory regulations are well-developed and afford a high level of food safety, there may still be an incentive for non-State actors to implement their own specifications. In some cases key function of private standards is not to enhance appreciably the level of food safety afforded by official regulatory requirements; rather, in

[430] Food Act 2014, Public Act 2014 No 32, 6 June 2014 (amending and replacing Food Act 1981).

[431] EU Best Practice Guidelines for Voluntary Certification Schemes for Agricultural Products and Foodstuffs, Communication from the European Commission, 16 December 2010, OJEU C 341/5.

[432] *Ibidem*, at para. 1.2.

[433] *Ibidem*.

view of avoiding reputational risks and the erosion of brand capital, private standards are designed essentially to comply with official food safety regulations and ultimately to provide assurances to buyers that relevant mandatory requirements have been complied with and that the desired level of protection has been achieved. In such cases, private standards act primarily as a means to manage the sunken costs that arise from investing in enhanced food safety systems and to reduce exposure to legal liability claims by getting a due diligence defence, that way coming to help implement and reinforce mandatory regulations.[434] This explains why more and more private standards require explicitly their members to comply with all applicable regulatory requirements of both the country of production and the country of destination, so as to support the application of official requirements in the countries of operation. This is also the reason why, especially when governmental or inter-governmental institutions require the accreditation of certification bodies, private standards are often reliant on public oversight to ensure credibility and allow for a rigorous liability defence.

Likewise, although international standards are addressed mainly to governments, many private food safety standards make explicit reference to these norms are/or are in practice constructed around these. Many in the food industry recognise the critical importance of the work undertaken by Codex and ISO and began to take steps which better align private standards and certification schemes with their standards, guidelines and recommendations; in fact, "[l]eaders in the food industry and retail sector have recognized the need to transform the way in which industry collectively assures food safety. A consensus exists that a supply-chain approach, with requirements based in large part on standards established by the official standard setting organizations, needs to be taken"[435]. In particular, "[t]he Codex Alimentarius, or the food code, has become the seminal global reference point for consumers, food producers and processors, national food control agencies and the international food trade. The code has had an enormous impact on the thinking of food producers and processors as well as on the awareness of the end users – the consumers. Its influence extends to every continent, and its contribution to the protection of public health and fair practices in the food trade is immeasurable"[436]. Hence, while individual firm standards continue to be utilised as a competitive tool and tend to differ even significantly from relevant national and international

[434] In many economic models retailers' incentives to adopt their own standards depend on the existence of a legal liability rule: see, e.g., E. Giraud-Héraud, H. Hammoudi, and L.G. Soler, *Food Safety, Liability and Collective Norms*, Cahiers du Laboratoire d'Econométrie de l'Ecole Polytechnique no. 2006/06, at: http://hal.archives-ouvertes.fr/docs/00/24/30/34/PDF/2006-06-02-1451.pdf (finding that the incentive for a retailer to differentiate its business activities via a premium private labels (PPL) is the higher the lower the public minimum quality standard (MQS)); and, P. Bazoche, E. Giraud-Héraud, and L.G. Soler, *Premium Private Labels, Supply Contracts, Market Segmentation, and Spot Prices*, (2005) Journal of Agricultural and Food Industrial Organization 3: 1-30 (finding that fewer producers have an incentive to deliver a PPL when MQS is increasing). For literature review: F. Bergès-Sennou, P. Bontems and V. Réquillart, *Economics of Private Labels: A Survey of Literature*, (2004) Journal of Agricultural and Food Industrial Organization 2: 1-23; and, E. Giraud-Héraud, L. Rouached, and L.G. Soler, *Private Labels and Public Quality Standards: How Can Consumer Trust Be Restored after the Mad Cow Crisis?*, (2006) Quantitative Marketing and Economics 4: 31-55.

[435] OIE, *A Private Sector Perspective on Private Standards: Some Approaches that Could Help to Reduce Current and Potential Future Conflicts between Public and Private Standards*, (edited by M. Robach), OIE Assembly – Seventy-eighth General Session, Paris, 23-28 May 2010, 78 SG/9, at 4.

[436] CAC, *Understanding the Codex Alimentarius*, cit., Preface.

requirements, collective standards appear to be very close to and largely consistent with Codex and ISO standards.[437] There are a number of reasons explaining such positive attitude of the private sector towards official regulation, most notably: international standards codify internationally recognised best practices and non-State actors – including private firms – often participate substantively in their formulation;[438] also, most private standards build around the facilities provided by mandatory regulations, i.e. accreditation of certification bodies, public laboratories for product testing, traceability, etc., such that they can reduce the cost of standards formulation and enforcement. As major examples, the Codex general principles of food hygiene have evidently formed the basis of many private standards for food processing, including the BRC Global Standard for Food Safety, IFS and SQF 2000, and also the GFSI Guidance Document; this is also the case of the Dutch Code, which in turn was submitted to ISO as basis for the preparation of ISO 22000 on food safety management systems. In addition, transparent linkage of private auditing schemes to the requirements established by official standards is being promoted under the aegis of global private standard setting bodies such as GFSI and GlobalGAP, as well as global industry organisations,[439] so as to foster and facilitate collaborative undertakings. Lastly, the parameters of private governance structures and support systems, such as processes for certifier approval, complains handling, compliance monitoring, etc., are largely laid down by international standards, especially those developed by ISO. As result of all the above, ultimately "many of the differences between the numerous private audit schemes have been overplayed […] When deconstructed, the private audit schemes were found to have a common foundation that was fairly consistent with expectations outlined by the CAC"[440].

In shorthand, private standards and conformity assessment systems enhance compliance with official requirements, perhaps enhancing overall system efficiency; from a different perspective, official food safety regulatory requirements may be reflected and subsumed into private standards, the latter acting to reduce the compliance costs associated with enhanced

[437] See in this sense, S. Henson and J. Humphrey, *Codex Alimentarius and Private Standards*, cit., at 170-171; and, CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit.

[438] Codex's operating procedures reflect "the imperative for private sector input" in the development of Codex standards (CAC, *Consideration of the Impact of Private Standards*, CAC Thirty-third Session, 9 July 2010, CX/CAC 10/33/13, at 3). Although only Members have voting rights, Codex process has three major ways that facilitate private sector engagement in standards-setting. First, Codex established transparent rules for international private bodies to get observer status; in this respect a significant number of international industry and consumer organisations have been given observer status. Second, Members can determine the composition of their own official delegations at Codex meetings, providing a route through which national industry and consumer organisations can participate; in fact national delegations often include industry representatives. Third, national Codex structures are encouraged to involve the local private sector in the discussion of issues of relevance for Codex at the national level through the establishment of National Codex Committees, the structure of which often parallels the CAC. Similarly, because of the formal relationships existing between Codex and ISO and because of the effective coordination between national Codex structures and institutions participating in ISO processes, there is huge scope for public sector input into ISO deliberations on food safety standards.

[439] These include, most notably, the International Poultry Council, International Egg Commission, International Meat Secretariat, International Dairy Federation, and International Federation of Agriculture Producers.

[440] OIE, *A Private Sector Perspective on Private Standards*, cit., at 4.

food safety systems and providing a mechanism through which due diligence can be demonstrated. Ultimately, this means that official requirements are passed down the supply chain through the requirements that downstream buyers impose on their suppliers.

14. Emerging contours of a multi-layered global food safety regime: Issues and challenges

In conclusion, this chapter essentially aimed at improving our understanding of food safety regulatory governance, which knows a prominent role of private controls in the shaping of an ever-growing global regulatory framework. Focusing on the EU and the US experience, we have identified the major drivers of the transition occurred in addressing food safety risks since the 1990s in the heightened consumer concerns about food safety risks and increased emphasis on credence attributes, the restructuring of agri-food markets around buyer-driven global value chains, and the transition from 'command-and-control' to risk-based regulatory approach. Then we have discussed the nature and complexities of private food safety standards, these being the most diffuse regulatory tools in the food value chain, and considered current and potential patterns of development and future evolution. In light of the role of the Codex Alimentarius Commission in the development of science and risk-based international food safety standards and of national authorities in the adoption of domestic regulations aimed at human health protection, the core question is the following: in such a multi-actor and multi-level framework, which 'law' is global food safety regulatory governance founded in? Away from considerations of rivalry and inconsistency, global food safety governance appears to rely on the overcoming of the conventional distinctions that oppose mandatory *versus* voluntary and public *versus* private regulation. Conversely, the public-private interface in this area is such that the actors operating in the value chain are able and flexible enough to fill the voids of domestic regulatory systems; private food safety standards prove the capacity of the private sector to bring about new governance institutions where existing arrangements are perceived weak or unable to provide the required level of protection. On the other hand, the private sector shows a positive attitude towards existing official regulation, acting in the sense of reinforcing and even pre-empting expected developments of this.

In such a framework, one major issue deserving investigation is the concern that overly 'heavy handed' regulation for food safety may act as barrier to the trading of agri-food products and may therefore run counter to international trade rules. In this respect, understanding the role that private sector standards play in helping and/or hindering access to international markets and consequently the place that those standards take in the rules-based multilateral trading system is of critical importance. Food safety regulation is deeply intertwined with ever-increasing global production sharing and international trade in food, such that food safety is recognised to be as much a societal concern as an economic concern. From a trade perspective, this means working out how the difficult interface between safe trade and free trade, i.e. between protecting consumers from foodborne hazards and ensuring

free movement of food products at the international level, can be managed along global food supply chains.[441] The free trade and food safety agendas are of equal importance, but at least potentially inconsistent: enacting food safety regulations is indeed necessary, but may have negative impacts on trade.

Since its establishment in 1995, the WTO has offered the reference normative framework to international regulatory cooperation in the field of trade-related food safety with the aim of addressing such trade-offs. The WTO is not by itself a standard setting organisation; rather, it is a standard ruling organisation that recognises the standards elaborated by relevant international standards setting bodies as the basis for WTO Members' food safety regulations. Specifically, Codex standards hold an influential position within international trade and huge weight in domestic regulatory development following their incorporation into the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).[442] Additionally, the SPS Agreement is subject to the WTO mandatory

[441] In the WTO case law – see, most notably, European Communities - Measures Concerning Meat and Meat Products, Report of the Appellate Body circulated 16 January 1998, WT/DS26/AB/R - WT/DS48/AB/R; European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body circulated 12 March 2001, WT/DS135/AB/R; and, European Communities - Trade Description of Sardines, Report of the Appellate Body circulated 26 September 2002, WT/DS231/AB/R – the Appellate Body defined the principle that "the WTO cannot and does not stand for free trade at any cost" (S. Shaw and R. Schwartz, *Trading Precaution: The Precautionary Principle and the WTO*, UNU Institute for Advanced Studies, 2005, at: http://i.unu.edu/media/unu.edu/publication/27997/Precautionary-Principle-and-WTO.pdf, at 11). It emphasised the relevance of international standards as basis for domestic technical regulations and, from a systemic perspective, for "uphold[ing] a rules-based multilateral trading system that ensures secure and predictable market access, while respecting health and [safety] concerns" (*ibidem*). For discussion see also, C. Button, *The Power to Protect: Trade, Health and Uncertainty in the WTO*, Oxford: Hart Publishing, 2004, at 227 (expanding on the health-and-trade interface and providing an insightful investigation of both WTO covered agreements and relevant case law).

[442] Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organisation - Annex 1A, 15 April 1994 (into force 1st January 1995), 1867 UNTS 493 (1994) [hereinafter 'SPS Agreement']. The SPS Agreement makes explicit reference to "[…] the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice" (Annex A, para. 3.a). In addition, Codex standards relating to product specifications, labelling, inspection, and certification, are relevant to the TBT Agreement. Considering the substantive and institutional differences between human health protection, on the one hand, and animal and plant health protection, on the other, the SPS Agreement equally recognises the standards developed by other international standards-setting bodies. Specifically, SPS measures concerning animal health and welfare, and zoonoses are to be based on the standards developed by OIE; in turn, SPS measures concerning plant health are to be based on the standards developed by the international and regional organisations operating within the framework of the International Plant Protection Convention (IPPC)' Secretariat, which aims at securing a common and effective action to prevent the spread and introduction of pests of plants and plant products and at promoting appropriate phytosanitary measures for their control. That is why, at present, CAC, OIE and IPPC altogether represent the so-called 'three sister organisations' in the international standardisation community: for discussion see, generally, T.P. Steward and D.S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, (1998) Syracuse Journal of International Law and Commerce 26: 27-54. Part of legal-institutional scholarship analyses the provision in Annex A, para. 3.a of the SPS Agreement as a "delegation", by the WTO, of the power to internationally legislate appropriate food safety standards: see, most notably, T. Büthe, *The Globalization of Health and Safety Standards*, cit. Conversely, ISO is not explicitly referred to in the TBT Agreement, which, generally, does not include any list of international standards-setting bodies. For an insightful analysis see *infra*, Chapter Three.

mechanism for settling international trade-related disputes, which indirectly serves as a compliance mechanism for Codex standards. As result, reference into WTO Agreements has elevated Codex to a position of "quasi-legislator"[443], with its standards acting as the international benchmarks against which compliance with WTO obligations is assessed in dispute settlement and arbitration cases.

As an integral part of the Uruguay Round Final Act of the GATT, the SPS Agreement is among the most ambitious attempts to control and minimise multilaterally the trade-restrictive effects of discriminatory domestic measures.[444] Together with the TBT Agreement, the SPS Agreement reflects the generally increasing recognition of how the expansion of global production chains and growing concerns about consumer protection and global competitiveness in richer countries resulted in the use of a range and variety of non-tariff measures (NTM) in international trade.[445] As tariff levels have dropped during the post-war period, product- and process- related standards and technical regulations have become actually or potentially, directly or indirectly, the most important barrier to cross-border movement of many agricultural, food and manufactured products. While those measures serve legitimate public policy goals and pursue non-economic objectives, they may be utilised also strategically either to enhance the competitive position of countries or individual firms or industries, or to be applied in a discriminatory manner as a trade protectionist tool. To avoid any intentional effect of "regulatory protectionism"[446], the SPS Agreement acknowledges the importance of harmonising differing national regulations that may become disguised non-tariff barriers and that may consequently hinder free movement.

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[443] J.P. Trachtman, *The World Trading System, the International Legal System and Multilevel Choice*, (2006) European Law Journal 12: 469-485, at 480. See also G. Marceau and J.P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, (2002) Journal of World Trade 36: 811-881, at 838; and, S. Charnovitz, *Triangulating the World Trade Organization*, (2002) American Journal of International Law 96: 28-55, at 51.

[444] See T. Cottier, *Challenges Ahead in International Economic Law*, (2009) Journal of International Economic Law 12: 3-15, at 3 ("Since the conclusion of the Uruguay Round of multilateral trade negotiations and the entry into force of the WTO Agreements in 1995, international economic law has witnessed an unprecedented emphasis on trade regulation. The field has moved centre stage in public international law").

[445] See S. Henson and R.J. Loader, *Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements*, (2001) World Development 29: 85-102; and, J. Bingen and L. Busch (eds.), *Agricultural Standards: The Shape of the Global Food and Fiber System*, Dordrecht: Springer, 2006.

[446] See A.O. Sykes, *Regulatory Protectionism and the Law of International Trade*, (1999) University of Chicago Law Review 66: 1-46; and, R.E. Baldwin, *Regulatory Protectionism, Developing Nations and a Two-Tier World Trade System*, (2001) Brookings Trade Review 3: 237-280. Cross-national differences in SPS measures are among the most prominent sources of NTM. A growing number of analytical studies highlight the trade reduction or diversion effects associated with food standards, including food safety standards: see, most notably, E. Ferro, J.S. Wilson, and T. Otsuki, *The Effect of Product Standards on Agricultural Exports from Developing Countries*, World Bank Policy Research Working Paper no. 6518/2013, at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/06/28/000158349_20130628082952/Rendered/PDF/WPS6518.pdf (using available data on pesticide MRL in 61 importing countries and suggesting that on average more restrictive food safety standards are associated with less trade: stricter standards would increase the cost of market access and force exporting firms to make investments in order to comply with new standards).

As any other international agreements, the SPS Agreement lays down the rights and obligations of WTO Members with respect to the adoption and application of public food safety measures; because of that, the predominant focus of legal and economic discourse remains largely on food standards and technical regulations both as trade policy instruments and as non-tariff barriers to trade. Nevertheless, as we have seen, the dynamics of agri-food markets have substantially evolved since the onset of the Uruguay Round. New trade issues relating to the dynamics of globally integrated markets became international trade realities for agribusiness firms, many of which still lie beyond the reach of international trade agreements.[447] One of these issues is the increasing predominance and variation of private sector standards, whose increasing role in the governance of agri-food supply chains and whose emergence as a potentially important trade issue takes the WTO into comparatively new unchartered territory. Indeed, the taking up of consumer concerns about the safety aspects of food in private voluntary standards is a phenomenon that largely post-dates the negotiation and adoption of the SPS Agreement; in addition, this development, which parallels the rapid increase of market penetration by very large retailers and retailer groups, had admittedly not been envisioned in itself by the drafters of that agreement, such that the possible application of the SPS Agreement to private voluntary standards and related conformity assessment systems was never anticipated. What is especially argued in the legal debate is that the hundreds of operating private standards are developed without any reference to the SPS Agreement and even in conflict with the letter and spirit of that agreement, and have the potential to cause confusion, inequity and lack of transparency. It is thus important to understand and clarify the interfacing of the multilateral trading system with the transnational standardisation community in at least three directions.

Firstly, fast growing stringent product and process requirements give rise to the question of market access: as the number of the dominant actors in the food sector has lately been reduced to a small group of powerful market actors – especially food retailers –, privately developed standards come to have a huge impact on the ability of a broad array of other actors, most notably small- and medium- sized farmers and processors, especially in developing countries, to reach markets; in some circumstances, however, market access is impeded by standards that are not normally discriminatory but sometimes zealously applied. In addition, diminished government capabilities following structural adjustment and the inflow of agri-food multinationals into producing countries have undermined the distributive power of developing country producers *vis-à-vis* global buyers, such that the power shift from supplier- to buyer- driven chains has also occurred between producing and consuming countries. In light of that, which impacts do stringent private standards have on international trade through the evolving structure and *modus operandi* of global agri-food value chains?

[447] For discussion see, C. Viju, *Are Agri-Food Trade Issues Changing?*, (2010) The Estey Centre Journal of International Law and Trade Policy 11: 128-135; D. Roberts, *The Multilateral Governance Framework for Sanitary and Phytosanitary Regulations: Challenges and Prospects*, Presentation at World Bank Training Seminar on 'Standards and Trade', Washington DC, 27-28 January 2004; D. Roberts and L. Unnevehr, *Resolving Trade Disputes Arising from Trends in Food Safety Regulation: The Role of the Multilateral Governance Framework*, (2005) World Trade Review 4: 470-491; and, T.E. Josling, D. Roberts, and D. Orden, *Food Regulation and Trade: Toward a Safe and Open Global Food System*, cit.

Secondly, the status of private standards under the WTO Agreements, most notably the SPS Agreement, needs to be clarified: in particular, do private standards come under the umbrella of the rights and obligations established by that agreement? Alternatively, can WTO disciplines holding official food safety regulation and relying on a single axis with a traditional inter-governmental standard setter like Codex be expanded sufficiently to deal with private standards? More broadly, is the logic behind the SPS Agreement somewhat flawed, such that it appears as 'disconnected' with or as having lost its grip on the global food safety regulatory environment that at least in part now largely develops independently from international trade rules? These questions are particularly relevant especially because the TBT Agreement deals not only with the development and implementation of mandatory technical regulations by governmental bodies but also, explicitly, with private activities aimed at the development and adoption of standards as well as at the carrying out of conformity assessment.

Lastly, significant anxiety has been expressed that the rapid pervasion of private standards is serving to undermine the present and future role of the WTO and the utility of food regulation based on inter-governmental cooperation, as well as the role of Codex in guiding national norm making. In this respect, do private standards actually disregard and challenge the role of official food safety regulation established around national and international institutions? Chapter Three will provide a critical analysis of these and other trade concerns that the proliferation of stringent private sector food safety standards rises at the WTO level in the analytical framework of the SPS and other relevant WTO Agreements affecting regulation of international trade in food.

From another perspective, our fundamental assumption is that the need for increased cooperation between the public and private spheres could not be more apparent as a prerequisite for responsive and affordable global food safety regulatory governance. Nevertheless, a more general question arises as whether it is 'appropriate' for non-conventional non-State actors to be setting regulation in areas that, because of their nature and the objectives pursued, have historically been the preserve of public authorities; in other words, the legitimacy of private standards *vis-à-vis* public regulatory instruments in regulating as societally relevant issues as food safety is questioned. No one denies that private standards in fields like food safety nowadays play a governing role in global affairs and have an impact, positive or negative, on a number of constituencies, as well as on a number of other policy fields. Indeed, as it is evident from the discussion in this chapter, unless coupled with controls and incentive systems, the interests and rationales of private actors engaged in food safety regulation may not necessarily be aligned with those of the general public. On the one hand, we came to the preliminary conclusion that both public and private food safety regulation ultimately shares the same objectives of establishing credible food safety systems so as to ensure adequate levels of protection against food safety failures. That is to say that the objectives pursued by private standards are in line with those pursued by public regulations; it is especially food retailers that tend to present an image of social responsibility in assuring food safety by keeping consumers, who demand an absolute guarantee for food safety,

satisfied. On the other hand, while public regulations target directly and specifically human health and consumer protection, private standards – with the partial exception of NGO-led standards and multi-stakeholder initiatives that support broader societal values – reflect essentially commercial interests, such that these are primarily intended either to firm and industry protection or to gaining a competitive edge in response to consumer concerns and expectations, and not always in science-based ways. This means that reliance on market actors may lead to regulatory capture and conflicts of interest, such that any regulatory reform can ultimately fail consumers. In addition, especially when private standards either are legally-mandated through reference in mandatory regulations or become *de facto* market requirements, the extent of the impacts those standards have on third parties becomes an issue. That private standards are not pure self-regulation, but regulation by private parties imposed on other actors along the supply chain, raises important new theoretical concerns about "legitimate, effective, and active participation […] by the private regulated parties themselves […]"[448], both in general – i.e., the fact that private standards are neither developed within any legal mandate nor are subject to public scrutiny – and in comparison with national public regulations and international standards – i.e., to what extent the regulated parties are involved in norm making and monitoring. Views on legitimacy and effectiveness of private standards vary widely; an important part of this analysis therefore will be mapping who is involved in each stage of the standardisation process, particularly focusing on the extent and modalities of participation and representation of all stakeholders. This analysis will be carried out in Chapter Four.

[448] O. Lobel, *New Governance as Regulatory Governance*, in: D. Levi-Four (ed.), *The Oxford Handbook of Governance*, Oxford: Oxford University Press, 2012, 65-82, at 66. Similarly *Id.*, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, (2004) Minnesota Law Review 89: 342-470.

CHAPTER THREE

CONSISTENCY OF PRIVATE FOOD SAFETY STANDARDS WITH THE MULTILATERAL TRADING SYSTEM: CONSEQUENCES FOR MARKET ACCESS

> "The development of private governance structures for food safety […] raises considerable challenges for the analysis of trade in agricultural and food products that, arguably, we are only now beginning to address.
> Private standards are a relatively new element of the food safety […] landscape and continue to evolve over time; if current trends continue, the extent and form of private governance structures is likely to change fundamentally over the next decade"[449].

15. International trade law in the face of today's realities of agri-food markets

The WTO webpage dedicated to sanitary and phytosanitary measures introduces from the outset the following problem: "How do you ensure that your country's consumers are being supplied with food that is safe to eat – 'safe' by the standards you consider appropriate? And at the same time, how can you ensure that strict health and safety regulations are not being used as an excuse for protecting domestic producers?"[450]. The free trade and food safety agendas are both crucial, but at least potentially conflicting. Smooth trading of food products is important for producers and consumers, but may expose the latter to sanitary risks through unsafe food; in turn, enacting food safety regulations is necessary, but may have negative impacts on trade. Such a trade-off is addressed at the international level by the SPS Agreement. As result of the fact that private standard setters have increasingly penetrated the food safety regulatory environment and, at least in some respects, are ever-more side-lining public authorities in that field, the SPS Agreement may be regarded as disconnected with the today's realities and as having lost its grip on the global food safety regulatory environment. By addressing mainly issues of public regulation at the governmental level and while attempting to realise the harmonisation of food safety standards at the inter-governmental level particularly through the Codex Alimentarius Commission, the logic behind the SPS Agreement appears somewhat flawed. This disconnection is said to have many negative consequences, most notably the erratic proliferation of a number of different public and

[449] S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, (2007) Journal of International Agricultural Trade and Development 4: 63-81, at 69.

[450] Sanitary and Phytosanitary Measures, at: https://www.wto.org/english/tratop_e/sps_e/sps_e.htm (accessed 23 November 2015).

private regulatory schemes and the potential marginalisation of the weaker actors in the food chain from lucrative markets.[451]

The increase in global production sharing and the growing importance of consumer concerns in respect of the safety and quality of food pose considerable challenges to the multilateral trading system. Apparently there is no legal impediment to prevent buyers from defining and applying specific safety requirements to the products they purchase. Private standards arise almost by logical necessity as tools for regulation of emerging global marketplaces in view of resolving the disconnection existing between the underlying assumptions of the WTO treaty system and today's realities of the agri-food markets. As we come to know from Chapter Two, the taking up of the consumer concerns in private standards is a phenomenon that largely post-dates the negotiation of the WTO covered agreements; and those few standards that did exist at that time were predominantly of B2B type. Conversely, it is the growing number of collective private standards that raises sensitive questions about the role of WTO law and, specifically, the 'value' of the SPS Agreement. A heighted debate has ensued about the potential impacts that the massive introduction of private requirements as tools of food safety governance is deemed to have on the structure and *modus operandi* of global agri-food value chains. The importance of such an impact on international trade is immediately evident when considering that agri-food products are the most widely traded goods worldwide and whose export accounts for a very large share of GDP in many countries. Hence, together with the emergence of multiple food safety governance structures and the interface with public regulation, the subject of private food safety standards has increasingly become a contentious issue in the multilateral trading system, which takes WTO law into comparatively new and unchartered territory.

Therefore the phenomenon of private standards cannot be effectively understood without addressing the trade-related issues it raises and without taking into account the WTO law in order to clarify the interfacing of the multilateral trading system and the transnational standard setting community. The key issues this chapter intends to discuss are the consistency of private standardisation with the multilaterally agreed discipline of international trade and whether private standards would come under the umbrella of the rights and obligations laid down by the WTO treaty system. To this end, after a preliminary discussion of major trade-related economic and legal concerns that the proliferation of private standards raises, the position of non-governmental entities and the role of non-governmental standards within the WTO legal system will be investigated. The articulations of the SPS Agreement with other potentially relevant avenues available under the WTO law that deal, directly or indirectly, with the issue of non-governmental entities will be taken into account in both a theoretical and, to the extent possible, practical setting so as to explore potential ways to work with private standards.

[451] See J. Wouters, A. Marx, and N. Hachez, *In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law*, Leuven Centre for Global Governance Studies Working Paper no. 29/2009, at: http://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp139e.pdf, at 4.

16. Private food safety standards as 'specific trade concern'

The issue of private food safety standards was brought first to the attention of WTO Members under the heading of "specific trade concerns" within the context of the SPS Agreement.[452] On the occasion of the meeting of the SPS Committee[453] on 29 and 30 June 2005, St. Vincent and the Grenadines pointed out the negative impact that at that time EUREPGAP certification relating to the use of pesticides had on its banana exports to UK supermarkets.[454] In turn, Jamaica raised a similar concern with regard to EUREPGAP certification for exports of various fresh fruit and vegetables.[455] In both cases the EUREPGAP certification scheme was challenged as being higher than the relevant international standards and more demanding than whatever regulation applied by the European Community (EC) and abiding by the disciplines of the SPS Agreement.[456] In those countries' perspective any conflict between the WTO disciplines and private standards was supposedly to be solved by granting primacy to public regulation over private one. Notably, it was argued that, "[t]he SPS Agreement recognizes the role of the International Standard Setting Bodies (OIE, Codex Alimentarius and the IPPC) as the only authorities for establishing SPS standards. However, the proliferation of standards developed by private interest groups without any reference to the SPS Agreement or consultation with national authorities is a matter of concern and presents numerous challenges to small vulnerable economies. These standards are perceived as being in conflict with the letter and spirit of the SPS Agreement, veritable barriers to trade (which the very SPS Agreement discourages) and having the potential to cause confusion, inequity and lack of transparency"[457].

Further support was given to these concerns by a number of other developing countries, most notably Peru, Ecuador and Argentina. In these countries' perspective, private standards appear to be developed and applied heedless of the rules of the multilateral trading system and prove to be more trade-restrictive than necessary to protect human health. This view was reflected in the statement made by the representative of Argentina to the SPS Committee in June 2005, which focused on the particular concern that the issue of private standards raises to developing countries eager to export their food products to the EU and other OECD countries.

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[452] It should be noted from the outset that parallel discussions have taken place at the CAC level about the relationship of the increasing pervasiveness of transnational private standards with international standards. This issue will be addressed specifically in Chapter Four.

[453] Pursuant to Article 12 of the SPS Agreement, the Committee is the body in charge of overseeing the functioning of the SPS Agreement. In particular, it provides WTO Members with a forum to review compliance with the agreement, to exchange information, and to comment on and raise concerns about the way in which one Member is implementing a domestic SPS measure with potential trade impacts.

[454] See WTO, *Summary of the Meeting Held on 29-30 June 2005 - Note by the Secretariat: Revision*, 18 August 2005, G/SPS/R/37/Rev 1, at para. 16.

[455] *Ibidem*, at para. 17.

[456] On that occasion the developing countries concerned requested the SPS Committee to take the most appropriate measures to reduce the exclusionary and other trade-restrictive effects of EUREPGAP standard scheme. Notably, they asked for support facilities for small-scale farmers and more flexible standards that take account of country-specific crops and circumstances, together with a greater involvement of chain actors in standards-setting and a deeper relation with the SPS Agreement.

[457] WTO, *Private Industry Standards - Communication from Saint Vincent and the Grenadines*, 28 February 2007, G/SPS/GEN/766, at para. 1.

As summarised in the record of that meeting: "The representative of Argentina recalled that the international community had generated international agreements to ensure that trade standards were not unnecessarily stringent so as to act as barriers to international trade and countries had devoted time and financial and human resources to attend all the international meetings where standards were discussed, developed and implemented. If the private sector was going to have unnecessarily restrictive standards affecting trade and countries had no forum where to advocate some rationalization of these standards, twenty years of discussions in international fora would have been wasted. The representative of Argentina was convinced that the rational and legal aspects of these kinds of regulations had to be addressed"[458]. This statement is a good illustration of the disconnection that is currently perceived as existing between the underlying assumptions of the SPS Agreement and today's realities of agri-food markets.

In response to these complaints, the European Commission – as the representative of the EC within the WTO – relied on the purely private character of EUREPGAP to argue before the SPS Committee that, "Eurep/Gap was not an EC body nor one of its member States. It was a private sector consortium representing the interests of major retailers. In no case could Eurep/Gap requirements be presented as EC requirements. Even if these standards, in certain cases, exceeded the requirements of EC SPS standards, the EC could not object to them as they did not conflict with EC legislation. […] The representative of the European Communities encouraged developing countries, particularly LDCs, to discuss this issue with non-governmental organizations since, in many respects, the Eurep/Gap requirements reflected their concerns. The current accumulation of such standards constituted an opportunity to emphasize the value of official standards, since private standards were often much more demanding"[459]. The EC position was further supported by Mexico, which expressed the view that it is only when a SPS measure is adopted by governmental authorities that a WTO Member is obliged – pursuant to Article 13 of the SPS Agreement – to ensure that governmental and non-governmental entities implement them properly.[460] Overall, it is clear the position of OECD countries, which argue that the setting of standards for the products they purchase is a legitimate private sector activity which governments should not interfere with.

To date no WTO Member has decided to use the 'hard way' of trying to enforce, by way of WTO dispute settlement, the SPS Agreement against private standards directly, or against another Member which would be harbouring private standard-setters. Nonetheless, the rise of private standards as a specific trade concern within the context of the SPS Agreement marked the beginning of some years of exploratory discussions within the WTO – and of a

[458] WTO, *Summary of the Meeting Held on 29-30 June 2005*, cit., at para. 7. See also *Id.*, *Private and Commercial Standards - Statement by Ecuador at the Meeting of 27-28 June 2007*, 5 July 2007, G/SPS/GEN/792.

[459] *Ibidem*, at para. 18. See G. Rabinowitz, *SPS Standards and Developing Countries: The Skeleton in the Closet for the Doha Round*, CUTS-CITEE Briefing Paper no. 1/2006, at: http://www.cuts-citee.org/PDF/tdp-1-2006.pdf, at 2 (highlighting a little willingness from the EC and other OECD countries to scrutinise closely private standards-setting and to question the reasons of the market actors who dominate the agri-food sector).

[460] See WTO, *Summary of the Meeting Held on 29-30 June 2005*, cit., at para. 19.

long debate among legal scholars, as well – as to the consistency of such standards with the WTO legal system. The awareness that discussing private standards in general terms was not a fruitful approach led to take on the matter from a more practical standpoint, such that any future discussions should address proposals on how to deal with the challenges posed by private standards and should focus on concrete experiences by Members of problems they face with those standards. Several, especially developing Members have actually made use of this opportunity provided by the SPS Committee to report on their experiences with private standards and to air their concerns. Yet, the same Members expressed soon the concern that such an approach risked losing sight of the big picture and did not resolve the issue of the role of the WTO legal system in addressing private standards. Hence, in the face of a claimed need for a systemic debate, in 2007 the WTO Secretariat listed some issues in respect to private standards under the SPS Agreement for possible consideration by the SPS Committee.[461]

In addition, the discussions within the SPS Committee took account of the limits of a purely legal analysis. After an impasse was reached on the question of whether the SPS Agreement has a role to play in disciplining private standards, in April 2008 Members confirmed their overwhelming support for keeping the issue on the agenda of the SPS Committee and agreed to set up a small working group on this issue. In July 2008 the Chair of the SPS Committee circulated a *questionnaire* seeking proposals on what the SPS Committee could and should do in order both to reduce the negative effects that private SPS-related standards have on international trade and enhance the potential benefits arising from such standards for developing countries. Thirty Members responded and the Secretariat circulated a summary thereof, including some proposals for possible actions.[462] What was apparent from the summary is the wide range of Members' views about the extent to which private standards establish SPS requirements, their effects on trade and development, and their legal relationship with the SPS Agreement. Even more, the Secretariat of the SPS Committee proposed a multi-track approach to the private standards issue by setting up a 'group of interested Members' – made up of those Members who provided responses to the *questionnaire*[463] – that would monitor private standards developments, report to the SPS Committee, and request the organisation of information sessions. The mandate of such an *ad hoc* working group on private SPS-related standards was to ultimately present an analytical report to the SPS Committee containing proposals for concrete actions regarding private standards to be considered and adopted by the Committee, in an effort to bring more structured and concrete examples to its discussions on SPS-related private standards.[464] The

[461] See WTO, *Private Standards and the SPS Agreement - Note by the Secretariat*, cit.

[462] WTO, *Private Standards: Identifying Practical Actions for the SPS Committee - Summary of Responses - Note by the Secretariat*', 25 September 2008, G/SPS/W/230.

[463] The WTO Members concerned are: Argentina, Australia, Belize, Brazil, Canada, Chile, China, Colombia, Costa Rica, Dominican Republic, the EU, Ecuador, Egypt, Guatemala, Japan, Mexico, Mozambique, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Peru, St. Vincent & the Grenadines, South Africa, Chinese Taipei, Thailand, Uruguay, the US, and Venezuela.

[464] See WTO, *Private Standards - Identifying Practical Actions for the SPS Committee*, cit., at paras. 4-7. In October 2008 the SPS Committee agreed on a three-step process for the *ad hoc* working group. As first step, in December 2008 the Secretariat circulated a *questionnaire* on SPS-related private standards (G/SPS/W/232), which sought information from Members about products and markets of concern, relevant private and

working group, which met seven times between October 2008 and October 2010, drafted a descriptive report as to "what extent private standards create trade difficulties; […] the nature of any such difficulties; the most relevant SPS disciplines; the role of Codex, IPPC and OIE"[465]. Such a report was finally adopted by the SPS Committee in its 30-31 March 2011 meeting.[466]

Preliminary to our analysis is the consideration that the complex and dynamic environment in which private food safety standards are applied makes the associated impacts be specific by product, by destination and/or origin country and by customer type, as well as across individual firms. In addition, it is difficult to isolate out the specific impact of each single standard and/or for particular country markets from a host of other factors. The difficulty to get a clear picture of the market penetration of many of these standards is further driven by a lack of a consistent body of evidence of the trade impact across product and geographical markets.[467] Such a picture is a precondition for understanding the real impact on market access and identifying and assessing possible actions that could optimise benefits and minimise the negative impacts. Hence, one major theme of recent academic literature is whether private standards work as barrier or as catalyst to the normal course of international trade in agri-food products, especially for small-scale food producers in developing countries, and whether they hinder or foster poverty reduction through agri-food exports. In short, the major concerns about private food safety standards are related to: market access issues; development issues; and legal issues. An additional huge concern is about the legitimacy of private tools of regulation and governance in international trade; this will make the object of analysis in Chapter Four.

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international standards, trade effects, compliance costs, and a number of related elements. As second step, in June 2009 a compilation of replies that summarised the information contained in the 40 responses received from 22 Members was circulated (G/SPS/GEN/932). The *ad hoc* working group considered the compilation of replies in the meetings held in June and October 2009. While some Members found the report a useful basis for holding discussions within the SPS Committee, other Members raised concerns about the limitations of the report, especially with regard to the scope, precision, and accuracy of some of the data provided in the replies to the *questionnaire*. A revised version of the compilation, taking into account comments from Members, was circulated in December 2009 (G/SPS/GEN/932/Rev.1). As third step, the working group requested the Secretariat to prepare a document identifying possible actions by the SPS Committee and/or Members about SPS-related private standards. Already in October 2009 the Secretariat had circulated a first draft (G/SPS/W/247), which drew upon the SPS Committee's discussions, Members and observers' specific written contributions, and the compilation of replies, keeping in mind its limitations. After deliberations reflected in three subsequent revisions of G/SPS/W/247, in October 2010 the working group agreed on some possible actions regarding SPS-related private standards to be presented for consideration to the SPS Committee.

[465] WTO, *Private Standards: Identifying Practical Actions for the SPS Committee*, cit., at 12.

[466] WTO, *Report of the Ad Hoc Working Group on SPS-Related private Standards to the SPS Committee*, 3 March 2011, G/SPS/W/256.

[467] The implementation of private food safety standards provides with much information (especially laboratory analysis and auditor reports), which is of fundamental importance in understanding where food safety problems actually lie and in making decisions on how the management systems could be modified.

16.1. The impact on market access predictability

The argument has been made that, while private standards allow for a global ratcheting up of food safety levels especially in high-value export chains, they exhibit also significant exclusionary and distributional effects mainly on agri-food products originating from developing countries. In fact, under certain conditions the ever increasing number of sector-specific standards developed by market actors can have trade-enhancing effects. In particular, for those chain operators that meet the set of private requirements governing a given chain segment the benefits in terms of long-term business relations through systems of 'preferred suppliers' may be enormous. In addition, compliance with private standards can give brands a better reputation and help suppliers have access to multiple markets especially where standards have transnational reach or if firms operating one or more of these standards trade internationally.[468]

On the other hand, awareness is growing that "even if [private voluntary] standards are not protectionist in intent, badly designed and applied standards can have highly discriminatory consequences for trade partners"[469]. In global buyer-driven supply chains the key issue for any exporter is more to gain access to a given chain rather than to a national market. The increasing concentration within the retail sector let large retailers act as major 'gatekeepers' to developed-country markets for agri-food products, such that compliance with the requirements they set for entry is perceived as fast becoming a primary determinant of market access. Particularly, conformity to an established standard can have a high 'signal' value, even among buyers that do not require that specific standard; that way, a dominant standard has a great scope to impede and/or redirect trade. As result of that, although private standards are not in and of themselves mandatory as a matter of law, their wide-scale application as purchasing requirements comes to exclude non-conforming suppliers from a given chain and results in taking on *de facto* binding force for producers and/or suppliers.[470]

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[468] A number of empirical studies reported gains in efficiency of food operations as result of the implementation of the safety management systems required by private standards and certification systems. Interestingly it is the developed countries that are more optimistic about such a positive outcome: see, e.g., OIE, *Final Report of the 78th General Session - OIE Questionnaire on Private Standards: Executive Summary*, cit. (showing that 87 percent of developed country respondents *versus* only 30 per cent of developing country respondents believe that private standards and certification schemes create benefits). For analysis see, particularly, J.E. Hobbs, *Public and Private Standards for Food Safety and Quality: International Trade Implications*, (2010) The Estey Centre Journal of International Law and Trade Policy 11: 136-152 (discussing the circumstances in which private food standards have a trade enhancing, diverting or reducing effect); see also ITC, *The Impacts of Private Standards on Global Value Chains. Literature Review Series on the Impacts of Private Standards – Part I*, MAR-11-198.E, Geneva: ITC, 2011.

[469] WTO, *World Trade Report 2005: Exploring the Links between Trade, Standards and the WTO*, Geneva: WTO, 2005, at 29.

[470] See WTO, *Effects of SPS-related Private Standards: Compilation of Replies*, 10 December 2009, G/SPS/GEN/932/Rev.1 (reporting the Members' responses to the *questionnaire* on the impact of private standards and confirming that many producers especially in developing countries consider these standards as significant obstacles to market access); similarly, OIE, *Final Report of the 78th General Session - OIE Questionnaire on Private Standards: Executive Summary*, cit. (showing that a very large part of respondents in both developed and developing countries share the idea that private standards create problems in terms of market access). Whether private standards laid down by leading food retailers result in abusive practices aimed at restricting market access or tying producers into supply arrangements falls outside the scope of our analysis.

From a different perspective, because private standards are applied across national borders, regardless of the levels of industrialisation and economic development, environmental circumstances, local practices and regulatory systems in different countries, there is always the potential for these standards to act as particular forms of NTBs able to produce "exclusionary effects"[471] in practice. Notably, the predominant discourse on the effects of private food safety standards on market access has focused on three major elements: the complexities of compliance; the costs of compliance and who bears them; and, the potential exclusion of small producers and processors.

Firstly, compliance with demanding private standards raises questions about the scale of the changes that are required to be made at the farm level so as to establish compliant methods of production. Well beyond regulatory requirements, private standards ask for appreciable asset-specific – technological, infrastructural and institutional – investments to comply with the specifications they set.[472] For many chain actors introducing widely implemented product and process-based food safety specifications is a radical departure from previous farming practices, particularly as far as low-pesticide production methods are concerned.[473] Also, where exports have several destinations they must frequently comply with different standards simultaneously, due to differing regulatory frameworks but also differing buyers' requirements, which may require specific measures that are not suited to the context in which local businesses operate.[474] Hence, compliance is made further difficult by the multiple constraints in keeping track of, and adjusting to such a multitude of different private sets of requirements coexisting and overlapping in the same chain, competing or contradicting each other without recognising the equivalence of standards set by other private entities. Still more, the very complex nature of private standards should never be forgotten, whose contents

[471] J. Wouters, A. Marx, N. Hachez, *Private Standards, Global Governance and Transatlantic Cooperation. The Case of Global Food Safety Governance, Leuven Centre for Global Governance Studies*, 2009, at: http://igov.berkeley.edu/sites/default/files/WoutersMarxHachez_foodsafety.pdf, at 15. See also, *Ids.*, *In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law*, cit.

[472] Arguably, at the post farm-gate level and specifically in processing facilities the introduction of process controls does not represent a major break with pre-existing practice. Public regulations may impose in fact even more complex controls at multiple points along the value chain. Contrarily, process controls undoubtedly have a significant impact when they are applied to primary production, since farming systems lack generally high levels of bureaucratic controls.

[473] Implementing a food safety standard requires: up-front capital investments for significant adjustments in production facilities (like pesticide stores, properly constructed grading sheds, latrines, running water and chemical disposal pits), soil and water analysis, and the development of HACCP-based and other food safety plans; higher operating costs due to changing farming and production practices (replacement of chemical pest controls with more expensive GAP-compliant raw materials and crop rotation, increased management duties, and higher labour inputs); investments associated with the development, implementation and maintenance of QMSs to ensure that the process control system integrity is performed along the value chain, stricter testing and documentation, and certification procedures; investments in the establishment of control systems and the costs of maintaining those systems (monitoring, control, form filling and record-keeping); external audit by a certification body, which is generally itself accredited by an official accreditation body; the skills and costs required for training personnel and managing the implementation of the associated control systems; the overall costs of conformity assessments with reduced profit margins as result.

[474] For instance, exporters of agri-food products like meat, dairy, fresh fruit and vegetables, and seafood, must comply with a number of different requirements that include food safety and quality standards, labels of origin, traceability requirements, phytosanitary controls, of both voluntary and regulatory nature.

are not limited to safety issues, but cover also technical specifications, ethical standards and quality requirements.

Secondly, great concern about private standards is associated to the degree to which the costs of compliance are shared along the value chain. As referred above, the same product on the same market is often required to comply with and possibly be certified under several different and potentially conflicting standards in order to be sold in different supermarket chains. To that it should be added the costs of third-party certification together with the requirement by some private schemes to use only specified certification bodies. All this comes to heavy conformity assessment procedures and ultimately to an apparently unreasonable or unfair multiplication of costs in terms of both time and money. Much of the ongoing debate – focused mainly on GlobalGAP – is about the 'unfair' distribution of costs and benefits along the value chain. A striking impact of private standards is the allocation of compliance costs away from large food retailers and agribusinesses in industrialised countries to smaller and more vulnerable producers and processors in developing countries. Since retailers tighten their prescriptive requirements on suppliers and consolidate their supply networks around a handful of "category captains"[475], the costs of compliance and conformity assessment are pushed lower down the value chain away from the standards adopters towards the standards implementers which are mostly located in developing countries. The critical factor here is the existence of competing suppliers which let buyers to bear rarely the burden of cost, since any actions that increase their costs of procuring from any one is likely to compel them to look elsewhere.

Thirdly, evidence that does exist shows that the cost burden per unit of production of introducing a private standard and the associated certification scheme is on average much greater on small and medium-sized farms than on large farms.[476] A particular problem is the cost of conformity assessment against PPM-standards, which for small scale producers may be very high relative to export turnover and profits. Once again, this reflects existing economies of scale in the processes of compliance. The costs faced by food chain actors in operating the certification schemes and in maintaining the integrity of their controls are considerably higher in supply chains with a structure made up of appreciable numbers of small farmers than if buyers procure from a limited number of medium and large scale

[475] J. Lee, G. Gereffi, and J. Beauvais, *Global Value Chains and Agrifood Standards: Challenges and Possibilities for Smallholders in Developing Countries*, cit., at 12328.

[476] Empirical studies found the costs of implementing GlobalGAP certification schemes are very high. The initial investment costs supported to obtain the GlobalGAP certification are estimated to amount on average to one-third of farmers' annual income; in addition, these costs have to be financed out of a production margin before labour costs. As result, without substantial initial donors' subsidy, it would be impossible for small-scale farmers to be financially viable. Nonetheless, even with substantial support donors, the breakeven period for small farmer investments in complying with GlobalGAP has proven to be three years, compared to one month for exporter-owned farms and one year for large contract farms. Despite some offsetting benefits and positive outcomes for small farmers of the introduction of GlobalGAP – most notably, reduction in costs due to a reduced pesticide application, enhancement in farm efficiency that can spill over into other crops – in small farmers' perspective "GlobalGAP does not make economic sense" (CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit., at 30). On the exclusionary effect of private standards see the analysis in OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit., at para. 76.

producers, since small scale producers usually lack the capacity to adjust their production processes in the short-term.[477]

As a result of the above, the complexities and costs of compliance with private standards lead to profound processes of chain restructuring that result in significant changes in the structure and *modus operandi* of the whole value chain. Compliance costs and complexities reduce *de facto* the cost-advantage that small farmers traditionally hold to possess especially in the production of labour-intensive crops (such as fresh fruit and vegetables); being unable to pay the price of compliance, resource-scarce chain actors are even excluded at all from entire segments of the value chain that present potentially significant opportunities for livelihood enhancement. All in all, alongside other competiveness factors private standards come to drive further the already existent processes of consolidation and concentration in the agri-food sector.[478]

16.2. Development issues

The market access argument discussed above turns out to be even more problematic than the above suggests when it is made with specific reference to less developed countries. A context where compliance with private standards has become in many cases a condition for accessing retailers-led supply chains has a major developmental impact. The bulk of the economic system of developing countries is often composed of small farming enterprises, and the economic and social development of most of these countries depends heavily on their exports

[477] See WTO, *Normas Privadas. Declaracion De Uruguay En La Reunion De Los Dias 2 - 3 De Abril De 2008*, 21 May 2008, G/SPS/GEN/843, at para. 6 (where Uruguay reported that, since scale economies are necessary in order for producers to absorb the costs of private standards, such standards are too burdensome for local producers; this explains – or at least contributes to explain – the reasons why, although 80 percent of national agricultural production is due to the activity of small, family-run enterprises, there is an imbalance in favour of large-scale producers which ends up displacing small-scale agriculture).

[478] See, for instance, A. Graffham, E. Karehu, and J. Macgregor, *Impact of EurepGAP on Small-scale Vegetable Growers in Kenya*, IIED Fresh Insights no. 6/2007, at: http://r4d.dfid.gov.uk/PDF/Outputs/EcoDev/60506fresh_insights_6_EurepGapKenya.pdf (highlighting how the introduction of GlobalGAP in Kenya has drastically reduced the participation by more than 50 percent of small farmers in the export vegetable sector); 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*, 2003, at http://agritrade.cta.int/en/Resources/Agritrade-documents/CTA-Studies/Study-of-the-Consequences-of-the-Application-of-Sanitary-and-Phytosanitary-SPS-Measures-on-ACP-Countries (reporting that large European retailers prefer to deal with large production units in ACP developing countries which can more easily undertake compliance measures, this resulting in the exclusion of smallholders from export markets); S. Henson, O. Masakure and D. Boselie, *Private Food Safety and Quality Standards for Fresh Produce Exporters: The Case of Hortico Agrisystems, Zimbabwe*, (2005) Food Policy 30: 371-384 (reporting that the participation of smallholders in the Zimbabwe export supply chain for fresh vegetables decreased dramatically from 45 percent of these exports in mid-1980s to 18 percent in 2000); and, S. Jaffee and O. Masakureb, *Strategic Use of Private Standards to Enhance International Competitiveness: Vegetable Exports from Kenya and Elsewhere*, (2005) Food Policy 30: 316-333 (finding that, in Kenya many of the traditional exporters have left the fresh vegetables sector, with an increasing predominance of a handful of large firms). See WTO, *Report of the STDF Information Session on Private Standards (26 June 2008) - Note by the Secretariat*, 24 July 2008, G/SPS/R/50, at para. 9 (where the representative of International Certification and Risk Services (CMi) – the largest independent certifier to GlobalGAP standards for fresh produce and the sole certifier of Tesco's Nature's Choice – explicitly pointed out that the certification costs are prohibitive for small-scale producers.

of agri-food products. This said to what extent would the above described exclusionary effects undermine poverty reduction and development strategies? It is generally accepted that the profound changes in the agri-food value chain present potentially valuable opportunities for developing countries. Primary produce (fresh fruit and vegetables, fish, meat, nuts and spices) collectively account for more than 50 percent of the total agri-food exports from these countries; also, these products' share is still rising while that of traditional commodities (coffee, tea, cocoa, sugar, cotton, and tobacco) is declining. These figures present in fact a rather optimistic picture for the ability of developing countries to gain access to and/or compete in contemporary agri-food value chains, and thus for exploiting the potentially high-value opportunities that industrialised country markets exhibit. In spite of tariff preferences and development assistance aimed at increasing their agri-food exports, the emergence of buyer-driven chains and the likelihood that private standards will continue to increase therein in scope and stringency is eroding developing countries' exports competitiveness and the ability of local producers to effectively access potentially lucrative export markets.

On the one hand, the rise of global supply chains triggered a shift away from previous pro-industrialisation policies, i.e., import substitution policies, FDI and local-content restrictions, State-owned enterprises, and so forth, to a new industrialisation path built around the 'join-instead-of-build-supply-chain' strategy. This new development paradigm imposed a cross-border restructuring of industrial organisation with production processes moving from developed to developing countries. This has been accompanied by a symmetrical transfer of regulatory power, which is not from the reach of regulators in developed countries to the reach of weaker regulators in developing countries, but from developing countries to non-State actors, with the result that private regulation is designed by market actors located in developed countries and implemented and monitored in developing countries.[479] What private standards permit to realise in such a context is the 'internalisation' of such distributional effects, with the rule-making power being reallocated from the public domain to the private sector and, within the latter, among different actors along the value chain in relation to the degree of market concentration and the actor size.[480] Generally, the burden of compliance with private standards is likely to fall disproportionately and sometimes unnecessarily so on producers in countries where public and/or private regulation is less well-developed. This is particularly the case of developing countries, where producers face a disadvantage relative to

[479] See C. Dolan and J. Humphrey, *Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticulture Industry*, cit. (describing the relationship between large retailers in developed countries and suppliers in developing countries as a form of "governance", whereby retailers exert close control over the supply chain).

[480] Private regulation subscribes to a comprehensive concept of 'regulation', which provides not only responses to market and government failures (see *supra*, Chapter Two), but also distributional effects both between public and private actors and among private actors themselves. The analysis and quantification of these effects varies significantly sector by sector; in the field of food safety see, most notably, J. Knight, *Institutions and Social Conflict*, New York: Cambridge University Press, 1992, at 19 (defining the "institutions" – including private standards – that arise out of strategic bargaining among private actors with divergent interests as a "by-product of conflicts over distributional gains"); Y. Amekawa, *Reflections on the Growing Influence of Good Agricultural Practices in the Global South*, (2009) Journal of Agricultural and Environmental Ethics 22: 531-557; and, L. Bush and C. Bain, *New! Improved? The Transformation of the Global Agrifood System*, cit.

comparable firms in advanced countries because of the higher costs of certification and the inability to achieve compliance in an effective way, whether because of the structure of production, previous investments in compliance capacity, knowledge and experience at the firm, value chain or national level, and so forth. As a result, in the absence of a strong bargaining power they are *de facto* excluded from the potential supply pool of most wholesaling and retailing actors in several major markets.

All the above comes to prevent developing country producers from reaping the full benefits of implementing standards, thus reducing the returns to related investments and theoretically diminishing the incentives to adopt these standards. The scale of the challenge faced by small-scale producers in complying with stricter food safety 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.[481] Even more, compliance with private standards adds to existing concerns relating to NTMs, and ends up imposing additional burdens on developing countries' already inadequate institutional capacity for complying effectively with official requirements and for establishing food safety national systems, together with the claimed lack of effective technical assistance in this regard.[482]

These arguments explain the reason why private food safety standards and the governance issues they bring to the core have become key policy concerns for developing countries, whose access to OECD markets remains one of the leading demands in multilateral and bilateral negotiations for agricultural trade liberalisation. Hence, it is not surprising that it is developing countries that have been the predominant 'voice' behind these concerns within the WTO and that have been highly critical about the potential detrimental effects those standards have on international trade in agri-food products generally, and on less developed

[481] Cases of successful adjustment by developing-country producers to private standards exist where effective technical and financial assistance has been provided. One of the mechanisms that operate in this respect is the Standards and Trade Development Facility (STDF), which promotes best practices in delivering technical assistance in the SPS area so as to enable food chain operators to implement programmes of food safety management. Another example of successful donor's technical assistance is the Export Promotion of Organic Products from Africa (EPOPA) capacity building programme, which was established by the Swedish International Development Agency (SIDA) so as to promote internationally-recognised local organic certification bodies in some developing countries by working closely with local stakeholders. In many cases 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 their own standards. Nevertheless, the current practice in technical assistance relies much on contractual relationships between vertically integrated companies and selected suppliers. This comes to create dependence on dominant buyers and to provide fertile ground for abusive practices. Also, such contractual framework results in the further marginalisation of those small-scale suppliers that are not among the preferred suppliers, whose dependence on dominant companies makes them vulnerable to opportunistic behaviour.

[482] The ITC business surveys suggest that TBT/SPS measures are the most burdensome for exporting firms in developing countries. Almost half of the NTBs perceived as burdensome are in fact TBT/SPS measures; in addition, more than 70 percent of burdensome NTBs are deemed to create procedural obstacles to export activities. For details see the dedicated ITC webpage at: http://www.intracen.org/itc/market-info-tools/non-tariff-measures/ (accessed 23 September 2015). See also, B.A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, (2000) Food and Drug Law Journal 55: 517-524, at 521 (describing a situation where developing countries are sometimes "forced to argue at Codex for downward harmonization" of international standards).

countries specifically. It is interesting to observe that some WTO Members suggested discussing about private standards in other, development-oriented forums, such as the WTO Committee on Trade and Development or UNCTAD, rather than the SPS Committee.[483] Nonetheless, all the developing-country Members expressed appreciation for the rich and constructive debate with the SPS Committee and noted that, in view of their relevant trade implications private standards should not only be examined in development forums.[484]

16.3. Legal issues

The increasing predominance, variation and strengthening of private standards raises finally questions of legal and normative nature, which are the core subject of our analysis. Critically, from a legal standpoint there is a fundamental difference between the situation where a food product may not be brought to market because it does not comply with official mandatory regulation, and the situation where a food product legally brought to the market is not bought by the intended buyer because it does not comply with the buyer's requirements. From an economic viewpoint, and for all practical purposes, these two situations may amount to the same result where the buyer concerned dominates the market. Therefore, even if government measures comply with the provisions of multilaterally agreed agreements, the issue remains whether, by reason of the imposition of private standards, exporters from other countries are prevented from placing their products in the market of the country where such standards are required.[485]

The conventional perspective that international rules governing the relations among States apply only in relation to acts of governmental authorities is clearly called into question when large or dominant market actors have the *de facto* ability to prevent a product from having access to the market of the importing country. This comes to render the rights and obligations carefully negotiated under the WTO Agreements futile. Hence, whether the traditional regulatory paradigm embodied in the WTO treaty system and restrained to official mandatory regulatory measures is still appropriate in the light of the proliferation of private food safety standards or whether the WTO disciplines should be applied in such a way as to take account of the shifts in governance described so far is open to question.

17. The applicability of the SPS Agreement to private food safety standards

The core issue that follows from the previous analysis and that underlies most of the discussions that have taken place within the SPS Committee and among scholars as of June 2005 is whether and to what extent the jurisdiction of the WTO covered agreements extends

[483] See WTO, *Summary of the Meeting Held on 29-30 June 2005*, cit., at para. 139.

[484] *Ibidem*, at paras. 142-172.

[485] See, G.H. Stanton, *Food Safety Related Private Standards: The WTO Perspective*, in: A. Marx, N. Maertens, J. Swinnen and J. Wouters (eds.), *Private Standards and Global Governance: Economic, Legal and Political Perspective*, Cheltenham: Edward Elgar, 2012, 235-254; and, CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit., Part II.

over the activities of private entities, whether individual firms, consortia of firms and other market actors, as the instruments for their business practices. In particular, the rather ambiguous language of its provisions and the absence of any authoritative settlement make the applicability of the SPS Agreement to private standards a thorny issue.

The attempt to provide a satisfactory answer to the question above asks, first of all, to delve back into the origins of the SPS Agreement, with a view of understanding the reason for being and the assumptions underlying the disciplines therein. We will consider the negotiating history of the Agreement throughout the Tokyo and the Uruguay Rounds of the GATT, including the preparatory work and the circumstances of the conclusion. Next, the obligations imposed to WTO Members under the Agreement are reviewed before plunging into the core examination of whether it contains disciplines governing – directly or indirectly – the adoption and implementation of private standards by market actors as a condition to purchasing or handling imported agri-food products. In so doing, much attention will be devoted to the legal analysis of Article 13 of the Agreement.

17.1. The origins of the SPS Agreement and the regulatory philosophy of international trade law

The SPS Agreement was negotiated during the Uruguay Round of the GATT (1986-1994), which triggered an unprecedented emphasis on regulation and modified substantially the "regulatory philosophy"[486] of the multilateral trading system. The almost exclusive focus on tariff reductions in the very first GATT negotiating rounds reflected the post-war view that achieving a consensus on liberalising international trade required safeguarding the prerogative of sovereign States to regulate their domestic economies. The MFN treatment (Article I:1) and national treatment (Article III:1) obligations enshrined in the GATT with respect to government regulation, as well as the prohibition of quantitative import and export restrictions (Article XI:2), remained largely unconcerned with the substance of domestic regulations so long as these did not discriminate between "like products".[487] The global reduction in tariffs that followed the successive negotiating rounds triggered the upsurge of the governmental resort to NTMs in international trade so as to serve public policy goals. Relative to the past "a clear trend has emerged in which NTMs are less about shielding producers from import competition and more about the attainment of a broad range of public policy objectives. The new NTMs […] address concerns over health, safety, environmental quality and other social

[486] V. Heiskanen, *The Regulatory Philosophy of International Trade Law*, (2004) Journal of World Trade 38: 1-36, at 2. In a similar sense see, M. Trebilcock, R. Howse, and A. Eliason (eds.), *The Regulation of International Trade*, New York: Routledge, 4th edition, 2013; and, A. Guzman, *Global Governance and the WTO*, (2004) Harvard International Law Journal 45: 303-351.

[487] Pursuant to Article III:4 of the WTO Agreement, the GATT 1947 is legally distinct from the GATT 1994. Nonetheless, the provisions of the GATT 1994, which is part of the WTO treaty system, are the same as those adopted at the Second Session of the Preparatory Committee of the UN Conference on Trade and Employment in 1947, as subsequently amended and finally enshrined in the GATT 1947. Accordingly, all of the comments made in relation to the GATT 1994 are, in principle, applicable to the GATT 1947.

imperatives"[488]. Sufficient latitude to pursue legitimate non-economic objectives was provided under Article XX of the GATT, even if, in so doing, the obligations above came not to be observed. Among the other objectives the GATT negotiators included the right to adopt or enforce measures "necessary to protect human, animal or plant health" as long as they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"[489]. Hence, Article XX served as a defence for a country seeking to restrict the import of unsafe foods, provided that the import restriction or prohibition was imposed for the legitimate reason of protecting human health or life.

Adopting domestic SPS measures has long been a key element of achieving public policy objectives, since safety has been typically considered to be a matter for governmental action in the form of either technical regulations or sanitary measures. Yet, cross-national differences in food safety regulation amount among the most prominent source of NTMs, whose impact on international trade is possibly even greater than tariffs.[490] That is the reason why from the Seventies the focus of the trading system has shifted away from tariff barriers that lie 'at-the-border' to regulatory barriers that lie 'behind-the-border'. The issue of domestic regulation turned particularly critical at the Tokyo Round of the GATT (1973-1979). In view of developing the general exceptions set out in Article XX and addressing more effectively non-trade related concerns, the GATT negotiators concluded an Agreement on Technical Barriers on Trade ('Tokyo Standards Code')[491] in the form of a plurilateral treaty, as such binding only some Contracting Parties to the GATT. This way, the relationship between the obligations about non-discrimination on the one hand, and the general exception of Article XX on the other, would no longer take the form of 'rule-exception' or 'breach-justification'; rather, no GATT obligation was intended to be breached if the requirements set in the Tokyo Standards Code were met.

The Standards Code was intended not to set out specific disciplines for SPS measures, but to regulate generally 'technical regulations', that is, "technical specifications, including the

[488] WTO, *World Trade Report 2012: Trade and Public Policies. A Closer Look at Non-tariff Measures in the 21st Century*, Geneva: WTO, 2012, at 3. See also the analysis in D. Sturm, *Product Standards, Trade Disputes, and Protectionism*, (2006) Canadian Journal of Economics 39: 564-581.

[489] GATT Article XX(b). On the interpretation of Article XX by the Appellate Body see, generally, P. Leyton, *Evolution of the "Necessary Test" of Article XX(b): From Thai Cigarettes to the Present*, in: E. Brown Weiss, J.H. Jackson and N. Bernasconi-Osterwalder (eds.), *Reconciling Environment and Trade*, Leiden: Martinus Nijhoff Publishers, 2nd edition, 2008, 77-102; and, D.M. McRae, *GATT Article XX and the WTO Appellate Body*, in: M. Bronckers and R. Quick (eds.), *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, The Hague: Kluwer Law International, 2000, 219-236.

[490] See T. Epps, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement*, Cheltenham: Elgar International Economic Law, 2008 (prospecting an increase in the number of disputes, especially in the SPS area, especially considering the different approaches to health and consumer protection between developed and developing-country WTO Members). See also, L. Catrain, *Book Review: T. Epps, 'International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement', Cheltenham: Elgar International Economic Law, 2008*, (2010) Global Trade and Customs Journal 5: 497-498.

[491] Agreement on Technical Barriers to Trade, 12 April 1979, 1186 UNTS 276 (1979) [hereinafter 'Tokyo Standards Code'].

applicable administrative provisions, with which compliance is mandatory"[492], irrespective of the content of such measures. In particular, it made disciplines for technical regulations and standards that pursued the protection for human health or safety, animal or plant life or health. For our purposes, apart from a number of obligations imposed to the Contracting Parties, specific provisions were negotiated concerning the preparation, adoption and application of mandatory and voluntary standards for industrial and agricultural goods by non-governmental bodies, as well as procedures for conformity assessment by non-governmental bodies. Nonetheless, the Standards Code proved arguably to be unable not only to reduce generally existing NTBs but also to provide effective regulation to the specific class of SPS measures, which became the subject of growing concerns during the Eighties. Hence, under the section devoted to negotiations on trade in agriculture, the signatories of the Punta del Este Declaration of 1986 – deciding to launch the Uruguay Round of the GATT – recognised as a priority that of "minimising the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements"[493].

Since then SPS-related negotiations have been moved away from all the other technical regulations addressed by the Committee on Technical Barriers to Trade. Reflecting the results of the discussions in the Working Group on Sanitary and Phytosanitary Regulations and Barriers established within the Negotiating Group on Agriculture,[494] a draft text of the Framework of an Agreement on Sanitary and Phytosanitary Measures was circulated in June 1990.[495] Intended initially to be a 'decision' to be annexed to the final negotiations on agriculture, the finally agreed SPS Agreement was one of the multilateral agreements that all the WTO Members ratified as part of a 'single undertaking'. It is listed in Annex 1A to the Marrakech Agreement establishing the WTO.[496] The SPS Agreements, which together the revised TBT Agreement replaces the Tokyo Standards Code, is the most ambitious and comprehensive attempt yet to reign in the use of NTBs to international trade through

[492] Annex I to the Tokyo Standards Code. In turn, a 'technical specification' was defined as any "specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product" (*ibidem*).

[493] General Agreement on Tariffs and Trade Punta del Este Ministerial Declaration of 20 September 1986, 25 ILM 1624 (1986), Part I - D. Subjects for Negotiation - Agriculture.

[494] In order to advance SPS negotiations a Working Group on Sanitary and Phytosanitary Regulations and Barriers was established in September 1988, which in on November 1990 issued a draft text to the Contracting Parties to the GATT. For the agenda and the issues discussed by the Working Group see GATT 1947, *Revised Synoptic Table of Proposals Relating to Key Concepts*, Negotiating Group on Agriculture, 30 April 1990, MTN.GNG/NG5/WGSP/W/17.

[495] Draft Text for the Framework of an Agreement on Sanitary and Phytosanitary Measures, 28 June 1990, MTN.GNG/NG5/WGSP/W/23. In December 1991 the Director-General of the GATT tabled a revised draft of all the agreements under negotiation ['Dunkel Text']: see Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 20 December 1991, MTN.TNC/W/FA.

[496] Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154 (1994). For a wider analysis of the SPS Agreement negotiating history see, R. Gliffin, *History of the Development of the SPS Agreement*, in: Food Agricultural Organisation [FAO], *Multilateral Trade Negotiations on Agriculture: A Resource Material. III: SPS and TBT Agreements*, Rome: FAO, 2000, 3-7, at http://www.fao.org/docrep/003/x7354e/x7354e00.htm.

international cooperation. It is intended to reduce the trade-inhibiting effects of SPS measures by imposing real constraints on Members' policy autonomy in such a politically sensitive realm without interfering with Members' ability to take the steps that are genuinely necessary to assure food safety and, therefore, to protect human health.

In force of the adoption of the SPS Agreement – and TBT Agreement, as well – "the function of the [WTO legal] system was no longer negative harmonization of international trade regulation by way of elimination of discrimination both between domestic and foreign products and between products originating from different third countries, but positive harmonization, i.e., the establishment of a uniform regulatory framework for global trade"[497]. This implies a shift from a system based on trade liberalisation to a system based on the establishment of an internationally-integrated marketplace.[498] As a result, even continuing incorporating the GATT principle of non-discrimination – based on the traditional view of the role of governmental authorities in risk regulation – the WTO disciplines now pursue the two-fold objective of limiting the trade-restrictive effect of legitimate regulatory measures while weeding out those regulatory measures that stem not from health concerns but rather from disguised protectionist objectives. The Appellate Body described such a balance as "on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate"[499].

17.2. Scope of application and general obligations of the SPS Agreement

This historical backdrop makes it clear that the SPS Agreement is an international treaty and therefore subject to the application of the general principles of general international law. As is clear from the wording of the Agreement itself, all the provisions therein explicitly refer to the rights and obligations of WTO *Members*, i.e. States and separate customs territories that have agreed to it according to Articles XI and XII of the WTO Agreement. In addition, it is fully

[497] V. Heiskanen, *The Regulatory Philosophy of International Trade Law*, cit., at 6. Even more, the regulatory function of the TRIPS Agreement goes beyond simple harmonisation, since its major concern is not so much cross-national differences as the lack of effective international protection of intellectual property rights (IPR).

[498] This change in the regulatory philosophy of international trade results in "a transition from a system based on 'principle' […] to a system based on 'policy', or, more precisely, to a system based on both 'principle' and 'policy'" (V. Heiskanen, *The Regulatory Philosophy of International Trade Law*, cit., at 14, footnote no. 50). For discussion about the differences between "negative integration powers" and "positive integration powers", i.e., the WTO's powers to "re-regulate" at a multilateral level, see G. Marceau and J.P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phitosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the WTO Law of Domestic Regulation of Goods*, cit., at 838 (comparing the disciplines of domestic regulation of goods in the three agreements and observing that "the law making in the areas covered by the SPS and TBT Agreements is quite unique"); and, L. Gruszczynski, *The SPS Agreement within the Framework of WTO Law: The Rough Guide to the Agreement's Applicability*, Polish Academy of Sciences Institute of Legal Studies, 2008, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152749 (discussing the role and applicability of the SPS Agreement).

[499] United States – Measures Affecting the Production and Sale of Clove Cigarettes, Report of the Appellate Body circulated 4 April 2012, WT/DS406/AB/R, at para. 109.

binding *only* on WTO Members. Finally, as a multilateral agreement it is fully binding on *all* the WTO Members.

17.2.1. The concept of 'measure'

In terms of Article 1.1, the SPS Agreement, "applies to all *sanitary and phytosanitary measures*, which may, directly or indirectly, affect international trade […]"[500]. From a substantive point of view, paragraph 1 of Annex A to the Agreement defines the concept of "sanitary or phytosanitary measures" as "*[a]ny measure applied*: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests"[501]. Accordingly, it is the risks and the specific characteristics making a product hazardous that determine whether a measure qualifies as a SPS measure.

From a formal point of view, the same provision specifies that "sanitary or phytosanitary measures" are "all relevant *laws, decrees, regulations, requirements and procedures* including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety"[502]. All other measures are covered by the TBT Agreement in accordance with the definitions in Annex A to that agreement. It follows that a measure includes "not only normative rules (i.e. those measures of general application), but also executive acts, such as the imposition of tariffs, as well as the application of laws in a Member's practice"[503].

Critically for our analysis, the provisions in Annex A fail to offer guidance as to which types of entities may promulgate or issue SPS measures for purposes of the SPS Agreement. From the definitions above it could be inferred that it is the *application* of an SPS measure to the end of protecting human health that is subject to discipline under the agreement. As pointed out by the Appellate Body in *Australia – Apples*, "[a] fundamental element of the definition of 'SPS measure' set out in Annex A(1) is that such a measure must

[500] Emphasis added.
[501] Emphasis added.
[502] Emphasis added.
[503] E. McGovern, *International Trade Regulation*, Exeter: GlobeField Press, 1995, at para. 1.1332.

be one 'applied to protect' at least one of the listed interests or 'to prevent or limit' specified damage"[504]. This issue was addressed specifically by the panel in *EC – Biotech Products*, which clarified that any SPS measure consists of three essential elements: "Annex A(1) indicates that for the purposes of determining whether a particular measure constitutes an 'SPS measure' regard must be had to such elements as the purpose of the measure, its legal form and its nature. The purpose element is addressed in Annex A(1)(a) through (d) ('any measure applied to'). The form element is referred to in the second paragraph of Annex A(1) ('laws, decrees, regulations'). Finally, the nature of measures qualifying as SPS measures is also addressed in the second paragraph of Annex A(1) ('requirements and procedures, including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; […]')"[505]. Consequently, "a measure […] would qualify as an SPS measure, as it meets the form (law), nature (requirement) and purpose (one of the enumerated purposes) elements of the definition of the term 'SPS measure' as provided in Annex A(1)"[506].

As far as the form element is concerned, from the panel report above it could appear that to comply with such a requirement SPS measures can only be in form of "laws, decrees and regulations", while "requirements and procedures" are only an additional "nature" element. In other words, if the terms "laws", "decrees" and "regulations" are by their very nature 'governmental' measures, "requirements" and "procedures" may also well be 'non-governmental'.[507] Nonetheless, from the contextual analysis of these exerts it can be argued that any SPS measure needs the involvement of the government. In particular, in analysing the question of governmental *versus* private actions with reference to a possible violation of the GATT 1994, the panel in *Japan – Film* first noted this risk by holding that, "[a]s 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. […] this 'truth' may not be open to question […]"[508].

Following that, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* said that, "a measure may be any act of a Member, whether or not legally binding, and can

[504] Australia – Measures Affecting the Importation of Apples from New Zealand, Report of the Appellate Body circulated 29 November 2010, WT/DS367/AB/R, at para. 172.

[505] European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Report of the Panel circulated 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.149.

[506] *Ibidem*, at para. 7.162.

[507] The GATT 1947 panel in *Canada – FIRA* found that the term "laws, regulations or requirements" in Article III:4 of GATT 1947 included written purchase undertakings by private investors that, once they were accepted, became part of the conditions under which the investment was approved. In such case compliance could be legally enforced. See GATT 1947, Canada – Administration of the Foreign Investment Review Act (FIRA), Panel report adopted 7 February 1984, BISD 30S/140, at para. 5.4.

[508] Japan – Measures Affecting Consumer Photographic Film and Paper, Report of the Panel circulated 31 March 1998, WT/DS44/R, at para. 10.12.

include even non-binding administrative guidance by a government"[509]. Hence, a measure may include other than governmental legislation, e.g., in the form of "requirements" and "procedures", provided these are adopted by a government. Hence, "any domestic instrument of a State or customs territory containing rules or norms, which: (i) provide administrative guidance; (ii) create expectations among the public and private actors; and (iii) are intended to have general or prospective application, constitute a 'measure'. This is irrespective of how or whether those rules or norms are applied in a particular instance"[510]. This interpretation finds support in the WTO Dictionary of Trade Policy Terms, where the term 'measure' is defined as being "[n]ormally any law, rule, regulation, policy, practice or action carried out by government or on behalf of a government"[511]. Finally, it is confirmed by a Note of the SPS Secretariat addressed to the SPS Committee on the relationship between private standards and the SPS Agreement, which reads as follows: "[…] the definition of an SPS measure in Annex A (1) and the accompanying illustrative list of SPS measures does not explicitly limit these to governmental measures"[512].

Furthermore, it is commonplace that a 'measure' for the purposes of WTO law refers also to any omission or failure to act on the part of one Member. Specifically, one could say that "in principle, any act or omission attributable to a WTO Member can be a measure for the purposes of dispute settlement proceedings"[513]. Although this definition does not describe a 'measure' as acts or omissions 'by' WTO Members, nonetheless "(t)he acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the State"[514]. Also the literature seems to be consistent in this respect. As has been put in evidence, "WTO Agreements frequently use the word measure to refer to behaviour which

[509] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, Report of the Appellate Body circulated 15 December 2003, WT/DS244/AB/R, at para. 81. See also Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico, Report of the Panel circulated 24 October 2000, WT/DS156/R, at para. 69, footnote no. 47.

[510] United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, Report of the Appellate Body circulated 29 November 2004, WT/DS268/AB/R, at para. 187.

[511] WTO, *Dictionary of Trade Policy Terms*, 5th edition, Geneva: WTO, 2007.

[512] WTO, *Private Standards and the SPS Agreement*, cit., at para. 15. See also *Id.*, *Report of the STDF Information Session on Private Standards*, 26 June 2008, G/SPS/50, at para. 15. The position and perspective expressed by the WTO Secretariat goes in parallel with the definition of the wording "requirements" provided in the Codex Principles for Food Import and Export Inspection and Certification (CAC/GL 20-1995), which refers to "the criteria set down by the competent authorities relating to trade in foodstuffs covering the protection of public health, the protection of consumers and conditions of fair trading" (*ibidem*, Section Two).

[513] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, cit., at para. 82. See also Australia – Measures Affecting the Importation of Apples from New Zealand, cit., at para. 171. In addressing the marketing restrictions on imported retreaded tyres imposed by some State laws as opposed to federal measures, the panel in *Brazil – Tyres* made reference to the observation of the Appellate Body in *US Corrosion – Resistant Steel Sunset Review* and stated that, while the phrase "measures taken by another Member" in Article 3.3 of the Dispute Settlement Understanding – referring to "[s]ituations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member" – creates a relevant nexus between a measure and a Member, "[…] any act or omission attributable to a WTO Member can be a measure of that Member for the purpose of dispute settlement" (Brazil – Measures Affecting Imports of Retreaded Tyres, Report of the Panel circulated 12 June 2007, WT/DS332/R, at para. 7.399).

[514] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, cit., at para. 81.

Members may be held responsible in dispute proceedings. This practice gives support to a notion that seems to be implicit in the jurisprudence of panels and the Appellate Body: that common principles of responsibility apply throughout the WTO system of rules"[515].

To sum up, the absence of any direct reference to the activities of private entities in Article 1.1 and in Annex A does not mean – at least, theoretically – that they are explicitly excluded from the scope of the Agreement. Nonetheless, taking into account the assumptions underlying all the WTO treaty system, as well as the fact that private food safety standards neither existed so massively on the market at the time of the inception of the WTO covered agreements nor were that "specific trade concern" they are today, legal scholars conclude that the SPS Agreement was essentially designed to deal with governmental measures.[516] Behind this approach lies the traditional view of the role of governmental regulation in the area of sanitary and phytosanitary risks. The idea is that "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"[517]. While this is normal and acceptable market behaviour, nonetheless, due to market failure, economic operators are not induced to take into account the interests of all affected actors, such that unregulated markets fail to provide an optimal level of safety. Therefore, governments step in to oblige market actors to act in a way that will result in an optimal safety level, equally accessible to all. Nonetheless, since the vulnerability of governmental regulators to private interest pressures may result in sub-optimal, i.e., protectionist regulation, it is governmental intervention in the market that needs to be disciplined. Ultimately, the SPS Agreement was negotiated to identify best regulatory practices that address aspects of the risk analysis carried out by national regulators.

17.2.2. The SPS disciplines

The SPS Agreement recognises the legitimate need of each WTO Member to regulate risks on the consideration that "[i]t is the 'prerogative' of a WTO Member to determine the level of protection that it deems appropriate"[518]. In light of that, Members "take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health […]"[519]. On the other hand, the negotiators intended to prevent from using SPS measures under the guise of one of the objectives declared and pursuing *de facto* protectionist purposes, this way circumventing the commitments relative to the reduction of tariffs and elimination of

[515] E. McGovern, *International Trade Regulation*, cit., at para. 1.1332.

[516] See, e.g., T. Epps, *Demanding Perfection: Private Food Standards and the SPS Agreement*, in: M.K. Lewis and S. Frankel (eds.), *International Economic Law and National Autonomy*, Cambridge: Cambridge University Press, 2010, 73-98.

[517] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement: Challenges and Possibilities*, (2008) South African Yearbook of International Law 33: 1-37, at 6.

[518] US/Canada – Continued Suspension of Obligations in the EC – Hormones Dispute, Report of the Appellate Body circulated 16 October 2008, WT/DS321/AB/R, at para. 523. See also, Australia – Measures Affecting Importation of Salmon, Report of the Appellate Body circulated 20 October 1998, WT/DS18/AB/R, at para. 199; and, SPS Agreement, Preamble recital no. 6.

[519] SPS Agreement, Article 2.1.

quantitative restrictions undertaken under the GATT.[520] That is the reason why the SPS Agreement elaborates a multilateral framework of "rules for the application of the provisions of the GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)"[521]. In this respect Article 2.3 repeats the language used in the *chapeau* to Article XX of the GATT to the effect that SPS measures are applied in a manner that does constitute neither "a means of arbitrary or unjustifiable discrimination between Members where identical or similar conditions prevail, including between their own territory and that of other Members" nor "a disguised restriction on international trade". Hence, Members agree to ensure that any SPS measure is applied in a non-discriminatory manner following the principles of national and MFN treatment, this way not discriminating foreign products against like domestic products or other like foreign products.[522] In addition, Members should ensure that any SPS measure is applied only to the extent necessary to protect health and life, so that SPS measures may not be more trade restrictive than necessary.[523] What is more, such measures must be based on scientific evidence, and may not be maintained without sufficient scientific justification.[524]

One major objective of the SPS Agreement is to reduce cross-national regulatory differences, which often require that products comply with many different conditions in order to access different national markets. In this respect, the object and purpose of Article 3 is to promote the harmonisation of domestic SPS measures on as wide a basis as possible by establishing, recognising and applying SPS measures common to different Members, so as to reduce market access problems. Because of that, Members are required to base their SPS measures on "international standards, guidelines or recommendations, where they exist"[525], in which case the domestic measures are presumed to be compliant with the Agreement. Also, Members undertake to engage in the preparation and periodic reviews of international standards in the framework of recognised international scientific organisations. As far as food safety is concerned, the Agreement prescribes the standards established by the *Codex Alimentarius* Commission relating to food additives, veterinary drug and pesticide residues, contaminant, methods of analysis and sampling, as well as the codes and guidelines of hygienic practices as the basis for Members' SPS measures.[526] Nonetheless, Members are enabled to introduce or maintain a measure that results in a higher level of protection than would be achieved by a measure based on the relevant international standards, provided that

[520] See WTO, *Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee*, cit., at para. 10.

[521] SPS Agreement, Preamble recital no. 8.

[522] See SPS Agreement, Article 2.3.

[523] See SPS Agreement, Article 2.2.

[524] *Ibidem*.

[525] SPS Agreement, Article 3.1. Hereafter, wherever reference will be made to "international standards", this will include implicitly also "guidelines and recommendations".

[526] SPS Agreement, Annex A, paragraph 3(C). For those matters that are not covered by international standards developed by Codex – together with OIE for animal health and zoonoses, and IPPC for plant health – WTO Members should make reference to appropriate standards, guidelines and recommendations adopted by other relevant international organisations, provided that they are open for membership to all WTO Members as identified by the SPS Committee. Yet, the Committee has to date identified no other relevant international organisation in this respect.

such a more stringent measure rests on scientific justification in view of achieving the acceptable level of risk.[527] Additionally, Article 4 requires Members to accept the SPS measures adopted by other Members as "equivalent" – even if those measures differ from their own or from those used by other Members trading in the same product – to the extent that the exporting Member objectively demonstrates that its measures achieve the importing Member's appropriate level of protection.[528]

Apart from the case of deviations from international standards, all SPS measures must be generally based on a scientific assessment of the risks to human, animal or plant life or health, carried out in order to determine the appropriate level of protection which SPS measures ought to apply.[529] A set of complex obligations in this respect – many of which have been the subject of dispute settlement – are specified in Article 5. Notably, SPS measures must be based on a risk assessment that is appropriate to the circumstances and that take into account available scientific evidence and internationally-established risk assessment techniques.[530] In the absence of relevant scientific evidence that would allow a proper risk assessment, Members are allowed to adopt SPS measures on a provisional basis, provided the produce the "available pertinent information"[531] and strive to obtain additional information necessary for a more objective risk assessment so as to revise the measures at stake in a timely fashion; anyway, provisional measures must be reviewed within a reasonable period of time.

Importantly, the WTO Members must consider the relevant economic factors associated with the measures at stake, as well as the objective of minimising negative trade effects.[532] In this respect, Members must apply, across the board, the same level of protection to the same risks; this is a consistency requirement whose aim is to avoid any arbitrary or unjustifiable discriminatory treatment between food products.[533] Very critically, Members undertake to

[527] See SPS Agreement, Article 3.3.

[528] See SPS Agreement, Article 4.1. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures. In addition, Members shall, upon request, enter into consultations so as to agree at the bilateral or multilateral level on recognition of the equivalence of specified SPS measures.

[529] See SPS Agreement, Article 5.1.

[530] See Australia – Measures Affecting the Importation of Apples from New Zealand, cit., at paras. 213-215.

[531] SPS Agreement, Article 5.7. See US/Canada – Continued Suspension of Obligations in the EC – Hormones Dispute, cit., at paras. 621-735; Japan – Measures Affecting the Importation of Apples, Report of the Appellate Body circulated 26 November 2003, WT/DS245/AB, at paras. 169-188; and, Japan – Measures Affecting Agricultural Products, Report of the Appellate Body circulated 22 February 1999, WT/DS76/AB/R, at paras. 86-94.

[532] See SPS Agreement, Article 5.3. In light of this provision the economic factors to be taken into account are: "potential damage in terms of loss of product or sales in the event of the entry, establishment, or spread of a pest or disease; the cost of control or eradication in the territory of importing members; the relative cost-effectiveness of alternative approaches". In addition, Article 6 concerns the recognition and adaptation of SPS measures to the conditions and characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. Such characteristics include: the level of prevalence of specific diseases or pests; the existence of eradication or control programmes; and appropriate criteria or guidelines which may be developed by the relevant international organisations.

[533] See SPS Agreement, Article 5.5.

ensure that their SPS measures are not more trade-restrictive than required to achieve their appropriate level of protection; a measure is deemed as being not more trade-restrictive than required "unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade"[534].

Article 7 and Annex B to the Agreement provide detailed transparency requirements such that all the WTO Members can access information about SPS measures actually or potentially affecting their trade with other Members. In particular, Members are under an obligation to publish and notify promptly any changes in their SPS measures and to allow a "reasonable interval" between the publication and the entry into force of the measures; this way, other interested Members may become acquainted with and comment on these, while producers and exporters, in particular from developing countries, may have time to adapt their production and/or processing methods as necessary. Notably, new measures that derogate from established international standards – or in the absence of any relevant international standard for a Member to base its measure on – must be notified in advance to other Members so that their comments can be taken into account.

Although the SPS disciplines are intended to make it easier for all Members to participate in international trade, the Agreement recognises that compliance with its provisions may make it more difficult for less developed-country Members to be involved in international trade. Therefore, Article 9 provides that Members should facilitate the provision of technical assistance to other Members, especially developing country Members, in support of their achieving appropriate levels of health or life protection.[535] In this respect, developed-country Members are encouraged to provide or fund technical assistance – either bilaterally or through international organisations – to help less developed countries establish food safety systems that comply with the Agreement, especially where substantial investments are required for an exporting developing Member to fulfil the SPS requirements of the importer.[536] Furthermore, Article 10 provides for special and differential treatment to developing countries and requires that, in the preparation and application of SPS measures Members take into consideration the special needs of these countries and in particular of LDC Members, notably by granting them time extensions for compliance with their SPS requirements.[537]

Lastly, disputes arising under the SPS Agreement are submitted to the general system of dispute settlement of the WTO.[538]

[534] SPS Agreement, Article 5.6, footnote no. 3.

[535] Assistance includes technologies, research and development, technical expertise, infrastructure, training, and the establishment of national regulatory bodies.

[536] See SPS Agreement, Article 9.2.

[537] See SPS Agreement, Articles 10.1, 10.3.

[538] See SPS Agreement, Article 11.

18. Article 13: A possible way for the application of the SPS Agreement to conduct of private entities?

As we have widely discussed in Chapter Two, the dynamics of agri-food markets have greatly evolved since the inception of the SPS Agreement, which could seem to fall short in the advancement of global food safety governance in many aspects. Its nature of international treaty makes it evident that the disciplines contained in the SPS Agreement do not *directly* address private entities and, specifically, non-governmental standards setting, and as such these entities do not have any obligation to comply with the Agreement. On the other hand, this begs the question of whether – as a legal matter – the SPS Agreement addresses at least *indirectly* the regulation of private business activities, and, if so, what kind of disciplines it imposes when the normal course of international trade is affected because of these activities. The Agreement remains largely silent on this matter. The only provision therein that references actions of non-governmental entities and that might relate in some way to private standards is Article 13, which is about the implementation of the Agreement. Literary, the provision, which is articulated in five sentences, reads as follows:

> "Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or 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".[539]

Article 13 defines the obligations that WTO Members have as far as the activities of other than central government bodies and non-governmental entities in the SPS area are concerned. Article 13 has been referred to as being potentially relevant to the effect of a discipline of private food safety standards since the very first meeting of the SPS Committee in which the issue of such standards was raised as specific trade concern. Nonetheless, whether this provision is applicable to market actors and their activities is a thorny issue; the complainants themselves – especially developing-country Members – claimed that the scope and wording of this provision needed to be clarified. In fact to this date no authoritative interpretation of

[539] Article 13 recalls the relevant provisions enshrined in the Tokyo Standards Code. Specifically, Article 2 contained substantive obligations in relation to central governments and in respect to the preparation, adoption and application of technical regulations and standards. Articles 3 and 4 disciplined the responsibility of the Contracting Parties to the GATT for acts by local governments and non-governmental bodies.

Article 13 is yet available neither through *ad hoc* interpretative decisions nor through dispute settlement rulings. Clarification is needed in at least two directions. A first key interpretative issue raises as to what kind of entities the wording "other than central government bodies" and "non-governmental entities" refers to, that is, whether these wordings may be taken to include only non-governmental entities that are someway linked to the government or also private entities such as market operators that are under the jurisdiction of a Member. Even admitting that this would be the case, a second major interpretative issue concerns the nature and limits of the responsibility of WTO Members with regard to private entities in their territories. The question here is two-fold: on the one hand, whether, and if so in which cases, actions by those entities might be regarded as a 'measure' by a Member that can be challenged under the SPS Agreement; on the other hand, whether Members are required to discipline private entities in relation to the development and application of standards in their territories.

To provide clarification to these issues we will make use of the hermeneutical criteria identified in Articles 31 to 33 of the Vienna Convention of the Law of the Treaties ('VCLT'). In particular, the general rule of interpretation in Article 31(1) states that, "[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". The three elements of text, context, and object and purpose, constitute "one holistic rule of interpretation […] [rather than] a sequence of separate tests to be applied in a hierarchical order"[540]. Especially relevant is also Article 32, which provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

18.1. Food firms as 'non-governmental entities'?

The second sentence of Article 13 does not raise controversial legal questions. It requires the WTO Members to support the observance of the SPS disciplines by "other than central government bodies" under their jurisdiction that are active in the area of sanitary and phytosanitary protection. A literary interpretation of the wording "other than central government bodies" may include an all-encompassing ocean of governmental bodies provided that they do not belong to the central government, such as bodies on the provincial and municipal levels. Such an interpretation finds support in a contextual interpretation that takes into account the overall structure of Article 13. On the one hand, the third sentence thereof provides for a separate discipline in relation to the observance of the Agreement by regional bodies and non-governmental entities. On the other hand, the fourth sentence mentions "regional or non-governmental entities" in parallel with "local governmental bodies". It could

[540] United States – Section 301-310 of the Trade Act 1974, Report of the Panel circulated 22 December 1999, WT/DS152/R, at para. 7.22.

be also argued that the negotiators of the SPS Agreement wanted to prevent the evasion of the SPS disciplines by Members through allowing ever-more SPS requirements to be developed or implemented through independent agencies or regional networks of regulators rather than by central government. In short, the second sentence of Article 13 is concerned with governmental conduct and requires Members to ensure compliance with the Agreement when SPS measures are adopted by a class of governmental bodies that do not belong to the central government structure. It follows that, such actions as the adoption and implementation of private standards by market actors are excluded from that precept.

More debated among the WTO Members, as well as in the literature, is the reference to "non-governmental entities" in the third sentence of Article 13. Here, the question is whether or not such a reference would bring under its scope the activities of entities that do not have any *de jure* or *de facto* link with the government, such as those private sector entities that set, implement or assess conformity with private food safety standards. Actually, no definition of "non-governmental entities" is provided either in the SPS Agreement or in any other WTO covered agreement; nor there is a case law on this provision that can contribute to provide for interpretative guidance. Still more, interpretative information from the preparatory works of the negotiation of the SPS Agreement – including both formal negotiating meetings and informal discussions – or from the work in the SPS Committee does not add much interpretation in relation to this issue. Neither substantive debate nor indications nor even mere comments by any Member appear to be at that time that the Agreement was intended to have application to private entities imposing SPS-type requirements for their own purposes, or to be applied by the Members to constrain the practices of private entities. It could be argued in this respect that, "had it been otherwise there would have been huge opposition to the SPS Agreement from commercial interests in developed countries, and there was not"[541].

The analysis that follows consists in shading light on some, apparently overlapping, wordings which the WTO covered agreements make use of in order to make clear comparatively the scope of the wording "non-governmental entities" in Article 13 and thus determine whether it could be the same as private entity.

18.1.1. The concept of 'non-governmental organisation'

First of all, the wording "non-governmental organisation" refers broadly to non-State actors that, because of the inherent international law nature of the WTO treaty system, are not so far allowed to take part in the WTO processes directly and on a normative basis. Ultimately, in the general aim of reducing, deterring or preventing unjustified barriers to trade, the WTO is an organisation that is strictly 'government-to-government'; as has been remarked, "[t]he WTO is far behind to most of the international organisations with regard to how it handles non-governmental organisations. Others have very elaborate methodologies of accreditation

[541] WTO, *Private Voluntary Standards within the WTO Multilateral Framework - Submission by the United Kingdom*, cit., at 78.

[…], such as the UN or the ILO and the WIPO"[542]. In this respect, Article V:2 of the WTO Agreement states that "[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". Based on this provision, the General Council adopted some Guidelines for Arrangements on Relations with Non-Governmental Organisations on 18 July 1996.[543] While recognising a broadly held view among the WTO Members that it would currently "not be possible for [non-governmental organizations] to be directly involved in the work of the WTO or its meetings"[544], the Guidelines recommend that the WTO Secretariat should interact with such organisations. For the purposes of the WTO law these seem to include non-profit organisations representative of the civil society and business organisations, be they firms and business associations and trade unions.[545]

In the same line of reasoning, while no observer status is granted to non-governmental organisations within the WTO committees,[546] two advisory bodies to the WTO Secretariat were established in June 2003, namely: the NGO Advisory Body, made up of non-profit civil society organisations, and the Business Advisory Body, composed of individual companies and business organisations.[547] These bodies meet twice a year with the aim to further

[542] J.H. Jackson, *The WTO "Constitution" and Proposed Reforms*, (2001) Journal of International Economic Law 4: 67-78, at 75.

[543] WT/L/162.

[544] *Ibidem*, at para. VI.

[545] The approach embodied in these guidelines is rather restrictive, especially when compared to the practice of other international organisations, particularly the UN. Nonetheless, the guidelines fostered a clear upsurge in the participation of non-governmental bodies representing environmental, development, consumer, labour and business interests at WTO Ministerial Conferences, where they are allowed to attend upon accreditation with the WTO Secretariat all events (but the 'green room negotiations', i.e. the meetings of the heads of delegation convened by the WTO Director-General or by the chair of a specialised committee). Whether such participation may be attributed either to a 'push' function exerted by non-State actors on the Organisation and its Members to be more closely involved into decision-making, or to a 'pull' function of the Organisation itself in its effort to attract the interest of non-State actors still remains an open question. In this respect see, G. Marceau and P.N. Pedersen, *Is the WTO Open and Transparent?*, (1999) Journal of World Trade 33: 5-49; S. Charnovitz, *Opening the WTO to Nongovernmental Interests*, (2000) Fordham International Law Journal 24: 173-216; D. Austin-Smith and J.R. Wright, *Counteractive Lobbying*, (1994) American Journal of Political Science 38: 25-44; *Id.*, *Theory and Evidence for Counteractive Lobbying*, (1996) American Journal of Political Science 40: 543-564; and, F.R. Baumgartner and B.L. Leech, *The Multiple Ambiguities of Counteractive Lobbying*, (1996) American Journal of Political Science 40: 521-542.

[546] One notable exception is ISO, which holds observer status in both the SPS and TBT Committees. ISO had similar status in relation to the Tokyo Standards Code.

[547] On the two advisory bodies see, D. Pruzin, *WTO Chief Sets Up Advisory Bodies with Business, NGOs to Boost Dialogue*, (2003) BNA's International Trade Reporter 20: 1044. Arguably the WTO committees provide non-State actors with the opportunity to exert considerable influence on individual Members as well as on the outcome of the Organisation's decision-making. In consideration of the international law nature of the WTO disciplines, to the limited extent that a relationship between the WTO and its Members, on the one hand, and non-governmental private bodies, on the other, may exist, this would be mostly about mutually beneficial information-sharing. To this end, most Members have mechanisms for consultation between government and interested parties on issues pertaining to the competence of the Organisation. Nonetheless, there is no obligation on Members to include the views and/or represent the interests of private entities in WTO decision-making processes; rather, it is open to the committees themselves to arrange for *ad hoc* consultations and information sharing with private parties. Such a process has been actually initiated by the SPS Committee. On the role and place of non-governmental entities within the WTO see, P.C. Mavroidis and W. Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO*, (1998) Journal of International Economic Law 1: 407-432; and, G.C.

transparency and improve the understanding of the complexities of the WTO. Additionally, a reference to "non-governmental organisations" can be found in Article VII:5 of the GATS. Accordingly, "[…] members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions". The same approach is taken by the Annex on Telecommunications to the GATS, which in its paragraph 7 states that, "Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex".

From these provisions it appears that, although the wording "non-governmental organisation" is taken to include also business organisations, the role of such organisations is essentially of consultative nature and concerns the support they are called to provide to the WTO Secretariat and the WTO Members as far as the implementation of the covered agreements is concerned.

18.1.2. The concept of 'non-governmental body'

We turn now to the analysis of the extent of the wording "non-governmental body" within the WTO legal system. How the position of "non-governmental bodies" is formulated within the TBT Agreement – the closest one to the SPS Agreement for its spirit and objectives – is immediately apparent when looking at Annex 1 to that Agreement, which defines a "non-governmental body" as any "[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"[548]. The most immediate evidence from this provision is that, by its very nature, a non-governmental body is such because it does not form part of any central or local government. But the essential aspect here is that the power of such an entity derives from the law and that a certain degree of government involvement seems to be necessary. In turn, this compels the question of what a 'government' is for purposes of WTO law. In this respect, the Appellate Body in *Canada – Dairy* noted that, "the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority"[549]. On this ground, the Appellate Body underlined the difference existing between a 'public body' and a 'private body', with the former being able to exercise authority or control inherent of a government body and the latter

Shaffer, *Defending Interests: Public-Private Partnerships in W.T.O. Litigation*, Washington DC: Brookings Institution Press, 2003.

[548] TBT Agreement, Annex 1, para. 8.

[549] Canada – Measures Affecting Dairy Exports, Report of the Appellate Body circulated 13 October 1999, WT/DS113/AB/R, at para. 97.

describing something that is not a government or any public body.[550] Hence, the Appellate Body considered that 'government' and 'public body' connote a sufficient degree of commonality or overlap in their essential characteristics, being the former a "superordinate" and the latter "one hyponym"[551]. The form and nature of the enforcing measures are not of relevance as to the issue of whether the measure is taken by a governmental body, as long as in the specific case where a body acts within the limits of the attributed powers.

Additionally, from a literary reading of such an open-ended definition, particularly of the word "including", the argument has been made that, if there are non-governmental bodies that have legal power to enforce technical regulations, there must also be non-governmental bodies that do not have such a power, such that the standards they may adopt or implement are of voluntary character. Put differently, a non-governmental body does not have *per se* the power to enforce technical regulations, unless it has been granted that power explicitly and on an *ad hoc* basis by a governmental body. Therefore, a non-governmental body appears to be any legal entity, which is 'recognised' by the domestic law of a WTO Member as such. In respect of the question of whether the TBT Agreement applies to both types of bodies, it has been argued that "the specific mention of bodies with enforcement power means, *a contrario*, that bodies lacking such power are not covered by this term"[552]. For the sake of our analysis it is relevant to observe that the negotiation history of the TBT Agreement shows that the EEC switched in its terminology in its proposals from the wording "private entities" to "non-governmental bodies".[553]

Although following the same argumentative line, the GATS seems to provide a better defined notion of "non-governmental body" relative to the TBT Agreement. When determining the scope of the Agreement, Article I:3 therein states that a "measure affecting trade in services" is considered to be a measure of a Member when it is taken not only by "central, regional or local governments and authorities", but also by "non-governmental bodies" provided that these act "in the exercise of powers delegated by central, regional or local governments or authorities". While the TBT Agreement contains a definition that includes non-governmental bodies with a legal power to enforce technical regulations, the GATS refers explicitly to a delegation of powers. Accordingly, not any measure taken by any non-governmental body falls under the scope of the GATS; rather, such a measure needs to be taken by a body to which specific powers have been conferred by delegation. Although the wording used is partially different, this same approach is shared by the Agreement on Preshipment Inspection whose disciplines "apply to all preshipment inspection activities

[550] United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body circulated 11 March 2011, WT/DS379/AB/R, at paras. 291-292.
[551] *Ibidem*, at para. 288.
[552] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 26.
[553] See the EEC's proposals dated 7 July 1988 (TBT/W/110) and 27 July 1989 (TBT/W/124).

carried out on the territory of Members, whether such activities are contracted or mandated by the government, or any government body, of a Member".[554]

In turn, in defining the cases where subsidies granted within the territory of a Member by private parties are to be deemed to be governmental action, Article 1.1 of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement') provides that there is a financial contribution by a government or any public body within the territory of a Member and therefore a subsidy exists if "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions […] which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; […]"[555]. The earliest expression and seminal statement regarding the matter of attributing some sort of public or official character to actions of private parties, and thereby subjecting such to the basic rules of international trade law, appears in a Report issued by the GATT Secretariat in 1960 entitled Review Pursuant to Article XVI:5.[556] This report indicated that a notification duty of a subsidy scheme existed whenever "the government took a part either by making payments into [a privately administered] common fund or by entrusting to a private body the functions of taxation and subsidisation with the result that the practice would in no real sense differ from those normally followed by governments"[557]. Taken out of the context of subsidisation, and stated so as to have meaning in regard to other sorts of private trade-affecting measures, any effort to determine whether participation by the government in a private party's actions imbues those actions with a public or official nature rests on whether the government has provided the operational revenues and the degree to which there has been government involvement in the private actions. In other words, a private action would be characterised as subject to GATT disciplines when the operation or functioning of that action depends on some form of government action or participation.

A handful of WTO adjudicative determinations have clarified and ever-more specified the conditions under which the WTO legal disciplines apply to private activities as a consequence of ascribing such activities to the government of a relevant Member. For instance, the panel in *US – Export Restraints* ruled that the ordinary meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command"[558]. In turn, the panel in *EC – DRAMS Countervailing Measures* shared a basic understanding of the terms "entrust" or "direct" as "requiring a government action which

[554] Agreement on Preshipment Inspection, Marrakesh Agreement Establishing the World Trade Organisation - Annex 1A, 15 April 1994 (into force 1st January 1995), 1867 UNTS 368 (1994), Article 1.1. The same wording is found in Articles 1.4 and 2.1.

[555] Agreement on Subsides and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organisation - Annex 1A, 15 April 1994 (into force 1st January 1995), 1867 UNTS 14 (1994) [hereinafter 'SCM Agreement'], Article 1.1(a)(1)(iv).

[556] Report by the Panel on Review Pursuant to Article XVI:5, GATT Doc. L/1160, 9th Supp. BISD 188, adopted 24 May 1960 (1961).

[557] *Ibidem*, at para. 12.

[558] United States – Measures Treating Export Restraints as Subsidies, Report of the Panel circulated 29 June 2001, WT/DS194/R, at para. 8.15.

obliges a private body to act in a particular way and generally refers to the situation in which government executes a particular policy by operating through a private body"[559]. Also, the Appellate Body in *US – DRAMS CVD Investigation* specified to what extent the terms "entrusts" and "directs" are to be understood as acts of 'delegation' and 'command': "'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body"[560].

From the provisions above it is almost clear that, as a matter of law, the plain meaning of the wording "non-governmental body" requires the investigation of the evidence of such a delegation, entrustment or direction, and that a government action addressed to a particular entity, delegating, entrusting or directing a particular task or duty, has taken place. This contributes determinately to delimit non-governmental bodies from private bodies.

18.1.3. The concept of 'non-governmental standardising body'

Since our analysis relates to that particular activity of private entities that is setting standard on the market, a further potentially relevant concept is that of "non-governmental standardising body". In this respect, neither the SPS Agreement nor the TBT Agreement does contain any definition of the wording "standardising body".[561] The Tokyo Standards Code, from which much of the discipline currently enshrined in the SPS and the TBT Agreements comes from, defined that as "[a] governmental or non-governmental body, one of whose *recognized* activities is in the field of standardization"[562]. In view of clarifying this wording, it could be useful to define previously the notion of "standard" for the purposes of the SPS and the TBT Agreements.

In the negotiations of the Tokyo Round the term "standard" was initially used to denote both mandatory and voluntary standards, although different obligations regarding their preparation, adoption and use were established. Specifically, the Draft Standards Code specified mandatory obligations for central government standards; conversely, second level obligations were established for mandatory local government standards and for voluntary

[559] European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea, Report of the Panel circulated 3 August 2005, WT/DS299/R, at para. 7.18.

[560] United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, Report of the Appellate Body circulated 27 June 2005, WT/DS296/AB/R, at para. 102. Similarly, the panel in *Korea – Vessels (Shipbuilding Subsidies)* observed that, in context of Article 1 of SCM Agreement the words "entrusts" and "directs" indicate that the governmental action must contain a notion of 'delegation' – in the case of 'entrustment' – or 'command' – in the case of 'direction' –; nonetheless, entrustment or direction need not to be "explicit" (see Korea – Measures Affecting Trade in Commercial Vessels, Report of the Panel circulated 7 March 2005, WT/DS273/R, at para. 7.350).

[561] It was agreed that the terms presented in the sixth edition of ISO/IEC Guide 2: 1991 – *General Terms and their Definitions Concerning Standardization and Related Activities*, when used in the TBT Agreement have the same meaning as given in the guide. In this respect, the TBT Committee adopted in 2000 a Decision on Principles for the Development of International Standards (G/TBT/1/Rev.10) where reference was made to the definition of 'standardizing bodies' contained in ISO/IEC Guide 2, as revised by ISO/IEC Guide 2:2004 – *Standardization and Related Activities - General Vocabulary*.

[562] Tokyo Standards Code, Annex 1, para. 9 (emphasis added).

standards, such that the signatories Parties were to use all reasonable means within their power to ensure that the relevant obligations were met. A major concern that was addressed during the negotiations was balancing the rights and obligations amongst the signatories, because of the alleged inequality of obligations which would apply between countries with a large proportion of standardisation work carried-out by private sector bodies developing voluntary standards and those where most part of or even all standards were mandatory. After several years of negotiation, the final text of the Tokyo Standards Code embodied the following definition of "standard": "[a] technical specification approved by a recognized body for repeated or continuous application with which compliance is not mandatory"[563]. As the Explanatory Note to this definition specifies, "[…] technical specifications which are not based on consensus are covered by the Code. This definition does not cover technical specifications prepared by an individual company for its own production or consumption requirements. The word 'body' covers also a national standardizing system".

The TBT Agreement was ultimately negotiated during the Uruguay Round with the key objective of disciplining the application of technical regulations as well as standards by WTO Members so that they do not constitute an arbitrary or unjustified barrier to trade. It provides in turn with the following definition of "standard": "Document approved by a *recognized* body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method"[564]. The Explanatory Note to the definition clarifies that: "The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This agreement covers also documents that are not based on consensus"[565].

This said there is little doubt that the term 'standard' as it is defined in the TBT Agreement does not have the same scope as it does in the parallel text of the SPS Agreement. In short, under the TBT Agreement a standard is a normative specification that is for voluntary application, whereas mandatory norms are termed 'technical regulations'. Conversely, the SPS Agreement refers to "standard" to identify a normative specification that is given mandatory application. Hence, the scope of the SPS Agreement extends to include

[563] Tokyo Standards Code, Annex 1.
[564] TBT Agreement, Annex 1, para. 2 (emphasis added).
[565] The definitions provided in the TBT Agreement do not address a number of normative elements that are conversely included in the guides established by ISO and the Economic Commission for Europe (ECE).

technical regulations and their conformity assessment procedures, but not standards that are by their very nature voluntary.[566]

18.2. Extension by analogy to Article 13

A restrictive interpretation of the wording we have examined so far leads to argue that only private entities which have been delegated, entrusted, directed or recognised – in terms of the provisions above – by some government authority with the performance of certain tasks or which have otherwise a special legal status fall under the definition of "non-governmental body" within the WTO treaty system. The question now is whether such an approach can be applied analogically to the SPS Agreement, or whether an argument *a contrario* should be applied to get to the conclusion that the SPS Agreement provides with a wider definition of the term "non-governmental entities" in Article 13 rather than limiting it to bodies acting in the exercise of powers of governmental nature. On the one hand, there would be good arguments for understating the wording "non-governmental entities" as covering any legal entity, other than governmental bodies. In this respect, had the WTO Members wanted to narrow the scope of this term, they would have explicitly done that, for instance by the use of the wording "non-governmental body". This argument points out that the effectiveness of the SPS Agreement could command that the term "non-governmental entity" is interpreted as applying also to those entities that, despite not being entrusted by government with certain tasks, operate or are established within the territory of a Member.[567] This is, among the others, the position of a legal study which was later incorporated in a submission by the UK to the WTO, which concludes that "private standard-setting bodies are non-governmental entities under Article 13 of the SPS Agreement"[568] so that WTO Members appear to have positive obligations in relation to making sure that these non-governmental actors do not act inconsistently with the SPS Agreement.

On the other hand, in presence of an established interpretation of a degree of government involvement as required to put a measure under the scrutiny of the WTO covered agreements, we may argue that also for a non-governmental entity in terms of Article 13 of the SPS Agreement to be subject to the disciplines of international trade law a degree of government involvement is necessary. In other words, under this argumentative approach, it needs to be considered that a non-governmental entity is not necessarily the same as a private entity; key to the delimitation of 'non-governmental entities' from 'private entities' is the

[566] See E. McGovern, *International Trade Regulation*, cit., at para. 14.41. Nonetheless, at the November 2005 TBT Committee meeting the US Representative observed that the WTO World Trade Report 2005 made use of the term 'standard' broadly to cover both voluntary market requirements and government regulations (see WTO, *Minutes of the Meeting of 2 November 2005 - Note by the Secretariat*, 22 December 2005, G/TBT/M/37, at para. 148). In front of a confusing impression that the standards developed by ISO and IEC were given primary importance and even formally recognised by the WTO, the US remarked that while the SPS Agreement recognised three specific standards-setting bodies, no similar identification exists in the TBT Agreement.

[567] In this sense see, e.g., D. Casey, *Private Food Safety and Quality Standards and the WTO*, (2007) University College Dublin Law Review 7: 65-89.

[568] See WTO, *Private Voluntary Standards within the WTO Multilateral Framework - Submission by the United Kingdom*, cit., at paras. 54-55.

requirement of government involvement or, equally, the exercise of powers delegated, entrusted, controlled or recognised by governmental authorities. Following this approach, David Luff submitted that, "*[e]n vertu de l'article 13 de l'Accord SPS, les mesures SPS visées sont celles que sont adoptées aussi bien par les gouvernements centraux des Membres que par les institutions régionales ou locales et les entités non-gouvernementales auxquelles les Membres ont confié des taches de mise en œuvre d'une politique SPS. Cette disposition reprend partiellement les termes de l'Article XXIV:12 du GATT. […] L'Accord SPS y ajoute la responsabilité du fait des entités non-gouvernementales auxquelles les Membres ont confié des responsabilités particulières*"[569]. This is also the position supported in the Report released in March 2011 by the *ad hoc* working group on private SPS-related standards established within the SPS Committee.[570]

Hence, the scope of the third sentence of article 13, as originally intended, appears to be 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"[571]. Considering that the SPS Agreement was negotiated at a point in time when the drafters were not aware of the emergence of private food safety standards, it is likely that the reference to "non-governmental entities" in Article 13 was intended by the negotiators to refer to "bodies such as national standards bureaus, which in many members operate independently of government, but whose standards in the area of food safety are frequently incorporated in national regulation"[572]. In addition and from another perspective, it would be difficult, and even undesirable, for the provision in Article 13 to be stretched as to encompass all sorts of entities as long as they do not form part of the formal structure of the government, and to be interpreted as imposing strict obligations on governments to ensure that private actions do not violate the Agreement. In fact "it is hard to conceive of a situation where an international agreement or treaty can be brought to bear on the private commercial transactions of buyers within agricultural and food supply chains. Indeed, private standards, whether taking the form of business-to-businesses specifications or collective standards, are (and have arguably always been) integral to the private contractual relations between buyers and sellers. The WTO has no jurisdiction there"[573]. Private standards are in fact developed and implemented by market actors in the exercise of their daily business transactions. While they remain free to develop standards to be applied as a condition to importing, purchasing or selling agri-food products, in much the same way a

[569] D. Luff, *Le droit de l'OMC: Analyse critique*, Brussels: Bruylant, 2004, at 269. In this same sense see, EU, *Private Food Standards and their Impacts on Developing Countries*, (edited by C.H. Lee), EC Directorate-General for Trade, 2006, at: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf, at 34-35.

[570] See WTO, *Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee*, cit., at para. 8.

[571] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 20.

[572] *Ibidem*, at 19-20.

[573] S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit., at 28. See also, J. Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?*, Presentation at the EUI Conference on 'Legal Patterns of Transnational Social Regulations and Trade', Florence, 24-25 September 2004, at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2088&context=faculty_scholarship.

government may be expected not to interfere with the freedom of private operators to engage, in full autonomy, in the sale and purchase of those products. Hence, a private firm that sells only products complying with proprietary or collective private standards may not be obliged to change its strategy on the grounds that its required standards are not consistent with international standards or otherwise to sound scientific evidence, as required in Article 3 of the SPS Agreement. At any rate, "international standard setting organisations as defined in the SPS Agreement are not in any way disciplined by the [SPS] Agreement and the position of non-governmental standard-setting bodies ought to be congruent with this"[574].

These arguments find support in the working definition of "private SPS-related standard" that the SPS Committee constructed in March 2012. Such a definition reads as follows:

> "SPS-related private standards are [voluntary] requirements which are [formulated, applied, certified and controlled] [established and/or adopted and applied] by nongovernmental entities [related to] [to fulfill] one of the four objectives stated in Annex A, paragraph 1 of the SPS Agreement and which may [directly or indirectly] affect international trade. […]"[575].

Although this definition did not encounter the consensus of the WTO Members for the reasons we will consider later on this chapter, three elements thereof deserve our attention. First, the content of a private standard must be "[voluntary] requirements". In this regard, it was proposed to the WTO Members to consider that "the requirement referred to should include technical regulations, guidelines and recommendations. Whether this was developed by non-governmental entities themselves or derived from existing private, official or international standards is irrelevant"[576]. Although a private standard may be derived from international standards, it is not developed, endorsed or promulgated by the Codex, IPPC or OIE. What is of importance is that its application must be part of the non-governmental entities' commercial objectives. Accordingly, a private standard must address marketplace demands, including consumer preferences and must form part of a private, commercial and contractual relationship. The former part of this suggestion is problematic. As was discussed in Chapter Two, private standards are often developed in response to the market but not exclusively so; additionally, it is very often designed to respond to an existing or expected government regulation and totally removed from demands from the marketplace.

Second, the actions required to bring private standards into operation, i.e., development, adoption, implementation and enforcement, must be performed by non-governmental entities. The moment any of these actions are performed by a governmental entity, it will no longer be considered as a private SPS-related standard. However, as illustrated in Chapter Two, there are many standards where the distinction of what entity performs which action is blurred. For instance, ISO standards have involvement of both private entities and governments. These

[574] WTO, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at para. 56.
[575] WTO, *Proposed Working Definition on SPS-Related Private Standards - Note by the Secretariat*, 6 March 2012, G/SPS/W/265, at para. 1.
[576] *Ibidem*, at para 2.

standards will then not be considered as private. As to the much debated concept of what is a non-governmental entity, the SPS Committee suggested that a "[…] non-governmental entity is any entity that does not possess, exercise, or is not vested with governmental authority. Nongovernmental entities are private entities, including sector bodies, companies, industrial organizations and enterprises"[577]. Consequently, both what these actions should be and that it must be performed by non-governmental entities were subject to further consideration by the SPS Committee.[578]

The last component of the definition above correlates with the wording of Article 1 of the SPS Agreement, to the effect that the Agreement will apply to SPS measures that "[…] may directly or indirectly, affect international trade". The SPS Committee suggested in this regard that when a Member assesses whether a SPS-related private standard may affect international trade, it should consider relevant available information such as: "The value or other importance of imports to the importing and/or exporting Members concerned, whether from other Members individually or collectively; the potential development of such imports; and difficulties for producers in other Members, particularly in developing country Members, to comply with the proposed SPS-related private standard. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant"[579].In summation, in the light of the context and purpose of the SPS Agreement, "non-governmental entities" are not individual economic operators or their associations, but rather private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special legal status as regards the development and implementation of the SPS disciplines. It is such a delegation of responsibility – such that government bodies rely on the activities performed by non-governmental bodies – that makes it difficult to argue that private standard setters such as individual food firms requiring compliance with their own B2B standards or consortia of food firms requiring compliance with collective standards can be regarded as "non-governmental entities" and thus coming under the remit of the SPS Agreement. Rather, only those private bodies that are engaged in setting, implementing or assessing conformity with official SPS regulations, either at national level or at regional level, are covered by Article 13.

18.3. Evolutionary interpretation of Article 13

While the disciplines of the SPS Agreement are arguably not suitable for application to the purely private character of market actors and cannot as such be used as a lever to discipline them, the reality of the fact that the standards these actors adopt and implement constitute an obstacle to international trade in agri-food products cannot be ignored. Therefore, could today's structure of global agri-food markets in the end 'open the door' for private food safety

[577] *Ibidem*.
[578] *Ibidem*.
[579] *Ibidem*.

standards to come under the jurisdiction of the SPS Agreement? This argument canvasses not only the possibility of amending the SPS Agreement but also the practicality and utility of developing working interpretations of Article 13. In this respect, Article 12.7 of the Agreement states that, "(w)here appropriate, the [SPS] Committee may submit to the General Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation". The WTO legal system stems almost naturally from that of GATT 1947 and catalogues a number of problems that it now faces that require changes. A question therefore arises as to whether a 'good faith' interpretation of the third sentence of Article 13, under Article 31 of the VCLT, would today require consideration of the changed circumstances in SPS governance.[580] Indeed, the considerable and ever-growing role private entities at national and transnational level play in adopting, implementing and assessing conformity with private standards, on the one hand, and the fact that the distinction between public and private sources of regulation in the SPS area is losing much of its meaning for market actors involved in global value chains, on the other, seem to call for an evolutionary interpretation of the SPS Agreement.

It is pertinent to recall in this respect what the Appellate Body concluded in the *US – Shrimp* case as for the interpretation of the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. The Appellate Body noted that, although they had been crafted over 50 years before, "[t]he words of Article XX(g) […] must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment"[581]. In addition, "[f]rom the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources"[582]. In particular, the Appellate Body identified two criteria of interpretation: first, 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"[583]; second, that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[584]. Actually, the evolutionary interpretation that is called for Article 13 of the SPS Agreement seems to go a step further than that applied by the Appellate Body in *US – Shrimp*. In fact, an extended interpretation of "non-governmental entities" in Article 13 to include also private corporations would be based on changes in the normative framework of SPS governance that have occurred over a much

[580] See in this sense, D. Prevost, *Private Sector Food-Safety Standards and the SPS Agreement*, cit., at 16; and, WTO, *Third Review of the WTO SPS Agreement - Proposal by India*, 14 April 2009, G/SPS/W/236, at 3.

[581] United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body circulated 12 October 1998, WT/DS58/AB/R, at para. 129.

[582] *Ibidem*, at para. 130.

[583] *Ibidem*, at para. 130, footnote no. 109 (with reference to ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Report 1971, 31).

[584] *Ibidem*.

shorter period due to the more recent exponential increase in private standards. In addition, these changes do not relate to the "subsequent development of law" or to the "legal system prevailing at the time of the interpretation", but rather to the acquisition of *de facto* binding force by private standards due to the reasons we have considered in Chapter Two. Such an evolutionary interpretation would give the third sentence of Article 13 a much wider scope and require WTO Members to discipline the new and arguably most relevant market actors in the field.

Nonetheless, the argument has been raised that the object and purpose of the SPS Agreement militates against an interpretation to the effect that WTO Members have to ensure compliance with its provisions by private entities. The aim of the Agreement is to achieve a balance between the Members' sovereign right to protect health in their territories and the need to prevent protectionism under the guise of SPS regulation. The application of the SPS disciplines to private sector bodies would not seem to further this objective. In fact private entities that develop, implement and assess conformity with private standards are ultimately motivated by commercial interests. Even admitting that private SPS-type standards aim at food safety and thus at the protection of human health, this cannot be taken to mean that private entities are responsible, in the way sovereign governments are, for the protection of health. Consequently, the considerations that underlay the activities of private bodies in this area differ significantly from those which governmental regulatory activity relies on. Government regulation has a normative foundation in the sovereign duty to ensure the rights to life and health, and incorporate considerations of distributional equity; instead, the standards elaborated and/or implemented by private entities are 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 do, 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. Neither can private entities be accused of protectionism since their activities take place along global value chains; rather, their actions raise concerns in the area of anti-competitive practices such as collusion or abuse of a dominant position by retailers.[585] Yet, this is an issue that the SPS Agreement, as well as any other WTO covered agreement, is not designed to address.

[585] The role of national governments in preventing that private standards foster anti-competitive practices was also remarked in D. Gascoine and O'Connor & Company, *Private Voluntary Standards within the WTO Multilateral Framework*, in annex to WTO, *Private Voluntary Standards within the WTO Multilateral Framework - Submission by the United Kingdom*, 9 October 2007, G/SPS/GEN/802, at para. 17(ii).

19. TBT disciplines for the preparation, adoption and application of voluntary standards: A way forward?

Following the conclusion that private standards regulating food safety do not seem to fall under the jurisdiction of the SPS Agreement, a question arises naturally as to whether the issue of private standards must be debated exclusively in the context of the SPS Agreement or whether there are other legal or institutional avenues that could be relevant to address the position of such standards within the multilateral trading system. We mentioned that the difficulties arising from the interpretation of Article 13 of the SPS Agreement were already known by the negotiators of the TBT Agreement. Actually, the Secretariat itself of the SPS Committee has clearly identified the TBT Agreement as another possible avenue in this respect.[586] In fact private standards often contain elements not directly related to food safety, such as environmental and labour requirements and other related aspects, which fall outside the scope of the SPS disciplines, but well fit the scope of the TBT ones in accordance with Annex A to the TBT Agreement. More importantly for purposes of our study, because of the historic close involvement of private industry in matters relating to technical regulations, the TBT Agreement was negotiated in full awareness of the importance of the private sector in setting, applying and assessing conformity with technical standards. This said, would the approach embodied in the TBT Agreement be the best way forward – or at least a viable option – to address the concerns arisen in relation to private food safety standards?

The substantive obligations agreed upon in the Uruguay Round and finally set forth in the TBT Agreement replicated for the most part the prescriptions of Article 2 of the Tokyo Standards Code. Nonetheless, beyond these obligations the Standards Code contained also some disciplines in the aim of preventing both technical regulations and voluntary standards from becoming obstacles to international trade and enhancing cooperation in preparation and use of international standards. These disciplines were specified in terms of 'best efforts' or second-level obligations; in other words, while legal obligations were imposed on central government bodies, the standardisation, testing and certification activities of other than central government bodies as well as of non-governmental bodies were covered only indirectly through the obligation of Members to ensure that those other bodies comply with the Code, as well.

During the Uruguay Round several delegations pushed for enhancement of the disciplines enshrined in the Standards Code. A number of proposals addressed particularly increased transparency and participation in the standards-related activities of government bodies – whether at the central, local, or regional level – and of non-governmental standardising bodies.[587] It was especially the EEC and the US that proposed to improve the

[586] See WTO, *Private Standards and the SPS Agreement*, cit., at para. 5; and, *Id.*, *Summary of the Meeting Held on 29-30 June 2005*, cit., at para. 19.

[587] For instance, India proposed notification of private voluntary standards, whose wide adoption by local industry gave them a status similar to national standards, and of legally-mandatory voluntary standards; also, India required that information was to be provided on standards issued by recognised national bodies and other standardisation bodies within the territory of a party (see GATT 1947, *Agreement on Implementation of Article*

discipline in respect of the preparation, adoption and application of voluntary standards by non-governmental bodies though a code of good practice [‘CGP’] annexed to the revised TBT Agreement. The aims of such a code, which the acceptance of and adherence to by those bodies would remain voluntary, would be to provide some yardstick by which the performance of both governmental and non-governmental bodies could be measured. Interestingly, the rationale behind such a call for enhancement of the TBT provisions regarding non-governmental standardising bodies is very close to that leading today to consider an improvement of the SPS disciplines with reference to private entities. In particular, the EEC pointed out that: “(a) Standards drawn up by non-governmental bodies can, when used on a nation-wide basis, in practice create barriers to trade as serious as if they were technical regulations drawn up by central government bodies; (b) A worldwide shift appears to be occurring towards a greater use of standards drawn up by nongovernmental bodies and a lesser use of technical regulations drawn up by central government bodies. […] (c) The current provisions of the Agreement have not succeeded in ensuring transparency of, access to, and some degree of influence on the activities of non-governmental standardization or certification bodies. Likewise, they have not resulted in Parties achieving results regarding non-governmental bodies as if those bodies were Parties.”[588]

In such a context, Article 4.1 of the revised TBT Agreement develops in a similar spirit to and in much the same way as Article 13 of the SPS Agreement the instances in which the acts of entities other than central government bodies – whether government in nature or not – in relation to the preparation, adoption and application of voluntary standards would engage the responsibility of WTO Members. Literary it reads as follows:

> “Members shall ensure that their central government standardizing bodies accept and comply with the [CGP]. They shall take such reasonable measures as may be available to them to ensure that local government and nongovernmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this [CGP]. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the [CGP]. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the [CGP] shall apply irrespective of whether or not a standardizing body has accepted the [CGP]”.

VII of the General Agreement on Tariffs and Trade (Customs Valuation Code) - Aspects of the Code Proposed for Negotiation - Note by the Secretariat, 2 December 1987, MTN.GNG/NG8/W/9, at 45).

[588] GATT 1947, *Code of Good Practice for Non-Governmental Bodies*, 7 July 1988, TBT/W/110. Such lack of success could be due to three factors: first, “[t]here may be insufficient incentives both for non-governmental bodies and Parties to fully abide by their substantive obligations”; second, “[t]hose substantive obligations themselves may be insufficiently strict or elaborate”; third, “[t]he substantive obligations are those of parties, but then applied to non-governmental bodies. They are not necessarily very practical, operational or even relevant for non-governmental bodies” (*ibidem*. See also GATT 1947, *Code of Good Practice for Non-governmental Standardizing Bodies - Proposal by the European Economic Community*, 28 July 1989, MTN.GNG/NG8/W/49 - MTN.GNG/NG8/W/71).

Specifically, as the WTO Secretariat noted, "one difference with respect to the 'reasonable measures to ensure compliance' required of Members under the TBT and SPS Agreements is the reference under the TBT Agreement to Members ensuring acceptance and compliance with the Code of Good Practice by non-governmental bodies"[589] in its Annex 3. The CGP lays down the obligations for Members in respect of any standardising body within their territories, whether central or local government bodies, regional bodies or non-governmental bodies. As far as the substantive disciplines are concerned, the CGP provides that standards: (i) should be non-discriminatory as between the products originating in different countries and should not create unnecessary obstacles to trade; (ii) should, wherever appropriate, aligned with existing international standards unless these would be ineffective or inappropriate; (iii) should be performance-based rather than expressed in terms of design or descriptive characteristics; and (iv) should be developed in a transparent manner – this requiring 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. As far as the standardising bodies are concerned, these: (i) should avoid duplication of effort of other standardising bodies; and (ii) should seek and be responsive to comments by interested parties during the development process.[590]

Nonetheless, a best endeavours obligation applies to compliance with the CGP by non-governmental standardising bodies: "[t]his Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; […] and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO […]"[591]. In other words, the acceptance of and adherence to such a code by particularly non-governmental bodies remains voluntary. On the other hand, while

[589] See WTO, *Private Standards and the SPS Agreement*, cit., at para. 27.

[590] One major example of voluntary standards-setting organisations reliant upon CGP is the Code of Good Practice for Setting Social and Environmental Standards adopted by the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance. This is a formal collaboration of leading international standards-setting and conformity assessment organisations that are focused on the promotion of credible voluntary social and environmental certification as legitimate policy instruments in a global environment. Its code of good practice proposes itself as a benchmark to assist standards-setting organisations in improving their standard development processes. ISEAL-compliant standards-setting organisations are required especially to: have documented procedures for the process under which each standard is developed, including active involvement of a balance of interested parties; publish a justification of the need for a standard and clear objectives that a standard aims to achieve; ensure that standards are relevant and based on updated scientific and technical knowledge; include objective and verifiable criteria, indicators and benchmarks; be adaptable to local economic, social, environmental and regulatory conditions; be expressed in terms of a combination of process, management and performance criteria rather than design or descriptive characteristics; provide for at least two rounds of comment submissions by interested parties, take comments into account and explain the response made; make decisions by consensus; publish standards promptly and make them available at minimum cost; and review standards periodically. Importantly, in order to avoid creating unnecessary obstacles to international trade, ISEAL-based standards need to be no more trade-restrictive than necessary to fulfil their legitimate objectives; actively pursue harmonisation of standards and/or technical equivalence agreements between standards; and participate within its means in the preparation of relevant international standards that are in line with the vision and objectives of the standards-setting organisation. For more details see, http://www.isealalliance.org/code.

[591] TBT Agreement, Annex 3, General Provisions, point B.

standardising bodies that have accepted and comply with the CGP are to be acknowledged as complying with the principles of the TBT Agreement,[592] the obligations above apply whether or not a standardising body has previously accepted the CGP. Put differently, regardless of whether the standardising body has accepted the CGP it is upon the Member to take such reasonable measures to ensure compliance with it. This should not create the impression that direct challenges are possible against non-governmental bodies that do not comply with the CGP. The WTO legal system provides in fact no means of bringing proceedings against non-governmental bodies which have behaved inconsistently with the CGP. Conversely, as in the case of the SPS Agreement, the obligations of the TBT Agreement as well are binding on Members only, such that it is the relevant Member that is responsible if it has not taken the reasonable measures available to it to ensure compliance.

Major additions in the TBT Agreement are also the substantially expanded provisions on conformity assessment in Article 8 thereof.[593] The WTO Members should use their best endeavours to ensure that non-governmental bodies comply with Articles 5 and 6 concerning conformity assessment and recognition of conformity assessment of other Members by government bodies. In particular, Articles 8 clarifies that central government bodies can rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the same obligations of central government bodies, with the only exception of the obligation to notify proposed conformity assessment procedures. In turn, Article 10 sets out the obligations of WTO Members concerning information about standards and conformity assessment procedures in respect of certain activities of non-governmental bodies which have the legal power to enforce technical regulations.

19.1. Difficulties in including private food safety standards under the TBT disciplines

The argument has been submitted that, since a number of private food safety standards contain SPS as well as TBT-related elements, entities involved in private standards-setting could be encouraged to subscribe to the CGP annexed to the TBT Agreement. Nonetheless, some considerations we have made earlier in this chapter that make it difficult to support the argument that private food safety standards could come under the disciplines of the TBT Agreement should be recalled. First of all, the definition of 'standard' provided by TBT Agreement as a *normative* specification, although voluntary in nature, theoretically closes the door to a possible inclusion of private food safety standards under its disciplines. Additionally, the scope of the concept of "non-governmental standardising body" in the TBT Agreement is understood as including only those private bodies that develop, implement and assess conformity with private sector standards and that have official enforcement powers. Such a restricted interpretation would negate the possibility to bring the type of private standard-setting entities alluded to in the SPS Committee's discussions under the TBT

[592] See TBT Agreement, Article 4.2.

[593] Refined provisions on conformity assessment can be regarded as a direct response to prior situations where countries required post-arrival conformity assessment on certain imported products, but restricted to single sites remote from entry points and with significant delays in assessment procedures.

Agreement. Still more, Article 8 of the TBT Agreement does not seem to be stretched up to include those private entities that assess conformity with private standards. Finally, from the proceedings of the SPS Committee it is clear the position of a vast majority of WTO Members that do not regard private SPS-type standards as falling under the disciplines of the TBT Agreement.[594]

That it is not clear to what extent the TBT Agreement applies to private voluntary standards is further evident when looking at the interpretative guidance expressed in other forums. An example is provided by the standards for labelling of goods for environmental purposes ('eco-labelling'). The Doha Ministerial Declaration of November 2001 instructed the WTO Committee on Trade and Environment to give particular attention to the issue of voluntary labelling requirements for environmental purposes. At the TBT Committee meeting held on 15 March 2002 the EC drew the WTO Members' attention on the number of labelling schemes that were developed and applied by non-governmental bodies subjected to the CGP.[595] Since the CGP provided disciplines for the transparency of these schemes, the EC suggested that keeping those labelling schemes under review was a very important issue. Under the TBT Agreement, however, such obligation is provided only for mandatory labelling, while no such provision is contained in the CGP for voluntary one. That is why in the process of triennial review of the operation and implementation of the TBT Agreement the TBT Committee has focused so far exclusively on international standard setting bodies and did not make any reference to voluntary standards elaborated by non-governmental bodies.

This Members' negative attitude towards discussing private food safety standards within the context of the TBT Agreement finds support in the practice of the CGP. Given the criticism they faced, a number of private standard setters now claim to voluntarily follow the CGP or at least be in a constructive dialogue with the WTO. However, of all the non-governmental entities that have notified so far their acceptance of or adherence to the CGP, none is concerned with SPS-related standards.[596] It should finally be considered that powerful lobbies of large retail conglomerates and consumer interest groups in developed-country

[594] Interestingly, asked by the Chair of the TBT Committee to discuss the issue of private SPS-related standards under the TBT Agreement, WTO Members 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 standard schemes was perceived by Members as more problematic than other elements: see WTO, *Summary of the Meeting Held on 29-30 June 2005*, cit., at para. 140.

[595] WTO, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, 6 May 2002, G/TBT/M/26, at para. 127.

[596] See D. Gascoine and O'Connor & Company, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at para. 24. Pursuant to Article 4.2 of the TBT Agreement, standardising bodies must notify the acceptance of CGP to the ISO/IEC Information Centre in Geneva, rather than to WTO, which publishes regularly an updated list of such bodies. At present, 160 standardising bodies from 116 Members have notified acceptance of the CGP. The majority of these bodies are central government standards agencies (84), while the rest consists of non-governmental standardising bodies (65), statutory bodies (3), non-governmental regional bodies (3), para-statal bodies (2), central governmental/non-governmental bodies (1), and autonomous bodies (1). With the exclusion of central government standards agencies, the other bodies are mostly broad-based national standards bodies whose activities are not confined to a single sector of industry. Notably, no non-governmental standards-setting body concerned with SPS-related standards generally, or with food standards specifically, has so far notified its acceptance of the CGP, although it is believed that there are some hundreds of different private bodies so engaged.

Members can be expected to exert pressure on their governments to oppose any such development.[597]

19.2. Difficulties in disciplining private standards-setting through international codes of good practice

If neither the CGP nor Article 8 of the TBT Agreement covers apparently market actors and the voluntary standards they adopt and implement along global value chains, the question that follows is whether those entities and standards may be at least the subject of discipline under the SPS Agreement through a separate code of good practice containing *ad hoc* procedural disciplines for private standards-setting, akin to the one annexed to the TBT Agreement. Such a suggestion has some merit. First of all, we have already consider that an interpretation of the third sentence of Article 13 that requires legislative action imposing the SPS disciplines on private entities would be contrary to the principle of effective treaty interpretation. In light of that, a separate code of good practice would enable WTO Members to draft disciplines that are appropriate for market operators, even including disciplines for conformity assessment procedures conducted by those entities. In particular, "these disciplines could target those practices of private bodies that developing-country Members have identified as particularly problematic, such as lack of transparency, absence of prior consultation to allow for input from producers, undue burden from costly and complex conformity assessment procedures, and non-recognition of equivalence"[598]. Such an *ad hoc* code should stop short of requiring private entities 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 entities. Also, while adherence would remain voluntary, such a code would be self-enforcing, by denying certain benefits to non-parties, and self-policing, by granting the parties the right to comment and lodge complaints. All in all, creating a code of good practice annexed to the SPS Agreement would have the effect of not neglecting the positive role that private standards play in global value chains, especially in terms of a global ratcheting up of food safety levels.

Very significantly, among the actions that the *ad hoc* working group on SPS-related private standards submitted in March 2012 to the SPS Committee for endorsement there was one that proposed that the Committee should develop – taking the TBT Agreement as a model – a code of good practice for the preparation, adoption and application of SPS-related private standards. Equally significant is the attempt of the EU to discipline private sector standards at the regional level. While recognising that "private standards are a matter of private contract"[599] and clarifying that "the EU neither mandates nor encourages the development of

[597] *Ibidem*, at para. 7.

[598] D. Prevost, *Private Sector Food-Safety Standards and the SPS Agreement*, cit., at 29.

[599] See EU, *Working Document on Standards & Trade of Agricultural Products*, EC Directorate-General for Agriculture and Rural Development, 2013, at: http://ec.europa.eu/agriculture/consultations/advisory-groups/international/2013-01-28/working-document-standards_en.pdf, at 4.

private standards, which fall outside the regulatory area"[600], however, the European Commission adopted in 2010 some guidelines in an effort to induce more clarity and transparency in the functioning of the hundreds of voluntary certification schemes that have been developed in the last decades at the EU level. The EU Best Practice Guidelines for Voluntary Certification Schemes for Agricultural Products and Foodstuffs offer guidance especially on how: to avoid consumer confusion and improve the transparency, credibility and effectiveness of those schemes; to reduce the administrative and financial burden on farmers and producers, including those in developing countries; and to ensure compliance with EU internal market legal and regulatory requirements and principles on certification.

On the other hand, there are a number of reasons for concluding that it could be in practice very difficult to include the activities of market actors under the disciplines of a voluntary code of good practice to be annexed to the SPS Agreement. Such reasons are addressed in the next paragraphs.

19.2.1. Recognition and coverage of non-product related PPMs

First of all, over a period of some years the TBT Committee has had a series of discussions about PPMs, in particular with reference to the environmental labelling referred to above. The gist of this issue is whether or not like products can be treated differently on the basis of how they are produced. In terms of nomenclature, product-related PPMs deal with production processes and are inherently inwardly directed; in turn, non-product related PPMs address how the product is produced and are inherently aimed at regulating something outside the jurisdiction of the enacting Member. Examples of the latter include requiring the country of origin or its producers to comply with any aspect of production that is not reflected in the characteristics of the final product, such as safety and quality requirements.[601] Yet, there is no case law that assists understanding of the applicability of the TBT Agreement to voluntary standards that are not product-related. Nor is the WTO Secretariat's Note on the negotiating history of the TBT Agreement with regard to labelling requirements, voluntary standards, and PPMs unrelated to product characteristics issued on 29 August 1995[602] of any positive assistance, although it does record a failed attempt late in the negotiations to remove a perceived ambiguity in the Agreement on the point at issue. Hence, what is immediately evident from these discussions is that most Members – almost all developing countries – believe that eco-labelling requirements relating to matters other than attributes incorporated

[600] *Ibidem*.

[601] The origins of the debate on PPMs and their consistency with the GATT come from the US Marine Mammal Protection Act, which was the subject of the 1991 *Tuna-Dolphin* panel case, where the US prohibited the imports of tuna products that were harvested using methods unfriendly to the welfare of seafaring dolphins (see United States – Restrictions on Imports of Tuna, Report of the GATT Panel adopted 3 September 1991, DS29/R).

[602] WTO, *Note by the Secretariat on the Negotiating History of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Process and Production Methods Unrelated to Product Characteristics*, 29 August 1995, WT/CTE/W/10 - G/TBT/W/11.

into the final product (e.g. pesticide residues) are proscribed under WTO rules.[603] The TBT Agreement is deemed to be the relevant regulatory instrument and that the balance of rights and obligations in this Agreement remains an appropriate one for dealing with both voluntary and mandatory eco-labelling schemes. At the same time other Members – mostly developed countries – do not agree.[604]

Looking at the definition of 'standard' provided in Annex 1, paragraph 2, to the TBT Agreement, the language used seems to indicate that the Agreement is not applicable to PPM which are not related to the product. In such a case, "even if the TBT Agreement applies to non-governmental bodies, it could not put restrictions on, for example, voluntary non-product related PPM standards (such as certain social and environmental standards), including those based on existing international standards. However, in that case these standards might still fall within the scope of the GATT, particularly under Article III of the GATT, which incorporates the national treatment obligation and imposes the principle of non-discrimination between domestically produced goods and 'like' imported goods"[605]. In other words, any applicability of the TBT Agreement to certain non-product related private standards seems to be excluded. In the Note above the WTO Secretariat concluded that: "[s]tandards that are based on [PPMs] related to the characteristics of a product are clearly accepted under the TBT Agreement, subject to them being applied in conformity with its substantive disciplines"[606]. In addition, the negotiating history suggests that "many participants were of the view that standards based inter alia on PPMs unrelated to a product's characteristics should not be considered eligible for being treated as being in conformity with the TBT Agreement. Towards the end of the negotiations, some delegations proposed changing the language contained in the 'definitions' in Annex 1 of the Agreement to make it unambiguous that only PPMs related to product characteristics were to be covered by the Agreement, but although no participant is on record as having opposed that objective, at that late stage of the negotiations it did not prove possible to find a consensus on the proposal"[607].

19.2.2. The expected impact of the adoption of a code of good practice

All things considered, it is questionable whether the widespread observance of an *ad hoc* code of good practice would make a significant difference to the circumstances of market actors in global value chains in relation to private voluntary standards. We are aware that a convincing

[603] See, for instance, the submission from Colombia to the CTE and TBT Committees on 9 March 1998 (WT/CTE/W/76) expressing the view that certain elements of voluntary eco-labelling schemes were covered by the TBT Agreement and CGP, including provisions on transparency. Hence, Colombia reiterated the view of applying Article 4 of the TBT Agreement, although no further action was taken in response to this issue.

[604] Also part of legal literature supports the view that from the language of the TBT Agreement there is reason to doubt that the agreement is applicable to non-product related PPMs: see, most notably, the arguments provided in D. Gascoine and O'Connor & Company, *Private Voluntary Standards within the WTO Multilateral Framework*, cit.

[605] WTO, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at paras. 31-32.

[606] WTO, *Note by the Secretariat on the Negotiating History of the Agreement on Technical Barriers to Trade*, cit., at para. 3(c).

[607] *Ibidem*.

response to this question would require analysis of a sample of the relevant standards, identification of their objectionable features from the exporters' point of view, and judgment as to whether a better structured process for standard development might have produced a more mutually satisfactory outcome. The introduction of an international discipline – although on a voluntary basis – may be helpful when considering how difficult is for firms and coalitions of firms setting food safety standards, such as GlobalGAP, that are vertically integrated and show an ever-growing transnational reach, to be regarded as fallen under the jurisdiction of one single WTO Member.[608] Nonetheless, it is tempting to guess that the conclusion of such an analysis would be along the lines that "the better process for standard-setting would remove some or all of the complaints that concern procedure (prior notice, consultation, etc.), but ultimately not make much difference to the burden of compliance borne by exporters"[609], especially in developing exporting countries. Very likely the same conclusions would apply in relation to the application of a code of good practice to the making of private voluntary standards in the SPS area.

19.2.3. Lack of consensus among the WTO Members

Anyway, lacking the WTO covered agreements recognition of direct effect, any application of the WTO disciplines to private entities would be subject to the agreement among WTO Members. One possible way is in the form of guidelines on the interpretation and implementation of relevant SPS provisions adopted by the SPS Committee in terms of its competence under Article 12.1 of the SPS Agreement.[610] Alternatively, if Members were to reach consensus on a decision, this could be forwarded to the Council for Trade in Goods and, eventually, to the General Council and/or the Ministerial Conference for formal adoption as an 'authoritative interpretation', i.e., an agreement on the clarification of the meaning of a specific provision, within the meaning of Article IX:2 of the Marrakesh Agreement. Another option is by way of a formal amendment to the SPS Agreement agreed to by the Ministerial Conference in accordance with Article X of the Marrakesh Agreement, following Article 12.7 of the SPS Agreement.[611] Anyway, all the decisions of the SPS Committee must be made by consensus. Equally in the second and third case; if consensus cannot be reached on a proposal to amend the Agreement, the Ministerial Conference may take a decision with a two-thirds majority. It is in fact very exceptional for WTO bodies to vote; instead, the GATT practice of

[608] See in this sense, EU, *Private Food Standards and their Impacts on Developing Countries*, cit.

[609] WTO, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at 6.

[610] Article 12.1 of the SPS Agreement mandates the SPS Committee to carry out the functions necessary to implement the SPS Agreement and to further its objectives. Yet the Committee is not empowered to amend the 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 meaning of Article 31.3(a) of VCLT, they must be taken into account by WTO panels and the Appellate Body when interpreting the relevant provisions of the SPS Agreement.

[611] Article 12.7 of the SPS Agreement reads as follows: "The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation".

decision-making by consensus has been continued under the WTO. Nonetheless, for all the reasons examined so far such a consensus about the possible legal framework within which private standards could be addressed is highly unlikely to be achieved.[612]

The discussions that have taken place within the SPS Committee since June 2005 are explicative of such a lack of consensus. We may say that a clear best solution would be a negotiated definition of what a private standard is, how it is governed by the SPS Agreement and what sort of measures would be reasonable for WTO Members to take in this respect. However, the SPS Committee and the WTO Members alike acknowledge that a negotiated way forward in this respect, which would satisfy the divergent concerns of Members at both ends of the debate – developing-country Members, on the one hand, and developed-country Members, on the other – is highly unlikely.[613] The discussions have focused so far particularly on the proposal of a working definition of 'SPS-related private standards' – considered in paragraph 14.2. – in respect of which the WTO Members could not come close to an agreed definition, as was the ambition. Three years after Members had agreed to try to provide a definition as the basis for future work, Members remain deadlocked.[614] Other five actions that the *ad hoc* working group on private food safety standards presented in March 2011 to be endorsed by the SPS Committee, without prejudice to the views of Members regarding the scope of the SPS Agreement, are still under consideration as consensus was not reached at that initial stage. These include exploring possible ways of information exchange on SPS-related private standards and their relation with international standards and governmental

[612] See WTO, *Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee*, cit., at para. 10. It should not be forgotten that, in accordance with Article 12.7 and together with the decision of the Fourth Session of the WTO Ministerial Conference, WTO Members are required to review the operation of the SPS Agreement at least once every four years. In addition, apart from any initiative of the SPS Committee, the extent of the applicability of the SPS Agreement to SPS-related private standards could be addressed by any dispute settlement body established under the DSU.

[613] This was particularly evident at the SPS Committee meeting held on 26 to 29 March 2012, where Members discussed the implementation of the 'six-action package' agreed by the Committee: see WTO, *Private Standards. Identifying Practical Actions for the SPS Committee: Summary of Responses - Note by the Secretariat*, G/SPS/W/230, 25 September 2008, at para 10; *Id., Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee*, cit.; and, *Id., Actions Regarding SPS-Related Private Standards*, Decision of the Committee (G/SPS/55), 6 April 2011.

[614] This followed especially the failure of China and New Zealand, in their capacity as co-stewards of the e-Working Group on private standards, to persuade the other WTO Members to accept the draft compromise they prepared from the contributions of the e-Working Group (namely: Argentina, Australia, Belize, Brazil, Burkina Faso, Canada, China, the EU, Japan, Singapore and the US). The proposed definition prepared by the co-stewards reads as follows:

"An SPS-related private standard is a written requirement or a set of written requirements of a non-governmental entity which are related to food safety, animal or plant life or health and for common and repeated use. (Optional footnote: This working definition or any part of it shall be without prejudice to the rights and obligations of Members under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures or the views of Members on the scope of this Agreement.)"

(WTO, *Report of the Co-stewards of the Private Standards E-Working Group on Action 1 (G/SPS/55) – Submission by the Co-stewards of the E-Working Group*, 18 March 2014, G/SPS/W/276, at para. 8). On the occasion of its meeting on 25-26 March 2014, in the absence of consensus on a definition of "private SPS-related standard" the SPS committee deferred a decision on a mediation procedure designed to avoid legal disputes. In parallel to that, accepting a suggestion from Canada WTO Members agreed on the opportunity to look at private standard-related definitions and vocabulary used in other international forums and to see how these might be adapted to food safety and animal and plant health.

regulations; on this matter differing views exist as to whether this should be part of the SPS Committee's agenda.[615]

Additionally, there are six actions on which the working group has yet to reach consensus at all. These concern more sensitive issues such as the development of guidelines and codes of conduct and the clarification of the Members' legal obligations under the SPS Agreement.[616] Namely, the proposed Action Seven suggests that the SPS Committee should provide a forum for the discussion of issues concerning SPS-related private standards under the auspices of a standing agenda item on "specific trade concerns". The objectives would be to raise the level of communication between the WTO Member in whose territory a private entity that has developed or implemented a private standard is located and the private entity itself, to facilitate the understanding of the reasons underpinning a standard, and to allow exporting Members to try to find positive solutions to the specific problems detected. Yet, some Members are of the view that private standards are not covered by the SPS Agreement and insist that neither the Members' governments nor the SPS Committee can interfere in the private contractual relationships. Under the proposed Action Eight the SPS Committee should develop guidelines on the implementation of Article 13 of the SPS Agreement as far as SPS-related private standards are concerned. This approach could be one way to reinforce the key principles of the SPS Agreement (scientific justification, transparency and equivalence) in the private standards arena. Yet, some Members indicated that it would be premature to develop guidelines before reaching a clear understanding on the meaning of the term "non-governmental entities" in relation to SPS-related private standards. Pursuant to the proposed Action Nine the SPS Committee would be required to develop a more formal transparency mechanism for SPS-related private standards. Some Members have expressed their concerns about some practical problems with this, such as: who would be responsible to notify, i.e., Members or private firms? If it is the responsibility of Members, how will they become aware of all private standards within their territory? Additionally issues such as time, cost, government jurisdiction, and intellectual property may arise, as well. Action Eleven invites the SPS Committee to develop guidelines for the WTO Members' governments to liaise with entities involved in SPS-related private standards. Lastly, under Action Twelve the SPS Committee should seek clarification as to whether the SPS Agreement applies to SPS-related private standards. Clarification in this sense could be based either on written submissions from Members or, alternatively, on legal opinions on this issue from qualified legal entities, for consideration by the SPS Committee.

[615] At the SPS Committee meeting of 20 June 2011, WTO Members proposed that this exchange should take place "outside the formal and informal sessions of the SPS Committee […]" (WTO, *Proposed Revision to Action Six of the Report of the Ad Hoc Working Group on SPS-Related Private Standards (G/SPS/W/256)*, 20 June 2011, G/SPS/W/261, para. 1).

[616] See WTO, *Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee*, cit., at paras. 7-9.

20. The State responsibility regime under international trade law

To the extent that actions by private entities cannot be bound by the WTO covered agreements in the absence of a sufficient level of government involvement, we come to ask whether and in which cases an act – or omission – that is carried out by a private entity in the territory of a Member and that constitutes a breach of obligations under one of the WTO agreements is in fact to be considered a conduct of that Member and therefore entails its international responsibility. In terms of public international law this question concerns the 'attribution' of private conduct to a State. While the issue of State responsibility for internationally wrongful acts is placed at the very core of the WTO dispute settlement bodies' operation, as a matter of fact the issue of State responsibility with regard to acts of non-governmental entities has been only occasionally set forth. Because of a lack of consistent adjudicative determinations, the question of attribution in relation to non-governmental entities does not have anything approaching an agreed normative answer in the WTO legal system. As the Members are fully responsible for the observance of all obligations set forth in the WTO covered agreements, the question of whether they may be deemed to be responsible for the activities of private entities in the sanitary and phytosanitary area has been extensively discussed at the meetings of the SPS Committee as of June 2005.[617]

While attempting to throw some light on this difficult question, this section will review the relevant provisions of the WTO covered agreements and case law in light of the customary rules and principles on State responsibility as codified in the 2001 ILC's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter 'ILC Articles on State Responsibility').[618]

[617] The issue of State responsibility for acts of non-governmental private entities within the WTO treaty system has received some academic attention in recent years: see most notably, L. Condorelli, *L'imputation a l'État d'un fait internationalement illicite: Solutions classiques et nouvelles tendances*, (1984) Recueil des cours de l'Académie de droit international de La Haye 189: 9-221; S.M. Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility May be Applied within the WTO Dispute Settlement System*, (2002) Journal of International Economic Law 5: 393-420; R.J. Zedalis, *When Do the Activities of Private Parties Trigger WTO Rules?*, (2007) Journal of International Economic Law 10: 335-362; Y.N. Hodu, *The Concept of Attribution and State Responsibility in the WTO Treaty System*, (2007) Manchester Journal of International Economic Law 4: 62-72; and, S.R. Gandhi, *Regulating the Use of Voluntary Environmental Standards within the World Trade Organization Legal Regime: Making a Case for Developing Countries*, (2005) Journal of World Trade 39: 855-880 (dealing with this issue specifically in relation to private standards for environmental protection).

[618] The Articles, which reflect customary international law, were endorsed on the first reading in the 1970s and definitively in 2001 at the ILC's fifty-third session. They were submitted to the UN General Assembly as part of a report which also contains commentaries on the draft Articles. The text now appears as Annex to General Assembly Resolution no. 56/83 of 12 December 2001, as corrected by Doc. A/56/49(Vol. I)/Corr.4 (in: Yearbook of the International Law Commission, 2001, vol. II (Part Two)).

20.1. Significance of the issue of attribution within the WTO treaty system

From the very beginning of the ILC's work on the codification of the rules on the responsibility of States for internationally wrongful acts,[619] it has been pointed out that State responsibility could only be invoked if a particular conduct – either act or omission – from the outset could be attributed to the State. It follows that a State is not generally responsible for acts or omissions occurring within its territory and perpetrated by private entities that did not show any link with that State. In defining the elements of an internationally wrongful act of a State, Article 2 of the ILC Articles on State Responsibility reads as follows:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State".

Attribution of a conduct to that of a State is referred to as the 'subjective' element of any internationally wrongful act. It consists of "the body of criteria of connection and the conditions that have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subject of international law) which has acted in a particular case"[620]. In fact 'attribution' only makes it possible to establish that a conduct is to be considered an act of the State under international law, but as such says nothing about the legality or otherwise of that conduct. Therefore, it ought to be clearly distinguished – at least in analytical terms – from the objective element of the internationally wrongful act, which concerns the characterisation of the conduct as internationally wrongful and presupposes that we are indeed faced with an act of the State.

Despite the considerable time invested by the ILC to such a codification work throughout its more than half a century history, attribution remains nonetheless a somewhat perilous issue. This is so, particularly, in the context of the WTO treaty system, which rarely elaborates on the notion of attribution.[621] Because of that such a notion is also far from being entrenched in the WTO judicial practice. In line with general international law the WTO

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[619] That 'attribution' is a fundamental issue in State responsibility has been affirmed by the ILC Sub-Committee on State Responsibility since its own appointment in 1962 to establish a working project on this matter: see UN, *Report by Mr. R. Ago, Chairman of the Sub-Committee on State Responsibility*, ILC Sub-Committee on State Responsibility, UN A/CN.4/152 (in: Yearbook of the International Law Commission 1963, Vol. II: 227-259).

[620] L. Condorelli and C. Kress, *The Rules of Attribution: General Considerations*, in: J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, 221-236, at 221. The attribution of a conduct to the State as subject of international law "is based on criteria determined by international law and not on the mere recognition of a link of factual causality" (Draft Articles on Responsibility of States, 2001, Commentary to Part One, Chapter II, para. 4).

[621] The principles and criteria for attributing a conduct to the State are meant to be applicable in all fields of international law. Yet, the ILC recognised that such principles and criteria could be derogated in those fields that are governed by some forms of *lex specialis*, i.e., by "special rules of international law" determining other conditions for the existence of an internationally wrongful act (see ILC Articles on State Responsibility, Article 55). In particular, for an insightful analysis of the application of the law of State responsibility to international trade law see, M. Garcia-Rubio, *On the Application of Customary Rules of State Responsibility by the WTO Dispute Settlement Organs: A General International Law Perspective*, Geneva: IHEID, 2001.

adjudicatory bodies recognised indeed that, "[…] any act or omission attributable to a WTO Member can be a measure of that Member for the purpose of dispute settlement"[622]. Nonetheless, when dealing with a complaint concerning the nullification or impairment of benefits accruing under the WTO covered agreements,[623] the panels and the Appellate Body seem to focus more on the breach of an international obligation itself (the objective element), without dealing separately with the distinct conceptual problem of attribution (the subjective element).[624] Such reasoning is centred on "an interpretation of the substantive provision, in search of elements that make it possible to conclude that there is *in casu* a violation by State"[625]. In other words, in the context of the WTO there is little doubt that the establishment that a Member has failed to respect its obligations under the WTO agreements presupposes that the relevant act or omission is directly linked to the Member concerned. The solution to the problem of attribution is indeed usually straightforward: generally, as a matter of fact, the panels deal with measures of Members and feel no need to elaborate on this point by making reference to general principles.[626]

20.2. Conduct of State organs

As seen earlier, the SPS Agreement addresses the obligations set out in Articles 2 through 11 to WTO Members, i.e., impose obligations to the State as a whole, without further specification. Since no specific rules are provided within the WTO treaty system in order to ascertain which the relevant conduct of the State is, reference ought to be made – first of all – to the conduct of the organs of the State. By virtue of the long-established nature of the general principle embodied in Article 4.1 of the ILC Articles on State Responsibility, "[t]he

[622] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, cit., at paras. 81-82. See also Brazil – Measures Affecting Imports of Retreaded Tyres, cit., at para. 7.399.

[623] Under the Dispute Settlement Understanding State responsibility arises when a WTO Member considers that any benefit it can reasonably expect to accrue to it directly or indirectly under any covered agreement is nullified or impaired, or that the attainment of any objective of a covered agreement is impeded, as result of: (i) the infringement by any Member of the obligations assumed under a covered agreement ('violation complaints'): in such a case, "the action is considered *prima facie* to constitute a case of nullification or impairment" (Article 3:8 of DSU); (ii) the application by any Member of any measures that, despite their consistency with the WTO disciplines, prejudices the 'balance of concessions' of the Members concerned ('non-violation complaint' for injurious consequences arising out of lawful acts); and (iii) the existence of any other situation ('situation complaint').

[624] In other words, from the ILC's distinction it follows that the WTO dispute settlement bodies tend to solve a problem of State responsibility through the direct interpretation and application of 'primary rules' that place obligations on the State and whose violation may generate responsibility, without using – at least expressly – the 'secondary rules' on State responsibility.

[625] S.M. Villalpando, *Attribution of Conduct to the State*, cit., at 396.

[626] One could remark that, when applying the relevant WTO provisions to the facts of the dispute at stake, the dispute settlement bodies do implicitly address the question of attribution, since the conclusion that there is a violation of a WTO rule presupposes the existence of an action or omission attributed to the State. Luigi Condorelli referred to this situation as one in which there is a "*rapport circulaire de presupposition reciproque*" between the two elements: the distinction between the objective and subjective elements can only be done in pure logical and theoretical terms, such that the analysis of the existence of a breach necessarily presupposes the attribution of the relevant conduct to the State and *vice versa* (see L. Condorelli, *L'imputation a l'Etat d'un fait internationalement illicite*, cit., at 96-97).

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". This is a rule of customary character.[627] An organ includes "any person or entity which has that status in accordance with the internal law of the State"[628]. A State is "responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity"[629].

The issue of whether Article 13 of the SPS Agreement entails the responsibility of WTO Members to ensure compliance with the SPS disciplines does not raise controversial issues when referred to the activities of "other than central government bodies". Indeed, in the context of the rest of Article 13 and in the light of the analysis we have conducted so far, the applicability of the obligations laid down in the SPS Agreement extends to cover any government bodies, even though these do not belong to the structure of central government.[630] In this respect, the second sentence of Article 13 prescribes that Members "formulate and implement positive measures and mechanisms in support of the observance" of the Agreement by other than central government bodies.

20.3. Conduct of State agents

Under international law there shall be attributed to the State also the conduct of entities of non-governmental character, which may in certain instances compromise the international responsibility of the State. This occurs when such entities are empowered by the law of the

[627] See ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, ICJ Reports 1999, 62, at para. 62 ("According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state").

[628] ILC Articles on State Responsibility, Article 4.2. Following the traditional legal theory of the distinction of powers an organ may be part of the central administration, the legislature or the judicial branch. Moreover, organs of a State are also those of limited territorial jurisdiction within the State, such as provinces and municipalities, as well as any territorial units of the State such that the conduct of these entities shall be attributed to the State as a whole. A State is responsible for acts of its organs notwithstanding the fact that the latter may be formally independent of the former or enjoy a very large autonomy or even act *ultra vires*. However, as Article 27 of VCLT clarifies, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

[629] Claim of the Salvador Commercial Company ('El Triunfo Company') and other citizens of the United States, Award of Arbitrators, 8 May 1902, Reports of the International Arbitral Awards 1902, XV, 463, at 477.

[630] This issue was addressed in the only dispute in which the interpretation of Article 13 has been at issue so far, namely *Australia – Salmon (Article 21.5 – Canada)* (Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada, Report of the Panel circulated 18 February 2000, WT/DS18/RW). This dispute contributed to the formulation of the today generally accepted approach that, pursuant to both general international law and WTO law, measures adopted by the *de jure* organs of the State are measures attributable to a WTO Member and therefore fall under its responsibility. Also, this case permits to draw some indications on how a panel should procede in its analysis of a possible violation of the SPS Agreement by a non-governmental entity: first of all, it should look at Article 13 to determine whether there is responsibility of a WTO Member; then, in the light of Article 1.1 it should decide whether the measure at stake is an SPS measure; and finally, it should rule on whether there was a breach of the obligations established by the agreement.

State to exercise elements of the governmental authority.[631] In such a case international law grounds generally attributions on the principle of agency, as clearly stated in Article 5 of the ILC Articles on State Responsibility: "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".[632] It is interesting to observe that, as a matter of fact, the generic term "entity" in this provision was used in order to include public corporations, but also semi-public entities, public agencies of various kinds and even private companies, provided that they are empowered to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.[633]

The essential manifestation of this phenomenon within the context of the WTO legal system clearly concerns the case of a State adopting a legal act that vests non-governmental entities with elements of governmental authority in the trade sector, namely, 'State trading enterprises' and enterprises enjoying exclusive or special rights. Both cases concern the exercise by 'para-statal' entities of specified functions which are akin to those normally exercised by the organs of a State.[634] Yet, this is not the case of food firms and coalitions of firms, which adopt and implement food safety standards.

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[631] As has been remarked, "[t]he fact that formal governmental action or legislation could be a ground for the initiation of a non-violation complaint, certain general policy statements by governmental agents or private actors assigned by government may amount to successful non-violation complaints" (Y.N. Hodu, *The Concept of Attribution and State Responsibility in the WTO Treaty System*, cit., at 65, referring to *Japan – Film*, para. 10.12).

[632] Article 7 makes it clear that the conduct of entities empowered to exercise elements of governmental authority is attributable to the State, even if it exceeds its authority or contravenes instructions.

[633] See Draft Articles on Responsibility of States, cit., Commentary to Draft Article 5, para 2.

[634] The provisions of GATT deserve a specific consideration in this respect. According to the Ad Note to Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" in these provisions are to be read comprehensively as including "restrictions made effective through state-trading operations". The GATT panel in *Japan – Agricultural Products* observed that, "[the] basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations" (Japan – Restrictions on Imports of Certain Agricultural Products, GATT 1947 Panel report adopted 22 March 1988, L/6253, 35S/163, at para. 5.2.2.2.). Accordingly, the adoption of such measures by State trading enterprises falls within the exercise of the governmental authority and engages the Members' responsibility in conformity with the general principle of attribution. It could be also argued that in such a context the criterion for attribution is not defined *ratione materiae*, i.e., by the exercise of elements of the governmental authority as provided for under the general rules of State responsibility, but *ratione personae*, i.e., by the entity having adopted the conduct under consideration. As result of that, the GATT discipline would adopt a criterion of attribution that is broader than the one in the general law of responsibility. Some GATT and WTO panels found that there was a violation of the GATT provisions above in cases where a State trading enterprise was holding an import monopoly or a privileged position in the market for the purposes of attaining objectives set by the governmental authorities (see most notably, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Report of the Appellate Body circulated 11 December 2000, WT/DS161/AB/R - WT/DS169/AB/R, at paras. 763-769, where the panel found that the measures adopted by the Korean Livestock Products Marketing Organization – a State-trading agency in charge of administering the import, distribution and sale regime for beef – were inconsistent with Article XI of GATT and Article 4.2 of the Agreement on Agriculture).

20.4. Conduct of private corporations

The relevant question for purposes of our examination now is whether the conduct of entities – be they natural or legal persons – that neither are State organs under domestic law nor exercise elements of governmental authority could be attributed to the State and engage its responsibility. The identification of criteria allowing the attribution of conduct of private entities *stricto sensu* is certainly one of the most complex issues in the law of State responsibility. This is of even greater importance under the multilateral discipline of international trade, which is founded on rights and obligations referred exclusively to States, and within the context of a dispute settlement system such as the one established by the WTO that does not allow for private entities to be parties to the proceedings either as claimants or defendants.

The approach adopted by the WTO dispute settlement bodies – consistent with general international law – does in fact encounter certain difficulties when it addresses the attribution of private conduct to that of a Member. Theoretically speaking, conduct of any natural or legal persons linked to a particular State by nationality or residence is attributable to that State, whether or not these persons have any connection to the government. Yet, with the view of limiting responsibility to conducts which engage States and recognising the autonomy of persons that act on their own capacity, international law tends to avoid such a theoretical approach to attribution. Hence, conduct of private persons is not *as such* attributable to that of the State.[635] Relevant principles for attribution of conduct of private parties may be retrieved from the codification work of the ILC on this matter. In particular, after a review of the relevant State practice, case law and legal literature, on first reading the ILC had proposed a provision recognising that, in principle, "[t]he conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law"[636]. It was also specified thereby that this was valid irrespective of the circumstances in which the private person had acted and of the interests affected by his or her conduct. Though this negative statement has been abandoned on second reading because of a lack of any independent content, the Commentary of the Articles still specifies the underlying principle, as a corollary to the general rule that the only conduct attributable to a State at the international level is that of its organs and agents. Nonetheless, the conduct of a private entity may exceptionally be attributed to the State in two specific hypotheses that are considered respectively under Articles 8 and 11 of the ILC Articles on State Responsibility.

20.4.1. Conduct directed or controlled by a State

The hypothesis considered in Article 8 is the one of the "*de facto* organ", i.e., a non-governmental entity acting at the behest of the government, which has been the object of rich

[635] See already League of Nations, Tellini, Official Journal 1923, II: 1349.
[636] Draft Articles on State Responsibility, Article 11.1.

elaboration in international case law as well as in legal literature.[637] Literary, Article 8 reads as follows: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". This provision envisages in fact two distinct criteria for attribution of such a conduct.

The first criterion concerns the clear-cut situation in which the State appoints and gives specific instructions for a person or group of persons to discharge a particular function or to carry out a particular duty, i.e., again the case of agency. In this respect, it could be imagined a situation where a WTO Member gives specific instructions to a company – especially a company that has a dominant position in the market – so as to perform on its behalf an act which would contravene the obligations contracted under the WTO covered agreements. In this case it must be genuinely proved that the person or group of persons concerned actually performed a particular function or duty at the instigation of the State's organs. The second criterion reckoned by Article 8 concerns a more limited intervention by the State, which only "directs" or, alternatively, "controls" – but not appoints – the specific conduct of private entities.[638] With regard to corporations, the 'test of direction or control' gives rise to difficult issues, since that a State owns a company (or a majority of the company's stocks) does not constitute *per se* a sufficient condition to attribute to that State the conduct of the said company. As the ILC does point out, no decisive criteria for the purpose of attribution in such a case can be drawn from "[t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, [or also] the fact that it is not subject to executive control"[639]. Rather, attribution would require the further demonstration that the State has actually determined the company's specific action.[640] Indeed, that in some cases the State's overall control of the company – for instance, through ownership – could be sufficient for the purposes of attribution would be "a very progressive, though probably dangerous, line of reasoning, which is certainly an open possibility in light of the most recent international jurisprudence. Nonetheless, this allegation would imply an extension by analogy of the *Tadic* decision (which was limited

[637] For in-depth analysis on this issue see, C. Kress, *L'organe* de facto *en droit international public: Réflexions sur l'imputation a l'État de l'acte d'un particulier à la lumière des développements récents*, (2001) Revue Générale de Droit International Public 105: 93-144.

[638] This criterion is derived from the ICJ's *dictum* in the *Nicaragua* case, where the activities of an organised rebel group (*Contras*) in the Nicaraguan territory were found not to be attributable to the US since it was not proven that "that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed" (Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986, ICJ Reports 1986, 14, at para. 115, emphasis added).

[639] Draft Articles on Responsibility of States, cit., Commentary to Draft Article 5, at para 3. Finally, in the absence of definition of any possible criterion of attribution, the ILC recognises that "[b]eyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions and is essentially a question of the application of a general standard to varied circumstances" (*ibidem*, at para. 6).

[640] *Ibidem*, Commentary to Draft Article 8, at para 6.

to military groups) and would then require careful justification"[641]. In addition, it is probable that "the mere fact that the State has established or owns the relevant company will have to be complemented with other evidence (about the company's hierarchical structure, its management and its policies) so as to make certain that the State's overall control has a direct incidence on the conduct at stake in a manner that could be compared to that of the military leadership over the action of its subordinates"[642].

20.4.2. Conduct acknowledged and adopted by a State as its own

As far as the other relevant hypothesis depicted by the ILC Articles on State Responsibility is concerned, Article 11 therein reads as follows: "[c]onduct which is not attributable to a State […] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own". Within the WTO context, such a question was raised in the following terms. We have already recalled that the panel in *Japan – Film* pointed out that, "[a]s 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 the WTO Agreement[s], refers only to policies or actions of governments, not those of private parties."[643]. Nonetheless, the panel continued that, "[…] while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions"[644]. After a brief review of some of those cases, the panel then concluded the following: "These past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis"[645]. These passages suggest that, in fact, it is necessary to know not only when a private conduct is to be attributed to a State, but also how the involvement of the government – or the governmental connection to or endorsement of private actions – ought to be appreciated. Of particular importance in identifying what is regarded as the exercise of elements of the governmental authority is "not just the content of the powers, but the way they are conferred on an entity, the purposes for

[641] S.M. Villalpando, *Attribution of Conduct to the State*, cit., at 413. Reference is made to ICTY, *Prosecutor v Dusko Tadic*, cit.

[642] S.M. Villalpando, *Attribution of Conduct to the State*, cit.

[643] Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at para. 10.12.

[644] *Ibidem*.

[645] *Ibidem*, at para. 10.16. The panel made reference to the 1989 panel report in *EEC – Restrictions on Imports of Dessert Apples*, which observed that "[t]he EEC internal regime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups" (EEC – Restrictions on Imports of Dessert Apples (Complaint by Chile), Report of the GATT Panel circulated 22 June 1989, BISD 36S/93, at 126).

which they are exercised, and the extent to which the entity is accountable to government for their exercise"[646].

The main concern in that respect is that a Member, faced with stringent engagements under the WTO treaty system, may choose to circumvent them for its own benefit by allowing private entities to carry out activities normally prohibited. In such a case, "it is not at issue that the entities or individuals involved are private persons or entities since States may supplement their own actions by instigating or recruiting private persons or groups as their 'auxiliaries'"[647]. In the concrete case of food safety, although private standards have evolved predominantly in response to consumers concerns as well as regulatory changes – most notably in the EU – there are clear signs that governments are seeking to promote the adoption of these standards, seeing them as an efficient and effective way in which to pursue public policy objectives. As the Secretariat of the SPS Committee promptly realised in its 2007 paper on private standards under the SPS Agreement, at least four specific situations are worth to be mentioned in which this question may arise.[648]

First, a government body may decide to incorporate a standard developed by a private entity by referencing it into its SPS measures. Indeed, some developed countries are considering ways of integrating private standard certification into overall national systems of food control to strengthen public health protection. This is the case of a governmental regulator that relies upon a private entity not for the implementation of official SPS requirements – as supposedly covered by the last two sentences of Article 13 – but for the development itself thereof. It could be submitted that, as that standard is incorporated into an official SPS measure, the manner in which it is elaborated must comply with all the relevant disciplines of the SPS Agreement.

Second, a government might also decide to permit the entry of or to grant import licences to products that are certified to comply with private SPS-type requirements that incorporate and exceed the official requirements embodied in national regulations and/or international standards. Because of these trends, as argued in general terms in Chapter Two, the boundary between private standards and public regulations is becoming ever-more blurred, with the consequence that it is increasingly difficult to single out the effects of changes in public regulation from those of private one, and that the distinction between voluntary and mandatory requirements is losing much of its relevance for the economic operators in global agri-food value chains.

Third, government bodies may outsource their regulatory tasks to private entities so as to escape simply their obligations under the SPS Agreement. The panel in *Japan – Film* first observed the risk undermining the achievements in improving market access by holding that, if this would be allowed, "WTO obligations could be evaded through a Member's delegation of quasi-governmental authority to private bodies"[649]. In other words, by minimising the level

[646] Draft Articles on Responsibility of States, cit., Commentary to Draft Article 5, para. 6.
[647] Y.N. Hodu, *The Concept of Attribution and State Responsibility in the WTO Treaty System*, cit., at 64.
[648] See WTO, *Private Standards and the SPS Agreement - Note by the Secretariat*, cit., at para. 17.
[649] Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at para. 10.328.

of government intervention Members may be able to avoid the attribution of private conduct to them.[650]

Lastly, national central and local governmental bodies can embed private standards in government procurement while defining the technical specifications that the product (or service) to be procured is required to exhibit.

In these cases, could the Members be deemed to breach their international obligations under the WTO law even in the absence of any direct intervention by State organs or of entities bestowed with elements of governmental authority? There exist some grounds of controversy such that this criterion of attribution could be justified only partially and unconvincingly. We have already recalled in this respect the conclusions reached by the panel in *Japan – Film*, which recognised that "[i]t is difficult to establish bright-line rules"[651] in respect of private conduct, which therefore "need[s] to be examined on a case-by-case basis"[652]. Nonetheless, the legal literature appears to call for a solution radically different from the one suggested by the panel above. Some 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 an 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 [of the SPS Agreement]"[653]. If such a criterion were applied within the context of the WTO, it would require that the dispute settlement bodies take into account also the attitude of the Member concerned after the performance by a private entity of a conduct potentially in conflict with the WTO disciplines.

[650] Many private standards are backed by what in the regulatory governance literature has been referred to as the "shadow of hierarchy", meaning the possibility, for the State or any other public authority to step in, by way of threats or incentives, in order to foster more effective private regulation in certain domains (see A. Héritier and D. Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance*, (2008) Journal of Public Policy 28: 1-17). Also, many private standards are disseminated and made operational through contract mechanisms, which are enforceable according to State law. On the links between self-regulation and contractual mechanisms see, F. Cafaggi, *Self-Regulation in European Contract Law*, in: H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and A Challenge to European Contract Law*, London: Kluwer Law International, 2008, 93-140; F. Cafaggi and P. Iamiceli, *Private Regulation and Industrial Organization: Contractual Governance and the Network Approach*, in: S.M. Grundmann, F. Möslein, and K. Riesenhuber (eds.), *Contract Governance: Dimensions in Law and Interdisciplinary Research*, Oxford: Oxford University Press, 2015, 341-374; B. van der Meulen (ed.), *Private Food Law: Governing Food Chains through Contract Law, Self-Regulation, Private Standards, Audits and Certification Schemes*, Wageningen: Wageningen Academic Publishers, 2011, 75-111; and, M. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, (2007) UCLA Law Review 54: 913-970.

[651] Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at para. 10.16.

[652] *Ibidem*.

[653] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 18.

20.4.3. Piercing the 'veil' of private standard setting: The 'catalyst act' as criterion of attribution

In particular, the argument has been raised that in the context of the WTO the problem of State responsibility in connection with conduct of private entities should be posed "not in terms of attribution […], but rather in terms of responsibility for internationally wrongful acts carried out by *de jure* organs of the State and catalyzed or revealed by private activities"[654]. The problem of attribution seems to show a distorted picture of the legal situation in relation to private standards, and could be better analysed under the hypothesis of what in the literature on State responsibility is known as the 'catalyst act'[655]. Such a doctrine intends to show that the private conduct is an event that is external to the act of State's organs, but that serves as condition for the existence of a breach of an international obligation. Put differently, private conduct is not relevant for the purposes of attribution of the internationally wrongful act to a State (the 'subjective' element), but is necessary for the breach of the international obligation to take place (the 'objective' element). Even when private conduct cannot be attributed to a State, the very fact that it could take place may reveal that there was a different action or omission by State organs constituting a breach of an international obligation.[656]

This hypothesis appears to be common in international trade law, where the majority of the WTO rules regulate the exercise of public authority with regard to the activities conducted by market operators, but not the conduct of private parties directly and themselves; as a consequence, only organs exercising elements of the governmental authority are in a position to infringe obligations of this kind. On the contrary, private companies – even if they should in fact be acting on the instructions of, or under the direction or control of, a State – cannot behave in such a way as to directly breach such obligations, since they lack the required capabilities. Their conduct could only catalyse or reveal a pre-existing act by organs of a State that are inconsistent with the WTO obligations. It has been submitted that the GATT and WTO case law can in fact be read as upholding the logic of the 'catalyst act'.[657] Since the 1960s, the GATT Contracting Parties have been cognisant of the role that private parties can play in disrupting the natural competitive economic relationships among countries. A handful of GATT and WTO adjudicative

[654] S.M. Villalpando, *Attribution of Conduct to the State*, cit., at 414.

[655] The wording 'catalyst act' was proposed by the ILC Special Rapporteur Roberto Ago (in: Yearbook of the International Law Commission, 1972, II, at para 65), and was then used by the ILC in the Commentary to Article 11, para 4. Although the ILC no longer use this expression in the Commentary to the Articles, it does retain the reasoning that underlies it.

[656] The paradigm of this situation was the *Hostages* case, decided by the ICJ in 1980. Since the act concerned (the attack and occupation of the US Embassy in Tehran) had been carried out by private individuals (notably, a group of students), the Court ruled that the attack against the Embassy was not attributable to the State, but that it revealed the violation of an obligation of 'due diligence' of the State in protecting the Embassy (Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980, ICJ Reports 1980, 3, at paras. 57-68). The act attributed to the State and entailing its responsibility was therefore the lack of protection of the Embassy (notably, by the inaction of the police force) and not the attack itself.

[657] See, most notably, S.M. Villalpando, *Attribution of Conduct to the State*, cit., at 416-418.

determinations over the intervening decades have initiated the process of fleshing-out the conditions under which GATT and WTO disciplines apply to private party conduct as a consequence of ascribing such conduct to a Member. The GATT panel in *Japan – Semi-Conductors* found that the voluntary export restrictions adopted by Japanese private companies were not limited in their own self-interest. The 'administrative guidance' provided by the government constituted in fact a measure falling under the scope of Article XI:1 of the GATT. In order to determine whether the measure taken constituted a contravention of Article XI:1, the panel was satisfied by two essential criteria: first, a lack of reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect; second, that the operation of the measure adopted to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on government intervention.[658] In other words, in reaching its conclusion, the panel did not rely on the attribution to the State of conduct of the companies concerned because of some governmental connection to or endorsement of their actions, but only referred to wrongful acts committed by *de jure* organs and catalysed by private companies.

This two-fold test was further developed by the WTO panel in the mentioned *Japan – Films* case. On that occasion the panel pointed out that in the examination of an alleged State measure in case of private activities account should be taken of the fact that not every utterance by a government or with some degree of government involvement falls within the concept of 'measure'. Then, which other acts should be interpreted as constituting 'measure' of a Member as required specifically by Article XXIII:1(b) of the GATT? As a response to this question, the panel gave a more textual meaning to "regulatory administrative guidance".[659] The panel relied on a broad definition of 'measure' as including not only legally binding obligations but also non-binding action, such as government's 'administrative guidance' that has influence on private parties. The panel considered that such guidance was not legally binding upon companies but, since the Japanese administrative guidance created incentives for undertakings to respond, it constituted a governmental measure within the meaning of Article XXIII:I(b) of the GATT. In so deciding, the panel supplemented the criteria established in the *Semi-Conductors* case with a test based on the fact that the non-binding government action shall have an effect similar to a binding one.[660] Nonetheless, once again the responsibility of Japan was inferred from the conduct of its government, and not of private parties. The approach remains to show that there is an act of the State for the purpose of responsibility, for which the internal law and practice of each State become very relevant.

Furthermore, the panel's enquiry in *Argentina – Hides and Leather*[661] was concerned with the act of a governmental authority and how – in connection with the conduct of the

[658] See Japan – Trade in Semi Conductors, Report of GATT Panel circulated 26 March 1988, BISD 35S/116, at paras. 108-115.

[659] Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at paras. 10.44-10.47.

[660] *Ibidem*, at para. 10.9.

[661] Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Report of the Panel circulated 19 December 2000, WT/DS155/R.

domestic industry – it results in a violation of Article XI:1 of the GATT.[662] The panel explicitly referred to the possibility of attributing the private conduct to the State: "[i]n our view, it is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility"[663]. In other words, the private conduct remains external from the measure adopted by the State organs, but serves as a condition for the existence of a breach of an international obligation. Similarly, the Appellate Body in *Korea – Beef* concluded that, "[i]n these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favorable for the imported product than for the domestic product"[664]. Hence, the Appellate Body did conclude that Korea was responsible as a consequence of the measures adopted promoting unfavourable competitive conditions and not of a fictive attribution of private conduct to the State.

A last mention needs to be made to the Agreement on Agriculture. Article 9.1(c) thereof recognises that illegal export subsidies provided by private entities or individuals may be attributable to a WTO Member, notwithstanding the fact that such a payment is neither directly charged from public account nor within the government mandate. As the Appellate Body pointed out in *Canada – Dairy*, "[…] under Article 9.1(c) of the Agreement on Agriculture, it is not solely the conduct of WTO Members that is relevant"[665]. As a consequence, Article 9.1(c), may be contrasted with Article 9.1(e) of the same agreement, as well as with Article 1.1(a)(1)(iv) of the SCM Agreement that we have discussed earlier.[666] Despite the use of the term "government", which denotes *stricto sensu* a central authority, and although the discipline of Article 9.1 may certainly involve situations where governments

[662] According to the contentions of the EC, Argentina's Resolution no. 2235/96 provided the tanning industry at the domestic level with the possibility to control the exportation of bovine hides and skins. The industry was therefore allowed to enforce an export ban, such that the resolution allegedly operated as a *de facto* restriction on exports. The resolution provided for the participation of representatives of the Argentinean Association of Industrial Producers of Leather, Leather Manufactures and Related Products in the inspection of raw bovine hide exports.

[663] Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, cit., at para. 11.51. Nonetheless, the panel concluded that there was "simply no proof that Resolution no. 2235 is what is causing (or making effective) the export restriction" (*ibidem*, at para. 11.54); consequently, it did not find that "the evidence is sufficient to prove that there is an export restriction made effective by the measure in question within the meaning of Article XI of the GATT 1994" (*ibidem*, at para. 11.55).

[664] Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, cit., at para. 146. In this case, the Appellate Body was confronted with a dual retail system adopted by the Korean public authorities in violation of Article III:4 of GATT. As consequence of a law promulgated in 1990, retailers in Korea had renounced the sale of imported beef, acting voluntarily on commercial bases.

[665] Canada – Measures Affecting Importation of Milk and the Exportation of Dairy Products, Report of the Appellate Body adopted 17 January 2003, WT/DS103/AB/RW2 - WT/DS113/AB/RW2, at para. 95.

[666] See *supra*, para. 14.1.2.

directly or indirectly mandate or directs the subsidies paid, the Appellate Body found that it may "also covers other situations where no such compulsion is involved"[667].

In summation, the WTO treaty system remains generally silent about the question of attribution, such that the approach that attempts to attribute the conduct of private corporations to the WTO Members for the purposes of determining their responsibility under the WTO agreements appears to be generally inadequate when faced by the norms of the law of State responsibility. At least some of the WTO cases that uphold the attribution of private acts to the State are in fact hypotheses where the private conduct seems to reveal or catalyse the existence of an hidden action or omission by *de jure* organs entailing the State's responsibility under the WTO agreements. In light of the doctrine of the 'catalyst act', the reference to "non-governmental entities" in the third sentence of Article 13 may be seen as finally including also private entities that are neither State organs nor State agents. Nonetheless, it is submitted that, "[a]lthough the case law of the dispute settlement bodies can already be reconstructed in this perspective, their approach remains imprecise and would require more secure criteria"[668]. Hence, there is a need for an autonomous and uniform approach to this matter for the purposes of assuring the stability and predictability of the multilateral trading system.

21. Which responsibility?

Irrespective of whether one finds the WTO rules that might be triggered by the actions of private parties operative as a consequence of a catalyst act or the more traditional notion of attribution, the central question still remains: how might an act by a private entity be considered an act by a State? In other words, how far would the State responsibility stretch in respect of conduct of private entities? We assume as the starting point of our analysis the first sentence of Article 13 of the SPS Agreement, which prescribes that "Members are fully responsible under the Agreement for the observance of all obligations set forth herein". As first observation, this provision confirms the general international responsibility regime binding all sovereign States for compliance with their obligations under international treaties regardless of their domestic structure. The purpose of Article 13 is indeed the implementation of the SPS Agreement, that is to say, to give meaningful effect to all the SPS provisions and prevent any frustration of the carefully negotiated benefits gained by the WTO Members through the Agreement as a result of actions by the organs, bodies and entities under their own jurisdiction. The very architecture of Article 13 determines the instances in which an act by such organs, bodies and entities is attributable to the Members,

[667] See Canada – Measures Affecting Importation of Milk and the Exportation of Dairy Products, op. cit., at para. 128.

[668] S.M. Villalpando, *Attribution of Conduct to the State*, cit., at 419. The author continues to say that "[a]n appropriate consideration of the issue of attribution within the context of the WTO agreements would certainly require no more than a slight change in the perspective presently adopted by the dispute settlement bodies. It would not revolutionize the current interpretation of the obligations under the GATT 1994, but would allow more accuracy and consistency in the appreciation of the facts of each case in light of the relevant legal rules. In law, as in painting, a change in perspective may allow a better depiction of reality" (*ibidem*, at 420).

which are and remain the sole subject of the obligations under Articles 1 through 11 of the Agreement. As Article 13 provides, an act is attributable to a WTO Member when it fails to act in the ways prescribed in the third to fifth sentence thereof when promoting compliance with the Agreement.

21.1. To take such reasonable measures as may be available to ensure compliance

The third sentence of Article 13 states that:

> "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".

That we are in the face of an extremely contentious provision is proved by the fact that, in the context of the systemic debate in respect to private standards in the area of sanitary and phytosanitary risks taking place within the WTO, the Secretariat of the SPS Committee listed as an issue for possible consideration what "reasonable measures" means. From the cautious terms in which the provision is framed it appears that the extent of the Members' obligations in respect of compliance by non-governmental entities is somewhat limited. Indeed, Members are not obliged to take all and whatever possible measures within their legal system to ensure compliance by those entities, but only to take such *reasonable measures* as may be *available* to them to do so.

First of all, this obligation is in essence to adopt 'measures' in the meaning of Article 1 and Annex A to the SPS Agreement. In addition, such measures are to be 'available' to the Member concerned. This suggests that, what in a single fact pattern may be capable of being used by or may be at the disposal of one Member, it may not be within the reach of another Member. Article 13 does not identify any specific criterion to determine whether a measure is available to Members. To that effect it could be pertinent to consider the wording the Appellate Body developed, as a matter of interpretation, in respect of the general exceptions in Articles XX of the GATT and XIV of the GATS, which closely resembles the wording in the third sentence of Article 13. The Appellate Body in *China – Publications and Audiovisual Products* observed that a measure is not available when "it is merely theoretical in nature, for instance, where the responding party is not capable of taking it, or where the measure imposes an undue burden on that Member, such as 'prohibitive costs or substantial technical difficulties'"[669]. By analogy, measures that are in principle reasonable to ensure that non-governmental entities comply with the SPS disciplines may nevertheless be unavailable to the Member concerned.

[669] China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, Report of the Appellate Body circulated 21 December 2009, WT/DS363/AB/R, at para. 318.

Finally, the WTO Members are required to take measures only to the extent that they are 'reasonable'. While it is clear that Article 13 does not oblige to take all measures at its own disposal, here the question is which measures a Member might be expected to use to discipline the actions of non-governmental entities. There is no relevant WTO case law on this point. Yet, in interpreting the term "reasonable" in Article 6.8 of the Anti-Dumping Agreement, the Appellate Body in *US – Hot-Rolled Steel* clarified that, "[…] the word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case [such that] [w]hat is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances"[670]. For its part, the panel in *Mexico – Telecoms* heavily relied on the Appellate Body's above interpretation to understand the term 'reasonable' in the GATS Reference Paper as follows: "Defined positively, reasonable can be defined as something 'of such an amount, size, number, etc., as is judged to be *appropriate or suitable to the circumstances or purpose*'. The term 'reasonable' thus suggests that the interconnection rates should be 'suitable to the circumstances or purpose' […] Flexibility and balance are also part of the notion of 'reasonable'"[671]. From these exerts appears, in the first place, that the 'reasonableness' in WTO law denotes a measure of flexibility, such that 'reasonable' is something considered to be appropriate or suitable to the circumstances. One obvious difficulty is that what a reasonable measure is may be different from one Member to another, for instance because of the domestic legal and constitutional system such that in one country the government bodies have the legal authority to coerce private entities while in another country this could not be possible; in turn, what reasonable is in one set of circumstances is not necessarily so in another. Hence, the precise extent of this term is not susceptible to being ascertained in the abstract but only in the light of all the surrounding circumstances must be weighed up.

This said, what would be such reasonable measures to ensure compliance by non-governmental entities with the SPS Agreement? The argument has been submitted that "[t]he limited and appropriate nature of [the] disciplines [of the SPS Agreement] 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"[672]. Actually, it does not seem that the wording "reasonable measures as may be available" extends so far as requiring Members to enact legislation or regulation obliging private entities to comply with the disciplines of the Agreement, for instance by imposing sellers of agri-food products to confine the adoption and implementation of their own standards to only those that rest on demonstrated scientific evidence. An interpretation of the third sentence of Article 13 that requires legislative action imposing the SPS disciplines on private entities would disregard the qualifiers 'reasonable' and 'may be available' entirely,

[670] United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body circulated 24 July 2001, WT/DS184/AB/R, at para. 84.

[671] Mexico – Measures Affecting Telecommunications Services, Report of the Panel circulated 2 April 2004, WT/DS204/R, at para. 7.182.

[672] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 29, footnote No 98.

contrary to the principle of effective treaty interpretation.[673] While a so high level of government intervention may be regarded as reasonable with respect to independent national standards bureaus, this is not the case in relation to economic operators such as supermarkets and retail consortia. Such an interpretation would seem to be in fact a step too far for a number of arguments.

First, the extent of the intervention in the private economic activity that would result if Article 13 were interpreted to require Members to ensure that private standards comply with all the SPS disciplines seems inappropriate.[674] In a market economy, the level of government intervention in normally competitive behaviour is limited to what is necessary to pursue public policy objectives such as consumer protection and prevention of anti-competitive practices. In such a context it is doubtful whether preventing food companies from responding to consumer demands for a higher level of food safety falls within these limits. Also, a government must take account of the fact that firms use private standards as a tool of product differentiation with a view to capturing and securing new segments of high-quality food market made up of affluent consumers with more sophisticated and varied tastes, mostly in advanced economies. Accordingly, when public health is at risk firms will not hesitate to implement their own standards to avoid being perceived by their customers as skimping on efforts to protect the health of the end consumers, even if such standards exceed existing domestic regulation, international standards or sound scientific evidence. In short, it would be unreasonable to demand that a WTO Member dismiss the significance of the corporate responsibility of market actors. All this considered it would be largely intrusive and ineffective that the Members' governments and the SPS Committee can interfere in the private contractual relations and restrict the use of private standards in commercial transactions through regulation, unless the use of such standards conduces to deceptive or anti-competitive practices. Still more, what might individual Members do about market actors having an ever-growing transnational reach? In this respect, considerable would be the

[673] As held by the Appellate Body in *US – Gasoline*, a treaty may not be interpreted in a way that clauses would be reduced to redundancy or inutility (United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body circulated 29 April 1996, WT/DS2/AB/R, at para. 21).

[674] In a document submitted to the GATT Secretariat in 1981, the US reported that it had complied with obligation under Article 4.1 of the Tokyo Standards Code – whereby "Parties shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories comply with the provisions of Article 2" – simply through adding in Section 403 of the Trade Act of 1979 the following clause: "(t)he President shall take such reasonable measures as may be available to promote the observance by State agencies and private persons […] of the procedures and provisions of the Trade Act of 1979". Furthermore, the US offered some examples of measures taken pursuant to Section 403. For instance: "[…] the Office of the U.S. Trade Representative, in Washington, has circulated a letter to the Governors of the fifty states, signed by the U.S. Trade Representative, informing the state Governors of the obligations of the Standards Code. The Department of Agriculture, also, is directly cooperating with state departments of agriculture. The Department of Commerce has published a pamphlet summarizing the provisions of the Standards Code and the relevant portions of the Trade Act of 1979 and is distributing this pamphlet as widely as possible to state agencies and private organizations. The Department of Commerce also sponsored a 'Conference on International Standardization Issues' which was attended by representatives from dozens of U.S. private standards and certification bodies. Furthermore, the Departments of Commerce and Agriculture are presently drafting a set of Voluntary Guidelines for state agencies and private persons on procedures that might be used in developing and promulgating standards that will comply with the provisions of the Standards Code" (WTO, Information on Implementation and Administration of the Agreement, TBT/1/Add.1/Suppl.3, 20 February 1981).

difficulties in defining the limit of the reasonable measures that national governments might take in relation to transnational entities.[675]

Second, a process of systematic interpretation that imposes to the WTO Members to ensure that within their territories any SPS-type requirements that are adopted and implemented by private entities comply with the SPS disciplines would result in a set of absurd and disproportionate requirements on non-governmental entities, if these were to include market operators as well. This 'substitution approach' proves in fact to be problematic and there appears to be no textual or contextual support for extending the scope of the obligations to entities that are not the WTO Members themselves. Apart from the arguments referred to above about the international legal nature of the WTO Agreements, it is doubtful whether some of the obligations in the SPS Agreement may be complied with by non-governmental entities. For instance, transparency, technical assistance, or special and differential treatment obligations are arguably outside the scope of conduct of those entities and apply only to SPS measures that are applicable generally.[676]

Third, it is significant to observe comparatively that, all the difficulties above were timely recognised during the Uruguay Round. From the preparatory work of the provision in Article 3.1 of the TBT Agreement – tantamount to the third sentence of Article 13 of the SPS Agreement – in particular appears that the EC and the US coined the wording "take such reasonable measures as may be available" as a 'best-endeavours' obligation.[677] This means that this obligation is one of conduct rather than one of result. Consequently, the WTO Members are not required to ensure actual compliance by non-governmental bodies, but only to take such reasonable measures in order to ensure compliance. Because of the discontent caused by this species of obligation, the negotiators of the TBT Agreement agreed on a code of conduct, annexed to the Agreement, to which bodies other than the central government – be they local, regional or non-governmental bodies – should adhere. No equivalent code of conduct was annexed to the SPS Agreement.

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[675] It could be useful to refer to the same wording "such reasonable measures as may be available" that is found in Article XXIV:12 of the GATT. The latter provision has been interpreted as requiring a "serious, persistent, and convincing effort" by a Member to ensure compliance (Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Report of the GATT Panel adopted 18 February 1992, DS17/R - 39S/27, at para. 5.37). Nonetheless, the GATT panel in *Canada – Gold Coins* pointed out that "Article XXIV:12 applies only to those measures taken at the regional or local level which the federal government *cannot control* because they fall outside its jurisdiction under the constitutional distribution of competence" (Canada – Gold Coins, Report of the GATT Panel adopted 17 September 1985, L/5863, at para. 56, emphasis added). In that case the panel concluded that, "Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties" (*ibidem*, at paras. 63-64). Hence, Article XXIV:12 serves as an exception to the general principle that a party to a treaty may not invoke its internal law as justification for not performing its treaty obligations (see Article 27 of VCLT).

[676] See SPS Agreement, Annex B, paragraph 1 and footnote no. 5.

[677] See GATT 1947, *Code of Good Practice for Non-Governmental Standardizing Bodies: Proposal by the European Economic Community*, 28 July 1989, MTN.GNG/NG8/W/49; and, *Id.*, *Improved Transparency on Regional Standards Activities in the GATT Agreement on Technical Barriers to Trade: Proposal by the United States*, 5 July 1988, MTN.GNG/NG8/W/49 - TBT/W/112.

Accordingly, for all these reasons, "[w]hile 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"[678]. Reference to complying with the relevant provisions of the SPS Agreement by non-governmental entities in the third sentence of Article 13 does not intend to impose actual obligations on such entities. It is not that these entities are obliged to do, or refrain from doing, something; rather, it is the WTO Member that would assume attribution for the acts of non-governmental entities. In such a context, it is arguably sufficient that a Member provides information and create incentives for private sector entities at the national and transnational levels to respect the provisions of the SPS Agreement that are of relevance for them.[679] Non-compliance with the disciplines contained in the SPS Agreement by a non-governmental entity does not entail necessarily the responsibility of a Member under Article 13; in other words, the second element of State responsibility, i.e., the breach of an international obligation, is not met *per se* when an inconsistent act of a non-governmental entity has been attributed to the Member concerned. Rather, only a failure by a WTO Member to take the required reasonable measures would be challengeable.

21.2. Not to require or encourage inconsistent action

In addition to taking positive measures, pursuant to the fourth sentence of Article 13 the WTO Members are required

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

As an initial matter, this sentence attempts to foreclose a scenario where other than central government bodies and non-governmental entities infringe the SPS disciplines as a

[678] D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 26.

[679] Reasonable measures to could encourage compliance are, for instance: involving all interested parties in consultations and informative sessions as to the relevant products and processes that are of concern under the SPS Agreement (and other relevant agreements); providing specific training on the SPS disciplines to private entities; encouraging behaviour from the private sector to be consistent with the provisions of the agreement; entering into memorandums of understanding with private sector bodies in which these bodies commit to comply with the disciplines of the agreement; and providing financial incentives for private sector bodies to encourage compliance by private corporations. Additional means might include the updating of the existing SPS regulations in a way that reflect the latest state of science; nonetheless, this could not be always feasible as this should be based on international standards or scientific evidence. Moreover, Members must be vigilant about not allowing the use of private standards for the pursuance of certain illegitimate goals; hence, for instance, competition laws must apply to instances of vertical integration, e.g. when a market operator, which belongs to a conglomerate, requires fulfilment of a private standard that another entity of the same business group is able to meet. Lastly, when business decisions rest on private standards and do not conform to the relevant provisions of the agreement, WTO Members must be vigilant that consumers are not misled into believing that, through certain private standards, the products sold by such firms are safer than others. For discussion of these and other possible ways of action see, D. Gascoine and O'Connor & Company, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at para. 11; D. Prévost, *Private Sector Food-safety Standards and the SPS Agreement*, cit., at 26; S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit., at 28; and, EU, *Private Food Standards and their Impacts on Developing Countries*, cit., at 34-35.

result of Members' positive action of encouraging or requiring them to act inconsistently with the Agreement. In other words, such a negative obligation "prohibits Members from circumventing the Agreement by relying on private action"[680]. Here, again, attribution requires that WTO Members undertake a positive conduct in the form of encouraging or requiring an inconsistent action. These conducts are different in the degree of compulsion. "Encouraging" does not suggest compulsion to carry out an act but, if it does so, the entity concerned will be better off.[681] In turn, "requiring" does suggest an element of compulsion to the effect that there is no possibility to avoid compliance with Members' order without receiving a sanction or not being able to exercise a right.[682] The form of attribution set out in the fourth sentence of Article 13 resembles closely the one set out in Article 8 of the ILC Articles on State Responsibility, which we have recalled earlier. Hence, particularly, when a Member encourages or requires a non-governmental entity to act inconsistently with the provisions of the SPS Agreement, this act, which is in principle attributable to the entity itself, is in reality an act of the WTO Member because the entity in question acts under the instructions or upon the giving of bounties in exchange for the inconsistent conduct.

21.3. To rely on private service suppliers compliant with the SPS disciplines

The fifth and last sentence of Article 13 makes provision for a rule of responsibility in respect of acts by non-governmental entities that supply services to a WTO Member for the implementation of domestic SPS measures. Literarily,

> "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".

It is submitted that extending the term 'implementation' as set forth in the sentence above to standard-setting activities is troublesome, because the SPS Agreement does not regulate the way in which standards are created.[683] Indeed, what is the subject of regulation under the Agreement are SPS measures, the basis of which are international standards or, else, scientific evidence. Moreover, implementing SPS measures suggests the prior existence of such measures. Therefore, setting a standard appears to fall outside the meaning of implementation of an SPS measure. Accordingly, the fifth sentence of Article 13 does not appear to address

[680] V. Röben, *Article 13*, in: R. Wolfrum, P.T. Stoll, and A. Seibert-Fohr (eds.), *WTO - Technical Barriers and SPS Measures*, Leiden: BRILL, 2007, 540-589, at 543. A similar provision is contained in Article 11 of the Agreement on Safeguards, pursuant to which WTO Members undertake the limited obligation to abstain from encouraging or supporting "the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1" (Japan – Restrictions on Imports of Certain Agricultural Products, cit., at para. 5.2.2.2).

[681] See Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at para. 10.48.

[682] See United States – Certain Country of Origin Labelling (COOL) Requirements, Report of the Panel circulated 18 November 2011, WT/DS384/R, WT/DS386/R, at paras. 7.389-7.392.

[683] For a different opinion see, V. Röben, *Article 13*, cit., at 543 (stating that, for purposes of Article 13, "(i)mplementation (of SPS measures) comprises both the setting and enforcement of standards").

the setting of standards which on formation may, or may not, be the basis of future SPS measures, but rather the implementation of existing SPS measures.

The provision under discussion does not require necessarily that the government delegates its inherent powers or authority to enact SPS measures to a non-governmental entity; the mandate of the contract may indeed be restricted to undertaking a scientific analysis or risk assessment, whilst the government may retain the ultimate power to adopt and implement binding SPS measures. However, the adoption of an SPS measure may rely upon the results of the scientific analysis carried out by a non-governmental entity, even more on the possible recommendations thereto. Thus, under Article 13 the responsibility of a WTO Member for inconsistency with the SPS Agreement is engaged to the extent that the Member concerned fails to ensure that their service suppliers comply with the provisions of the SPS Agreement, and to the extent that such acts are actually inconsistent with any of the obligations of the Agreement.

21.4. Considerations on WTO Members' constitutional systems and the direct effect of WTO law

In the current state of art of the WTO treaty system, any application of the SPS Agreement to non-governmental private entities would have to take place through the mediation of the WTO Members, unless the Agreement was to be recognised as having direct effect. Particularly in EU law the 'direct effect' – or 'direct applicability' – means that a legal provision "not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"[684]. This is the case if a provision contains a "clear and unconditional obligation"[685]. Under such circumstances, directly effective international rules takes precedence over domestic law, meaning that these rules "not only render automatically inapplicable any conflicting provision of current national law but […] also preclude the adoption of new national legislative measures"[686]. Hence, imposing WTO rules – or guidelines and working criteria – directly to private entities without any governmental intervention by the WTO Members having jurisdiction on these entities would require the direct effect of WTO law.

That a WTO agreement defines detailed rights and obligations does not necessarily mean that it is directly applicable.[687] Since its inception the WTO legal system has been in fact neutral in this respect, leaving it to its Members to decide on the direct effect of its rules in their own domestic legal orders. The WTO panels and Appellate Body have consistently maintained this position in their reports. In particular, the panel in *US – Sections 301-310 of the Trade Act* stated that, "[u]nder the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements,

[684] *Van Gend & Loos*, Judgment of 5 February 1963, Case 26/62, ECR 1969, 1.
[685] *Ibidem*, at para. 12.
[686] *Simmenthal*, Judgment of 9 March 1978, Case 106/77, ECR 1978, 629, at para. 17.
[687] In this sense see, M. Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, (2001) Journal of World Trade 35: 167-186.

obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals"[688]. Significantly, Footnote No 661 in the same panel report clarified the following: "[w]e make this statement as a matter of fact, without implying any judgment on the issue. We note that whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute. The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue".[689]

Accordingly, under the constitutional systems of most Members the WTO law does not produce any direct effects. In the Uruguay Round the EC and the US strongly prevented the invocation of WTO law before domestic courts by expressly denying any direct effect in their respective ratification acts. As far as particularly the EC is concerned, Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the EC, as regards matters within its competence, of the agreements negotiated in the Uruguay Round clearly provided that, "[…] by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts"[690]. The ECJ has historically shown a more assertive attitude by debating whether to recognise the direct effect of WTO disciplines within the EU legal order. Early ECJ case law denying the direct effect of GATT rules was mainly based on two arguments: on the one hand, the negotiating history of the GATT, which was conceived as a trade and diplomatic tool rather than as a judicial one; on the other, the flexible and imprecise nature of the Agreement, which is incapable of conferring rights that individuals can invoke in domestic courts.[691] After the WTO was established, the ECJ revaluated its prior arguments in light of the more rule-oriented WTO system. Nonetheless, the ECJ relied on concerns over the lack of reciprocity – that is, none of the EU major trading partners gave in turn direct effect to WTO law – and upheld its prior case law denying direct effect to WTO law.[692]

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[688] United States – Sections 301-310 of the Trade Act of 1974, cit., at para. 7.72.

[689] On this see, P. Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, (1997) Common Market Law Review 34: 11-58; J. Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question worth Revisiting*, (1998) European Journal of International Law 9: 626-657.

[690] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations, OJEU L 336, 23 December 1994, at 1.

[691] International Fruit Co. v. Produktschap voor Groenten en Fruit, Case C-21/72, [1972] ECR 1219, 1224.

[692] In *Portuguese Republic v. Council* the ECJ ruled as follows: "[a]s regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the

Recognising the existence of rights directly on private parties is generally believed to hamper the ability of WTO Members to defend domestic interests by undermining the flexibility that underpins the whole multilateral trading system.[693] It is common ground, moreover, that some of the WTO Members, which are among the most important commercial partners of the EU, have concluded from the subject-matter and the objectives of the WTO legal system that the covered agreements are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.[694] Admittedly, as the ECJ remarked, "the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must *ipso facto* be distinguished from agreements concluded by the Community may lead to disuniform application of the WTO rules"[695]. In conclusion, imposing provisions of WTO law to private entities without any governmental intervention would require a direct effect that the WTO law today does not have.

22. Where does the emergence of non-State sites of regulation leave the WTO legal system?

In conclusion, with a system of far-reaching international agreements and an effective dispute settlement mechanism, the multilateral trading system as embodied in a full-fledged international organisation could be considered one of the most vibrant branches of public international law.[696] Yet, the proliferation of private standards is said to challenging the present and future role of the WTO as the main forum through which trade issues related to food safety are addressed, and the utility of food standards inter-governmental diplomacy. Private standards as specific trade concern raised a number of issues in relation to market access predictability, development, and consistency with the WTO legal system. While critics argue that private standards need to be 'reigned in', from the analysis conducted in this chapter it seems that the WTO has little scope to act.

In consideration of the regulatory philosophy that underlies international trade law, the SPS Agreement could not be said to apply to private standards. On the one hand, the scope of the concept of SPS 'measure' in Article 1.1. extends exclusively to acts adopted by the WTO Members. On the other, private (commercial) entities operating in the food chain cannot be

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principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community […]" (Portuguese Republic v Council of the European Union, Case C-149/96, ECR [1999] I-8395, at para. 42).

[693] In this sense, see A. Alemanno, *Judicial Enforcement of the WTO Hormones Ruling within the European Community: Toward EC Liability for the Non-implementation of WTO Dispute Settlement Decisions?*, (2004) Harvard International Law Journal 45: 547-561.

[694] For the EU see, Léon Van Parys NV, 1 March 2005, Case no. C-377/02, at para. 37. See also, WTO, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., at para. 10.

[695] Portuguese Republic v. Council, cit., at paras. 42-45.

[696] See J. Wouters, A. Marx and N. Hachez, *In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law*, cit.

said to be those 'non-governmental entities' that fall under the consideration of Article 13 of the SPS Agreement in the absence of a sufficient level of government involvement. Also, there is little doubt that the term 'standard' as it is defined in the SPS Agreement does not have the same scope as it does in the parallel provisions of the TBT Agreement, such that the TBT disciplines for the preparation, adoption and application of voluntary standards cannot be a possible way forward in addressing private standards within the WTO.

From a different perspective, to the extent that actions by private entities cannot be bound by the WTO agreements, an act – or omission – that is carried out by a private entity in the territory of a Member and that constitutes a breach of WTO obligations is in fact to be considered a conduct of that Member and therefore entails its international responsibility when the latter allows private entities to carry out activities normally prohibited in order for its own benefits to circumvent stringent WTO engagements. Under the 'catalyst act' theory private conduct is an event that is external to the act of State's organs but that serves as condition for the existence of a breach of an international obligation. In such case, nevertheless, it is difficult to discover a responsibility for violation of one of the obligations prescribed in Article 13, as well as one of the substantive obligations under Articles 1 through 11 of the SPS Agreement, because the sole subject of those obligations are and remain the WTO Members. Is there any scope for a non-violation complaint pursuant to Article XXIII:1(b) of GATT? In this respect we recall the words of panel's report in *Japan – Film*: "[a]s 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. […] this 'truth' may not be open to question […]"[697].

Overall, in the current state of art of the WTO treaty system, any application of WTO law to non-governmental private entities would have to take place through the mediation of the WTO Members. Nonetheless, despite the absence of any effective discipline over potentially adverse consequences of private conduct, private standards warrant attention as they have a large impact on the way global value chains operate and finally on international trade in agri-food products. As Gretchen Stanton pointed out, "[o]ne thing is clear: the trade implications of private standards are too great for this issue to quickly disappear from the agenda of the SPS Committee"[698].

The discussions inside the SPS Committee would, in theory, bring some relief to those WTO Members concerned with the proliferation of private standards. Yet, this requires an active role of developed countries, which makes it difficult to reach a shared position with the other, especially developing country Members. As can be inferred from the divergent views

[697] Japan – Measures Affecting Consumer Photographic Film and Paper, cit., at para. 10.12.

[698] G.H. Stanton, *Private (Commercial) Standards and the SPS Agreement*, Remarks at the Round Table on 'The Role of Standards in International Food Trade', Cosmos Club, Washington DC, 24 September 2007, at: http://www.agritrade.org/events/documents/PrivatestandardsandSPSAgreement.doc, at 6.

of Members on private standards, it is unlikely that consensus will be reached; consequently, the sought-after certainty and practical solutions will stay amiss. Hence, only a well-informed dialogue between public and private standards-setters could successfully address the challenges posed by private standards without having to resort to long technical debates in the context of the SPS Committee.

Whether private standards should be held to the same disciplines to which WTO law holds official food safety regulation leads to the question about whether it would be desirable to bring some kind of discipline to the development and implementation of private voluntary standards that relate to sanitary and phytosanitary matters. This means to consider some key legal and policy aspects, such as: what issues should be left for the private sector to determine and what needs oversight or intervention by governments? In which areas is there a need for collaboration to meet the needs of food industry and government responsibilities?[699] Nonetheless, the very issue that underlies the previous concerns is whether private standards are legitimate tools of regulation. At the heart of the on-going debate about the role and implications of private food safety standards on the structure and *modus operandi* of global agri-food markets are therefore questions about their legitimacy, both in general and in comparison to the standards elaborated by established international organisations in the area of food safety, especially where public regulation has traditionally been the dominant institution. This considered, the proliferation and growing pervasiveness of private standards is said to challenging the present and future role of the WTO as the main legal and institutional forum where trade issues related to food safety are addressed, and the utility of food standards inter-governmental diplomacy. The objective of the next chapter is to address these legitimacy questions.

[699] These concerns are expressed in OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit.

CHAPTER FOUR

CONSISTENCY OF PRIVATE FOOD SAFETY STANDARDS WITH INTERNATIONAL STANDARDS-SETTING: CONSEQUENCES FOR (DEMOCRATIC) LEGITIMACY

> "It is generally acknowledged that due to their transboundary dimension and their potential widespread impact on human health, food safety challenges demand close international cooperation and global governance. Following in the wake of a clear trend in international law and practice, we are now witnessing the emergence of a general principle on food safety, […] which requires that international standards and guidelines be voluntary complied with, legal obligations be fulfilled in good faith and all stakeholders at different levels play their proactive role in enhancing the international community's preparedness and capacity of response to food safety threats"[700].

23. Transnational private regulatory governance: A case in point for legitimacy

The continuing proliferation of private standards – aside other forms of transnational private regulatory governance – challenges the traditional conceptions of legal authority and public regulation of the economic activity. Standards are generally valuable tools in promoting international trade by assuring trading partners of the attributes that the products they sell possess. Regulating a segment of the market through standards is legitimately within the hands of market operators, such that anyone can create a new standard and, in turn, anyone can decide whether or not to adopt it. Yet, when standards are made legally binding through their adoption by governments or when they are adopted widely enough that they become *de facto* market requirements, their impact on those who are obliged *de jure* or *de facto* to comply so as to gain market access becomes an issue. Such a situation is exacerbated in the case of standards that source from market actors and in a largely independent way from regulatory authorities and from recognised standards-setting bodies. Indeed, as business-driven initiatives, private food safety standards are global in reach, as their applicability is not *a priori* limited to a given territory, and are of a voluntary nature, in the sense that they are not binding by virtue of law. Nonetheless, private standards have the ambition to be regulatory in character, even though not in the traditional sense. This is not simply to say that they aim at creating niche markets where they could be applied, even though this could have

[700] S. Negri, *Food Safety and Global Health: An International Law Perspective*, cit., at 16.

an impact – either positive or negative – on a number of constituencies, as well as on a number of other policy fields. In fact, unlike other non-State sites of governance, the ultimate goal of private standards is to be 'authoritative' in the sense of establishing rules with a sufficient 'pull toward compliance' so as to create an obligation to comply on the parties which sign on and to affect effectively the situation and behaviour of all the parties concerned. Indeed, once a party signs on, it becomes subject to a governance regime that resembles more State regulation than standards of voluntary bodies that can be abandoned with little consequence. This is so although private standards lack the regulatory capacity to back up that obligation with enforceable rules.[701] In other words, having spread throughout the agri-food value chain, having become imposed contractually in producer-retailer relationships, and increasingly conditioning the access of food products to distribution channels, private food safety standards end up 'governing'[702] the food sector.

Because private standards are not pure self-regulation, but regulation by private parties imposed on a relatively wide range of other parties with potentially far reaching consequences, and because such standards have the huge impact on the structure and *modus operandi* of global agri-food value chains we have seen in Chapter Three, a number of theoretical and legal criticisms have been made. The fact that they are developed by non-governmental actors outside of any legal mandate and public scrutiny and following unilateral procedures, together with the fact that they may run counter to domestic and international legal rules, emphasises the functional, normative and democratic challenges that the emergence of private sites of regulation at the transnational level poses in fields where public regulation has been the dominant institution. These challenges – in regard to how private regulation takes on regulatory effects and how it can be kept accountable to whom – are commonly articulated in terms of 'legitimacy'.[703] Put it differently, private actors are said to

[701] See T. Franck, *The Power of Legitimacy among Nations*, New York: Oxford University Press, 1990, at 24. In this same sense see, S. Bernstein and B. Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, (2007) Regulation and Governance 1: 347-371; B. Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, (2002) Governance 15: 502-529; and, M. Levi and A. Linton, *Fair Trade: A Cup at a Time?*, (2003) Politics and Society 31: 407-432.

[702] See N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, (2011) Journal of International Economic Law 14: 677-710, at 678-679 (concluding that, private food safety standards-setters are in fact "governing entities"). On the acquisition by private entities of the ability to 'govern', and on what it implies see, most notably, R.B. Hall and T. Biersteker (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge: Cambridge University Press, 2002; I. Hurd, *Legitimacy and Authority in International Politics*, (1999) International Organization 53: 379-408; T. Büthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton: Princeton University Press, 2011; J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press, 1979, at 3. In light of this, some place the discourse about private standards in the field of 'regulatory governance' instead of international law. Differently, in a psychological perspective see, T.R. Tyler, *Why People Obey the Law*, Princeton: Princeton University Press, 2006.

[703] In the regulatory literature legitimacy concerns are often referred to as 'problem of compliance': see, e.g., J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, (2008) Regulation and Governance 2: 137-164, at 141-144; and, K. van Kersbergen and F. van Waarden, *'Governance' as a Bridge between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy*, (2004) European Journal of Political Research 43: 143-171.

lack the legitimacy to exercise regulatory authority in the public realm, especially in relation to politically sensitive public policy issues such as food safety.

Yet, while emphasising the impact that private standards have on international trade, the international legal literature and debate has so far given less attention to whether the regulatory function exerted by private actors at the transnational level could ever produce legitimate outcomes. Hence, apart from the issue of market access we have considered in the previous chapter, from an international law perspective the key questions here are whether sites of non-State food safety regulation are legitimate and how legitimacy in relation to them could be assessed. There is no clear or obvious answer to these questions. In fact views on legitimacy issues vary widely, depending entirely upon the perspective one takes to assess the legitimacy and, more widely, the legal nature of private regulatory norms. To the extent that private actors are exercising functions hitherto generally considered to be public functions, it stands to reason to expect that they be held to the same standards of legitimacy as their public counterparts. In this respect, in much of the current debate there is an almost automatic tendency to consider private standards as having less legitimacy than regulation by governmental authorities.

Following that, the argument has been raised that the private standards-setting operations create most difficulties about their relationship with established governmental and inter-governmental institutions in the regulation of food safety. Traditional 'command-and-control' State regulation has been criticised for being ineffective, inflexible and neglecting the responsibility at different levels – both consumers and food businesses – this way giving non-State actors the possibility to emerge and to serve the need to fill governance gaps left open by national and international institutions. In this respect, the rise of private standards as the predominant form of regulatory governance of agri-food value chains has been seen as challenging the legitimacy of governmental authorities in areas that have historically been the preserve of public regulation.[704] In particular, apart from challenging the position of the WTO in ensuring that domestic SPS measures comply with multilaterally agreed rules, significant anxiety has been expressed that the rapid coming to the fore of allegedly illegitimate private food safety standards as the predominant form of food safety governance in global value chains would end up undermining and marginalising the legitimacy of the science-based and multilaterally-agreed international food safety governance through the CAC and other relevant international standards-setting bodies.[705] Hence, from 2008 the issue of private food standards has also been discussed within the Codex.[706] Here, as already at the WTO level, a

[704] See, in this sense, J. Black, *Critical Reflections on Regulation*, cit.

[705] We remember that, since the development of internationally accepted standards that occurr through OIE and the IPPC Secretariat are not directly concerned with food safety, they are not addressed in this chapter.

[706] Following the discussions of the 60th and 61st sessions of the Executive Committee of the CAC in 2008 (*Report of the Sixtieth Session of the Executive Committee of the Codex Alimentarius Commission*, 30 June - 5 July 2008, ALINORM 08/31/3; *Report of the Sixty-First Session of the Executive Committee of the Codex Alimentarius Commission*, 30 June - 4 July 2008, ALINORM 08/31/3A) and of the 31st session of the CAC (Report of the Thirty-First Session of the Codex Alimentarius Commission, 30 June - 4 July 2008, ALINORM 08/31/REP), Members agreed to charge FAO/WHO with the preparation of a paper on private food safety standards for consideration at the 32nd session of CAC in July 2009 (Report of the Thirty-Second Session of the

number of developing country Members was the predominant 'voice' behind these concerns, so adding fuel to the already huge debate about the potential detrimental effect of private food safety standards. In relation to this, they demanded clarification of how private food safety standards relate to Codex standards and sought guidance from the concerned international institutions on the current and expected impact of such standards on the rules that govern international standards-setting.

These "post-modern anxieties"[707] are seen as evidence of the struggle that international law is making to maintain a regulatory grip of global realities while proliferating private sources of regulation are challenging existing conceptualisations of regulation. We have been used to well-defined public regulatory forms, which we have come to trust as legitimate, even though not properly effective. Public regulation is considered legitimate because of the democratic character of decision-making procedures on rules, implementation, monitoring and enforcement that are meant to safeguard the proportionality of rules and measures, inclusion of all relevant interests and redress procedures. Most importantly, however, public regulation is legitimised through its roots in decisions taken – through representatives – by the general public. When we come at the international level, legitimacy chains become longer and more loosely defined; yet, it is always in the hand of elected governments the appointment of bureaucrats that represent them in international organisations and negotiations. Actually, this is not the case of private entities against which such a trust may not be unconditionally extended; rather, there is unease when attempting to define the conditions under which they may be considered as legitimate. That one cannot simply superimpose functional equivalents of State legitimacy structures is due, first and foremost, to the awareness that radically different is the 'setting and context' in which private norms are developed and adopted.[708] Indeed, while public regulation almost naturally directs attention to the 'democratic' character of its legitimacy, this could be hardly referred to or associated with private regulation. After all, private actors are not legitimised directly through elections or indirectly through the liberal principle of representation. Nonetheless, instead of abandoning democratic principles when entering the private sphere, we argue in favour of introducing alternative criteria for assessing the democratic legitimacy of private food safety regulation.

Hence, following much of the work done by lawyers in the global governance realm, which has single out legitimacy as a potentially effective lever to scrutinise the legal nature of evolving transnational regulatory structures, the present chapter proposes an inquiry into the democratic legitimacy of these standards, with reference to a range of governance institutions

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CAC, 29 June - 4 July 2009, ALINORM 09/32/REP). Yet at that session no conclusion was reached. CAC agreed that further work was needed to analyse the role, cost and benefits of private standards especially as far as the impact on developing countries was concerned; in addition, CAC agreed to monitor the developments on private standards on the basis of discussions taking place in parallel at the WTO level, and to work in close cooperation with OIE and the IPPC so as to define a common strategic position on this matter.

[707] M. Koskenniemi and P. Leino, *Fragmentation of International Law: Post Modern Anxieties*, cit. See also T. Porter, *Transnational Private Regulation and the Changing Media of Rules*, (2012) German Law Journal 13: 1508-1524.

[708] See P. Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"*, cit.

playing a prominent role in today's agri-food system. To this end we need to recall the motivations for the elaboration of these standards and the governance structure behind their elaboration we have analysed in Chapter Two, in view of addressing what has been called "the puzzle of legitimation"[709] of sites of non-State regulation. Firstly, however, we address the issue of why the thorny issue of legitimacy takes on a particularly normative significance in relation to sites of private regulation, even from an international law perspective.

24. Why is legitimacy so relevant?

Legitimacy is at the heart of the relationship between a regulator and those it seeks to regulate. Generally, legitimacy expresses "the sense that we are governed by the right institutions, the right people, and the right norms"[710]. It is of such great importance to a site of regulation because it is one of the main drivers which leads to support – whether active or passive – for that site.[711] While governmental authorities are able to garner support and ensure compliance with rules through the authority of public law, private sites are generally unable to do so. It is for these reasons that legitimacy is paramount to the effectiveness of private sites of regulation, especially in the current configuration of cross-border economic governance. Indeed, in an environment that is characterised by the absence of enforcement power by way of hierarchical relationships and where authority is most often horizontal or 'networked',[712] the question of legitimacy of the entities exerting regulatory functions is a crucial element in the effectiveness of a norm and in the level of compliance with that norm by its addressees.[713] In these "polycentric regulatory regimes"[714], consisting of a plurality of both subjects and actors claiming authority on a particular subject matter and each issuing their own norms as to it, 'regulatory competition' is to an important degree decided by the public's perception of the legitimacy of both the norms and the entities issuing those norms. As a result, in such a

[709] D. Casey, *Three Puzzles of Private Governance: Global GAP and the Regulation of Food Safety and Quality*, University College Dublin Working Papers in Law, Criminology and Socio-Legal Studies Research Paper no. 22/2009, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515702, at 3.

[710] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 679. Similarly see, D. Casey, *Three Puzzles of Private Governance: Global GAP and the Regulation of Food Safety and Quality*, cit., at 16 ("I define legitimacy […] as either being justified as or, perceived as being 'desirable, proper, or appropriate' in a specific context").

[711] See M.C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, (1995) Academy of Management Review 20: 571-610, at 575.

[712] On the re-allocation of effective 'governing authority' between State systems and other "spheres of authority" see, J. Rosenau, *Governance in a New Global Order*, in: D. Held and A. McGrew (eds.), *Governing Globalization: Power, Authority and Global Governance*, Cambridge: Polity Press, 2002, 70-86, at 76-78 (arguing that contemporary world relies upon "a fragmented and multicentric governance configuration at the global level"); B.G. Peters and J. Pierre, *Governance, Accountability and Democratic Legitimacy*, in: A. Benz and Y. Papadopoulos (eds.), *Governance and Democracy: Comparing National, European and International Experiences*, London: Routledge, 2006, 29-43, at 37-38.

[713] For the opposite view see, R. Mayntz, *R. Mayntz, Legitimacy and Compliance in Transnational Governance*, MPIfG Working Paper no. 2010/5, at: http://www.mpifg.de/pu/workpap/wp10-5.pdf, at 13-15 (arguing that the role of legitimacy in compliance is overstated and rests more on habits).

[714] J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit.

context regulators "must strive for legitimacy as a means to impose their own norms as those regulating the relevant subject matter"[715].

As far as global food safety standards-setting is concerned, the legitimacy issues deserve particular attention due to several factors. First, as illustrated in Chapter Two, food safety definitely constitutes such a polycentric governance regime, characterised by a large number of regulatory entities, of a public, private, and even hybrid (public/private) nature, and of a local, national, regional, or transnational dimension. All these constituencies compete with one another for a "regulatory share"[716], and therefore should be particularly attentive to their legitimacy. Second, food safety is a highly complex field, such that issuing norms in this area involves a wealth of issues. The previous chapter has illustrated that among the most important of these issues are the impact private standards have on the viability of smallholders, especially in less developed countries, and the barriers to trade these standards may create. Other major food safety-related issues include consumer health, environmental consequences of production methods, and the human welfare of food workers. Hence, identifying the 'appropriate' food safety regulation is not immediately or self- evident. The legitimacy discourse in the food safety regime is thus particularly intricate, and deserves close consideration.

24.1. Analytical approaches to legitimacy

In attempting to disclose the terms of the legitimacy debate and provide the reasons for its relevance for food safety regulation, two competing approaches to the legitimacy of a norm may be disentangled: a descriptive (empirical) one and a prescriptive (normative) one. As Julia Black observed, "[i]t is the empirical questions that we need to ask before we can approach the normative"[717], since they are logically prior questions. The descriptive approach identifies empirically whether a site of private regulation is legitimate in terms of 'acceptance' in reality.[718] In this sense, from a socio-legal perspective, legitimacy is "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions"[719]. To this, some add that "these actions […] must be justifiable to relevant audiences"[720]. For the sake of

[715] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 681. In the same sense see, E. Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, (2008) Chicago Journal of International Law 8: 513-534.

[716] J. Black, *Legitimacy and the Competition for Regulatory Share*, LSE Law, Society and Economy Working Paper Series no. 14/2009, at: http://www.lse.ac.uk/collections/law/wps/WPS2009-14_Black.pdf, at 15.

[717] J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 144.

[718] See A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, (2006) Ethics and International Affairs 20: 405-437, at 405; and, M. Zürn, *Global Governance and Legitimacy Problems*, (2004) Government and Opposition 39: 260-287, at 260-261.

[719] M.C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, cit., at 574.

[720] S. Bernstein and E. Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, (2008) Journal of International Economic Law 11: 575-608, at 582 (concluding that,

our purposes, it is particularly relevant that dimension of descriptive legitimacy that is called "pragmatic legitimacy"[721]. This reflects the consideration that legitimacy requires recognition of the capacity of a private site of regulation to benefit those that are regulated and to be accepted as an authoritative arena in which to develop standards;[722] hence, the legitimacy of private standards can be assessed in terms of the extent to which they have traction in the marketplace. In other words, for a regulatory norm to be legitimate it must be accepted by those to whom it is addressed. The underlying rationale for acceptance and, therefore, the legitimation of a regulatory norm lie in the existence of congruence between the norm and an actor's "beliefs or expectations or […] interests"[723].

Yet, it has been observed that, while "market uptake indicated momentum for legitimacy, […] currently no way exists to determine by whom a standard needs to be accepted, indicators of what constitutes 'sufficient reach', or tools to evaluate a standards' market impact"[724]. International law is not definitive on the requirements for recognition of international standards. In addition, a standard may be simply inappropriate or irrelevant for certain countries or region. Still, large marketing budgets or more attractive branding may also advantage some standards, thus creating survival of the fittest conditions that have little

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"to be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society").

[721] See M.C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, cit., at 578-579. The author offers a comprehensive schema to analyse the legitimacy of a site of private governance, which includes two additional pillars of legitimation. On the one hand, legitimacy may be granted because there is perceived congruence between a site of governance and a legitimacy community's normative evaluations ('moral legitimacy', *ibidem*, at 579-580). On the other hand, the legitimacy granted to a site of non-State governance may be cognitively based ('cognitive legitimacy', *ibidem*, at 582-583). Consequently, legitimacy may be granted to a site of governance for a multiplicity of reasons and by a multitude of legitimacy communities. This means that it may not be possible for a site of non-State governance to have complete legitimacy. Legitimacy demands are not homogenous. While there may be congruence, and indeed a certain degree of compatibility between certain legitimacy demands, it is equally likely these demands will lead to contestation and a "legitimacy dilemma" for the site of governance, that is, what they need to do to be accepted by one part of their environment is contrary to how they need to respond to another (J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 144-145). Where a legitimacy dilemma develops, a site of governance will have to make a strategic decision as to how it responds to and manages the competing legitimacy demands. For discussion see also, C. Oliver, *Strategic Responses to Institutional Processes*, (1991) Academy of Management Review 16: 145-179, at 159.

[722] On the ability of a norm to provide utility-based incentives to its addressees see, D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, (1999) American Journal of International Law 93: 596-624, at 603.

[723] J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 144. In this respect see also, T. Franck, *Legitimacy in the International System*, (1988) American Journal of International Law 82: 705-759, at 711 ("In place of coercion, there is only the claim to compliance, based on social entitlement, which a legitimate rule makes on, and on behalf of, all members of the community […] The legitimacy of a rule, or of a rule-making or rule-applying institution, is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process"); and, C. Reus-Smith, *International Crises of Legitimacy*, (2007) International Politics 44: 157-174, at 159 (defining legitimacy as "a quality that society ascribes to […] an institution's norms, rules or principles").

[724] S. Bernstein and E. Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, cit., at 595 (the authors conclude that, "if a particular standard is not universally applicable, it is unreasonable to evaluate its traction in the marketplace, and hence its legitimacy, according to its geographical reach").

to do with the substance of those standards. For all these reasons, market uptake is therefore a necessary but insufficient measure of a standard's legitimacy.

Therefore, our analysis of legitimacy essentially calls for a normative approach. This relates to the 'validity' of a norm in regard of the normative expectations of its addressees, or – that is the same – its 'acceptability'. Such an approach ascribes "'standards and criteria of legitimacy' which must be met by a site of (non-state) governance in order for that site to be afforded 'the predicate legitimate'"[725]. Before illustrating these criteria of legitimacy, it is important to observe that these two dimensions – empirical and normative – of legitimacy should nonetheless ideally co-exist in legitimate regulatory regimes. The descriptive approach is not insulated from the normative one; on the other hand, normative concerns are in fact empirically grounded in a particular legitimacy setting. Hence, since law reflects non-legal, i.e. political, social, and economic dynamics, an analysis of what constitutes a legitimate standard requires both a legal and political discussion. In light of that, only on a descriptive analysis that compares different types of private food safety standards and institutions one can discuss ways to assess and eventually improve the democratic legitimacy of private food safety regulatory governance. The two approaches need therefore to be re-coupled with each other, such that any prescription should take account of and reflect the plurality of potentially competing legitimacy demands as identified by empirical research. Nonetheless, this is not always the case, and examples abound as to norms that enjoy acceptance and yet are hardly justified from a normative point of view, or the reverse. The next paragraphs endeavour to produce a comprehensive assessment of the determinants of legitimacy in a global context, with specific reference to food safety governance.

24.2. Assessing legitimacy in the transnational private realm: Four legitimacy criteria

The complexity of the legitimacy issue in a global governance context becomes immediately evident when analysing the legal nature of evolving regulatory systems at the transnational level. While the heading 'private standards' tends to be understood as a homogeneous group, it covers a wide array of standards, which differ significantly among themselves depending on their objective and scope, and the governance structure, i.e., the type of organisations that own and require them, the parties they target, and the areas they apply to, as well as the modes of verifying that standards are met. Hence, generalisations about their impact are very difficult; yet, a number of seminal determinants of the legitimacy of private regulatory actors and the norms they adopt could be arguably identified.

In a normative and essentially prescriptive analytical approach, because of a lack of a universally agreed assessment benchmark, the legitimacy of regulatory norms outside of international law may be evaluated according to a two-fold criterion, namely: 'output (or

[725] J. Steffek, *The Legitimation of International Governance: A Discourse Approach*, (2003) European Journal of International Relations 9: 249-275, at 253. See also, S. Bernstein, *The Elusive Basis of Legitimacy in Global Governance: Three Conceptions*, Institute of Globalization and Human Condition Working Paper Series no. 04/2, at: http://www.ciaonet.org/catalog/7538 (accessed 10 December 2015), at 4.

substantive) legitimacy', concerning the quality and the effectiveness of a norm in terms of the extent to which it has traction and overall acceptance in the marketplace (market uptake); and 'input (or procedural) legitimacy', referring to the process through which a norm is developed and resting on the fact that a norm reflects the preferences of the 'public'.[726] Based on this two-fold side of analysis, four distinct criteria may be identified to assess the legitimacy of private standards-setters and the norms they adopt. These can be illustrated as follows. On the output side:

1. Effectiveness of standards in pursuing the stated regulatory goals: Does they deliver what they set out to do? Are the regulatory outcomes consistent with established norms? Can attempts to produce a single set of global standards clash with other goals? Additionally, how is compliance with the standards monitored and enforced?

In turn, on the input side:

2. Participation: Is the regulatory process inclusive and deliberative to safeguard participatory rights and guarantee proper representation of the interests at stake, at least of those they purport to regulate?
3. Governance: Do standards-setting structures and processes conform to norms of good governance (transparency of decisions-making, reason giving for decisions, regular reviews of performance, complaints mechanisms, and similar other practices that characterise modern deliberative regulation)? And,
4. Accountability: To whom and in which ways are private entities accountable for their exercise of regulatory functions? Are they adequately accountable to members and relevant stakeholders?

In our analysis of the democratic legitimacy of private food safety standards we refer to at least some of the principles that the initiators of the 'Global Administrative Law' ('GAL') project have identified as a way to enhance the accountability and, hence, the legitimacy of global governance instruments within the 'global administrative space'.[727] Nonetheless, it is

[726] European scholars have largely adopted such conceptual distinction between 'input' and 'output' dimensions of legitimacy as first developed in F.W. Sharpf, *Governing in Europe: Effective and Democratic?*, Oxford/New York: Oxford University Press, 1999. For application of this analytical framework see, notably, J. Black and D. Rouch, *The Development of the Global Markets as Rule Makers: Engagement and Legitimacy*, (2008) Law and Financial Markets Review 2: 218-233; and E. Meidinger, *Competitive Supragovernmental Regulation*, cit. Generally, on the different sides of the legitimacy debate see, B.G. Peters and J. Pierre, *Governance, Accountability and Democratic Legitimacy*, cit., at 38-40; and, C. Cutler, *The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force*, (2010) Socio-Economic Review 8: 157-185. Aside the concepts of input and output legitimacy, some scholars suggested also the concept of 'throughput legitimacy': see, most notably, T. Risse, *Transnational Governance and Legitimacy*, in: A. Benz and Y. Papadopoulos (eds.), *Governance and Democracy: Comparing National, European and International Experiences*, cit., 179-199. 'Throughput legitimacy' to some extent matches the requirements of transparency, deliberative quality, responsiveness and reliability, responsibility and accountability, and congruence. Risse argues that such conditions may only be guaranteed by a public framework. Nonetheless, the combination of the multiple aspects of the procedures of a governance institution, as well as of positive and normative criteria, inhibits a systematic empirical evaluation of legitimacy.

[727] See, for instance, the criteria identified in: J. Black, *The Role of Non State Actors in Standard Setting*, cit.; S. Courville, *Social Accountability Audits: Challenging or Defending Democratic Governance?*, (2003)

worthy to observe in this respect that the TBT Committee of the WTO enunciated in 2000 a set of principles for the development of international standards falling under its scope, which include openness, consensus, impartiality, and transparency.[728]

Though the criteria above are separable analytically, they are interrelated in practice and are to be viewed as potentially important in determining what counts as a legitimate standard in an international law's perspective. These criteria are widely recognised values and offer strong analytical advantages in the study of private institutions from a democratic perspective. Moreover, they are well suited to study highly complex environments that are associated with transnational corporate activities, and new modes of democratic decision-making evolving alongside traditional institutions. While democratic ideals such as transparency, participation, accountability and deliberativeness, as well as compliance with norm-making procedures defined by a legal order ('legality') and congruence with the norms and traditions of the public concerned ('legal legitimacy'), are hugely emphasised in the current discussions relating to 'governance beyond the State',[729] functional and performance criteria such as expertise, effectiveness and efficiency, are particularly outlined in the literature relating to private regulation.[730] By contrast, issues such as fairness, due process, consistency, adaptability/reflexivity and coherence which all fall under the rubric of constitutional claims

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Law and Policy 25: 269-297 (suggesting that key elements are effective representation of relevant stakeholders, periodic reviews of standards, and effective monitoring systems); AccountAbility, *Partnership Governance and Accountability: Reinventing Development Pathways - The PGA Framework*, 2006, at: http://www.pgaframework.org/findings.asp (developing a set of principles to capture the essential ingredients of good public-private partnership governance, including how to engage stakeholders, how to analyse and review appropriate governance, and mechanisms for accountability); and, T. Porter and K. Ronit (eds.), *The Challenges of Global Business Authority: Democratic Renewal, Stalement or Decay?*, New York: SUNY Press, 2010. Actually, GAL principles admittedly fall short of achieving on their own a mature 'global democracy', yet they are germane to the democratic ideal and are viewed as sustaining the emergence of a global democracy, which the initiators of the GAL project, however, find too ambitious a prospect for the time being. For discussion see, B. Kingsbury, N. Krisch and R. Stewart, *The Emergence of Global Administrative Law*, cit., at 48-51.

[728] See WTO, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, 13 November 2000, G/TBT/9, Annex 4 'Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement'.

[729] See, e.g., M. Zürn, *Democratic Governance beyond the Nation State: The EU and Other International Institutions*, (2000) European Journal of International Relations 6: 183-221; G. De Búrca, *Developing Democracy beyond the State*, (2008) Columbia Journal of Transnational Law 46: 221-278; K.D. Wolf, *Private Actors and the Legitimacy of Governance beyond the State*, in: A. Benz and Y. Papadopoulos (eds.), *Governance and Democracy: Comparing National, European and International Experiences*, cit., 200-227; S. Wheatley, *Democratic Governance beyond the State: The Legitimacy of Non-State Actors as Standard Setters*, in: A. Peters, L. Koechlin, T. Forster and G.F. Zinkernagel (eds.), *Non-State Actors as Standard Setters*, Cambridge: Cambridge University Press, 2009, 215-240; T. Risse, '*Transnational Governance and Legitimacy*', op. cit.; N. Brunsson and B. Jacobsson (eds.), *A World of Standards*, cit.; and, D. Kerwer, *Rules that Many Use: Standards and Global Regulation*, (2005) Governance 18: 611-632.

[730] Julia Black identifies four broad and essentially normative logics of legitimation, namely: constitutional, justice, functional (or performance), and democratic: see J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 145-146 (concluding that, these normative logics of legitimation are "both contested and contestable, not only between the different groups, but within them").

are afforded greater significance where non-State actors are perceived to be engaged in law-making.[731]

One can easily point out that public regulation frequently does not completely fulfil these requirements, either. The present analysis, however, is not aimed at painting a black and white picture of private *versus* public food safety regulation. Rather, we consider the private regulation's legitimacy in its own right by identifying areas in which such standards performs well from the perspective of legitimacy and areas in which notable problems exist. The next paragraphs sequentially consider each of these four criteria.

25. 'Output legitimacy': Effectiveness of the standards and standards-setters in pursuing the stated regulatory goals

The concept of 'output legitimacy' says well how global private regulators and the norms they create may gain legitimacy as a result of their problem-solving capacity. Regulatory norms require pragmatically recognition and uptake in the marketplace through, for instance, their adoption in production processes or specification within supply-contracts. Adoption essentially means accepting the norm as being *de facto* mandatory for a variety of reasons and aiming at compliance. In such a functional understanding, the notion of legitimacy would, at least partly, coincide with that of 'effectiveness', in the sense of the ability to provide results or, in other words, of 'getting the job done'.

As has been remarked in the legal theory, legitimacy is one of the elements of the 'validity' of a legal rule,[732] along with its formal validity, whereas a valid rule is defined as "*la norme ou l'acte dont on reconnaît, dans un système juridique donné, qu'il doit sortir les effets que ses auteurs entendaient lui attribuer* […]"[733]. A certain trend could be seen towards a 'technocratic' conception of governance, the legitimacy of which in large part depends on "the quality of the outcomes they produce, that is, if they do their job well or not. Results not process matters most, or […] the quality of the outputs matters more than the democratic inputs"[734]. To the extent, then, that private regulation is effective in pursuing its stated regulatory goals, it could be considered as having legitimacy. In turn, achieving legitimacy is a major objective for private regulation, since this conditions its ability to pursue in an effective manner its regulatory goals.

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[731] See, e.g., E. Meidinger, *Forest Certification as Environmental Law Making by Global Civil Society*, in: E. Meidinger, C. Elliot and G. Oesten (eds.), *Social and Political Dimensions of Forest Certification*, Remagen-Oberwinter: Forstbuch, 2003, 265-289; O. Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, (2003) Indiana Journal of Global Legal Studies 10: 25-64.

[732] In this sense see, e.g., T. Risse, *Transnational Governance and Legitimacy*, cit., at 183.

[733] F. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Brussels: Publications des Facultés universitaires Saint-Louis, 2002, at 309.

[734] N. Woods, *Global Governance and the Role of Institutions*, in: D. Held and A. McGrew (eds.), *Governing Globalization. Power, Authority and Global Governance*, Cambridge: Polity Press, 2002, 25-45, at 34.

25.1. In whose interest?

About the first criterion, assessing effectiveness requires the preliminary definition of objectives, against which the performance of a standard can be evaluated. Standards are generally used to ensure that products, processes and services are consistently fit for their purposes. It is undoubted that achieving food safety is the immediate regulatory objective of the standards under discussion, at least as their heading of 'private food safety standards' seems to reflect. Chapter Two has already clarified that such standards may pursue also some other quality attributes. Yet, while quality standards have long existed in the agricultural sector, safety standards have emerged in the wake of a series of high-profile food crises in the Nineties. These two types of immediate objectives include both product and process standards. On the other hand, it does not seem that industry-led initiatives in the food safety area deliver other public policy goods, like environmental protection, workers well-being, animal welfare, or fair trade, these being more the objectives of NGO-led standards and multi-stakeholder initiatives. It is worthy to observe that it is unclear whether NGO-initiated certifications make a marked difference in improving sustainability along the value chain compared to their commercial equivalents, which both co-opt and challenge the non-profit ones.[735]

Several reviews on the subject proved that private standards are really serving the important purpose of driving food safety backwards throughout the food chain. Arguably, private standards-setters would not engage in the development of these standards and/or impose additional costs on their supply chains unless further and necessary protection was provided to them. In fact standards have different levels of objectives, which range from the immediate ones to the ultimate ones throughout the more operational ones.[736] If we consider the ultimate objective of a standard, this relates to the strategic goals that the standard-setter aims to achieve by prescribing that given standard. In particular, the standards that are set by food businesses are usually used as a tool for:

- Regulating supply and governing the value chain; and
- Differentiating products from competitors on the market.

Specifically, large food manufacturing and retailing firms set supply chain management standards that aim to control procurement and – beyond this – the whole supply chain, and to ensure the uniformity of products and/or processes. As largely discussed in Chapter Two, the increased responsibility of the private sector in assuring food safety in their own business operations is part of government strategy for more effective and efficient food control. It is indeed the food business that is best placed to evaluate the food safety risks associated with its

[735] In this sense see, G. Gereffi, R. Garcia-Johnson, E. Sasser, *The NGO-Industrial Complex*, (2001) Foreign Policy 125: 56-65.

[736] In this sense see, P. Liu, *Private Standards in International Trade: Issues and Opportunities*, Presentation at the WTO's Workshop on 'Environment-Related Private Standards, Certification and Labelling Requirements', Geneva, 9 July 2009, at: http://www.fao.org/fileadmin/templates/est/AG_MARKET_ANALYSIS/Standards/Private_standards___Trade_Liu_WTO_wkshp.pdf, at 3-4.

operation and to establish in the most efficient way the most effective control at the most appropriate point in the value chain. In turn, risk management is driven by the level of food safety protection required of standards adopters in the context of the regulatory requirements in which they operate. Because of that, the argument could be made that outcome-based State regulation allows the food industry to find the optimal way of achieving safety targets within their own operations.[737] At the other end of the chain, producers groups and industry coalitions set standards essentially to differentiate their products on the market and add value to exports, in this way raising export earnings, generating employment, supporting small producers, and even improving food security; also, producers' standards convey information to buyers in the aim of creating specific market demand, thereby improving market access and possibly fetching a price premium. Yet large-scale retailers also have launched own standards to the effect of product differentiation and value addition. From the analysis of a huge number of standards it appears that especially those aiming at regulating food supply rather than at differentiating food products pursue food safety as their immediate objective.

The final level of objective can be designated as operational objective and corresponds to what is directly addressed by the standard, in other words the expected outcome of the standard's implementation. A food safety standard may aim at the adoption of GAPs and at fully traceable products. Buyers such as food processors or retailers may set a standard to ensure that procured products have a consistent level of 'quality' – in a broad sense – without the need for inspecting all the suppliers; large firms may choose to do this individually by setting own proprietary standards. In turn, producers may have an interest to set a standard in order to show a wide range of buyers that they fulfil certain requirements generally in demand in the market; such an assurance programme may save time and money, compared to assuring each buyer individually. Product differentiation has been traditionally pursued through improving the physical attributes of the food products, be they observable – like grade, shape, colour, physical integrity, variety, packaging – or not – like taste, acidity, sugar content. In addition, in recent years, farmers and processors have increasingly differentiated their products on the basis of the production process. Most standards mix several immediate and operational objectives together.

In short, different actors involved in the agri-food value chain define the objective(s) that a standard pursues very differently, even though they all tend to broadly refer to food safety objectives.

25.2. Advantages of providing private food safety regulation

Whether a private standard is beneficial ultimately depends on the actual improvement in the safety attributes of a product or process that it generates with respect to the previous situation.

[737] See M. Ollinger and D. Moore, *The Interplay of Regulation and Marketing Incentives in Providing Food*, cit. (illustrating the importance of company food safety management decisions on food safety outcomes in relation to safety in meat and poultry processing in the US, and concluding that company actions accounted for two-third of pathogen reduction while official regulation accounted for one-third).

Private food safety regulation is said to overcome the traditional 'command-and-control' State regulation and to be more effective at lower costs. First and foremost, food firms are experienced in creating effective international management systems that lower transaction costs and provide inducements and penalties to structure how upstream suppliers manufacture food products. In such a context, compliance with private standards may further benefit producers. In particular, traceability and efficient record keeping may improve the management of the farm and the entire value chain by rationalising production and cutting input costs, e.g. through a more efficient use of pesticides. Also, standards may improve market access through enhanced product quality and improved corporate image. Still, some standards may have a direct value-adding effect by enabling producers to obtain higher sale prices.

Additionally, some of the assumed advantages of private regulation are based on the supposition that these requirements are based on the scientific and technical expertise, and inside knowledge that private food standards-setters possess, which would prevent practical obstacles in implementation and application of the standard. Food technology, such as genetic modifications, products from cloning, novel foods, and nanotechnologies,[738] is both complex and rapidly evolving; as such, it is normally beyond the traditional expertise of the government agencies that are charged with administering human health and safety issues. Conversely, transnational food corporations and industry associations usually possess their own laboratories, teams of expert scientists, and specialised knowledge and information in food technology, which State institutions may lack.

Another key factor contributing to the effectiveness of private standards is the extent to which the standards-setting process is dynamic and adaptive enough to tap quickly into emerging or broadly recognised global problems, as well as to be rapidly responsive to the demand for new or revised standards as circumstances change. Many standards-setters show a huge capacity to track changing legislation, introducing new elements into their standards as public regulation change. All this reflects the fact that food regulatory entities have lean managerial structures and streamlined and well-resourced decision-making processes,[739] as well as that they are driven by rather narrow sectoral interests.[740]

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[738] On the European and international discipline of novel foods see, F. Argese, *Verso una effettiva coerenza tra obiettivi interni di tutela della salute umana e obblighi internazionali in tema di liberalizzazione degli scambi e promozione dello sviluppo? Il caso della disciplina dei nuovi prodotti alimentari nell'Unione europea*, (2012) Quaderni del Dipartimento di Scienze Politiche - Università Cattolica del Sacro Cuore no. 1/2012, 27-60; F. Argese, *Regulating Food Innovation and Technology in the European Union*, in: A.M. Lupone, C. Ricci, A. Santini, (eds.), *The Right to Safe Food towards a Global Governance*, Torino: Giappichelli, 2013, 259-284; and, F. Argese, *La disciplina dei nuovi prodotti alimentari nell'Unione europea: problemi e prospettive*, in: C. Ricci (ed.), *La tutela multilivello del diritto alla sicurezza e qualità degli alimenti*, Milano: Giuffré, 2013, 257-270.

[739] For instance, apart from a paid secretariat, commercial members of these entities provide their technical personnel with services and cover the associated travel costs to attend meetings.

[740] Among the others, the BRC Global Standard for Food Safety was revised seven times over the period 1998 to 2015. Issue 7 was published in January 2015, setting the latest benchmarks for best practice in food manufacture. Likewise, despite the differences existing between ISO 22000 and the GFSI Guidance Document with reference to accreditation processes, best manufacturing practice and ownership, FoodDrinkEurope (a

Beyond the advantages that private standards may provide for companies – be they producers, distributors or retailers along the value chain – they can also be beneficial to final consumers, especially by reducing the number of food poisoning incidents, providing higher-quality products and improving consumer health. In the end, society as a whole may benefit from these standards, which may ultimately contribute to reducing government expenditure on food controls and the national medical care system. On the other hand, in some developing countries there is even a tendency for establishing a double control system, with food safety management being taken seriously for exports whereas the domestic market suffers from neglect. Notably, in many less developed countries national supermarket chains are being established and their controls on suppliers are improving the safety of food for growing segments of the population although improved protection for the most vulnerable elements of the society rests heavily on the ability of the public authorities to develop and implement effective risk-based food control programmes through both regulatory and non-regulatory mechanisms.[741] In these situations private standards do not seem either to be able to improve significantly access to safe food for a great majority of consumers or to enhance appreciably the level of protection afforded by official regulatory requirements.

The foregoing says that the benefits of a private standard to society depend on the extent to which the objective of the standards-setter meets the collective public interest. When a food regulatory entity sets a standard to achieve narrow corporate goals only, such as the above, no benefits may be expected. The level of food safety protection afforded by private standards might be expected to enhance where private standards extend official regulatory requirements or put in place stipulations where no official regulatory requirements exist. Indeed, if a country has a high level of public standards on food safety with strong enforcement, introducing stricter private standards may not result in higher food safety. In this way certification to HACCP-related standards has proven to provide a driver for improved hygienic practices along the food value chain. Some developed countries have considered ways of integrating effective private standard certification into overall national systems of food control to strengthen public health protection.

25.3. Concerns in relation to the contents and effects of private food safety standards

Private standards may well be regarded as effective in influencing behaviour of the parties affected and in pursuing their regulatory goals as defined above. In this respect, because of the enormous market power in the hands of transnational food corporations, the argument has been raised that private rather than public standards could become “the predominant drivers of

confederation of food and drink industries in the EU) developed a pre-requisite programme that, in conjunction with ISO 22000, is likely to be benchmarked against the current version of the GFSI Guidance Document.

[741] See T. Havinga, *Private Regulation of Food Safety by Supermarkets*, cit.; D. Boselie, S. Henson, and D. Weatherspoon, *Supermarket Procurement Practices in Developing Countries: Redefining the Roles of the Public and Private Sectors*, (2003) American Journal of Agricultural Economics 85: 1155-1161.

agrifood systems"[742]. At the same time, private standards may be problematic when they address areas that are already covered by technical regulations. Food safety is one area where such an overlap of public and private regulatory intervention has particularly become the subject of major controversies.

Namely, on the one hand private food safety standards are said to 'go beyond' what is required by public regulation.[743] This involves at least two different aspects. First, private standards introduce often ostensibly stricter requirements for particular product attributes than official standards and technical regulations do, without sound scientific justification. Second, private standards are much more prescriptive than public regulation about how to achieve the defined outcomes and which production processes are to be used, without appropriateness to local conditions especially in the developing country contexts; this implies that the scope of the regulated activities is extended both vertically by expanding the span of control up and down the value chain, and horizontally by including additional elements, most particularly environmental and social impacts. From an economic perspective, food firms may prefer tighter regulation if compliance is relatively more costly for rivals and/or if this acts as a barrier to new entrants. From a legal perspective, this 'going beyond' the requirements of public regulations and official standards results in the capacity of private standards to limit exposure to potential regulatory action and to pre-empt or co-opt regulatory developments.[744] In other words, food firms may be motivated to implement enhanced food safety controls voluntarily because, if they fail to do so, regulatory requirements could emerge that will force adoption, potentially at higher costs; conversely, through voluntary action firms have latitude in both the level of food safety they deliver beyond minimum public standards and the forms of food safety controls they implement. This may mean that, since the 'add-ons' can be off-target with respect to what is generally agreed to be major food safety risks associated with food and food processes, to some extent private standards come to conflict with national regulations and international standards.[745]

On the other hand, there appear to be also aspects where private food safety standards may be said to 'stay below' what is required by public regulation. This relates especially to the extent to which they promote recognition of equivalence among different food safety requirements, and consequently processes of harmonisation. The next paragraphs will address all these concerns in sequence.

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[742] S. Henson and N.H. Hooker, *Private Sector Management of Food Safety: Public Regulation and the Role of Private Controls*, (2001) International Food and Agribusiness Management Review 4: 7-17, at 8.

[743] It should be preliminary observed that sometimes an incorrect comparator is used when Codex and national standards are dismissed as being 'too basic' or when some private standards are criticised as being 'too strict'. For instance, comparison of private schemes like GlobalGAP Fruit and Vegetable Standard with relevant Codex requirements implies consideration of a number of reference texts including Codex Code of practice for fruit and vegetables, Codex General principles of food hygiene, and, at least in some cases, Codex Code of practice for leafy vegetables, as well as other Codex texts that may be of relevance in relation to the specific case. It follows that in some cases the Codex texts can be seen to be more detailed that private ones.

[744] In this sense see, e.g., J.J. McCluskey and J.A. Winfree, *Pre-empting Public Regulation with Private Food Quality Standards*, (2009) European Review of Agricultural Economics 36: 525-539.

[745] See CAC, *Consideration of the Impact of Private Standards*, cit., at 26.

25.3.1. Lack of scientific justification for more demanding requirements in terms of stringency and scope

In the rationale behind the SPS Agreement, "governments of importing countries adopt measures to control food safety risks associated with imported food and these measures are to be just stringent enough to reduce risk to an acceptably low level, i.e. are sufficient to achieve the importing country's appropriate level of protection"[746]. It follows that the WTO Members must demonstrate that the measures they put in place are compatible with the declared level of protection, and make such an adjustment to avoid applying measures that are more stringent than necessary to achieve the appropriate level of protection. In all these respects, the SPS Agreement requires WTO Members to demonstrate that their domestic SPS measures are based on a science-based risk assessment.[747] Such a requirement is deemed to be satisfied where national measures are based on Codex standards, guidelines and recommendations. This means also that risk assessment is central to standards-setting in the Codex framework itself. Nonetheless, since Codex standards have no legal force *per se* – they are recommendations aimed primarily at governments to guide national rule-making – governments can adopt SPS measures that are not based on Codex recommendations, although these would be open to challenge within the WTO and, once again, should be justified through risk assessment.

Setting international standards has proven to be difficult due to the variety of circumstances that exist in each single country around the world. This is especially true for agricultural practices, which have to respond to differences in climate, soils and ecosystems; in addition, they are integrally part of cultural diversity. To address such a diversity private standards should be 'normative' standards, i.e., generic standards or guidelines to be used as a framework by local standards-setting or certification bodies to formulate more specific standards that fit local conditions. Yet, beyond the consideration largely discussed in Chapter Three that private food safety standards fall outside of the scope of the WTO covered agreements, the major concern that these standards create unjustified and unnecessary trade barriers finds its rationale in that the regulatory output of private sites of regulation tends to be stricter in both stringency and scope than the SPS measures adopted by WTO Members and the international standards which they rely on.[748] Indeed, private standards usually include a requirement that all relevant national standards have to be met, such that the former are in way less stringent than the latter. Even more, for reasons of corporate image individual retailers need to respond responsibly to public pressure and ensure that they use adequate expert advice in the development and implementation of their standards so as to prove that they support and do not frustrate implementation of public policy.[749] In this way, private

[746] WTO, *Private Voluntary Standards within the WTO Multilateral Framework - Submission by the United Kingdom*, cit., at 25.

[747] See the analysis conducted in this respect in Chapter Three.

[748] See, generally, T. Vandemoortele and K. Deconinck, *When Are Private Standards More Stringent than Public Standards?*, (2014) American Journal of Agricultural Economics 96: 154-171.

[749] According to an OECD study based on interviews with leading food retailers, standards owners, selected manufacturers and farmer associations, "[o]ver 85% of the retailers reported that their required standard

standards supplement official end-product food safety regulations either by setting stricter safety requirements or by encompassing additional requirements such as quality attributes, social accountability and environmental protection. Of course, the stringency of a standard is correlated with the degree of regulation, rather than with the number of provisions which that standard consists of.

Frequent criticism of private standards is that they are based on "a non-scientific, zero-risk, marketing approach"[750], and therefore come to be in conflict – at least in spirit – with the relevant international disciplines.[751] This is evident in relation to private product (numerical) standards, which make the output of a food safety system resulting in a residue of a particular added substance no greater than the recommended MRL. Private collective standards such as GlobalGAP refer generally to relevant official pesticide residue regulation without setting additional pesticide residues requirements; conversely, there is considerable evidence of individual retailers that include such requirements in their own proprietary standards that are stricter than the corresponding Codex provisions and national regulations, and that arguably serve to differentiate food products on the market.[752] Also, in some cases proprietary

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is higher than that of the government and about half reported that they were significantly higher. […] This result is attributed to both the safety and quality management protocols adopted and the additional firm specific requirements applied. The latter may include expanded lists of possible allergens, contaminants, packaging materials and care in transport, storage and distribution procedures." (OECD, *Final Report on Private Standards and the Shaping of the Agro-food System*, cit., at para. 50). In addition, food industry communication to the public passes the message that their products' safety is above what is required by official regulation. That way, "[c]ommunicating to the urban or developed country consumer that private standards exceed the stringency and/or enforcement of public standards encourages consumers to buy products from countries that they may see otherwise as having lax quality and safety regulations" (S. Henson and T. Reardon, *Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System*, (2005) Food Policy 30: 241-253, at 248). In the same sense see, L. Fulponi, *The Globalization of Private Standards and the Agri-Food System*, in: J. Swinnen (ed.), *Global Supply Chains Standards and the Poor: How the Globalisation of Food System and the Standards Affects Rural Development and Poverty*, Oxford/Cambridge: CABInternational, 2007, 5-18, at 12.

[750] WTO, *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)*, 25 February 2008, G/SPS/GEN/822, at para. 2.

[751] Taking into account the deviations from the international standards-setting bodies that are specifically referenced in the SPS Agreement, one of the actions submitted to the SPS Committee to further its understanding of private standards consisted in the Committee informing regularly Codex, OIE and IPPC in relation to relevant developments concerning SPS-related private standards and in inviting these organisations to likewise regularly inform the Committee of relevant developments in their respective bodies (see WTO, *Proposed Revision to Action Six of the Report of the Ad Hoc Working Group on SPS-Related Private Standards (G/SPS/W/256)*, cit.). As discussed in Chapter Three, WTO Members have not yet reached consensus on this proposed action.

[752] Two cases are worth of attention in this respect. On the one hand, a large number of retail labels impose more stringent limits ranging from 25 to 80 percent of the official MRLs. The MRL determination is based at the GAP level in the food chain, where food safety risks are usually considerably lower than in other stages of the chain, such that reducing the MRL does not provide additional protection of human health. In turn, the MRL determination by JMPR always involves a comparison of the limit with ADI, i.e., the exposure limit value for long-term uptake of a pesticide residue from food, to assure 'no harm' in terms of safety. FAO/WHO and its independent expert bodies are committed to using the best scientific evidence available and risk assessment in considering multiple exposures to contaminants as basis for decisions. In this respect see, EU, *Private Food Standards and their Impacts on Developing Countries*, cit., at 27 (reporting that major retailers such as Aldi, Lidl, Metro and Rewe – all requiring Ivory Coast pineapple producers be GlobalGAP-certified by 1 January 2006 – imposed as additional requirement that pesticide MRLs be limited to one-third of the MRLs permitted within the EU); and, D. Gascoine and O'Connor & Company, *Private Voluntary Standards within the WTO Multilateral Framework*, cit., footnote no. 10 (concluding that, either the retailers involved were ignorant

standards blacklist certain chemical compounds, particularly pesticides that are under consideration by regulatory bodies. It is not clear whether such an action is in deference to consumer perception of the risks associated with use of the chemical substance in question or whether such an action is taken to allow themselves maximum time to re-organise their supply chains thereby preventing any disruption in their supply base where the enactment of a new regulation is expected from public authorities. In either case, in so doing, the companies displace risks and adjustment costs onto their suppliers.[753]

Furthermore, collective private standards covering manufacturing operations do not incorporate own microbiological criteria, but refer to those established by national authorities.[754] It should be observed in this regard that Codex has received very few requests from its Members to develop international microbiological criteria, although many governments have adopted such criteria at national level. Hence, Codex has developed some guidelines for the establishment and application of microbiological criteria,[755] as well as

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of the fact that EU residue levels were established at the lowest level achievable by GAP or they intended to deceive consumers by claiming that their products were safer due to more stringent private requirements).

On the other hand, a growing number of retail labels impose limitations on the *total* number of residues in food, taking account of the possible synergistic toxicological effect of multiple residues. On such a practice there is no risk assessment model available at present, such that, even admitting that concerns for public exposure to multiple residues were the actual motivation, the response of food retailers does not appear to be based on scientific data. Additionally, in some cases the practice of limiting the total number of residues risks to undermine the IPM schemes developed and implemented by environmental sustainability programmes vigorously supported by FAO and adopted by a number of governments as public policies. IPM involves reduced use of broad spectrum pesticides and combines different management strategies and practices to control pests including, where necessary, use of targeted pesticides against specific pests: overall IPM results in *low* or *reduced* levels of multiple residues. Private requirements that impose arbitrary limitation in the number of residues tolerated on specific products may encourage producers to use broad spectrum pesticides, which is contrary to the IPM approach. For broader discussions on pesticide residues requirements in private standards see, R. Clarke, *Private Food Safety Standards: Their Role in Food Safety Regulation and their Impact*, cit., at 10-12.

[753] Over the period 2000-2005, FAO implemented a project involving 7 countries from Africa (Cote d'Ivoire, Kenya, and Uganda), Asia (India and Indonesia) and Latin America (Brazil and Colombia) in the aim of reducing the levels of Ochratoxin-A (OTA) – a toxic fungal metabolite classified by the International Agency for Research on Cancer as a possible human carcinogen – in green coffee. This project, funded by Common Fund for Commodities with support from the European Coffee Industry and the supervision of the International Coffee Organisation (ICO), was instigated by the announced consideration by European food safety authorities of the need to establish an OTA limit to protect public health. The limit under consideration was 5 ppb for green coffee. In 2004 the European Commission finally decided to establish a limit of 5 ppb for roast and ground coffee without any limit for green coffee. In the meantime, however, many importers had already imposed requirements for certificates of analysis showing that OTA content of the green coffee was below 5 ppb, which caused unnecessary added costs to traders and exporters and much uncertainty for the small-scale coffee producers. Codex was thus asked to develop a code of practice for the reduction of OTA in green coffee, which was finally adopted in 2009 (Codex Code of Practice for the Prevention and Reduction of Ochratoxin-A Contamination in Coffee, CAC/RCP 69-2009). Comparison of GlobalGAP Green Coffee Standard with Codex Code of practice above makes immediately evident that the former is at least questionable in the decisions about the 'major musts' indicated for hygiene controls in the production of green coffee, which are significantly at variance from the provisions in the latter.

[754] For instance, GlobalGAP Livestock Standards do contain microbiological criteria for zoonosis monitoring that are of significance in terms of GHPs in primary production and that are in line with the OIE Terrestrial Animal Health Code (24th edition, 2015).

[755] Codex microbiological criteria set since the establishment of JEMRA include criteria for *Salmonella* and *Cronobacter spp*. in powdered formulae for infants and young children (CAC/RCP 66 – 2008) and *Listeria*

principles and guidelines for the conduct of microbiological risk assessment and risk management.[756] Conversely, proprietary standards do usually include microbiological criteria, which appear to be stricter than relevant national and international norms. Lacking an extensive review of all individual firm standards incorporating microbiological criteria, just some general observations may be done from which it would be correctly inferred that at least many of the microbiological criteria established by the food industry and organisations are not in line with Codex guidance and relevant national regulations. In particular, such criteria lack any rigorous scientific justification and are not always accompanied by sampling plans and specified methods of analysis as recommended by the Codex, without which it is impossible to interpret the findings. As a result, these additional requirements could be expected to end putting considerably additional burden for testing on producers / suppliers.

25.3.2. The appropriateness of prescriptive requirements

Another emblematic side of the tendency of private standards to exceed relevant international standards and official regulations is the one related to the detailed and prescriptive operational procedures that these standards require.[757] Private standards, particularly as they relate to food safety, not only involve a specification of 'what' outcomes are to be achieved, but also set precise requirements for 'how' those outcomes should be achieved. These standards usually provide tighter vertical coverage in the sense of extending the span of control on almost all the operations along the value chain, and prescribing a series of process controls (these latter increasingly under third-party certification). As result of that, private standards are much more prescriptive about both the attributes and characteristics of food products, and the process through which the defined outcome should be achieved than is the case with public regulation.

Actually, Codex standards are not concerned with establishing the means or stipulating conditions by which a certain outcome should be met. Yet the Codex includes codes of practice for production, processing, manufacturing, transport and storage, which are more concerned with establishing common reference framework than setting a specific outcome, and that for such a reason take the form of guidelines recommended to Members. Since these relate to GAP, GHP and GMP processes, that is, the means by which products are produced, handled and processed on their way to the consumer, they could be considered sort of 'meta-standards' that have been drawn from best practice on food safety, then codified by Codex, and finally incorporated into specific outcome-based standards. Nonetheless, even Codex codes of practice focus on what factors need to be considered and what results need to be

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monocytogenes in ready-to-eat foods (CAC/GL 61 – 2007). Some Codex micro-criteria, like those for natural mineral waters (Codex Stan 108-1981) and for *Salmonella* in spices (CAC/RCP 42 – 1995), were adopted prior to the establishment of JEMRA.

[756] Beyond defining standards about product characteristics, Codex suggests ways in which these standards should be implemented by setting recommendations about methods of analysis, sampling and testing procedures for veterinary drugs in food.

[757] In this respect see the criticisms advanced in WTO, *Effects of SPS-related Private Standards - Compilation of Replies*, 10 December 2009, G/SPS/GEN/932/Rev.1.

achieved, and not on how the results should be achieved. This is so in recognition of the wide range of realities facing Members, which require adaptation to local conditions and differentiation in approaches. The issue here is not whether one reference point is better than another, but that each Member uses the same reference point in order to facilitate transactions, interfaces between products, and so forth. Still more, Codex texts that set out principles and that provide guidelines for interpreting those principles serve the need to specify the ways in which food safety rules – e.g. inspection and controls on imports and/or exports – are formulated and implemented.

Although they are addressed to governments for guiding them in the development of national regulations, a number of food business operators have taken account of Codex codes for the construction of their safety standards. If we were to compare those, especially collective private standards that deal with Codex guidelines we could find that they are similar.[758] There are a number of reasons for this. Firstly, these guidelines represent best practice, and private firms often participate in their formulation either through their participation in national Codex committees or through their membership of bodies such as ISO. Secondly, national governments, together with producer, food business associations and individual food businesses, all play some role in interpreting and 'translating' the guidance provided by Codex into actionable and auditable provisions as to what actions and procedures must be implemented within food operations to ensure that safe food is reliably produced. Thirdly, private standards for food safety are often responses to government regulations, and therefore are aimed at the same outcome. Lastly, by building on the framework of public regulations, private standards are able to reduce the cost of standards formulation and enforcement. Indeed, private standards-setters can use the facilities provided by the public infrastructures – like recognition of laboratories or rules regulating certification bodies – for the development and implementation of their standards.

It seems obvious that a food company or standards-setter has the need to translate general guidance into clear instructions for the management of food safety within their operations along global value chains. And prescription presents undoubtedly a number of advantages in this respect. Specifically, producers and processors can clearly understand what is required of them; in turn, auditors can readily judge with relative uniformity whether the required provisions are being met; lastly, standards implementers have reasonable assurance that their requirements are met by their suppliers. Despite these advantages, nonetheless, one cannot overlook the potential problems that prescriptive provisions pose. A major concern arises with the fact that along value chains that are global in their scope prescriptive requirements are imposed on businesses operating under widely variable situations. As a

[758] For example, Codex Recommended International Code of Practice – General Principles of Food Hygiene (CAC/RCP 1-1969) stipulates that a food safety system should enable traceability. It has evidently formed the basis of many private standards for food processing, including BRC Global Standard for Food Safety, IFS and SQF 2000, and also the GFSI Guidance Document for benchmarking these standards. All these specify the substantive elements traceability systems should contain, how these systems should perform, and how the effectiveness of these systems should be monitored. Likewise, ISO 22000 series substantively defines a HACCP-based food safety management system in accordance with Codex guidelines.

result, process standards come to require specific measures that do not fit the local conditions of the contexts in which they are applied. In particular, if the detailed instructions are inappropriate to the national or local contexts, then the operations of a standard can inhibit innovation along the value chain, and impose inefficiencies and unnecessary costs to those who are obliged to meet such requirements. In addition, many of these criteria may be simply irrelevant for producers in production systems other than those for which the standard was originally developed or with which the standards-setter is familiar. That is the reason why private standards have been strongly criticised for imposing a European model of agricultural and food production by prescribing PPMs that are inappropriate and insensitive to local economic conditions, as well as social, religious and cultural contexts.[759] As we have considered in Chapter Three, particularly the stipulation of non-product-related PPMs is a key source of concern for doing what States have multilaterally agreed not to do. It seems that "[t]he big industry players who have been known to insist with authorities on the importance of regulations that allow them flexibility in designing and implementing their food safety systems are now less willing to accord flexibility to their suppliers"[760].

Some issues deserve, in particular, to be discussed that generally exceed Codex recommendations and that underlie many of the reported difficulties that are encountered in the application and implementation of private food safety standards. A first important aspect is that process standards include some forms of traceability to link particular food products at some point downstream in the value chain to the point of at which the standard specifies and controls processes. More particularly, traceability encompasses two elements: on the one hand, 'tracking', which refers to the ability to determine in real time the exact location and status of produce in the value chain; on the other hand, 'tracing', which refers to the ability to reconstruct the historical flow of produce on the basis of records maintained through the chain. All private standards emphasise the traceability of products throughout the supply chain as the most effective way to achieve their regulatory objectives. Yet, some private standards require operators along the value chain even to be able to trace all raw materials used in their operations from source to the end-product throughout distribution. This is clearly beyond Codex provisions, under which product tracing consists in "the ability to follow the movement of a food through specified stages of production, processing and distribution"[761]. Also, private schemes are well beyond ISO 22000, which requires that "the traceability system shall be able to identify incoming material from the immediate suppliers and the initial distribution route of the end product"[762].

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[759] See, WTO, *Private Standards and the SPS Agreement - Note from SPS Secretariat*, cit. In literature see, H. Campbell, *The Rise and Rise of EurepGAP: European (Re)Invention of Colonial Food Relations?*, (2005) International Journal of Sociology of Food and Agriculture 13: 1-19.

[760] R. Clarke, *Private Food Safety Standards: Their Role in Food Safety Regulation and their Impact*, cit., at 18.

[761] Codex Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System, CAC/GL 60-2006, Section 2.

[762] ISO 22000 – *Food Safety Management Systems - Requirements for Any Organization in the Food Chain*, at para. 7.9. The Synergy Pre-Requisite Programme (Synergy PRP) provides a good illustration of the utility of Codex GPFH as the basis of GHPs at national and industry level. In particular, comparing the relevant

Next, staff training is undoubtedly an important aspect of any food safety scheme. There is increasing specificity as far as staff training requirements are concerned, as we move from Codex to collective private standards to individual firm standards. The Codex GPFH requires that, "[t]hose engaged in food operations who come directly or indirectly into contact with food should be trained, and/or instructed in food hygiene to a level appropriate to the operations they are to perform"[763], and provides further guidance on factors to be considered by food operators in deciding on the level of training required. Collective private standards are generally in line with the Codex guidance but in some cases, where they specify areas of training needs and also explicitly require that training records be kept. Some individual firm standards require further that key food safety staff be trained through approved industry training courses. A number of private sector initiatives exist that operate on this front, such as the Food Safety Knowledge Network ('FSKN'), a GFSI supported initiative aimed at developing harmonised core competencies of food safety professionals, which can then be integrated into existing food safety training schemes and linked to the certification process against GFSI benchmarked schemes. Nonetheless, initiatives like FSKN, if on the one hand could provide a useful tool for promoting better food safety training for food industry professionals and reducing the cost burden to small-scale operators of achieving private certification, on the other clearly mark a move towards even greater prescription on training requirements. Likewise, laboratory testing requirements in private standards may in some cases be justified, while in other cases they constitute prescription that come to simply add costs without adding public health value. For instance, in many countries the absence of accredited laboratory services means that samples need to be sent abroad for testing which can greatly increase costs.

Finally, the documentation and record keeping requirements established by private standards generally go beyond Codex, as well. Such requirements are a crucial part of food safety management systems – whether public or private – which often are recognised as sources of difficulty, especially for small-scale food operators located in developing countries. Indeed, in a situation where different buyers are highly prescriptive about these requirements, the risk – actually already in place – is that producers/suppliers are constrained to keep multiple parallel records that essentially demonstrate the same things to satisfy each

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requirements in relation to the control on incoming materials one may find that the additional private provisions are consistent with the spirit of the Codex principles, particularly where Codex recommends that hazard analysis should guide the development of adequate measures to control all operations. In turn, the issue of allergen control is generally given more prominence in private standards than in Codex GPFH, which considers allergens as chemical food hazard. As for reporting required in relation to allergen and compositional information on supplied products, there is considerable variability with different retailers and buyers imposing their own requirements. Some reporting formats are so complex that they are often beyond the capability of smallholders that need costly external assistance to meet the buyers' documentation requirements. In this respect, Synergy PRP combined with ISO 22000 series and resulted in Synergy 22000, which was benchmarked by GFSI in February 2010 (Synergy Global Standardisation Services, Synergy PRP 22000:2009 – *Food Safety Management Systems – Prerequisite Programmes for any Organisation in the Food Chain*, 2009).

[763] Codex General Principles of Food Hygiene, cit., Section 10. Other Codex codes provide guidance on training needs in specific operations.

buyer.[764] In fact the challenge of achieving effective and practicable food safety recording keeping must not only be seen in relation to private food safety requirements but even to facilitating compliance with official food hygiene requirements by small-scale food businesses.

Of course, some prescriptive clauses in process standards are difficult to avoid, like the prohibition of the use of synthetic pesticides in organic agriculture. In this respect, therefore, results-oriented standards are preferable, because the food business operators along the whole value chain are left with the choice of selecting the most appropriate means of arriving at the specified outcome in a way that is well suited to the peculiarities of their own production systems and processes. Nonetheless, where the real utility of prescriptive requirements such as the above – traceability, staff training, laboratory testing, and documentation and record keeping – is proved, either mutual recognition among private food safety standards or demonstrating equivalence of individual standards with private collective standards in terms of food safety outcomes could be a viable approach for preventing obstacles and inefficiencies in the day-to-day running of food operations in the value chain while maintaining the positive aspects of prescription and the food safety guarantees.

25.3.3. Extent to which private standards promote the harmonisation of food safety requirements

There is a second argument in favour of a need for harmonisation with as widely as possible applied requirements. Certainly, private standards, which differ widely across countries, regions, and products, remain far from being universally applicable and, in certain contexts, can be fragmented or even conflicting. Nonetheless, the lack of requirements for private entities to be consistent in the stringency of their requirements and the highly prescriptive nature of the operational procedures required result in discrimination between 'like products', either inside or outside of a defined standard scheme, according to the specific standard adopted by major buyers. Proliferating mutually exclusive private standards – both across and between markets – come to ignore the principle of 'equivalence' between alternative schemes that achieve the same outcome and leads to a repetition of certification, especially in the absence of one single recognised certification body. Hence, another major criticism addressed to private standards in the food safety area is that they undermine processes of harmonisation, introducing a new layer of regulatory governance that further fragments national markets according to the safety requirements with which exporters must comply.[765] Conversely, we

[764] In particular, some of the 22 WTO Members who replied to the *questionnaire* on private standards (see WTO, *Effects of SPS-related Private Standards: Compilation of Replies*, cit.) voiced their concern about specific HACCP-related recording and documentation formats that are required by some private standard schemes.

[765] See, e.g., J.G. Surak, *Harmonization of International Standards*, in: C. Boisrobert, A. Stjepanovic, S. Oh, and H. Lelieveld (eds.), *Ensuring Global Food Safety: Exploring Global Harmonization*, cit., 339-362 (calling for harmonisation of various food safety standards at the global level). Also from a (micro) economic perspective there is no reason for such proliferation of alternative and mutually exclusive private requirements. There is indeed an inevitable trade-off between the need to reduce transaction costs (economies of scale), on the

recall that the SPS Agreement references Codex standards, guidelines and recommendations as the foundations of legitimate national SPS measures; hence, one of the key drivers of the Codex standards-setting activity is the elaboration of international standards that will foster the progressive harmonisation of SPS measures among WTO Members.

Nonetheless, some efforts are being made by private standards-setters, organisations, and industry coalitions to benchmark different and differing requirements to global standards and drive processes of harmonisation. The active collaboration among private standards-setters in producing benchmarking activities is said to reflect "the current trend in governance more generally, towards the organisation of specific policy areas by coalitions of private actors who, traditionally at least, would not have had cooperative relationships"[766]. Benchmarking is aimed at facilitating recognition of food safety equivalence among private standards so as to reduce the duplication of certification and work towards a vision of 'once certified, accepted everywhere'. Chapter Two mentioned some most notable examples, such as the BRC Global Standard for Food Safety at the national level (UK) and the GFSI at the international level. This is also the approach taken in several countries with respect to the implementation of GlobalGAP Fruit and Vegetables. The rapid growth of GlobalGAP has stimulated the development of national GAP codes, led either by the private sector or by the public authorities, which have subsequently been formally recognised as equivalent in a number of countries.[767] Next to this, a formal benchmarking process was established to reduce overlap and discrepancies between competing interests and preferences in food safety governance. It is of importance in this last respect that, since GlobalGAP standards include also elements such as social rights, worker health, safety and welfare, environmental protection, and animal welfare, its standards-setting is based on the ISEAL Alliance's Code of Good Practice for Setting Social and Environmental Standards, which is the benchmarking platform in sustainability standards-setting. Currently, too few benchmarked national GAP standards exist to draw conclusions on their success. The hypothesis might be made that, in consideration of the today's share of trade in agri-food products major food retailers, service firms and manufacturers represent worldwide, the elaboration of collective private food safety standards and their benchmarking to one another could made a substantive contribution to the harmonisation of food safety standards globally.

However, benchmarking is recognised not to be an easy process and may not be a viable option for many countries, most notably developing countries. This is so for a number of

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one hand, and the ability to satisfy consumer demands along a range of safety (and quality) attributes, on the other; in fact the proliferation of private standards serves the opposite goal of reducing network economies and enhancing transaction costs on the part of both buyers and suppliers along the value chain.

[766] See D. Casey, *Three Puzzles of Private Governance: Global GAP and the Regulation of Food Safety and Quality*, cit., at 5.

[767] The work of FAO/WHO on the development of the decision support tool for effective control of *Campylobacter* and *Salmonella* in the poultry chain is an example of such capacity development. Also, the development of KenyaGAP highlights the potential impact of national benchmarking process in making the implementation of private standards more feasible in the local context: for discussion see, J. Humphrey, *Private Standards, Small Farmers and Donor Policy: EUREPGAP in Kenya*, IDS Working Paper no. 308/2008, at: https://www.ids.ac.uk/ids/bookshop/wp/wp308.pdf.

reasons.[768] First, unlike developed countries where GAP schemes are generally owned by the private-sector, in developing countries there are government-owned GAP schemes, at times developed and implemented with some participation of producers, most notably small growers; even where such schemes are privately-owned, these are generally developed with some government support.[769] Benchmarking is in fact easier when it occurs between private schemes than between a private-sector scheme and a government-owned scheme; this is particularly evident where the official schemes are already well-developed, because governments may be reluctant to incorporate private requirements into a government-owned GAP standard. Yet, in order for a national GAP scheme to be recognised against global standards, such as GlobalGAP, it needs to comply with all the criteria of that standard. Such a "strict interpretation of equivalence" is important in order for consumers to have confidence in the global standard.[770] The equivalence required by private standards is more onerous than the equivalence required under the SPS Agreement. Indeed, while the latter apply the test of equivalence of outcomes, the former tests for equivalence of processes. What makes it even more onerous is the fact that the national standard needs to reapply for assessment of equivalence at each revision of the private standard. Overall, the benchmarking process needs

[768] See WTO, *Private Sector Standards and Developing Country Exports of Fresh Fruit and Vegetables - Communication from the United Nations Conference on Trade and Development (UNCTAD)*', cit., at paras. 37-40.

[769] Empirical research proves differences in the approaches to the development of national GAP schemes and in the priorities of such schemes in different regions and even within the same region. In particular, in South-East Asia the development of national GAP schemes is largely driven by governments in close cooperation between the public and private sectors and on proposals by the private sector. This was the case of Thailand, where the Ministry of Agriculture and Cooperatives developed a national GAP programme relying on the 'Q' quality mark, a third-party certification system owned by same Ministry. This was also the case of Malaysia, where in 2002 the national Department of Agriculture developed the Malaysian Farm Certification Scheme for GAP, which was recognised bilaterally only by Singapore (the country's largest market for fruit and vegetables exports); in reaction in 2005 the national Department of Standards adopted MS-GAP (Malaysian Standard: Crop Commodities-Good Agricultural Practice, MS 1784:2005), which could be benchmarked also against EUREPGAP (then GlobalGAP).

Conversely, Latin America countries show a strong initiative and ownership by governmental authorities. The Brazilian Ministry of Agriculture, Livestock and Food Supply is the owner of the standards for Integrated Fruit Production (IFP), currently covering some 20 different fruit categories. Similarly, the Argentinian government issued voluntary guidelines for GHP and GAP for fruit and vegetables. The implementation of Mexico Quality Supreme GAP is being carried out by an export promotion body owned by the Ministry of Agriculture, which has close links with main producers and exporters. The only exception in such panorama is Costa Rica, which does not have a national GAP scheme.

In ASEAN countries evidence proves a gradual approach that begins with a scheme focusing on national food safety with major government involvement and subsequently used as basis for the development of local or even national 'premium' GAP essentially designed to facilitating access to key export markets. On the other hand, negotiations started on an ASEAN-wide QA system for fruit and vegetables being developed by interested ASEAN Member States as part of ASEAN-Australian Development Cooperation Programme Stream – Quality Assurance Systems for ASEAN Fruit and Vegetables Project. Such regional GAP consists of four modules (food safety; environmental management; worker health, safety and welfare; and produce quality), where each one can be used alone or in combination with other modules taking consideration of individual country priorities.

[770] See UN, *Codes for Good Agricultural Practices: Opportunities and Challenges for Fruit and Vegetable Exports from Latin American Developing Countries: Experiences of Argentina, Brazil and Costa Rica*, (edited by U. Hoffmann and R. Vossenaar), 2007, UNCTAD/DITC/TED/2007/2 (arguing that, the "strict interpretation of equivalence" in the GlobalGAP context is necessary if buyers are to have confidence in the comparability of different standards).

to be better adapted to already-existing GAP protocols in developing countries, and the concept of 'equivalence' should take full account of the achievements of such programmes.

Second, benchmarking neither does necessarily imply equivalence nor does always result in equivalence. Benchmarking relies in fact on the equivalence of processes rather than on the equivalence of outcomes. In the case of GlobalGAP and GFSI, in order for a standard to be formally recognised it must comply with all control points and compliance criteria as set out in the relevant standard including a benchmarking option, and not merely result in the same level of safety in order to be recognised. This explains why the BRC and IFS standards are not recognised as equivalent to GlobalGAP, even though both are benchmarked against the GFSI.

Third, though benchmarking of requirements is a facilitator of international trade in agri-food products, the levels at which these are set can make compliance difficult in the short-run and exclude some chain actors. Benchmarking may also imply the need to introduce into existing national protocols requirements that may not be particularly relevant or appropriate to local conditions, and that may create obstacles to small growers, who are primarily interested in the domestic market. This is aggravated by the fact that buyers tend not to offer long-term purchase contracts to reduce uncertainty for those willing suppliers who must invest in order to meet buyers' standards. Lastly, a standard has to re-apply for benchmarking to take account of revisions of the reference standard. This means that, the benchmarking process may be time-consuming.

Despite all these difficulties, nonetheless, there is evidence that the tendency and speed towards harmonisation of private food safety standards – through the elaboration of collective standards and the benchmarking of standards and conformity assessment schemes to global standards – far exceeds similar efforts at both the national and the international levels.[771] The lack of speed and complexity of the standards-setting process within the Codex has long been a cause of concern. The concern here is that Codex is not able to elaborate new or revised standards at the rate that adopters require them. Many Codex standards take appreciably longer to establish and/or revise.[772] This is in contrast to the relatively rapid development of private standards, reflecting the limited membership, narrower focus and more common interests of the firms and organisations involved.

26. 'Input legitimacy': Democracy beyond the State

A standard is meant to benefit, first of all, the prescribing entity. Whether it also benefits those entities that must comply with it and society as a whole does not depend on the consideration that a standard is relevant to its contents and effective in achieving its

[771] See S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit., at 77.

[772] At present, Codex takes on average two or more years to establish a new international standard or to revise an existing one. For instance, Codex General Principles of Food Hygiene have been revised four times since its original adoption in 1969, while BRC Global Standard for Food Safety has been revised seven times since its initial implementation in 1998.

regulatory goals. At least a part of the legal literature strongly criticises the concept of 'output legitimacy', "especially as it frequently is used as a justification for the democratic legitimacy of private governance, but applied in very sweeping and superficial terms"[773]. It is indeed extremely difficult – even though not impossible – to assess the effectiveness of a private regulatory entity. This depends essentially on the fact that different 'stakeholders' actually exist in the food chain, which may define different objectives, or even similar objectives differently. Hence, assessing the effectiveness of the sole regulatory entity against its self-set objectives does not provide the real picture of the situation or a way out of the above dilemma. After all, a standards-setter may set objectives for itself that neglect or even hurt the interests of those who are regulated as well as of those who are in some way affected by the regulation. In such a situation, the achievement of the self-set objectives can hardly function as a source of legitimacy.[774] In other words, while a great flexibility in decision-making and the associated ability to deploy highly specialised expertise have contributed to a perception that the private production of rules is more efficient than rule-making in public institutions and bodies, the characters of the deliberative process is necessary to define the legitimacy of a regulatory standard. Because of that, we cannot conclude that "'getting the job done' would be the new paradigm of legitimacy, at the expense of democratic forms"[775].

It is submitted that, "displacing the bases of legitimacy […] to an effectiveness-based surrogate adulterates the values which nowadays determine the 'appropriateness' of government"[776]. In such a line of reasoning, conceptions of legitimacy based on outputs come to undermine the essence of the traditional conceptions of democracy as 'government by the people', this meaning a participatory, transparent and responsive deliberative process that involves all affected parties in an inclusive and egalitarian way. Conversely, focusing on output legitimacy and effectiveness would in practice "surrender agenda-setting and rule-making to the actors most able to deliver outputs, rather than to the community actually affected by such agenda and rules"[777]. Such an approach runs high risks of seeing regulation

[773] D. Fuchs, A. Kalfagianni, and T. Havinga, *Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation*, (2011) Agriculture and Human Values 28: 353-367, at 359 (evaluating the democratic legitimacy of private food governance against the background of the highly ambivalent implications that this exhibits for the 'sustainability' of the global agri-food system in terms of food safety, but also environmental protection and farmers' incomes).

[774] The approach adopted by Ponte and Gibbon extends the scope of GVC analysis with respect to regulatory structures, which goes beyond direct participants in the chain and incorporates both a 'horizontal' and a 'vertical' dimension to global value chain. Since value chains do not operate in a regulatory vacuum, the authors emphasise that there are several factors that may have some influence on the 'drivers' in a value chain. Hence, they investigate the "contestations over divergent qualifications and how collective enrolment in particular conventions permits forms of control at a distance […] [and] emphasizes the heterogeneous centers, form and relations of network power" (S. Ponte and P. Gibbon, *Quality Standards, Conventions and the Governance of Value-Chains*, (2005) Economy and Society 34: 1-31). See also L. Raynolds, *Consumer/producer Links in Fair Trade Coffee Networks*, (2002) Sociologia Ruralis 42: 404-424, at 419.

[775] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 684.

[776] *Ibidem*, at 685.

[777] *Ibidem*.

dominated by self-interested actors.[778] In a weakly institutionalised global environment that lacks 'checks-and-balances', this amount to what sometimes has been described as "capture"[779] by the powerful, with the interests of the strong will turning into officially desired outputs and leaving the weaker fringes the burden to bear the costs thereof. In food regulation capture is actually said to be a problem also in respect of public institutions such as Codex and government regulation, which may conceal hidden private interests.[780] Put it differently, "[s]eparating the process of rule-making from politically accountable institutions, global governance is argued to suffer a massive 'democratic deficit'"[781]. In this context, huge output legitimacy alone cannot overcome such a deficit.[782] The question then becomes the following: who gets to decide what outputs are sought?

This question pushes our analysis towards the second dimension of legitimacy we have identified earlier, that is, 'input legitimacy', which is based on the principle of democracy. In modern legal theory a decisive determinant of legitimacy is still the democratic character of a norm, whether global or local, public or private.[783] In many scholarly contributions dealing with legitimacy in global governance, it is often explicitly or tacitly accepted that legitimacy must be understood as 'democratic legitimacy', and that the democratic character of a norm makes it legitimate.[784] As Robert Keohane argues, "[t]o make a partially globalized world benign, we need not just effective governance, but also the right kind of governance"[785]. Yet, "[a]ny attempt to offer a democratic assessment of private governance with traditional notions

[778] See R. Keohane, *Governance in a Partially Globalized World*, cit., at 330 (emphasising that powerful actors can draw rents from certain institutional arrangements they capture; such rents, which are inefficient for society at large, may render those actors reluctant to accept innovative arrangements that would reduce their benefits).

[779] 'Capture' is a hugely discussed issue in political and global governance theories in relation to the balance to be found between the general and particular interests. See, generally, M. Levine and J. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, (1990) Journal of Law, Economics, and Organization 6: 167-198; and, J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge: Cambridge University Press, 2000, at 401-408.

[780] For a view that international institutions and processes are not and cannot be democratic see, R. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in: I. Shapiro and C. Hacker-Cordòn, *Democracy's Edges*, Cambridge: Cambridge University Press, 1999, at 19-36.

[781] P. Nanz and J. Steffek, *Global Governance, Participation and the Public Sphere*, (2004) Government and Opposition 39: 314-335, at 314.

[782] In support of this position see, most notably, J. Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, (2003) Indiana Journal of Global Legal Studies 10: 29-43; and, A. Moravcsik, *Is There a "Democratic Deficit" in World Politics? A Framework for Analysis*, (2004) Government and Opposition 39: 336-363.

[783] See in this regard, among many others, D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, cit., at 599 ("it is [...] no exaggeration to say that democracy has become the touchstone of legitimacy in the modern world"); S. Bernstein, *Legitimacy in Global Environmental Governance*, (2005) Journal of International Law and International Relations 1: 139-166; S. Bernstein and B. Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, cit., at 353; and, K. Dingwerth, *The New Transnationalism: Private Transnational Governance and its Democratic Legitimacy*, Basingstoke: Palgrave Macmillan, 2007.

[784] See e.g., R. Keohane, *Global Governance and Democratic Accountability*, in: D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance*, Cambridge: Polity Press, 2003, 130-159, at 130 ("[…] in a democratic era […] rules are only legitimate if they conform to broadly democratic principles, appropriately adapted for the context").

[785] R. Keohane, *Governance in a Partially Globalized World*, cit., at 325.

of democracy will fail as fundamental democracy requirements are violated"[786] when we come at the global level. Retailers, as any other private actor, are not democratically elected and cannot be held responsible towards a relatively homogenous and territorially-defined *demos*. Public authorities have to justify their actions before citizens of a certain nation-State, who can participate in rule-making through parliamentary representatives and can punish them by voting them out of office, and according to a legal framework setting limits to their competences in view of the public interest. This model of (liberal) democracy is in fact impracticable at the level transcending the nation-State.[787] This leaves legal theory, as it sets out to redraw the map of law's legitimacy from the perspective of transnational private regulatory governance, in a considerable dilemma. Faced with a multitude of overlapping, fast-evolving private regulatory regimes, many of the concerns formulated with reference to legitimacy arise in response to the apparent absence of much of the institutional and normative architecture in a transnational setting, which has been conventionally associated with the nation-State narrative.

Democracy is, however, a conceptually and historically loaded concept, and analysts struggle to approach it in relation to the many facets of global governance. This is especially true in the food safety area, where the two-fold objective of maintaining consumers' health and pursuing the commercial interest of business operators – it should not be forget that both the former and the latter are located in western countries – is pursued through rules adopted by powerful corporations. This, however, takes place with little consideration for the necessary balance with the equally legitimate objective of enhancing the interests of developing countries, where most of the downstream food business operators in the food value chain are located.[788] This state of play allegedly has a potentially negative impact on weaker actors, who – as illustrated in Chapter Three in the context of the multilateral trading system – often question the legitimacy of private rule-making in this field on both substantive and procedural grounds.

Yet, instead of abandoning democratic principles when entering the global private sphere, however, we argue in favour of moving away from the domestic analogy and adopting alternative criteria for democratic checks-and-balances. Different interpretations of

[786] D. Fuchs, A. Kalfagianni, and T. Havinga, *Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation*, cit., at 357.

[787] This contributes to explain the attempt to foster legitimacy in such a context without necessarily referring to democracy *per se*. Examining the nexus between science and law, which has attracted much attention in the legal debate especially since the negotiation of the SPS Agreement falls outside the scope of our analysis. But we should mention at least that an alternative basis for legitimacy as a surrogate for democratic accountability in the global context has been identified in the scientific and technical expertise that private actors are able to produce. On that see, C. Cutler, *The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force*, cit. (expressing a critical view of uncritical deference to experts); and, R. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, (1994) Political Science Quarterly 109: 23-34 (on the issue of democratic deficit at the EU level).

[788] See D. Fuchs, A. Kalfagianni and M. Arentsen, *Retail Power, Private Standards, and Sustainability in the Global Food System*, in: J. Clapp and D. Fuchs (eds.), *Corporate Power in Global Agrifood Governance*, Cambridge/London: MIT Press, 2009, 29-60.

'democracy beyond the State' have been advanced in the literature.[789] Yet these approaches suffer from a number of shortcomings – first of all, a lack of emphasis on private actors and, especially, businesses – that make their applicability in the cases examined here at least problematic.[790] Since we are approaching the legitimacy issue from a normative (or prescriptive) perspective, along with the deliberative democracy school of thought, we understand that notion in the substantive sense, that is, as a measure of the extent to which a norm or institution pursues the 'public' or 'general interest'.[791] In this conceptual framework, regulation is said to be in the public interest if "it is arrived at through a deliberative process which allows everyone likely to be affected by it to have a voice in its formation"[792]. Indeed, "an inclusive forum offering proper due process is said to promote the public interest whereas a closed and exclusive forum favors capture"[793]. Making a step forward, achieving the public interest requires not only fair regulatory processes independently from how these are applied, but also, and most notably, active and robust stakeholder engagement and participation from the public.

In short, whereas legitimacy in global governance could not be entirely encompassed by the democratic ideal, and whereas it notably includes more or less precise substantive criteria such as the general interest, achieving legitimacy cannot dispense with a strong democratic base. Of course, this is not to negate the trade-offs existing between participation and effectiveness at the global level.[794] The stakeholder involvement is bound to slow the standards-setting process due to often conflicting goals. Hence, when the standards-setter wants to produce a standard in a short time span, it is likely to lose the support of some groups. Nonetheless, input legitimacy is expected to result in output legitimacy, while the

[789] For instance, the concepts of "cosmopolitan democracy" (see, D. Held, *Democracy and the Global Order*, Stanford: Stanford University Press, 1995; E.U. Petersmann, *European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO*, cit.; and, *Id.*, *International Economic Law in the 21st Century: Need for Stronger 'Democratic Ownership' and Cosmopolitan Reforms*, cit.) and "discursive democracy" (see, J.S. Dryzek, *Discursive Democracy: Politics, Policy and Political Science*, Cambridge: Cambridge University Press, 1990) offer useful insights for democratic approaches to global governance based on global citizenship and discursive practices.

[790] See T. Porter and K. Ronit (eds.), *The Challenges of Global Business Authority: Democratic Renewal, Stalement or Decay?*, cit.

[791] Buchanan and Keohane argued that, "[t]he concept of legitimacy allows various actors to coordinate their support for particular institutions by appealing to their common capacity to be moved by moral reasons, as distinct from purely strategic or exclusively self-interested reasons" (A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, cit., at 409). In this regard see also, S. Wheatley, *Democratic Governance beyond the State: The Legitimacy of Non-State Actors as Standard Setters*, cit., at 226-227. A significant attempt to reconceptualise democracy aside from the forms and models of institutional representation can be found in Cohen and Sabel's concept of "directly deliberative polyarchy" (see J. Cohen and C. Sabel, *Directly Deliberative Polyarchy*, (1997) European Law Journal 3: 313-342).

[792] W. Mattli and N. Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in: W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, Princeton: Princeton University Press, 2009, 1-43, at 13-14.

[793] *Ibidem*, at 14.

[794] On that see, J. Wallner, *Legitimacy and Public Policy: Seeing beyond Effectiveness, Efficiency and Performance*, (2008) The Policy Studies Journal 36: 421-443; and, J. Bendell, *Growing Pain: A Case Study of a Business-NGO Alliance to Improve the Social and Environmental Impacts of Banana Production*, Bristol: Aspen Institute, 2001 (showing that many stakeholders dropped out of the standards-setting group as the standard was being elaborated and adapted to operational constraints).

latter alone is not guaranteed since all the parties concerned will admittedly push for their own interest in the decision-making process. Even more, input and output legitimacy are not alternates, but rather they represent the extremes of an ideal *continuum*: on the one hand, democratically legitimate processes have the ideal result of delivering effective norms in the general interest; on the other, it must not be forgotten that private standards are only relevant to the extent that they are actually adopted in the value chain (market uptake).

Assuming the democratic principle that the people must 'own' – directly or indirectly – regulation, the way the concept of democratic legitimacy can be effectively operationalised in the global governance context is in terms of 'public accountability'.[795] Hence, the democratic character of a transnational private regulator and of the rules it produces is a function of its accountability to the public. This way, public accountability mechanisms are meant "to reinforce democracy and the rule of law"[796] and therefore the normative commitments of a system. This raises the following questions in relation to global food safety regulation: on the one hand, what is the 'public' and what is its role? On the other, what does 'accountability' concretely mean?

26.1. The issue of the 'public'

The issue of the 'public' relates to and assumes the idea of a collectivity. To better understand the characteristics of the collectivity that form the 'public' of private food safety regulation at the transnational level we need to integrate the deliberative-democratic principle discussed above with a functionalist and problem-solving perspective of analysis. In light of the perceived impossibility to form a world-scale public, a 'public' must not necessarily be territorially defined or linked with a nation-State; rather, global publics may be forming along certain global issues. The relevant public associated with a regulatory entity and its norms may be identified in relation to a particular issue, on the basis of "an 'affected' criterion"[797]. As result, accountability mechanisms in private regulatory settings tend to apply to a much wider and more elusive constituency of stakeholders, both along the supply chain and geographically. It may be even argued that belonging to such a functionally differentiated

[795] See, J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 13-14 (discussing the role of institutions in relation to legitimacy as public accountability in "polycentric regulatory regimes").

[796] J. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in: M. Dowdle (ed.), *Public Accountability. Designs, Dilemmas and Experiences*, Cambridge: Cambridge University Press, 2006, 115-156, at 153 (analysing the practice of contracting out public functions to private parties in terms of the problems that this may pose with regard to 'public accountability'). Conversely see, D. Curtin, *Executive Power of the European Union: Law Practices and the Living Constitution*, Oxford: Oxford University Press, 2009, at 246 (adopting a 'thin' view of accountability). For analysis of the many ways private standards-setting struggles and deal with practical issues of public accountability see, M. Dowdle (ed.), *Public Accountability. Designs, Dilemmas and Experiences*, cit.

[797] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 689. See also R. Mayntz, *Legitimacy and Compliance in Transnational Governance*, cit., at 10 ("Participation by representatives of organized groups of "stakeholders" in sector-specific decision processes is an alternative to formally democratic procedures closely related to deliberation").

"global public sphere"[798] is no longer the result of a territorial and cultural identity, but of a choice.[799]

With this comprehension in mind, we convene that, where a regulatory authority is exercised by a private entity, legitimacy is ultimately concerned with the connection of the regulator with the ensemble of parties that are likely or willing to enter into public deliberations in order to regulate a specific issue in the general interest. We can distinguish between those parties who are directly affected by the regulatory activity concerning a given issue and those that hold a stake in the regulatory activity. Specifically, in the field of food safety it is possible to distinguish descriptively four broad categories of actors:[800]

1. The owners of a standard: as already known, these can be individual retailer firms, standards-setters organisations or food industry coalitions.
2. Actors that are part of the value chain and that are affected by the regulatory process: these are business operators, such as most notably farm input suppliers, farm producers, primary collection and processing facilities, food ingredient and packaging manufacturers, food manufacturing firms, commercial intermediates distributors, importers, exporters, and food service and restaurant operators.
3. Actors that provide services to the regulated industry: these are business actors as well, such as certification and auditing bodies; and
4. Actors that are outside the value chain and that are not directly affected by the regulatory process, although they may hold a relevant interest in that: these are the final consumers and civil society organisations as the representatives of the general public, as well as governmental authorities as private regulation always interacts and sometimes interferes with public regulation and in so far as the private regulation has consequences for the need of State intervention.[801]

Actually, the interest constellations of affected parties and stakeholders are of such a complexity that leads to significant problems of identification, representativeness, and feasibility in designing democratic governance processes. And the traditional legal discourse does not seem adequately equipped to give consequential voice to such increasing diversity and to operationalise accountability in global governance. This is a further demonstration of how a dichotomous distinction between public and private, or governmental and non-

[798] J. Cohen and C. Sabel, *Global Democracy?*, (2005) New York University Journal of International Law and Politics 37: 763-797, at 794.

[799] See J.M. Guéhenno, *From Territorial Communities to Communities of Choice: Implications for Democracy*, in: W. Streeck (ed.), *Internationale Wirschaft, National Demokratie: Herausforderingen für die Demokratietheorie*, Frankfurt/New York: Campus Verlag, 1998, 137-150.

[800] See T. Havinga, *Conceptualizing Regulatory Arrangements: Complex Networks of Actors and Regulatory Roles*, Nijmegen Sociology of Law Working Papers Series no. 2012/01, at: http://repository.ubn.ru.nl/bitstream/handle/2066/100876/100876.pdf?sequence=1, at 18.

[801] See T. Risse, *Transnational Governance and Legitimacy*, cit., at 185 and 193 (admitting that the concrete accountability mechanisms available to the internal and external stakeholders may be differentiated, notably for reasons of practicability, as long as they stay effective).

governmental sources of regulation is no longer an adequate conceptualisation for analysing the reconfiguration of the regulatory patterns in the food safety area.

26.2. 'Retrospective accountability': Rendering account to the affected parties and relevant stakeholders

Turning to the issue of what 'accountability' means, this has been subject to much debate in legal and political theory. In a narrow sense, "accountability involves the principle that those whose rights or interests are adversely affected by the actions of someone else have a right to hold that person to account"[802]. In this sense, accountability has a retrospective dimension and designates an "accountability relationship" in which "an individual, group or other entity makes demands on an agent to report on his or her activities, and has the power to impose costs on the agent"[803] as the case may be. This view of accountability logically presupposes that the regulatory entity has already acted, or issued and/or implemented norms, before control may be exercised, and it tends to be adversarial and sanctions-based.

In the public sphere accountability is an "almost universally accepted standard for public administration"[804], and a fundamental prerequisite for the exercise of democratic control over governance institutions. In liberal democracies, the accountability of public actors can be regressed to democratic electoral, judicial or disciplinary mechanisms, which may give rise to well-defined sanctions at the end of a reasoned assessment process.[805] It can be even argued that public institutions benefit from a "double accountability"[806] guarantee, since they are accountable to both their citizens and multilateral institutions. In the specific case of food safety standards Chapter Three has illustrated the complex multilateral discipline concerning standards-setting, obligation of notification, provision of information and mechanisms for dispute settlement.

Accountability is equally crucially needed in private governance arrangements in relation to the connection between the regulatory entity and the affected parties and relevant stakeholders. A retrospective approach to accountability emphasises the 'control' that the circle of affected parties and stakeholders must be entitled to exercise on private regulators,

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[802] R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, New York: Palgrave MacMillan, 2003, at 13.

[803] R.O. Keohane, *Accountability in World Politics*, (2006) Scandinavian Political Studies 29: 75-87, at 77. Similarly see, R. Grant and R. Keohane, *Accountability and Abuses of Power in World Politics*, (2005) American Political Science Review 99: 29-43, at 99 ("[a]ccountability, as we use the term, implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met"); and, M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, (2007) European Law Journal 13: 447-468, at 450 (defining accountability as "[a] relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences").

[804] A. Wolf, *Symposium on Accountability in Public Administration: Reconciling Democracy, Efficiency and Ethics – Introduction*, (2000) International Review of Administrative Sciences 66: 15-20, at 16.

[805] See H.L. Gulbrandsen, *Accountability Arrangements in Non-State Standards Organisations*, (2008) Organization 15: 563-583.

[806] See P. Liu, *Private Standards in International Trade: Issues and Opportunities*, cit., at 15.

and the 'sanction' of the norms and regulatory activities that deviate from the outcome of public deliberations.[807] We come back to the foundational idea of democratic governance that the affected public should own regulation of a given issue and be able to hold decision-makers – be they public or private – accountable. In fact private standards-setting seems to fall outside the structures of both domestic and international law, thus raising questions of accountability deficit. As has been stressed, "[t]he shift of regulatory authority and activity from domestic to global bodies has outstripped traditional domestic and international law mechanisms to ensure that regulatory decision makers are accountable and responsive to those who are affected by their decisions"[808]. The emergence of private actors exerting regulatory functions in the absence of any legal mandate raises questions about the real responsibilities and possible liability of such actors in the exercise of their regulatory roles.[809] In particular, this challenges the traditional public control mechanisms since these originated in hierarchical relationships and are consequently quite difficult to operationalise in 'diffuse' and 'networked' governance regimes at the global level. As result, whereas accountability relationships are well-determined in traditional legal and administrative hierarchical structures, they are much less clear in private governance arrangements.

The question is to whom accountability is provided. It does not seem that such a control may be achieved in many ways or following different channels. Indeed, internal accountability, which is assessed essentially in terms of the existence of responsibility mechanisms to board members, is ensured almost exclusively to the shareholders. More difficult is to achieve external accountability, where organisations are held accountable to those that are affected by their decisions. Accountability channels such as market-based or reputational mechanisms (product boycotts, naming and shaming campaigns orchestrated by watchdog NGOs, and so on) may be diffuse. This means that diffuse governance not only is difficult to assess, but also makes it possible collusive practices such as the formation of distributive coalitions among relevant actors, which are likely to stimulate rent-seeking and transfer of costs to actors that are in a marginal position. Finally, not any party affected by a standard discipline has paths and instruments available to hold a standard accountable.[810]

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[807] On the importance of controls and sanctions in a democratic regime see, M. Kahler, *Defining Accountability Up: The Global Economic Multilaterals*, (2004) Government and Opposition 39: 132-158, at 148.

[808] B. Kingsbury and R. Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, in: S. Flogaitis (ed.), *International Administrative Tribunals in a Changing World*, Esperia, 2008, 193-220, at 1.

[809] See F. Cafaggi, *Gouvernance et responsabilité des régulateurs privés*, EUI LAW Working Paper Series no. 2005/06, at : http://cadmus.iue.it/dspace/bitstream/1814/3326/1/law05-06.pdf (discussing the question of the *ex post facto* liability of private regulators and its different forms); C. Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, cit., at 74; and, C. Harlow and R. Rawlings, *Promoting Accountability in Multilevel Governance: A Network Approach*, (2007) European Law Journal 13: 542-562.

[810] Different seems the situation of multi-stakeholder initiatives, where the extent of the parties that are able to demand accountability is by definition broader and diversified. Such initiatives exhibit mechanisms by which workers and suppliers can hold the standards accountable to a certain extent. For instance, ETI's Alleged Code Investigation Guidelines allow NGOs and trade unions to forward complaints from members in developing countries. In addition, ETI member companies commit themselves to provide secret complaint mechanisms for

An important element of control is State law. As private entities, private standards-setters are subject, at least in certain cases, to the domestic law of the State where they are incorporated. More institutionalised forms of transnational private regulation, such as certification schemes, require for the regulatory bodies to be incorporated in a particular jurisdiction, which will provide basic rules for their governance structures, reporting requirements, and so on, and for the norms issued by these bodies to be embedded within an applicable system of State law, to be determined by PIL choice of law rules. Most particularly, where compliance with a private standard is contractually imposed, this will be subject to review of its compatibility with the applicable contract law. The effectiveness of contractual standards is to a large extent dependent upon PIL norms, which disciplines the choice of the applicable law, the enforcement of judgments in other jurisdictions, and so forth. Equally relevant in relation to food laws is that a standard arguably has to be in line with applicable substantive domestic legislation to the extent that this trumps contractual provisions. Nonetheless, while domestic legal controls are a strong element of retrospective public accountability, they are limited by their territorial, material, and personal scope and therefore exclude a broad range of situations on which control should be exercised. The applicability of international norms and standards as accountability instruments is even more controversial and less evident, since private entities fit less well into public international rules' scope, as the discussion taking place at the WTO level illustrate.

26.2.1. Conformity assessment through third-party certification

To address these deficiencies it is underlined the "role of intermediary organisations as institutions that are particularly suited to develop and maintain standards of accountability"[811]. Generally, an independent and trusted actor is awarded the authority and instruments to regularly conduct checks of the performance of the given regulatory entity. In the food safety area, such intermediary organisations are essentially auditors and certifiers in regimes of third-party certification. At a general level of considerations, in respect of the ultimate objective of food safety standards, i.e., fostering supply chain management, certification can bring benefits at all levels of the food value chain, namely, to producers by increasing market access, market share and product margins for certified products, to intermediate actors by protecting liability and reputation for product and label claims, and to final consumers by providing reliable and trustworthy assurance on product and process attributes.

More specifically, among the three systems of conformity assessment described in Chapter Two, first-party (or self-) assessment is the easiest system to establish and the cheapest one. However, under adverse circumstances, the company may face a dilemma between the cost of complying with the standard and its immediate financial performance

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workers, although very few of them have actually done so. For details see, S. Schaller, *The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative*, University of Duisburg Essen INEF Report no. 91/2007, at: http://inef.uni-due.de/page/documents/Report91.pdf.

[811] See F. Furger, *Accountability and Systems of Self-governance: The Case of the Maritime Industry*, (1997) Law and Policy 19: 445-476, at 449.

target. Hence, compliance comes to depend upon the option pursued in solving such a trade-off. Also, when a standards-setting body certifies against its own standard, a conflict of interests may also arise. This is why, ideally, the owner of a standard should not carry out the certification operations by itself. In second-party assessment the risk of conflicts of interests is lower, as compliance is monitored by another party – generally, the producer / supplier. Yet, there is still scope for such a conflict, for example when supply is scarce or in the case of preferred suppliers that the buyer cannot afford to lose. Conversely, with third-party certification the potential for conflict of interests is reduced. Certification is by definition done by a body that does not have any direct interest in the economic relationship between the buyer and the supplier; hence, a certification body is an assurance of independence and impartiality. Even more, to ensure that the certification bodies have the capacity to carry out certification programmes, they are evaluated and accredited by an authoritative institution. Third-party certification proves to the buyer that its supplier in the value chain complies with its own standards, which can be more convincing than if the supplier itself provided the assurance. This is a useful instrument to access remote markets when the issue of trust arises. In countries where the effectiveness of regulation is perceived as low, or the developing country stereotype influences the perception of consumers in the importing markets, the use of independent monitoring may be a solution for establishing trust in the quality of exported products.

An increasing number of private food standards rely on third-party certification for monitoring and enforcing compliance with private standards.[812] The most immediate reason is that few developing countries have domestic certification bodies. In addition, consumers in importing (advanced) countries are more likely to trust a food product that bears the label of their own country's certification bodies, because these appear to be less vulnerable to possible conflicts of interest than the certification bodies of the producing countries. No critical difference could be found among the standards regarding evaluation of external accountability. To certify against a standard certification bodies have to be accredited by independent accreditation bodies that check their capabilities. With the exception of SQF, the standards-setter does not decide which organisations are authorised to monitor and enforce compliance with its own standard. Usually a certified company is audited at least once a year. An audit report has to be technically reviewed prior to the certification decision by the certification body. The body that decide to grant, suspend, revoke or renew certification should be independent to the auditor. Critical or major non-conformity against fundamental requirements of the standard should result in suspending or withholding the certification, and a new audit has to begin; minor non-conformities are followed by corrective action and need to be revisited.

However, critical observers point out weaknesses of third-party certification mechanisms, which highlight how the infrastructure for third-party certification becomes

[812] The use of foreign certification bodies is common practice particularly in the agriculture export sector and in organic food. Multinational certification companies, like *Bureau Veritas Quality International* or *Société Générale de Surveillance*, perform safety and quality controls of agricultural products for export worldwide.

fundamental to the functioning of private food safety standards, although some of them still involve first and second-party controls. In particular, a major source of criticism is that independence, while being the main point of strength of third-party certification, is often also its Achilles' heel, because of possible conflicts of interest and capture by the entities that are being certified. In other words, certification is not automatically assurance of impartiality. And this is so for a number of reasons.

Firstly, from an 'agency theory' perspective, the problem with third-party certifiers is that they appear to serve as agents for three principals: retailers who want to maximise profits, consumers who demand safe foods, and finally all those who rely on third-party certification to verify regulatory compliance. Such an arrangement generates conflicts and problems in the accountability mechanisms to oversee how the certifier operates, because the principals' interests are not aligned.

Secondly, a standards-setting body would like to see high implementation rates of its standard, or may have a bias against certain types of producers, which may influence certification decisions. Especially retailers in an oligopolistic market structure may 'encapsulate' third-party certification to legitimise and promote their standards of production. In this regard, it seems that "the big winners in this food trade environment where private standards schemes proliferate are those in the business of [third] party certification"[813].

Thirdly, if the certifier is a for-profit company, it may have an interest in not interpreting a standard in too strict a manner in order to promote its adoption by a large number of producers or avoid that those who have adopted that standard switch to competitors who have a more flexible interpretation.

Fourth, if certifiers are the expression of a trade association or have too cosy a relationship with the industry they certify, their independence may be compromised, together with the credibility of their certification. In most cases the certification bodies are trained by the standards-setter itself, while the methodology used in the certification process is considered intellectual property right of the standard, and thus details remain confidential. This serves to explain the little information that is publicly available on the extent to which these mechanisms prevent non-complying companies from becoming certified.

Fifth and lastly, the company wishing to be certified against a standard hires the certification organisation itself, which could provide an incentive to forego rigour in favour of future cooperation with the company.

Beyond criticisms in relation to impartiality, another source of concern relates to uniformity of assessment. Producers in a given country can be penalised with respect to their counterparts in other countries because of differences in the interpretation of the standard requirements by different certification bodies. Finally, criticism is sometimes addressed to private regulatory entities that they develop their standards in a functional way and may not

[813] R. Clarke, *Private Food Safety Standards: Their Role in Food Safety Regulation and their Impact*, cit., at 27.

be mindful of the impact they have on the operation of other systems of norms.[814] Hence, if "governance contributions of private actors may be quite effective and successful with regard to sectoral problem-solving, [they] will fail to deal with the trans-sectoral consequences (negative externalities) of their regulatory activities"[815]. This implies that third-party certification only aims to ensure compliance with the standard on the basis of the standard's own terms of references and therefore accountability on the issues covered by the standard at the most; conversely, mitigation of externalities or unintended consequences along the value chain is not covered.

All in all, it seems that the quality of independence and impartial in third-party certification is not often ensured. Yet, businesses displaying various certificates of compliance with food safety management schemes say well the importance of certification, although there are evident weaknesses in their operations. In light of that, constant monitoring of the certification bodies' performance and transparent reporting are important elements of safeguarding the integrity and demonstrating the credibility of this system.[816]

In summation, the picture with respect to the accountability of private food safety standards is at best mixed. Internal accountability, that is, accountability in its narrow sense, is a feature of most of the standards and initiatives analysed here. Yet, external accountability, that is, accountability to the broad range of affected parties and relevant stakeholders is given in hardly any institution. In terms of this broader notion of accountability, then, private food safety standards tend to exhibit a fundamentally limited democratic legitimacy. Indeed, while food business operators in the value chain are responsible for compliance with the relevant standards towards the standards-setter through generally third-party certification and auditing systems, in turn the standards-setters are not accountable to the affected parties and relevant stakeholders but exclusively to their shareholders or to the general public through the law of the State of incorporation. We may conclude that accountability, as such, cannot serve as a reliable source of democratic legitimacy.

26.3. 'Prospective accountability': Taking account of the interest of all affected parties

A more extensive view of accountability adds a prospective dimension that insists on the necessity for the regulator to take into account the preferences, interests and concerns of the 'public' – defined as above – in setting norms. This other side of accountability emphasises more the responsiveness that a regulator must show to the concerns of the affected parties and relevant stakeholders. Bearing in mind the assertion of Hans Kelsen that "participation in the

[814] See C. Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, cit., at 58.

[815] K.D. Wolf, *Private Actors and the Legitimacy of Governance beyond the State: Conceptual Outlines and Empirical Explorations*, cit., at 210. It may be arguably an option for some actors that seek normative change on a given issue to shift deliberately this issue to other regimes, or even to create a new regime that competes with existing ones, so as to force the latter to amend their practices or norms.

[816] In 2008 the GFSI established an accreditation task force which drafted additional requirements to ISO/IEC 17011:2004 – *General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies*.

government must be considered as the essential characteristic of democracy"[817], an effective way to achieve prospective accountability is by means of mechanisms of inclusive and egalitarian participation. These can take many forms, such as voting procedures to adopt a rule, or public notice and comment procedures prior to making a decision.[818] In this sense, participation is understood as opposed to 'delegation' models of accountability, working along the lines of principal/agent relationships.[819]

Achieving inclusiveness and equality in participation is a daunting challenge especially in food safety governance, where notably geographic distribution in access to control and participation mechanisms is overwhelmingly skewed in favour of western stakeholders and to the detriment of the weaker actors.[820] Nonetheless, this does not mean that participation and responsiveness could be dissociated or considered separately from accountability. Adopting such a stance would make it almost difficult to account for all the links that exist between accountability, on the one hand, and responsiveness and participation on the other.[821] Hence, responsiveness (through participation) and control should be seen as two sides of the same accountability coin.

In light of the foregoing, the 'accountability relationship' in the field of transnational private regulation can be seen as two-fold: on the one hand, the relationship of a regulatory entity with its relevant stakeholders, according to which the former must allow inclusive and

[817] H. Kelsen, *Foundations of Democracy*, (1955) Ethics 66: 1-101, at 3.

[818] De Búrca qualifies the principle of participation as the prime "building block of democracy" and insists on the principle of equality in participation of the public in a governing entity, which "refers both to the idea of equal opportunity to participation in the process of governing and to that of equal consideration for the interests of all members of the community" (G. De Búrca, *Developing Democracy beyond the State*, cit., at 251-252). Democratic legitimacy can be established through deliberative processes whereby participants scrutinise heterogeneous interests in the light of the 'common good' of a given constituency. Hence, "any bestowal of democratic legitimacy on global governance must ultimately depend on the creation of an appropriate public sphere, i.e. an institutionalized arena for (deliberative) political participation beyond the limits of national boundaries" (P. Nanz and J. Steffek, *Global Governance, Participation and the Public Sphere*, cit., at 315).

[819] On the prospective-retrospective aspects of accountability in the classical 'principal-agent relationship' context see, e.g. D. Curtin, *Executive Power of the European Union: Law Practices and the Living Constitution*, cit., at 248 (discussing accountability issues at the EU level and identifying *ex ante* controls, that is, procedures through which the principal ensures *a priori* that the agent acts in conformity with the terms of delegation, and *ex post* controls, that is, procedures through which the agent renders account *a posteriori* of its activities to the principal; in the author's view, accountability concerns exclusively *ex post* control). See also M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, cit. (identifying the many connections existing between the two dimensions of accountability, with the retrospective one having not only a control function, but also a "learning and improvement function", and finally feeding into prospective rule-making); and, R. Mulgan, *"Accountability": An Ever-Expanding Concept?*, (2000) Public Administration 78: 555-573.

[820] See D. Fuchs, A. Kalfagianni, and T. Havinga, *Actors in Private Food Safety Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation*, cit., at 356.

[821] Many accountability claims relate in fact to issues of responsiveness and participation. Some authors distinguish 'participation' from 'accountability', but define responsiveness as function of the latter (*ibidem*, at 358). Some other authors talk about a "participation model of accountability" in view of shedding light on the accountability mechanisms that seem to extend beyond strict *ex post* control: see, e.g., R. Grant and R. Keohane, *Accountability and Abuses of Power in World Politics*, cit., at 31; and, J. Ferejohn, *Accountability in a Global Context*, IILJ Global Administrative Law Series Working Paper no. 2007/5, at: http://iilj.org/publications/documents/2007-5.GAL.Ferejohn.web.pdf (discussing global deliberative practices as part of "accountability in a global context").

equal participation of the latter in its activities, in order to take account of the stakeholders' input and preferences in rule-making; on the other, the relationship according to which the relevant stakeholders are entitled to control and sanction *a posteriori* the regulatory entity for the way it has conducted its regulatory functions, these including the whole spectrum of rule-development, adoption, implementation, and enforcement. Hence, public accountability ensures that the interests of the relevant stakeholders are reflected – *ex ante* through participation and *ex post* through control – in the norm-setting process and in the norms finally issued by a regulatory entity. If such accountability relationship is effective, such norms for the purpose of regulating issues of concern to the relevant stakeholders should approximate what is called 'democratic' and hence have good chances of being viewed as legitimate.

To ensure the effectiveness of the regulatory arrangements it is highly important that the regulated parties have a say in standards-setting and interpretation. The questions are therefore: to what extent are regulated parties involved in standards-setting? And what are the consequences of this? In replying to these questions, the following aspects of the input side of legitimacy in private food safety standards-setting will be addressed in sequence: first, the type of interests represented, i.e., the extent to which there is a duly consideration of the public interest or only of the private self-interest; second, openness of standards-setting, i.e., the scope for involvement of key stakeholders in decision-making and sensitivity to developing country interests; and finally, transparency of standards-setting and implementing.

26.3.1. Representativeness: In-between industry needs and consumer protection

Questions of equal and inclusive participation in private standards-setting should be asked along with a parallel reflection about the effective representation of the parties and interests affected in the regulatory process.[822] In general terms, the rationale for the distinction between public and private regulation is not whether regulation takes the forms prescribed by public law, but rather which interests are taken into account when a norm is set and enforced. In the public domain it is assumed that the interests of all the parties involved are taken into account. As such, for instance, official standards are not only based on scientific justification but also represent a political consensus between diverging interest and pressure groups. Externalities are also factored into the decisions-making process.

On the other hand, critics point out that, market actors, unlike governmental institutions, cannot be neutral contributors to public policy goods or purveyors of the general interest. Private standards, which take the form of B2B specifications, are developed and implemented by market actors in the exercise of their daily business transactions, and therefore are integral to the private, commercial and contractual relations of buyers with sellers. Hence, such standards are assumed to pursue primarily – if not exclusively – the cost-minimising and

[822] See, P.J. Spiro, *New Global Potentates? Nongovernmental Organizations and the "Unregulated" Marketplace*, (1996) Cardozo Law Review 18: 957-970; and, J.A. Scholte, *Civil Society and Democracy in Global Governance*, (2002) Global Governance 8: 281-304.

profit-maximising goals.[823] In the absence of any mandate bestowed on private regulators, the key driver for the development and adoption of private standards is indeed marketplace demands, including most notably consumer preferences, such that they reflect the freedom of business operators to engage, in full autonomy, in the development of such standards to be applied as a condition to importing, purchasing or selling agri-food products. Nonetheless, this would be the case also of private standards that are designed to respond to an existing or expected government regulation and that are therefore – at least in part – removed from demands from the marketplace. In any case, when the narrow private interest and the general interest come into conflict, corporations would be strongly inclined to privilege the former at the expense of the latter. As we have already remarked when talking about the applicability of multilateral trade disciplines to private food safety standards, why would profit-making businesses engage in costly system of private food safety control if there is not a sound commercial reason for doing so? Of course, this does not mean that a private standard never takes the general interest into account; yet, this happen only incidentally where this interest corresponds to the private one.[824]

Hence, one important factor to be considered is the difference in scope between science-based venues of regulation – in support of socially desirable levels of consumer protection and advancement of general societal values, including most notably health outcomes – and sites of regulation that pursue market-oriented interests. In this sense, it is not private standards *per se* but food safety regulation as a whole – relying upon both the private and the public layer – becomes a product of balancing multiple and multi-dimensional interests, namely, social and economic needs, as well as wishful thinking and economic feasibility.

26.3.2. Inclusive and egalitarian participation

The prospective side of accountability entails that the regulatory entity must take into account the preferences, views and interests of its 'public' as defined above, and seek to reflect the outcome of 'public' deliberations, thereby ideally leading to decisions in the interest of the all the parties affected by the regulatory process. Generally, market-driven forms of regulation – including private standards – differ from corporate self-regulation and CSR initiatives, which frequently involve limited input from stakeholders and produce standards and statements of principles that are voluntary and discretionary. On the other hand, private standards raise a number of issues for legitimacy due to the nature of their ownership and their development process, which is rarely sufficiently participatory, transparent and based on scientific evidence. Knowledge of which particular actors are involved and what their role is in a regulatory field reveals power relations that may find a reflection in the standards development process, the level of compliance with prescriptions, and the reliability of a certification. To make it even more complex, the involvement of actors and the roles they

[823] On the inclusion of profit-seeking actors into democratic rule-making see, D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, cit., at 251.

[824] See WTO, *World Trade Report 2005: Exploring the Links between Trade, Standards and the WTO*, cit., at 32-33.

perform develop over time. Just to have an example, a picture of the actors and roles involved in EUREPGAP in its inception in 1997 differs significantly from the picture of GlobalGAP today.[825]

Legitimacy involves putting in place, first of all, inclusive participation mechanisms. Critically, "[t]he fact that a small and select group of insiders effectively decided what constituted stakeholder groups – and based on this definition, the decision about participants […] – can, from the perspective of democratic theory, hardly be legitimated"[826]. At the most fundamental level, participation requires access to information and decision-making. In this respect, all the parties potentially affected by the regulatory discipline should be granted decision-making power in the central governing organs of the private regulatory institution. Secondly, participation should also be egalitarian, and all constituencies should have an equivalent chance of weighing in on decision-making. For constructing trust in a regulatory arrangement, it is important that none of the parties is too powerful. A regulatory arrangement were one party monopolises the decision-making process will be criticised for being in the interest of that party only, neglecting other interests. From the perspective of input legitimacy, next to the participation of all regulated parties, the participation of other stakeholders, such as consumer organisations and NGOs, is crucial. In relation to this it is important to observe that international standards-setting makes every effort to reach agreement on the adoption or amendment of standards by consensus. Here we refer to 'consensus' as conceptually developed in the standardisation process, that is, as a "[g]eneral agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments"[827].

Accordingly, participation is incentivised since the earlier stages of the standards development process on the basis of mutually agreed deadlines.[828] Thirdly, participation finds further expression in the distribution of decisions-making power on a geographic base, and particularly in the extent to which developing-country interests are taken into account in this process. Lastly, participation must be meaningful in the sense that its outcome must find some reflection in the regulatory entity's activities, and at the same time must not be burdensome as to make any decision impossible, or to damage the effectiveness of the regulatory entity's

[825] See S. Bernstein and B. Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, cit. (showing that political legitimacy of NSMD governance systems involves a three-phase process – initiation, widespread support, and political legitimacy *stricto sensu* – with different actors participating and different relationships between them).

[826] K. Dingwerth, *The Democratic Legitimacy of Public-Private Rule-Making: What Can We Learn from the World Commission on Dams*, (2005) Global Governance 11: 65-83, at 78.

[827] ISO/IEC Guide 2:2004 – *Standardization and Related Activities - General Vocabulary*.

[828] The Codex standards-development process provides the possibility to adopt or amend standards by vote only at the final stage and only after failure of every effort to build consensus among Codex Members. To date, Codex has made rarely use of the voting procedure. Likewise, ISO emphasises consensus as a procedural principle in the development and adoption of international standards. For the illustration of the highly structured standards-setting processes within Codex and ISO see Chapter Two.

operations. Participation mechanisms that would negatively impact on the effectiveness of a private standard may be counterproductive for legitimacy.[829]

Designing "appropriate accountability-enhancing participation mechanisms"[830], when they concern large and diverse groups of affected parties and stakeholders, is a particularly difficult task that involves subtle fine-tuning. It has been pointed out that, "[t]he inclusiveness and transparency of the private standard-setting process can be at least as problematic as that of public regulations, but without the multilateral guarantees of the SPS and TBT Agreements"[831]. In fact critics of private standards argued that their development process is not participatory. The different governance structures exhibited by the private food safety regulatory field can be placed along a *continuum* ranging from retailer dominated ones, to joint retailer-producer initiatives, to multi-stakeholder initiatives. The figure below shows how major private food safety standards fall on this *continuum*.

Figure 6: Participation in some major private food safety standards

Category	**Standard**	**Participation and position in standards-development**			
		Retailers	Food industry	Service providers	Civil society & NGOs
Retailer-led	BRC	Absolute decision-making power	Consultative role	Consultative role	No voice
	IFS	Absolute decision-making power	Consultative role	Consultative role	No voice
	SQF	Absolute decision-making power	Consultative role	Consultative role	No voice
	GFSI	Clear majority	Minority representation in Board, consultative role	Consultative role	Participation in annual meetings and regular exchange of information
	GlobalGAP	Equal representation, elections	Equal representation, elections	Consultative role and only for Associate Members	Participation in annual meetings
Multi-stakeholder initiatives	MSC	Minority representation in Board	Represented for 1/3 in Board	No representation	Represented

[829] See R. Stewart, *Administrative Law for the 21st Century*, (2003) New York University Law Review 78: 437-460, at 460.

[830] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 702.

[831] D. Hirst, *Recent Developments in EU Pesticides Regulations and Their Impact on Imports of Tropical Fresh Produce*, quoted in CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit., at 25.

Most private food safety standards are elaborated through a rather 'closed' process which strongly prioritises retail access, while exhibiting a limited scope for stakeholder input. In particular, BRC,[832] IFS and SQF,[833] and GFSI[834] are exclusively retailer-led organisations, allowing the food industry and certification bodies to be represented in the committee that reviews the standard and makes recommendations on improvements to the Board only with a consultative role. Although there are sign that some of the business coalitions that set standards have started opening the development process to external stakeholders, in practice most of the B2B standards developed by retailers focus on large commercial farms and food processing firms only. Other stakeholders, most notably, consumer and other civil society organisations, usually are not included in the decision structure of retailer-led standards and in no way have decision-making power. They may be provided with access to meetings of the central governing organ, but with a consulting status only. Alternatively, they may be excluded from the meetings at all. GFSI is the only retailer-led organisation with some food industry representatives on the Board and with a structure for information exchange with civil society; it invites all interested parties that want a voice in GFSI to participate in annual meetings. Multi-stakeholder initiatives appear to bring together different actors with opposing interests trying to reach an agreement on crucial societal issues.[835] Yet it is important to note that even in this case resource asymmetries still prevent equal participation, even if certain stakeholders are allowed participation.[836]

[832] Started as a pure retail initiative, over the years BRC has involved other stakeholders like major manufacturers, trade associations, certification bodies, and even the UK Accreditation Service (UKAS), which have voice in the BRC standards development process through the BRC Technical Advisory Committee and the Standards Governance and Strategy Committee. Nonetheless, the British retailers remain in a predominant position.

[833] SQF standard is owned by FMI, an American organisation of retailers and wholesalers. The Technical Advisory Council is made up of 25 members, including a relative majority of retailers (11), predominantly from the US. Similar observations can be made about IFS, whose major decision-making bodies give access only to retailers from Germany, France and Italy. Other stakeholders, in particular manufacturers and certification bodies, participate in the Review Committee which has advisory functions.

[834] The GFSI Board of Directors is still dominated by retailers (13 out of 16 members), which come mainly from the US (7) and Europe (6). Three Board members are from the food industry (additionally two advisers come from industry as well). Since September 2006 a wider range of stakeholders are allowed to make recommendations to the Board. Also, the Consumer Goods Forum was established in April 2009 to advise the Board; this brings together the CEOs and senior management of some 400 chain operators across 70 countries, and reflects the diversity of the food industry in geography, size, product category, and format. Nonetheless, even in the Forum most members are from the US and Europe. Still more, the Board and Forum's membership is by invitation only.

[835] Most notably, MSC developed from a partnership between Unilever and WWF into a multi-stakeholder organisation. Its initial governance structure was strongly criticised by a number of NGOs as lacking democratic representativeness, credibility, and effectiveness. Yet, even in such multi-stakeholder governance structure the decision-making authority is the Board of Trustees, which functions like a corporate board by approving targets, strategies, and financial accountability, and appointing chief board and committee members. Trustees are not elected but appointed by cooptation. Almost all trustees are from Western countries (the US, Europe and Australia), although some of them focus on fisheries in Africa or the Southern Ocean. For analysis see, S. Tully, *Access to Justice within the Sustainable Development Self-Governance Model*, ESRC Centre for Analysis of Risk and Regulation CARR Discussion Paper Series no. 21/2004, at: http://eprints.lse.ac.uk/36056/1/Disspaper21.pdf, at 3).

[836] Discrimination in access to representatives from developing countries may be observed in MSC. In the Stakeholder Council only four members are listed in the 'developing world category' compared to 16 in the

Non-inclusiveness is an issue that is especially critical for developing countries' stakeholders, whose inputs and perspectives are very marginal or even inexistent in private standard setting. Most of these countries, especially the majority of low-income countries, attend meetings only irregularly; in fact their participation in meetings of subsidiary bodies, where standards are actually elaborated, remains very low. Also, it appears that developing country interests play little role in the setting of standards, reflecting the fact that the key stakeholders in these organisations are commercial interests – rather than States – that are especially located in industrialised countries. What results is a bias of private standards set from the developed countries' perspective; this is particularly evident when considering that a certification is usually granted by foreign certification bodies and can be obtained only at developed-world prices not easily affordable for local producers. It is not without reason therefore that in the meetings of the SPS Committee the fundamental objection to private standards by many producers, particularly from developing countries, is that they have no 'voice' in the setting of standards that have the potential to influence markedly their market access capacity.

In short, the above illustrates how inclusion in private standards-setting tends to be "not only elitist, but also selective with respect to the consideration of interests"[837], since not all constituencies have either the possibility or the capacity for providing their input and imposing their representation. All private food safety standards tend to lack democratic legitimacy from the perspective of the participation criterion to some extent, with weakly organised interests rarely involved in the regulatory process. The degree of the severity of the problem varies, however, with retailer-led regulation reflecting the lowest degree of democratic legitimacy.[838] All in all, as Hachez and Wouters pointed out, this seems to be "a recurrent shortcoming of governance patterns, which are dominated by certain fringes of interests which are little concerned with the interests of others in or outside the network"[839]. In this respect, it could be argued that also developing country participation within Codex is not without criticism. Participation in Codex meetings, including the Commission and subsidiary bodies, is open to Member States and Associate Members of FAO and/or WHO, as

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'commercial and socioeconomic category' and 11 in the 'public interest category'. In this respect, MSC has initiated special programmes, most notably the Sustainable Fisheries Fund, to improve developing countries' access to MSC certification and global sustainable seafood markets. Likewise, concerns have been voiced about access constraints of developing countries to ETI, due to limited resources, irregular consultation with workers, and unequal power structures between retailers in developed countries and suppliers in developing countries.

[837] A. Benz and Y. Papadopoulos, *Introduction. Governance and Democracy: Concepts and Key Issues*, in: A. Benz and Y. Papadopoulos (eds.), *Governance and Democracy: Comparing National, European and International Experiences*, cit., 1-26, at 8.

[838] Examples of the opposite trend exist, although these tend to be the exception rather than the rule. For instance, on-going revisions of Tesco Nature's Choice are driven by a Technical Advisory Committee consisting of members of Tesco's own technical team, as well as producers, independent technical experts and CMi (the registrar of Nature's Choice).

[839] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 709, footnote no. 160. Indeed, "[s]ome actors taking part in policy networks are not necessarily mandate holders […] When they do have these considerations, for example as interest representatives, then they are accountable to sectoral and not to widely encompassing interests" (A. Benz and Y. Papadopoulos, *Introduction: Governance and Democracy: Concepts and Key Issues*, cit., at 9).

well as international NGOs that have been granted observer status. All Members, currently numbering 187, have equal status, and ultimate authority lies with the Directors-General of FAO and WHO. Developing countries struggle to maintain an expensive team of scientists at the Codex headquarters and to send representatives to the many Codex meetings. There have been efforts to improve a more egalitarian participation of all Members, most notably the establishment of the Codex Trust Fund. If formal participation of developing countries in Codex activities has increased as result of the operations of the Trust Fund, the actual participation and the scientific/technical input of those countries in Codex needs to be strengthened.[840]

26.3.3. Transparency and information asymmetries

Legitimacy needs support from some meta-principles to be put in place, the most important of which is transparency. As said earlier, at the most fundamental level participation requires access to information and decision-making. In such a context, transparency refers to the level of access enjoyed by the diverse parties concerned to timely, reliable and comprehensible information about and from the regulatory entity and its activities. Specifically, relevant information concerns governance-related issues (the decision-making structures and processes, membership and goals) and performance-related issues (the associated benefits gained by the implementation of the standard).[841] Transparency is important especially towards stakeholders that do not participate in the regulatory process, because it enhances public scrutiny and visibility in complex environments, thereby ensuring accountability as well as strengthening meaningful participation.[842] In this respect, it is relevant the existence of external control mechanisms instead of simply self-reporting activities on a voluntary basis.

Admittedly, a key concern relating to the proliferation of private food safety standards is their potential impact on the transparency of the regulatory process. As far is governance-related transparency, information on the standards-setting processes, especially while they are going on, is rarely available. Private standard setters, when they adopt or modify a standard which will apply at a large scale and may have substantial market access and trade implications, have neither to notify in advance nor to publish following a transition period to allow time for all affected parties to comply with the new standard. Besides, in many instances private standard setting does not rely upon transparent procedures open to independent review, so that those standards are developed without prior consultation to engage in dialogue and allow for input from producers. This is especially the case of proprietary standards that are part of a firm's competitive strategy for which suppliers that are not in a relationship with the standard owner are not informed of the requirements to be met.

[840] See Codex Trust Fund Mid-Term Review – Final Report, 30 April 2010, CX/CAC 10/33/14 Add.1.

[841] See D. Fuchs, A. Kalfagianni, and T. Havinga, *Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation*, cit., at 358.

[842] See T. Hale and A.M. Slaughter, *Transparency: Possibilities and Limitations*, (2006) Fletcher Forum of World Affairs 30: 153-163 (conceptualising transparency as 'enabler' of accountability). See also T. Hale, *Transparency, Accountability and Global Governance*, (2008) Global Governance 18: 73-94 (discussing the interplay between transparency and accountability).

It follows that the resulting standard ignores variations in local production conditions and/or risk mitigation approaches. Additionally, having a look at the information provided on the relevant websites it is immediately evident, for instance, that the working drafts of standards and the reports of meetings of Codex subsidiary committees and the Commission are distributed on the Codex website; conversely, the minutes of the meetings of private standards-setting organisations are not publicly available, making it difficult to see how competing interests have influenced the elaboration of a standard. In some cases information to the general public is only provided after decisions have been made, constraining meaningful intervention from the part of civil society in the process. Of course, among private standards the situation is varied, ranging from the extensive and detailed coverage of GlobalGAP to the BRC, which provides the most limited information on its governance. In all cases, however, most of the documents related to the standard development and monitoring are only available to members. In that respect, Julia Black observes that "courts have been puzzled when it came to judicially review private regulations, as the distinction between private and public law, and hence the scope of action of the court, sits uneasy between the private status of the actor and the public repercussions of its regulatory activities"[843]. This finds its reason in the fact that these standards are predominantly driven by the needs of the standards adopters, which are also the predominant 'voice' in the standards-setting process and there is no evident benefit from enhanced disclosure of how these standards are set. In addition, it should not be forgotten that most of these standards are of the B2B type, this meaning that they target corporate clients and not the final consumers, as it would be in the case of B2C schemes.

All the above contravenes another principle that is equally crucial for deliberation and for retrospective control, that is, stating the reasons for making a regulatory decision. While stating reasons is a general principle of administrative law in domestic and international administrative settings,[844] it seems to be gaining ground also at the global level. Stating reasons will allow shedding light on the deliberative dynamics and on the arguments at play, and will make the control of the norm and of the regulatory entity all the more objective.

Performance-related transparency is available to a certain extent. For instance, one can find without difficulty information about the number of certified producers and their geographical coverage. Also, the contribution of the standards to food safety concerns is explained, although this is done in a quite narrative way rather than providing statistical information. Moreover, especially retailer-led standards show a selective transparency. In other words, these standards strive for food safety while ignoring other aspects, such as environmental and social performance, which are crucial indicators for the sustainability of the food system. Finally, the reliability of information is put at risk by a lack of external

[843] J. Black, *Constitutionalising Self-Regulation*, (1996) Modern Law Review 59: 24-55, at 31.

[844] For instance, Article 296, second sentence of TFEU reads as follows: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties". For discussion see, e.g., K. Lenaerts and P. Van Nuffel, *European Union Law*, London: Sweet & Maxwell, 3rd edition, 2011, at 888.

evaluation of the standards' performance, which is therefore undergone through self-assessment and in a voluntary way to the detriment of the standards' accountability.[845]

Transparency on the part of food industry and industry coalitions is of importance not only in the processes leading to the setting of a standard, but also in the implementation of the standard adopted. In a comparatively perspective, Codex does not assess conformity with the international standards, guidelines and recommendations it develops. Rather, implementation is dependent on adoption by Codex Members, in whole or in part and formally or informally, and/or incorporation into the standards of other bodies, including private standards-setters. Thus, the Codex role within the standards process is simply as standards-setter.[846] Contrariwise, retailers that either implement their proprietary standards or participate in a collective standard scheme seem to have access to much more information emerging from those schemes than the public authorities, which need to be making decisions that affect public health. As the major enforcement arm of private regulatory systems, the certification bodies have a hugely important role in this respect.

To sum up, our analysis proves that transparency increases as participation broadens. A democratically accountable food safety standards-setter should not only be subject to internal or consumer control but, taking account of its role as a regulatory entity, should connect to all the stakeholders by subjecting itself to their scrutiny. Retailer dominated standards are less open about their processes and have limited issue coverage. Moreover, information provision is voluntary and based on self-reports. In contrast, standards involving more stakeholders are relatively more transparent. However, while detailed information on governance structures, membership and activities is publicly available, in no way relevant information about board and/or caucus group meetings is distributed. This highlights the need to enhance transparency in the setting as well as in the implementation of private food safety standards.

27. Questioning legitimacy: Diversification of legitimacy issues in respect of the governance structure of private regulatory bodies

The three criteria of 'input legitimacy', i.e., participation, governance, and accountability, are entirely fulfilled in none of the multiplicity of private standards we have analysed. In terms of participation, a lack of access in the standards-development and monitoring, especially for small farmers and civil society actors and particularly from less developed countries, could be identified as an area of high concern. Moreover, the power asymmetries among the actors involved in private food safety regulation raise questions about the constraints on actors'

[845] Also multi-stakeholder initiatives suffer from selective transparency and performance shortcomings, even though less so in relation to private commercial standards. For instance, both MSC and ETI fail to provide information on important issues in their respective fields of regulation, and undergo voluntarily the evaluation of their own performance and impact. Yet, as of 2005 MSC has initiated to collaborate with ISEAL Alliance to explore the development of a CGP on measuring the impact of certification.

[846] Likewise, once ISO has established a standard, its members are responsible for implementing and certifying against that standard, or for accrediting other bodies to perform this function. In some cases, ISO standards are translated into national standards (like in the UK and US) or regional standards (most notably, at the EU level).

choice. In terms of transparency, we found that it is limited in its external dimension, thus weakening the influence of actors besides the standard owners. However, differences exist, with multi-stakeholder initiatives being considerably more open and reliable in their reporting than retailer-led standards. Finally, in terms of accountability, even though internal accountability is provided in most cases, external accountability to the general public is either lacking or in need of major improvement. Such asymmetries in access and influence among different stakeholders constitute one of the core challenges for private food safety regulation and for the sustainability of the global agri-food system.

Given the existence of such asymmetries, it should not come as a surprise that most private standards primarily reflect the interests of retailers in minimising the risk of scandals and marketing their products to western consumers. In terms of effectiveness, i.e., the criterion endorsing 'output legitimacy', that some of the requirements that private standards establish appear to be inconsistent with food safety finds reason in the fact that the private standards' ultimate objective is not food safety *per se*, but the management of global agri-food value chains and differentiation of food products on the market. Because of that the emphasis rests on food safety and traceability, which is therefore an intermediate goal. Environmental and social issues are also included in private standards, as Northern consumers place increasing demands on retailers in this context. A lack of adequate inclusion of civil society organisations in the retailer-led schemes means that private standards tend to address these issues only in a selective manner. Finally, smallholders in less developed countries have little representation in the standards-setting process of most of the private regulatory bodies we have discussed here and no means to enforce a pursuit of their interests, either.

Nonetheless, these generalised observations must be combined with questions of institutional design. As anticipated in descriptive terms in Chapter Two, the processes by which private food safety standards are developed differ across and within different forms of organisation. For such a reason we now turn to the analysis of the governance structure of private standards-setters by identifying the impact of the four legitimacy criteria on each type of organisation.

27.1. Standards adopted by individual firms and by standards-setter organisations

Evidence from an exhaustive review of the standards currently in operation suggests that proprietary standards, i.e., standards set and adopted by individual food firms (retailers or producers), are the most prone to establish provisions that differ significantly from relevant national and international requirements and that are more stringent than these. The reason for this is the strategic role that these standards play in competitive product differentiation on the market. While some of these standards distinguish the standard owner/adopter in terms of quality, environmental or social sustainability, some do seem to use food safety as a marketing tool; though there is general agreement in the food industry that food safety should not be used as a competitive tool, it seems nevertheless that this is sometimes the case. This has the potential to undermine public policies, as well as the public confidence in national

food safety authorities by suggesting that national standards do not provide an appropriate level of protection.

The two phases of standards development and adoption are typically closely aligned. In companies that maintain appreciable technical capacities in the area of food safety, standards may be elaborated in-house, while companies with more limited technical capabilities make use of external consultants. In any case, since the primary driver of such standards is the perceived interests and needs of the individual firm itself, as both the developer and adopter of the standards, and since these standards are developed by powerful chain actors for their own use, these processes tend to be largely closed, with little or no scope for input from stakeholders unless specifically 'invited' by the firm that is developing the standard. In this same respect, the costs of complying with proprietary standards have to be borne somewhere in the value chain, although they may be offset somewhat by improvements in overall system efficiency. Now, while there may be a tendency for dominant buyers to resist absorbing these costs, they are also mindful of the need to retain a critical base of reliable suppliers. In line with this is that usually these standards make use of first-party certification for their assessment, which essentially means self-evaluation. Overall, in the spectrum of private food safety standards, proprietary standards provide the least opportunity for stakeholders input.

Food safety standards may be created also by professional firms or organisation active in the field of standardisation, which make use of internal technical resources and external consultants. In such a case, however, advice and guidance is usually obtained, formally or informally, from potential standards adopters. Most of these companies are 'for-profit' and their commercial success is dependent on the adoption of their standards along the value chain, predominantly by food retail and food service companies. As discussed in Chapter Two, in the US, where private standards companies remain a key element of the private food safety standards landscape, many of these standards are explicitly linked to compliance with public regulatory requirements. Consequently, such standards largely rely on public regulations and standards. Food safety standards established by such firms and organisations are generally certified by the standards firm itself. Indeed, the fees paid for certification are often the key revenue stream for such firms.[847]

27.2. Collective private standards

In turn, the findings from major collective food safety standards, whether developed by industry organisations (groups of retailers and producers) or standards coalitions, show that they display at the process level many characteristics of institutionalisation as regulatory instruments. In view of that, a certain degree of procedural formalisation and institutionalisation is introduced in standards-setting to accomplish procedural integrity and

[847] For instance, AIB International is an institute involved in education, technical advice and research, as well as in food-related services. It derives about half of its profit from the provision of auditing and certification services to the food industry. It would be reasonable to infer that the economic and financial viability of AIB International is dependent on its audit and certification revenues.

effectiveness. Collective standards serve the interest of a wider segment of the food industry according to their membership. Promulgation is generally undertaken through a 'semi-closed' process, especially where the membership of the organisation elaborating the standard includes the key standards adopters.[848] Typically, a multi-tiered decision-making allows for technical inputs from members of the industry organisation or standards coalition, and also other 'invited' stakeholders. These standards are generally elaborated by technical committees that include representatives of food retailers and suppliers, in some cases external experts as well, from multiple countries. This might suggest that, in some cases, private standards are more open to influence by trading partners than national regulatory requirements. Additionally, it is relevant to observe that none of the organisations issuing collective standards undertakes audits or certification to these standards, as otherwise required by ISO Guide 65 on General Requirements for Bodies Operating Product Certification Systems. Rather, independent third-party certification bodies are approved and certify to these standards. Consequently, firms that implement these standards may opt to one of the approved and accredited certifiers.

At the same time, there is evidence of a tendency among collective standards to become more inclusive both vertically along supply chains, through the inclusion of suppliers and/or their representative organisations, and the participation of non-commercial interests, including NGOs, consumer groups, etc. This trend reflects concerns about the potential anti-competitive claims against these standards, recognition that network efficiencies may be enhanced by the participation of other levels of the value chain, and the increasing need for oversight from non-commercial actors as private standards come to encompass a wider range of food quality attributes, including environmental and worker protection, animal welfare concerns, etc.

In many of these organisations the Secretariat plays a key role in directing the standards-setting process, where a major objective is to reconcile the competing interests and demands of the ultimate adopters of the standards. Central is the awareness that a standard is of little utility unless and until it is adopted. For this reason, the elaboration of collective private standards can take considerably longer than with proprietary standards. While the costs for individual participants in standards setting may be less than if they elaborated their own standard, the trade-off is the compromise that has to be made in order to establish an agreed collective standard.

Overall, collective private standards are close to and consistent with Codex standards. The private interests promoted by this type of standards are often in line with public interests: in many cases private standards can be seen as useful tools for implementing public policies.

[848] BRC Global Standard for Food Safety is an example of a standard scheme where all major adopters, i.e., major UK food retailers, are substantively involved in the standard development process. Revisions to the BRC standard are managed by an internal Global Standards Team, which receives guidance from a Technical Advisory Committee consisting of food retail and other stakeholders. The entire standards-setting process is overseen by a Governance and Strategy Committee made up of BRC members and other international representatives. BRC operates a formal complaints procedure which allows for feedback on the performance of certified processing facilities and/or approved certification bodies to be provided.

Where these standards are stricter than official ones is in terms of how management systems should be implemented and not in terms of what should be covered.

27.3. The case of GlobalGAP

While concluding the analysis of the criteria of private standards-setters and standards' legitimacy in the food safety area, one standard, in particular, deserves a thorough examination. This is GlobalGAP, which arguably is the *cause celebre* among critics of private standards since these have become a specific trade concern within the WTO. As an exceptionally fertile and, as yet, largely unexplored terrain, GlobalGAP is one of the most exemplar cases of the emergence of transnational private sites of food safety regulation and, at the same time, a critical case in the study of governance beyond the State. Actually, it appears to be an exception to the picture we have depicted so far by undertaking the most legitimate process of private food safety standards-setting.

27.3.1. GlobalGAP governance structure

As presently constituted, GlobalGAP is a wholly private retailer-led site of regulatory governance, which sets GAP standards for agricultural products.[849] Although not legally binding, their enormous influence and control over the European food market makes GlobalGAP standards *de facto* mandatory for market access. They are meant to become a single GAP benchmark, and in practice they have gained great prominence, as certification is now required by numerous retailers in Europe and all across the world.[850] As the most widely implemented farm certification scheme worldwide, GlobalGAP standards could be arguably said to be 'the' norm, the significance of which extends throughout the supply chain and effectively 'governs' the wholesale and consumer markets in respect of food safety, but also of social and environmental issues, well beyond the individual contractual relationship in which a retailer requires certification from a producer.

GlobalGAP has a quite highly structured standards-setting process, which has evolved appreciably over time in reflection of broader organisational changes. Actually, the exact nature of GlobalGAP as an organisation is undefined; it describes itself as a 'body' without relying on a legally organised form. Leadership lies with a Board of Directors, which "agrees on the vision and shorthand long-term activity plan of the organization"[851]. The day-to-day management and the implementation of the standards and all other GlobalGAP policies, as well as the legal representation of the body, are assumed by a Secretariat. It is interesting to note that this is incorporated as a private German not-for-profit limited liability company,

[849] For the historical background and the description of GlobalGAP standards see supra, Chapter Two.

[850] See EU, *Private Food Standards and their Impacts on Developing Countries*, cit., at 27 (finding that more than 85 percent of European food retailers require the products they buy to be GlobalGAP-certified).

[851] GlobalGAP, General Regulations, 2013, [hereinafter 'GlobalGAP General Regulations'], Part I – General Rules, at: http://www1.globalgap.org/north-america/upload/Standards/IFA/v4_0-1/120206_gg_gr_part_i_eng_v4_0-1.pdf, at para. 6.

FoodPlus GmbH, which is owned by a scientific institute of the retail industry, EHI Retail Institute.[852] Standards development takes place within a number of Sector Committees, which are responsible for decision-making on technical elements of the standards. The members of these committees are elected, with a balance between food retail and producer / supplier sector representatives. Monitoring and compliance is by way of independent third-party certification. In addition, a Certification Body Committee, which is composed of over a hundred independent certification bodies that are GlobalGAP's associate members and at the same time accredited to at least one GlobalGAP scope according to EN 45011 or ISO/IEC Guide 65, provides feedback on implementation issues.[853] An elaborate system of sanctions and appeals is put in place for cases of non-compliance with the standards.[854]

27.3.2. Participation in the standards-setting process

GlobalGAP stands out as a body in which standards-setting has become progressively more open to input from the relevant stakeholders. Over time the influence of the key standards adopters – namely, major European food retailers – has diminished as the formal representation of producers / suppliers has been enhanced,[855] such that "[p]articipation in the standard-setting procedures […] is open for interested parties in the subject matter"[856]. In this respect, any producer, supplier or retailer may adhere and be elected to the Board of Directors or to the sector committees, provided they agree to the terms of reference of the organisation.[857] To date membership consists of three categories, namely: food service members (retailers), producer/supplier members, and associate members, i.e., members from the input and service side of agriculture that are engaged in activities related to the food industry or that exercise standards-related activities (certification bodies, consultancies, and the crop protection industry). The relevant organs of the body are made of elected members with equal numbers from the food retailing sector and the production/supply sector. Each

[852] EHI Retail Institute consists of more than five hundred members that include international retail companies and their industry associations, together with manufacturers of consumer and capital goods, and several service providers. These are exclusively from Europe, and overwhelmingly from Germany.

[853] See GlobalGAP General Regulations, Part I, Annex I, at para. 2. For a description of the certification process, which is of purely private nature and governed by a model contract between the certification body and the producer see, GlobalGAP General Regulations, Part I, at paras. 13 ff.; and *ibidem*, Annex I.

[854] See GlobalGAP General Regulations, Part I, at para. 21.

[855] On the drivers of these changes see *supra*, Chapter Two.

[856] See GlobalGAP, Procedures for the Setting and Revision of GLOBALG.A.P. Standards, 2008, at: http://www.thesaigontimes.vn/Uploads/Articles01/28450/3caeb_Globalgap.pdf, at para. 12.

[857] See GlobalGAP General Regulations, Part I, at paras. 8-9. All members commit "to respond to consumer concerns on food safety, environmental protection, worker health, safety and welfare and animal welfare". To this end GlobalGAP members: encourage the adoption of commercially viable farm assurance schemes in order to minimise agrochemical and medicinal inputs, both within Europe and worldwide; develop a GAP framework for benchmarking existing assurance schemes and standards, including traceability; provide guidance for development and understanding of best practice; establish a single, recognised framework for independent verification; and communicate and consult openly with consumers and key partners, including producers, exporters and importers.

constituency elects its own representatives.[858] Associate members are not represented in the governing organs of the body.

Although the procedures for the adoption of a standard specify that, "[b]alance of interested representatives is always promoted between producers and retail/food service organizations"[859], balance in geographic representation is not in fact ensured. In practice, the members' ability to engage with GlobalGAP and to represent their interests reflects their technical and financial capacity, and the availability of human resources to do so. In relation to that, the yearly membership fee can be a deterrent to joining, even though members may join as a group. Also, the cost of the procedure often implies significantly upgrading the farm facilities in order to become compliant; the financial burden of such improvements, which – as we have seen in Chapter Three – must be borne by the producers, can be considerable, especially for small producers.[860] Consequently, GlobalGAP's standards-setting offers effective representation for large food businesses and trade organisations since they are more able to participate and set agendas; conversely, it does not necessarily incorporate the voice of smaller firms and consumer organisations as well as other marginalised groups, especially in developing countries, which are all unlikely to have the ability to effectively participate in the process. And indeed, GlobalGAP's membership originates in a very large majority from developed countries. Such an unequal geographic distribution of members results in an overwhelming domination of European producers/suppliers, retailers, and associates, at all levels of the organisational structure and decision-making.[861] For instance, to date the Board of Directors consists of 10 members that, while representing an equal number of elected producers and retailers, count nine representatives from Western Europe, and only one representative from developing countries (Costa Rica). Members of sector committees are also overwhelmingly from Europe. As such, "[GlobalGAP] seems more concerned about the producer/supplier-retailer equilibrium than with the equal representation of all regions of the globe"[862]. Although GlobalGAP's influence is diffusing geographically outside of Europe in North America and Japan, such a strong continental bias originates from the fact that originally EUREPGAP was established on the basis of typical production conditions in European countries and for application in those countries. The requirements were later applied

[858] GlobalGAP's members are not properly 'shareholders' of the organisation, but rather actors that show "additional commitment to shape and improve GLOBALG.A.P. […] as active partners" (GlobalGAP General Regulations – Part. I, at para. 9).

[859] GlobalGAP, Procedures for the Setting and Revision of GLOBALG.A.P. Standards, at para. 12.

[860] See WTO, *Private Voluntary Standards and Developing Country Market Access: Preliminary Results - Communication from the OECD*, 27 February 2007, G/SPS/GEN/763, at 3-4. It should be observed nonetheless that, once a farm is compliant with GlobalGAP requirements, the certification cost per product becomes reasonable in relation to sales (amounting to a few percent of the sale price).

[861] GlobalGAP involves 49 retail and food service members (37 from Europe, 6 from the US, 5 from South Africa, and 1 from the United Arab Emirates), 194 producer and supplier members (142 from Europe, 19 from the US, 12 from Latin America, 10 from Asia, 7 from Africa, and 3 from Oceania), and 153 associate members (86 from Europe, 21 from the US and from Latin America respectively, 12 from Asia, 10 from Africa, and 3 from Oceania). The membership list, broken down into the three categories above, is accessible at: http://www.globalgap.org/uk_en/who-we-are/members/index.html (accessed 12 December 2015).

[862] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 703.

to production systems in distant countries outside of Europe as a condition of gaining access to retailers in Europe.

Besides, aware of the difficulties that smallholders, predominantly in sub-Saharan Africa, have in a biased certification process, and of the criticism that these raise at the WTO level, GlobalGAP representatives have occasionally attended meetings of the SPS Committee to discuss the trade-restrictive effects of its own standards. More significantly, GlobalGAP has developed a 'Smallholder Involvement' programme. To this framework belong a specifically crafted 'Smallholder Manual', designed to assist small farmers in developing countries to acquire cost-effective certification as a pre-requisite to integrate into supply chains and to link them to export markets, and smallholder implementation guidelines, which are practical tools and global best practice guidelines to facilitate implementation of the standards by smallholders worldwide. In addition, smallholders are allowed to apply for group certification so as to reduce their individual certification costs.[863] Next to this, GlobalGAP engaged with the UK Department for International Development ('DFID') and the German Technical Cooperation Agency ('GTZ') to establish a 'Smallholder Task Force'; as a result of this initiative, a 'Smallholders Ambassador' and 'Observer for Africa' was appointed in May 2007. The Observer/Ambassador, who is supposed to reflect the views of weaker producers originating from developing countries, is invited to participate in all sector committee meetings and provide feedback from smallholders on practical ways in which to facilitate their compliance with GlobalGAP standards with a view to reducing costs.[864] Even further, a working group specifically dedicated to discussions relating to smallholders was created and met for the first time in early 2010. All these initiatives, while designated to provide more opportunities for African smallholder representation in the standards-setting process and to facilitate GlobalGAP certification, do not seem however to be sufficient remedies or to have appreciable impact in practice. Developing country stakeholders are granted only a mild input opportunity in the process but without any voting power and without being placed on an equal footing with their western counterparts.

It could be said then that participation of developing country stakeholders may admittedly take place through National Technical Working Groups, which are established at the national level on the voluntary initiative of individual GlobalGAP members. The purpose of these groups is to develop national interpretation guidelines for the application of the standards where they need adaptation to local circumstances, as well as to gather substantive input from local experts and other stakeholders in respect of the differing legal and structural conditions that exist globally.[865] Whereas in the past, the vast majority of National Technical Working Groups had been established in developed countries, ever-more such entities are

[863] This is described as 'Option 2' in GlobalGAP General Regulations – Part II, 2013, at: http://www1.globalgap.org/north-america/upload/Standards/IFA/v4_0-1/120306_gg_gr_part_ii_eng_v4_0-1.pdf.

[864] See http://www.africa-observer.info/ (accessed 12 December 2015).

[865] For instance, GRASP can only be used in countries where national interpretation guidelines exist: see GlobalGAP, FAQs – GRASP National Interpretation Guidelines, at: http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/globalg.a.p.-00001/GRASP/GRASP-National-Interpretation-Guidlines/ (accessed 12 December 2015).

being set up in developing countries that are large exporters of agri-food products. Such guidelines may be useful instruments for re-balancing, to some extent and in some instances, the GlobalGAP strong European bias. Yet, once again, such groups remain firmly bound by the general standards, this meaning that national interpretation guidelines must be ratified by the relevant sector committee and may be revised or withdrawn unilaterally in case the global integrity of standards is threatened.

GlobalGAP claims that to ensure global acceptance it actively engages with many different stakeholders around the globe,[866] and that proposals and recommendations from all relevant parties are welcomed to feed into its standard development. In this respect, the standards-setting process is characterised by open consultation of the relevant stakeholders. In particular, draft standards – in the case of the development of a new standard as well as of a new product-specific module for an existing standard – are subject to two periods of public consultation, with responses feeding into the standards-setting process.[867] Furthermore, formal mechanisms exist for the views and interests of key stakeholders, such as certification bodies and standards implementers at the national level, to be fed back to the standards-setting process. In practise, however, despite this declaratory openness some stakeholder constituencies like consumer groups, environmental NGOs, and scientific experts, do not take part to decisions-making. As it appears, the engagement of civil society is confined to the public notice-and-comment phases in the standards development and does not result in voting power. Further stakeholder consultation takes place in the Certification Body Committee, where associate members, including stakeholders joining on a voluntary basis, may be elected. Nevertheless, the Certification Body Committee consists of just five representatives of certification bodies, which report on and discuss the technical issues that have arisen in the exercise of their certification activities. As a result, input and participation from consumers and other relevant civil society actors in standards-setting only takes place at the margins, through notice-and-comment procedures, but not in the actual decisional process leading to the final adoption of a standard. In this way, associate members have a significant influence on the GlobalGAP standards-setting process, without being directly involved in decision making. In terms of legitimacy, such a limited embeddedness of stakeholder participation in the standards development process does not coincide with the huge impact that the standards have on the value chain; hence, it could be identified as a democratic deficit.[868]

[866] See point (v) of the GlobalGAP Terms of Reference.

[867] The decision to initiate the process is taken by the Board of Directors by consensus. The terms of reference are then drafted and made publicly available on the GlobalGAP's website, and stakeholders invited to comments (first public review phase). The sector committees are required to take into account public comments in defining the technical elements of the standards. Draft standards approved by the Board are then subject to a second public comment phase to correct technical errors; to this end draft standards are newly published on the website (60 days) and comments invited from stakeholders. Such comments are compiled by the Secretariat and fed into the relevant sector committees. After that, new or revised standards are first agreed by the relevant sector committees (by consensus where possible or a simple majority vote) and finally approved by the Board. Standards are normally revised every four years to ensure continued relevance and effectiveness.

[868] See, H. Brunkhorst, *Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism*, (2002) Millennium 31: 675-690.

From this review of the participation mechanisms put in place by GlobalGAP we may conclude that these fall short of the democratic threshold and raise a concern for their impact on a wide array of stakeholders and for the necessity to gain legitimacy toward them. In the governance structure of GlobalGAP it is possible to clearly distinguish between full-fledged registered members and the public at large. While producers and retailers are awarded direct participation in standards-setting, others stakeholders like consumers, civil society organisations, as well as producers that do not have the means to join, are confined to participate through informal and non-binding consultation procedures. Together with a strong geographical bias, this does not guarantee inclusive and egalitarian participation, and is therefore not necessarily conducive to democratic legitimacy. Even more, despite the responsibility of the elected Board for final approval of any newly adopted or revised standards, the Secretariat plays a key role in directing the setting and revision process. Despite these deficiencies, and regardless of the progress that can be achieved in this respect, GlobalGAP seems to be a 'champion' in best practices relative to other private standards-setting entities in the food safety area.

27.3.3. Retrospective accountability and control

In a private corporate model such as that characterising GlobalGAP, arguably only retailers and producers/suppliers have access to strong accountability mechanisms. As provided for by the rules governing the functioning of the body, they may elect by closed ballots and amongst themselves the members of the Board of Directors and of the sector committees for a period of four years; therefore sanction would consist in failing to re-elect them when their term is up.[869] Other stakeholders segments have much more limited control abilities. Next to this, as a private body GlobalGAP is subject, in certain cases, to domestic law. This is immediately evident in the case of the Secretariat, which operates under the applicable German law. Where retailers impose contractually compliance with a standard, this is subject to review of its compatibility with the applicable contract law. The GlobalGAP standard states in this regard that, "[l]egislation overrides GLOBALG.A.P. where relevant legislation is more demanding"[870]. Nonetheless, as already observed, domestic legal controls are limited by their territorial scope (*ratione loci*), their subject matter (*ratione materiae*), and the actors

[869] See GlobalGAP, Terms of Reference for the Board of Directors, 2008, at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/130128-GLOBALGAP_Board-ToR.pdf; and, GlobalGAP, Terms of Reference for the Technical Committees for the Integrated Farm Assurance Standard V4 Crops, Livestock and Aquaculture, 2008, at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/120814-GLOBALGAP_TC_ToR_Final_Jan12_rev1_en.pdf.

[870] GlobalGAP, Integrated Farm Assurance – Introduction, 2013, at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/130315_gg_ifa_intro_and_specific_rules_v4_0-2_update_Mar13_en.pdf, at para. 5. The provision continues as follows: "Where there is no legislation (or legislation is not so strict), GLOBALG.A.P provides a minimum acceptable level of compliance. Legal compliance of all applicable legislation per se is not a condition for certification. The audit carried out by the GLOBALG.A.P certification body is not replacing the responsibilities of public compliance agencies to enforce legislation".

addressed (*ratione personae*), such that a broad range of situations on which control should be exercised are *de jure* and *de facto* excluded.

As to the control capabilities of those stakeholders that are outside GlobalGAP's corporate structures or outside the scope of application of domestic legislation, GlobalGAP is subject only to diffuse accountability channels, such as market-based or reputational mechanisms, which are almost exclusively in the hands of final consumers. Recent years have shown growing consumer awareness for social and environmental-related concerns, which enter into consideration for the consumers' perception of GlobalGAP standards and for the way they can adapt consumer behaviour. The dynamics at play in these diffuse accountability channels reflect the fact that GlobalGAP is expressly committed to meeting consumer preferences and expectations, and therefore is to some extent subject to their control in case of unhealthy performance. For listed companies, control may also be exercised by stock market actors. While these retrospective control mechanisms may give the impression that GlobalGAP is accountable to civil society, this is not necessarily the case, though.

A first reason of this is that, as a B2B standard scheme, GlobalGAP is primarily intended to be used in business transactions and across supply chains. Although all standard documents are easily accessible online and may therefore be abstractly reviewed by external stakeholders, the standards are not directly visible to 'external' stakeholders, as they may not appear on products.[871] The consumer market is therefore hardly a place where those who are GlobalGAP certified may be controlled and/or sanctioned for their practices. This shows a bias in favour of strictly business-oriented rather than public-oriented standards, and such a lack of transparency may be said to have repercussions on the accountability of GlobalGAP toward the actors affected by its standards and which do not have access to the B2B loop. Additionally, retrospective accountability relying on consumer market control and reactivity is hardly a guarantee that the regulatory entity's activities will be in line with the general interest. Market mechanisms are hampered by serious information asymmetries and run the risk of being highly inaccurate; besides, they depend on the consumers or investors' responsiveness to issues of general interest that extend well beyond the simple act of consuming or investing.[872]

As a result of the above, if GlobalGAP is only loosely controlled and sanctioned by the consumer or possibly the stock market, its regulatory outcomes may suffer a bias to please consumers exclusively and be conditioned by cost-benefit analysis. Consumer interests are certainly an important component of the public interest and weigh heavily on public deliberations. Yet, because GlobalGAP was initiated and is operated by essentially western retailing groups, the consumer interests they address are also mostly western. The problem is

[871] See GlobalGAP, General Regulations – Part I, Annex I.1, at para. 26.

[872] See A. Fung, *Making Social Markets: Dispersed Governance and Corporate Accountability*, in: J. Donahue and J. Nye (eds.), *Market-Based Governance. Supply Side, Demand Side, Upside, and Downside*, Washington DC: Brookings Institution Press, 2002, 145-172, at 145 (maintaining that markets are able to enforce social and environmental values, provided that consumer concerns and other public concerns do not closely coincide).

that, as the food products market is largely global, GlobalGAP affects a much wider public than simply western consumers, in particular small producers in developing countries.

After all, the accountability of GlobalGAP to the stakeholders that are not included within its corporate structure is diffuse and only operates along erratic market and reputational lines. Some categories of stakeholders, namely those who do not have access to corporate control procedures and cannot count either on applicable legal safeguards or on the operation of diffuse market and reputational mechanisms are even excluded from any retrospective accountability relationship. In this respect, despite evidence of efforts to provide external stakeholders with tailored avenues to their operations, such as the case for smallholders from developing countries, this does not seem to be a sufficient solution to compensate for the accountability deficit. Therefore, retrospective accountability mechanisms developed by GlobalGAP fall short of the inclusiveness and equality commanded by effectively democratic legitimacy.

27.3.4. Overall assessment of GlobalGAP legitimacy

From the assessment of the democratic legitimacy of one of the most pervasive private food safety standards currently in operation we may conclude that, while the operationalisation of public accountability at the global level is associated with practical challenges, GlobalGAP's practices evidence that it still views itself as a private actor essentially accountable to its direct constituencies, and not necessarily to the general public. Whereas GlobalGAP is making efforts to increase the inclusion of the relevant stakeholders in its activities, its public accountability still suffers from deficiencies that seem to be typical of private organisations acting as regulatory actors in global governance. Those stakeholders that are granted access to GlobalGAP's corporate structure, namely retailers and producers/suppliers, enjoy full and egalitarian participation and have a direct bearing on the substance and adoption of the standards; in addition, they may effectively control GlobalGAP's activities and decisions, and enjoy tight and strong accountability, which approximates democratic thresholds. On the other hand, 'external' stakeholders such as consumers and small producers (most importantly from developing countries), which actually form the greater share of GlobalGAP's public, as well as the associate members themselves, have limited participatory rights which only indirectly impact the substance of the standards, and may only rely on diffuse control and sanction channels. Overall, it could not be neglected that the progressive opening of its deliberations to wider stakeholder input has resulted in significant gains in making GlobalGAP standards more feasible for smallholder farmers without jeopardising food safety. On the other hand, GlobalGAP "cannot yet be said to function under the democratic standards which should be required from governing entities in our times in terms of stakeholder

inclusion and equality"[873]. As a result, "it is doubtful that GlobalGAP standards reflect the global public deliberations associated with food safety issues"[874].

28. Regulating food safety globally: Both effective and accountable?

In much of the current debate there is a tendency to consider private sites of regulation as having less legitimacy than public ones. Private standards have been criticised for being unaccountable, for violating a basic need for fairness, and for lacking sensitivity to developing country interests; also, private standards-setting has been denounced for lacking participatory and transparent mechanisms, together with issues relating to the credibility of claims – and the consequent potential for misleading consumers – and the degree to which safety requirements are science-based. Such limits and deficiencies we have carefully analysed and discussed throughout this chapter affect the ability of private actors to develop a sound and legitimate food safety governance system. In a sort of vicious circle, one could argue that a lack of input legitimacy, resulting from a generalised democratic deficit at the global level, may be simply compensated by a high degree of output legitimacy. Private food safety standards prove the ability of the private sector to bring about new governance institutions where existing arrangements are not deemed to provide the required level of protection, both against non-compliance with legal food safety requirements and against losses to market share and corporate image. Despite this, one of the most important determinants and sources of legitimacy in the legal and political theory is and remains democracy. Democratic legitimacy in global governance is the 'accountability relationship' of the relevant regulatory entity with the *ensemble* of the parties that are affected by its regulatory outcomes. Particularly, such a relationship comprises a prospective and a retrospective dimension, with a focus, for the former, on responsiveness and participation, and for the latter, on control.

We also insisted on the need for inclusive and equal participation, which must permeate the regulatory process in order for norms to effectively reflect the preferences of the parties concerned and be regarded as pursuing the 'general interest' according to the canons of deliberative democracy. In this respect, the broader the membership, the less likely private standards are to be used as tool for product differentiation and the wider the range of perspectives and input that are considered in decisions-making. It is the openness of processes that strengthens the value of a standard even when there may be disagreement about selected issues. On the other hand, the more participation is inclusive and egalitarian, the more accountability issues arise. It is rather unclear who is entitled to hold private regulators into account for their regulatory activities, and what interests the latter really represent and defend. By posing the question "How to call to account a constellation of regulators?"[875], Julia Black

[873] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 710.

[874] *Ibidem*.

[875] J. Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, cit., at 138.

well expresses how accountability problems are related to the distribution of regulatory roles and responsibilities among several actors along global value chains.

Yet, a strong element which might spur a private standard's quest for legitimacy and which may motivate it to adopt best accountability practices is that, with respect to food safety, it is bound to cohabit with other private and/or public regulatory schemes that regulate the same subject matter. It is therefore important, considering the role of the standards in consumer preferences, "to 'win' the regulatory competition, which on its turn is dependent on the standards being perceived as legitimate or not"[876]. As all actors inside of the value chain have an interest in displaying the highest commitment to safety to consumers and regulatory authorities, competition between standards provide arguably alternative incentives and mechanisms for accountability, and thus is a source of continuous improvement of the standards and perhaps of increased legitimacy.[877] The cohabitation of several regulatory schemes and regulatory entities is also to some extent a guarantee against capture by a powerful stakeholder group.[878]

In conclusion, we are of the view that the legitimacy of private standards, and more generally of private sites of regulation, is based on both input legitimacy, based on the criteria of participation, governance, and accountability, and output legitimacy, expressed in terms of problem-solving capacity. The former is expected to result in the latter, while the latter alone is not guaranteed since all the parties concerned will admittedly push for their own interest in the decisions-making process. This means that input and output legitimacy are not alternates, but rather they should be considered as an ideal *continuum*: on the one hand, democratically legitimate processes have the ideal result of delivering effective norms in the general interest; on the other, it must not be forgotten that private standards are only relevant to the extent that they are actually adopted in the value chain (market uptake).

Hence, the overarching question here is the following: how could standards be developed that meet the profit-maximising needs of the retailing sector and, at the same time, take into account the interests of all the parties affected by the regulatory process? Put it differently, how can the trade-off between effectiveness and participation be solved? And, at a more general level, how can the legitimacy of private sites of regulation be improved so as to fit international economic law?

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[876] N. Hachez and J. Wouters, *A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P.*, cit., at 701.

[877] See S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit.

[878] About competition between different regulatory schemes it has been argued that in such a context, "if one institution were captured, its competitors would quickly reveal and criticize that fact" (K.W. Abbott and D. Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, (2009) Vanderbilt Journal of Transnational Law 42: 501-578, at 552).

CONCLUSIONS

RESITUATING THE CORE AND THE BOUNDARIES OF LAW FOR EFFECTIVE AND LEGITIMATE RULES-BASED GLOBAL ECONOMIC REGULATORY GOVERNANCE

> "If Westphalia is the story of a move from vertical order to a horizontal order based on state consent, managing diversity in today's world does not mean recovering the 'paradise lost' of Westphalian State sovereignty, but rather deepening and expanding the horizontality that started with the Peace of Westphalia, through management of differences at the global level using both laws and institutions"[879].

29. From multi-centred to multi-layered regulatory governance

Awareness of the worth of food safety globally has been greatly enhanced in the last two decades and its impacts are now recognised at different levels. And it is ever-more evident that it can no longer be properly coped with through unilateral measures at the domestic level. Although it is still placed centre-stage in discussions of efforts to meet heightened societal concerns and to prevent market failures, unilateralism proves to be inadequate in facing issues and externalities that are global in nature, because of the bounded territorial scope of domestic law, together with the inadequate scientific and regulatory capacities of developing countries. In addition, traditional command-and-control regulatory paradigms prove to be anachronistic and largely ineffective to tackle contemporary challenges that occur along geographically dispersed value chains.

In turn, substantive evidence of governmental endorsement or even legal incorporation and use of private governance tools in different regulatory and policy areas as well as in countries at different stages of economic development, together with competition among private regimes for market uptake, provides a healthy check on the effectiveness of transnational private regulation in achieving the objectives pursued. Private actors have been able to take advantage of their privileged position inside of the food markets, as well as of their technical expertise and relevant resources for establishing and implementing standards that are highly adaptable to new scientific data and to new circumstances.

In such a context the proliferation and pervasiveness of private food safety standards cannot be seen as merely a feature of de-regulation resulting from a retreat of the State from

[879] K. Nicolaïdis and J.L. Tong, *Diversity or Cacophony?*, cit., at 1371.

the regulatory area. Rather, as remarked widely in Chapter One, this is manifestation of on-going broader processes of re-regulation of global agri-food markets in the attempt to respond to the changes illustrated in Chapter Two, which in the end involve new relationships and different allocations of responsibilities between State actors, on the one side, and non-State actors, on the other.[880] As consequence of an increasingly complex public-private interplay, keeping public and private modes of regulation distinct becomes ever-more difficult, while considering mandatory and voluntary modes of regulation still as alternate becomes even irrelevant in practice. In the end, it is the traditional dichotomy regulator *versus* regulatee itself that is breaking down, with the regulatee becoming in turn regulator rather than exclusively self-regulator.

Because food safety has emerged as a "shared responsibility"[881] between the public and the private spheres, innovative conceptualisations on the nature and role of regulation in this area and globally are needed that "reflect[…] a belief that regulators should work with the private sector rather than seeing themselves simply as enforcers"[882]. In relation to this, considering that private standards are directed at compliance with mandatory requirements, it is often taken as given that the dominant or even exclusive direction of causality is from regulatory-based incentives to firms' decisions to adopt enhanced food safety controls; nonetheless, firms' decisions to adopt such controls, and the scope and mode of such decisions, can equally influence the regulatory environment in which firms operate.[883] In this respect, the most widely-held perspective on the relationships between private voluntary standards and mandatory regulations is the view that the former are never less stringent or less extensive than legal obligations. This 'going beyond' means that to some extent private standards come to conflict with State regulations and international standards; in turn, a risk exists for the latter to lose their grip on global issues and thus to be marginalised by much more dynamic sites of regulation.

In practice not all differences between public and private regulation result in conflicts. Indeed, as consequence of the effectiveness of management-based standards and of the due diligence approach toward product liability embodied especially in EU food safety law, official regulations limit themselves in specifying that controls should be put in place, without providing specific instructions for enforcement and monitoring. One can say that mandatory standards lay down the basic parameters of a food safety system, while private standards elaborate on what this system should 'look like' operationally in order to be effective.[884] In this way, each side of the prism of global food safety regulatory governance focuses on a separate aspect of risk management: government regulations aim at outcomes, with food business operators being responsible for ensuring, by whatever means, that these requirements

[880] See I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford/New York: Oxford University Press, 1992.

[881] R. Clarke, *Private Food Safety Standards*, cit., at 3.

[882] CAC, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit., at 11.

[883] See S. Henson, *Public and Private Incentives to Adopt Enhanced Food Safety Controls*, cit.

[884] See FAO, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, cit.

are met; in turn, private standards, which *per se* do not have legal character but which still possess regulatory force, tend to establish prescriptive criteria and to focus on processes, with specific instructions on PPMs and testing procedures. In a way, "private food law is more global than international food law (such as […] the Codex Alimentarius). International (public) food law does not govern behaviour of specific stakeholders, but sets a meta-framework for (national) food law that in turn applies to stakeholders' behavior. Private food law does govern stakeholders' behavior and in this sense private food law is more law than international food law"[885]. In short, the public and private sides of food safety regulation are not necessarily opposed to each other; rather, they seem to be able to operate side by side or, at least, to be mutually supportive in important respects in an institutional complementarity design.[886] That is why 'comprehensive' global food safety regulatory governance cannot rely but upon the interplay of *both* public and private sites of regulation across processes of standards-setting and conformity assessment. It follows that the development and adoption of one's regulatory instruments depends on how the other is evolving. In this sense, the boundaries between the public and the private domains become decidedly blurred.

On the other hand, the fact that private entities exercise *de facto* regulatory authority beyond the reach of both domestic and international law, together with the de-formalisation of norm-making outside of any context of delegation, gives rise to particularly acute concerns in terms of legitimacy as understood in Chapter Four.[887] The result of our analysis of the democratic legitimacy of private regulatory standards in the food safety area is not a positive one. Effective regulation in the food safety area – as well as in other fields – is desirable in a number of ways. Yet, the operations of transnational private regulation often extend, directly or indirectly, beyond the sphere of those who are addressed by a given regulatory act and produce 'knock-on effects' on the behaviour of a wider number of parties – most notably sidelining the weaker parties like small farmers in developing countries in the food sector. Again, fulfil the criteria of democratic legitimacy in a global environment characterised by

[885] B. van der Meulen, *The Anatomy of Private Food Law*, cit., at 108-109.

[886] On such perspective see, J. Wouters, A. Marx and N. Hachez, *In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law*, cit.; S. Duquet and D. Geraets, *Food Safety Standards and Informal International Lawmaking*, cit., at 429; and, CAC, *Consideration of the Impact of Private Standards*, cit., at 3. For a different position see, most particularly, T. Josling, D. Roberts, and D. Orden, *Food Regulation and Trade: Toward a Safe and Open Global System*, Washington DC: Institute for International Economics, 2004 (stating that the main challenge in establishing and improving a safe and open food regulatory system consists in maintaining both the confidence of consumers and the cooperation of chian operators in implementing domestic regulations and international standards, while avoiding any regulatory capture by either group. In such a context, the authors recommend that mandatory regulations be used predominantly to discipline food safety risks, while market-based voluntary standards to accommodate consumer preferences on food quality).

[887] As an example of legitimacy issues outside of the food safety area, the European Parliament "acknowledged some concerns" in the European financial sector about the idea of "private self-regulatory associations" self-attributing the qualification of "lawmaker[s]" (Resolution on International Financial Reporting Standards and the Governance of the IASB, 24 April 2008, A6-0032/2008 / P6-TA-PROV(2008)0183, at para. 2). In the analysis of the Parliament, these associations "may lack transparency and accountability as a result of not being under the control of any democratically elected government, the EU institutions not having established the accompanying procedures and practices as regards consultation and democratic decision-making that are unusual in their own legislative procedures" (*ibidem*).

complex and long-distance value chains and by huge information asymmetries, is proved to be an extremely difficult task; nonetheless, public food safety regulation warrants critical questions regarding its own effectiveness and legitimacy, as well. Overall, the significant implications in terms of market access due to the *de facto* mandatory nature private standards assume for any actor who wants to participate in the market make legitimation a fundamental concern for global food safety regulatory governance.

Because of the foregoing, a perspective that relies on the possible gains of enhanced public-private interaction and synergy has implications that deserve careful consideration. Shifting food safety responsibility to the private sector ultimately means establishing a legal status for non-governmental standards and standards-setting bodies, and defining an additional layer in food safety regulation. A multi-track regulatory structure may be particularly valuable in a dynamic sector such as food safety, which is sensitive to rapid changes. The fundamental question here is therefore how multiple levels of regulation may coexist in a consistent way and how such a multi-layered regulatory structure may be both effective and legitimate in its conceptualisation and practice. A part of legal writing suggests that the different scope of public and private regulation, with the former being focused on outcomes and the latter on processes, may be beneficial to the extent that this relationship could be characterised as a "tacit alliance"[888]. Such a position would refuse any kind of meta-regulation for a coherent interface between the public and the private sides. For other part, food safety can be better achieved at the global level through a model of "delegated global governance"[889] that relies upon a coordinated approach that involves public and private regulation. In this sense, the harmonisation of private food safety schemes with relevant international standards is already a fundamental concern of collective private standard schemes such as GlobalGAP and the GFSI; considering their market uptake, these schemes could be 'championed' and serve as models for public-private cooperation. Such a position would end up to affirm even the desiderability of co-regulatory settings, especially considering the ability of private standards to evolve at much faster rates than comparable efforts in the public sphere.[890]

The perspective of public-private complementarity we have depicted so far with reference to regulation of global food safety has the merit of providing arguably for a better reflection of what occurs in today's agri-food systems than traditional perspectives on regulation do. Nonetheless, this raises challenging analytical complexities when it is referred to the multitude of private normative orders populating the most diverse areas of regulation of increasing global relevance. Hence, it is in the wider context of international economic law in

[888] UNCTAD, *Food Safety and Environmental Requirements in Export Markets - Friend or Foe for Producers of Fruit and Vegetables in Asian Developing Countries*, cit., at 22.

[889] In this sense see, e.g., S. Henson and J. Humphrey, *Codex Alimentarius and Private Standards*, cit., at 170-171; and, M. Huige, *Private Retail Standards and the Law of the World Trade Organisation*, in: B. van der Meulen (ed.), *Private Food Law*, cit., 175-185.

[890] See, most notably, S. Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, cit., at 59; and, M. Garcia Martinez, A. Fearne, J.A. Caswell, and S. Henson, *Co-regulation as a Possible Model for Food Safety Governance: Opportunities for Public-Private Partnerships*, (2007) Food Policy 32: 299-314.

the face of global regulatory governance and outside of the specific setting of a restricted sub-sector that the overall validity of this theoretical perspective and its systemic implications for international law should be assessed.

30. Beyond global food safety: Options in response

Making clear the legal nature of non-conventional forms of regulation does not mean automatically solving the underlying conundrum of how to integrate such regulatory processes into theoretical methodology and legal doctrine. Because of the global nature of regulatory governance, it is becoming ever-more evident that, transposing or replicating as such tested patterns and categories of legal regulation pertaining to the governmental and inter-governmental frameworks would likely prove to be an inadequate solution. Hence, the debate on the role of international economic law in the global context needs deepening so as to resituate the core and boundaries of law even in areas that were once exclusively tied to State sovereignty. In other words, we need to develop a more comprehensive view of international economic law and a new 'covenant' to make global governance work.[891] We have seen how the two-fold criterion of 'procedural integrity'[892] (or 'procedural rationality'[893]), i.e., 'output (or substantive) legitimacy' and 'input (or procedural) legitimacy', reflects the need for transnational private actors to accommodate a double objective: on the one hand, the effectiveness in achieving their objectives, and on the other hand, the need for accountability to their constituencies. Logically two options are open in response to the international legal system, namely: either self-containment or integration ('merger-and-acquisition'). In other words, should non-State regulation be left to market competition or should be integrated into international law?

On the one hand, State-centred international law may seek to preserve the *status quo* by resisting new modes of regulation and keep to its traditional conceptions, without recognising that it is enshrined in an increasingly broader legal universe with a more diverse 'normative menu' of options from which actors can choose *à la carte*.[894] As consequence, different sources of regulation, including law, would continue to coexist in an incoherent and multi-track framework, where the State would remain the main governing authority for a declining number of domestic issues, while international institutions and treaty-making would continue

[891] See A.M. Slaughter and T. Hale, *A Covenant to Make Global Governance Work*, (2005) Debating Globalization 7: 126-133, at 127.

[892] See H. Schepel, *Private Regulators in Law*, in: J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, cit., 356-367, at 365-367.

[893] See H. Simon, *Rationality as Process and as Product of Thought*, (1978) American Economic Association Review 68: 1-16 (pointing out from the decision theory perspective that, in the face of highly complex issues where rational deliberation is not well-performing, the only viable option is a "rational and agreed-upon way to organise a decision-making process"). Along the same line see, W. Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, (2003) International Sociology 18: 325-349, at 331.

[894] See J. Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?*, cit., at 19. For an early conceptualisation of this option see, M. Virally, *La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)*, (1983) Annuaire de l'Institut de Droit International 60: 166-257.

to be relevant only for strictly inter-governmental fields. Here a double risk has been observed that stems from a lack of deference to non-traditional patters of regulation. One is "under-inclusion of international obligations"[895], with the consequence to tolerate non-conventional normative patterns that may constitute fertile grounds for violation of those obligations. This would be the case of private standards within the multilateral trading system, as discussed extensively in Chapter Three. The other risk is one of "over-inclusion of international obligations in a confined setting"[896], with the consequence of isolation and marginalisation as forum for addressing issues that touch on a broad range of societal concerns and that are dealt with in different forums. If and when this other risk materialises, a normative order would offer just one option that would be limited to a given setting and that would be therefore meaningless, because of the possibility to be contradicted under other normative orders. Also in this case, however, the legitimacy of international obligations would be seriously seriously attempted.

Where self-containment would be the option pursued, global economic governance would be established as a system consisting of the sum of loosely interrelated sub-systems underpinned by a normative structure that can most accurately be characterised as 'transnational economic law'. This term comes to describe "the multifaceted network of various kinds of regulations that are created cooperatively by a multitude of State […] and non-State actors to provide a normative framework for the international/transnational economic system, because of its apparent suitability for this purpose"[897]. In other words, as Larry Catá Backer puts, "[t]o frame global law, one must abandon the study of a system for the study of governance systematization"[898]. Therefore, the core question becomes how

[895] J. Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?*, cit., at 20. Such risks have been observed by the author in relation to the WTO as exemplification of the traditional focus of international law on State-centred law, but similar considerations may be extended to other international institutions.

[896] *Ibidem*, at 8.

[897] C. Tietje, *Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law*, (2004) European Business Organization Law Review 5: 321-351, at 329. See similarly, M.C. Ponthoreau, *Trois interprétations de la globalisation juridique*, cit., at 21 (pointing out that, globalisation calls for a rethinking of "*un ordre juridique unifié et hiérarchisé […] au profit d'un espace normatif hétérogène […] d'un ordre juridique pluraliste, coopératif organisé en réseau*"); and, A.B. Zampetti, *Democratic Legitimacy in the World Trade Organization: The Justice Dimension*, (2003) Journal of World Trade 37: 105-126, at 121 ("[a]s such ['transnational economic law'] includes in its purview states, international organisations, multinational companies, non-governmental organisations and private individuals"). The wording 'transnational economic law' has been deeply inspired by Philip C. Jessup, former judge of the ICJ, who coined and defined the term 'transnational law' as "includ[ing] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories" (P.C. Jessup, *Transnational Law*, New Haven: Yale University Press, 1956, at 2). See also P.C. Jessup, *The Present State of International Law*, in: M. Bos (ed.), *The Present State of International Law: Written in Honour of the Centenary Celebration of the International Law Association 1873-1973*, Deventer: Kluwer International Law, 1973, 339-344. For discussion see, C. Tietje and K. Nowrot, *Laying Conceptual Ghosts of the Past to Rest: The Rise of Philip C. Jessup's 'Transnational Law' in the Regulatory Governance of the International Economic System*, (2006) Essays in Transnational Law 50: 17-43.

[898] L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century*, cit., at 182. See also *Id.*, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, in: S. Muller, S. Zouridis, M. Frishman, and L. Kistemaker (eds.), *The Law of the Future and the Future of Law*, cit., 427-437.

international economic law would interact with other normative orders each with distinct normative foundations. Such a context would require a form of 'inter-systemic conflict of law'[899] to achieve anyway "a weak normative compatibility of the fragments [and a] loose coupling of colliding units"[900]. Conflict-of-law systems are concerned with ensuring the co-existence of multiple normative orders through meta-norms that replaces hierarchy and unity with compatibility.

On the other hand, a lack of consistency within the international system would ultimately come to affect its predictability and reliability and to put in doubt any pretence of "legal objectivity"[901]. Thus, more rational seems to be a direction of development of international economic law that pushes its boundaries so as to internalise non-conventional forms of regulation and be more responsive to issues of concerns for both the international community and the global society. Here it is not a quest for the softening or expanding of the boundaries of law, but rather a quest for adjustment of models to keep both traditional international law and non-traditional forms of regulation in check. In this respect, the 'integration' option would mean establishing a properly unified legal order and moving from multi-centred to multi-level regulation.[902] Similarly to the concept of 'multi-level governance' as developed in political science and international relations theories, the concept of 'multi-level regulation' describes from a legal perspective the interactions between different levels and processes of regulation within a unified or common normative order. This would perfectly fit the original intent of the Westphalian international order to overcome fragmentation by moving towards coherence. Yet this does not mean an equal shift from a plural to monolithic.[903] Increased complexity requires increased specialisation but within one single system. An optimal functioning of a system thus stems from the inherent properties of the constitutive parts that, in turn, need to work together with the system as a whole and the kind of connections which exist between them. In this respect we may say that transnational private regulation and its scrutiny through 'incorporation' would represent the 'new frontier' of international economic law beyond NTMs.

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[899] From the legal pluralism perspective the key concept here is "inter-legality": see, e.g., B.S. Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, (1987) Journal of Law and Society 14: 279-302, at 297-299; and, R. Wai, *The Interlegality of Transnational Private Law*, (2008) Law Contemporary Problems 71: 107-127. In this respect, some argue that conflicts between State and non-State normative orders should be settled by mixing elements from both of them, this resulting in the creation of a new, intermediate normative order (see, e.g., G. Teubner and P. Korth, *Two Kinds of Legal Pluralism*, cit.; and, G. Teubner and A. Fischer-Lescano, *Regime-Collisions*, cit.). Others suggest that global legal pluralism requires adopting among existing conflict-of-laws doctrines (see, e.g., R. Wai, *The Interlegality of Transnational Private Law*, cit.).

[900] A. Fischer-Lescano and G. Teubner, *Regime-Collisions*, cit., at 1004. Theories of global constitutionalism claim that different normative orders may communicate peacefully with each other and/or realise cross-fertilisation and reciprocal influence on the basis of a "global constitution", which could be defined as "*un droit commun issu des systèmes juridiques qui pénètre à son tour lesdits systèmes en vue non pas de leur unification, mais de leur rapprochement*" (M.C. Ponthoreau, *Trois interprétations de la globalisation juridique: Approche critique des mutations du droit public*, (2006) Actualité Juridique Droit Administratif 1: 20-25, at 22).

[901] K. Nicolaïdis and J.L. Tong, *Diversity or Cacophony?*, cit., at 1351.

[902] See T. Bartley, *Transnational Governance and the Layering of Rules: Intersections of Public and Private Standards*, (2011) Theoretical Inquiries in Law 12: 1-25.

[903] See J. Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?*, cit.

Our central assumption is that the effectiveness of law is a function of its internal consistency and consequently of the legitimacy of the processes through which it is created. Denying any role for the formal characteristics of sources and focusing on the way these sources operate would mean that the normative effects of transnational private regulation, despite their general uptake, would lack any pragmatic legal relevance. Hence, in the effort to construct a coherent global economic governance, international economic law – originally designed to serve inter-State economic relations – needs to construct manifold "relationships of recognition"[904] with a plurality of non-State normative orders. This approach relies on the acknowledgment of the positive contribution of non-conventional sources of regulation in addressing issues of global concerns and in being responsive to rapid scientific change and substantive developments. On the other hand, it requires the mitigation of the trade-restrictive effects associated with private sites of regulation, and recognises the need for their harmonisation and legitimation.

Of course, while acknowledging that the role of the State is being transformed in a context that is marked by "an increasing diffusion of authority and, consequently, by a diminution of hierarchy"[905], this does not mean that the State and the State-centred international system lose their significance. In fact the State possesses a competitive regulatory advantage in terms of legal certainty, unity, and predictability of the legal systems it creates at the domestic and international level. All the more importantly, the State is and remains the major provider of legitimacy for every other legal system, at least in the current state of its development.

31. 'Better regulation': Lessons from the EU

Legitimacy concerns call for re-thinking the way regulatory capacity is exercised beyond the State and State-based systems. The more de-formalised the regulatory processes and sources outside of the charted territory of international law, the more these same processes and sources need to be recognised as being legitimate in the sense analysed in Chapter Four. Besides, the mere fact that something falls outside of the scope of international law does not preclude that it could be regulated by law or that it needs justification under law by reference to established criteria of legitimacy.[906] It has been observed that, "[…] recognition of private

[904] J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit., at 138. 'Recognition' is legally the analogy of what Saskia Sassen described as "transnational sovereignty whereby part of the 'global' is endogenous to the State" (S. Sassen, *The State and Globalization: Denationalized Participation* (2004) Michigan Journal of International Law 25: 1141-1158, at 1141). See also L.C. Backer, *The Structural Characteristics of Global Law for the 21st Century*, cit., at 95, footnote no. 100 (arguing that, "polycentric norm-making among multiple systems of functionally differentiated governance communities […] are required to interact with each other in complex and dynamic ways. Incompatible systems, law and norm, must effectively find a way to communicate and to harmonize values and relevance for their constituting communities […]").

[905] A. Peters, L. Koechlin, and G. Fenner Zinkernagel, *Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion*, cit., at 11.

[906] In this sense see, H. Schepel, *The Constitution of Private Governance*, cit., at 413-414 (saying that, "[a]s long as we keep our constitutional aspirations and our legal imagination locked in the unity of law and state, we will not only fail to understand the phenomenon of global law conceptually but also fail normatively to

legislation reflects both a desire to better understand the diffuse nature of capacities underpinning regulatory and wider governance practice and a concern respecting the legitimacy of such non-governmental rule making"[907]. In light of that, recognition is not a "normative postulate"[908] such that each normative order would be obliged to recognise each other. Nor does recognition is an "objective definition of law"[909] in the sense that those orders must be recognised to exist. Rather, recognition is "the observation of how in fact plural normative orders behave and in so doing it does allow them to be legally relevant"[910].

In the absence of any criterion that regulates legitimacy for norms that do not belong to the original State law, transnational private regulation may be recognised as legitimate when certain conditions are fulfilled. Specifically, we call for the application to international economic law of the 'better regulation' discourse. This originated in the EU as a brand name for a strategy designed to improve the EU decision-making without making any explicit constitutional adjustment,[911] and which has then developed into a burgeoning area deserving separate consideration in its own right. Inspired by "a widely felt need to supplement legal reason with a more explicit economic rationality"[912], this approach exhibits huge emphasis on 'institutionalisation' and 'proceduralisation' as key aspects of "[t]he 'how' of regulation, or more particularly 'how to do it better"[913]. The validity of this approach is that, as a procedural framework and accepted 'template' for assessing regulatory solutions, it may attract universal support. Also, it involves the promotion of substantive tests often of quantitative nature (such as cost-benefit analysis and administrative burden targets) and procedural standards (like public consultations). As result, 'better regulation' comes to identify a huge variety of legal discourses that show an emphasis on institutionalisation and proceduralisation as mechanisms for conflict management. In light of our approach, a quest for recognition implies two different aspects.

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grasp the opportunities to enhance its legitimacy"); J. Cohen and C. Sabel, *Global Democracy?*, cit., at 765 (supporting tha idea that, "[p]rincipal-agent models that deeply shape our ideas about legitimate and effective delegation of authority are 'irrelevant' in global administrative space"); and, G. Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, (1997) American Journal of Comparative Law 45: 149-169, at 159 (finding that, "we are provoked to look for new forms of democratic legitimation of private government that would bring economic, technical and professional action under public scrutiny and control").

[907] C. Scott, *Regulating Private Legislation*, in: F. Cafaggi and H. Muir Watt (eds.), *Making European Law: Governance Design*, Cheltenham/Camberley/Northampton: Edward Elgar, 2008, 254-286, at 254.

[908] R. Michaels, *Global Legal Pluralism*, cit., at 21.

[909] *Ibidem*.

[910] *Ibidem*.

[911] See Final Report of the 'Mandelkern Group on Better Regulation', 13 November 2001, at: http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf. More recently the European Commission changed the label to 'smart regulation': see *Smart Regulation in the European Union*, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 8 October 2010, COM(2010) 543 final. See also *EU Regulatory Fitness*, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 12 December 2012, COM(2012) 746 final.

[912] B. Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification*, Aldershot: Ashgate Publishing, 2003, at 31.

[913] J. Black, *Legitimacy and the Competition for Regulatory Share*, cit., at 15.

On the one hand, recognition means 'meta-regulation' or 'regulation of self-regulation'. In this first sense, 'better regulation' "teach[es] regulatory actors to give regulatees incentives and tools to use their own inherent 'regulatory capacities'"[914]. The starting point here is that "all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanisms of steering – whether through hierarchy, competition, community, design or some combination thereof"[915]. Non-State actors would be therefore allowed to exercise their own regulatory capacity, provided that they institutionalise the regulatory process.

On the other hand, recognition means 'regulation of regulation'[916], such that State-based institutions would regain control ove the whole regulatory space. This second dimension fits perfectly the idea that "[t]he philosophy of leaving matters to unregulated markets is conceptually flawed. Markets and the exercise of power need roadmaps and regulation"[917]. Following Karl Polanyi's seminal argument that helped legitimate the original Bretton Woods system,[918] the UN Secretary-General's Special Representative on business and human rights, John Ruggie pointed out that 'embedding' markets in broader societal values and goals – today defined no longer (exclusively) domestically but rather (also) globally – is still necessary for the ongoing legitimacy of an international liberal economic order. This argument is basically that the lesson learned by the architects of the post-World War II economic order from the experience of the 1930s, that is, the idea that "markets that societies do not recognize as legitimate cannot last",[919] is still valid in an era of increasing

[914] J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit., at 148. See also, C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy*, Cambridge: Cambridge University Press, 2002.

[915] C. Scott, *Regulating Everything*, UCD Geary Institute Discussion Paper Series, 2008, at http://www.ucd.ie/geary/static/publications/workingpapers/gearywp200824.pdf, at 27. See also, J. Jordana and D. Levi-Faur, *The Politics of Regulation in the Age of Governance*, Cheltenham/Camberley/Northampton: Edward Elgar, 2004, at 6-7.

[916] See C.M. Radaelli, *Regulating Rule-Making via Impact Assessment*, (2010) Governance 23: 89-108, at 89.

[917] T. Cottier, *Challenges Ahead in International Economic Law*, (2009) Journal of International Economic Law 12: 3-15, at 12. Of central importance in such a line of reasoning is the role that legal rights have in providing market actors with legally recognised freedoms to engage in binding activities. In other words, "market did not simply evolve according to 'natural' laws, but were instead subject to and the result of regulation, at the centre of which existed a fragile if crucial tension between 'negative' and 'positive' rights" (P. Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International'*, cit., at 55). In the same sense see, E.U. Petersmann, *Constitutionalism and WTO Law: From a State-centered Approach towards a Human Rights Approach in International Economic Law*, cit.; *Id.*, *From 'Member-Driven Governance' to Constitutionally Limited 'Multilevel Trade Governance' in the WTO*, cit.; *Id.*, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, cit.; and, *Id.*, *International Economic Law in the 21st Century: Need for Stronger 'Democratic Ownership' and Cosmopolitan Reforms*, cit.

[918] See K. Polányi, *The Great Transformation*, cit.

[919] R. Abdelal and J. Ruggie, *The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism*, in: D. Moss and J. Cisternino (eds.), *New Perspectives on Regulation*, Cambridge/MA: The Tobin Project, 2009, 151-162, at 152.

globalisation, where "[t]he core principle […] is the need to legitimize international markets by reconciling them to social values and shared institutional practices"[920].

In short, 'better regulation' consists of both shared tools and normative commitments. It does not consist of traditional checks-and-balances or judicial review, but can be found in guidelines, programmes, impact assessment frameworks, control of regulatory quality by oversight bodies, and peer review processes. In the end legitimacy relies on procedural transparency requirements. With these characteristics, the 'better regulation' approach espouses the idea that multi-level governance does not required *per se* and almost inevitably multi-level constitutionalism. It is interesting to observe that, outside of the EU legal order, such emphasis on procedural rather substantive norms seems to have been endorsed also in the practice of the WTO Appellate Body. Since the beginning it underscored the flexibility and adaptability of WTO law "to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world"[921]. Following this line of reasoning, the Appellate Body tells usually a WTO Member how to come to a decision rather than what decisions it is allowed to make.

31.1. Institutionalisation and proceduralisation

It is argued that, because of the complexities of transnational private regulation and the numerous constituencies that could directly and indirectly be affected by its effects, insisting on the development of legitimacy principles such as participation, transparency and accountability is unlikely to be adequate on its own, for a number of reasons.[922] First, private authority may escape scrutiny by suggesting that the instruments it creates are not intended as legal instruments and thus not subject to judicial review, which instead is limited to scrutinising instruments that are of legal nature or intended to have legal effect. Second, review is almost by definition *ex post*, and at best a surrogate for transparent and participatory decision-making. Lastly, even formal compliance with decision-making procedures may be substantively empty.

Against these arguments, we counterargue that legitimacy and effectiveness of transnational private regulation requires very solid sets of institutions and normative foundations. In traditional 'command-and-control' State regulation legal norms takes on

[920] *Ibidem*, at 153. See also, J.G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, (1982) International Organization 36: 379-415; *Id.*, *Taking Embedded Liberalism Global: The Corporate Connection*, in: D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance*, cit., 93-129; and, *Id.*, *Global Markets and Global Governance: The Prospects for Convergence*, in: S. Bernstein and L.W. Pauly (eds.), *Global Liberalism and Political Order: Toward a New Grand Compromise?*, New York: SUNY Press, 2007, 23-50.

[921] Japan – Taxes on Alcoholic Beverages, Report of the Appellate Body circulated 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, at para. 34.

[922] See J. Klabbers, *Reflections on Soft International Law in a Privatized World*, cit., at 1204; *Id.*, *Straddling Law and Politics: Judicial Review in International Law*, in: R.S. MacDonald and D.M. Johnston (eds.), *Towards World Constitutionalism*, Leiden: Martinus Nijhoff, 2005, 809-835; and, O. Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, (2003) Indiana Journal of Global Legal Studies 10: 25-64.

regulatory effect within the law-making process itself. It is a condition for the operation of those norms the existence of a commitment amongst the 'public' concerned to the law-making process, such that we might transitively presume that law-making at the national and international levels is legitimate and democratically accountable.[923] Conversely, in private regulation promulgation is not sufficient. Therefore, by "embedding […] norms within some wider structures which impact upon their distribution, enforcement, and mode of transmission"[924], institutionalisation provides for "an opportunity structure to handle a whole set of specific instruments, such as co-regulation, self-regulation, market-friendly alternatives to classic command and control regulation, consultation and economic analysis"[925]. As the case of collective private food safety standards prove, the institutionalisation of non-conventional forms of regulatory governance at the global level is a development in progress. Of course, this does not happen automatically or overnight.

In turn, proceduralisation occurs through systems of public consultation, accepted templates, and other mechanisms for non-judicial review. It assesses regulatory options in a functional or instrumental way, so that conflicts about regulatory ends among the participants in a regulatory regime may be overcome by avoiding any explicit substantive choices in the assessment process. Operationally this means that, instead of choosing a specific decision criterion, it is common to have a list of possible decision criteria, like efficiency, effectiveness, coherence, fundamental rights protection, etc., and procedures for communicating how they have been applied.[926] Ultimately, proceduralisation serves the need to embed the regulatory approach into the law-making process.

31.2. Consensus-based procedural rationality

The 'better regulation' approach questions the conventional definition of a norm's legitimacy with reference no longer to whether or not it emanates from a law-making authority, but rather in the light of the input into decision-making provided by those that are affected by the norm so created. This allows any normative utterances to be accommodated in terms of

[923] Actually, that international law is *per se* legitimate and democratically accountable because based on State consent – this is the principle that underlies the Westfalian system of modern States, resumed in the *dictum* '*auctoritas, non veritas facit legem*' – is no longer accepted blindly: see, most notably, J. Pauwelyn, R. Wessel, and J. Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, cit., at 734 ("State consent is actually the only validation requirement in traditional international law, which for the rest is agnostic on how an agreement is reached (process), who participates in its establishment (actors), and what is actually agreed on (content)"); *Id.* (eds.), *Informal International Lawmaking*, cit.; and, S. Besson, *Theorizing the Sources of International Law*, in: S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, Oxford/New York: Oxford University Press, 2010, 163-186, at 166 (concluding that, "[State] consent is insufficient to ensure the authority and legitimacy of international legal rules").

[924] D. Casey and C. Scott, *The Crystallization of Regulatory Norms*, (2011) Journal of Law and Society 1: 76-95, at 77.

[925] C.M. Radaelli and A.C.M. Meuwese, *Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU*, (2010) West European Politics 33: 136-153, at 142.

[926] See, e.g., the Decision Matrix designed to highlight trade-offs, and the Best Practice Library from the European Commission's IA template, at: http://ec.europa.eu/smart-regulation/impact/commission_guidelines/best_pract_lib_en.htm (accessed 13 June 2015).

recognised manifestations of consent.[927] Since the fading out of the public-private distinction asks to "focus[…] on process not status"[928], the issue of whether the nature of regulator is public or private is subordinated to "procedural values of publicness, or, less controversially, the 'public-regardingness' of law and regulation"[929].

Specifically, the dimension of input legitimacy plays a central role in assessing the credibility of a norm, which in turn feeds into its legitimacy. Crucial in this respect is the effort to build consensus about the suitability and future possible effectiveness of the norm.[930] In the end of the day, rather than whether regulation is legally binding or not, what matters is whether the process is inclusive and transparent, as well as whether all affected stakeholders are involved or not in the regulatory process.[931] However, while an inclusive and consensus-based regulatory process is a condition for legitimacy and helps strengthen the stability of a regulatory regime, it can be also seen as a cost. This contributes to explain the reason why private regulatory regimes appear in fact somewhat partial or incomplete in their representing and attracting certain types of interests. Under-resourced and under-represented interests often lack real possibilities to participate in an effective way into the deliberative process. Overall, a regulatory process that exhibits democratic deficits and provides with relative or only notional concepts of participation, accountability and governance, provide fertile ground for regulatory capture also at the transnational level, with the most powerful actors taking control or gaming the system to their own advantage.[932] In this respect, private norms are likely to be experienced as being imposed coercively by leading actors in the value chain, this resulting in adverse consequences for commitment to the regime itself. This way private norms are expression of "a system of developed country imperialism"[933] by which 'exclusive clubs' of non-State actors, mostly located in developed countries, establish a northern-inspired set of

[927] See A. Fischer-Lescano and G. Teubner, *Reply to Andreas L. Paulus: Consensus as Fiction of Global Law*, (2004) Michigan Journal of International Law 25: 1059-1073, at 1070.

[928] H. Schepel, *Private Regulators in Law*, cit., at 357.

[929] *Ibidem*. See also B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, (2009) European Journal of International Law 20: 23-57.

[930] In the standards world, "'[c]onsensus' is best understood as shorthand for the near universal procedural core of private standard setting: elaboration of a draft by consensus in a technical committee with a composition representing a balance of interests, a round of public notice-and-comment of that draft with the obligation on the committee to take received comments into account, a ratification vote with a requirement of consensus, not just a majority, among the constituent members of the standards body, and an obligation to review standards periodically. The codes, manuals and 'standards for standards' where these rules are laid out are impressive tomes of private administrative law" (H. Schepel, *Private Regulators in Law*, cit., 356-367, at 365). Principles of procedural character already underlay various codes of practice for standardisation, including most notably the ISEAL Code of Good Practice for Setting Social and Environmental Standards, ISO Code of Good Practice for Standardisation (ISO/IEC Guide 59:1994), ISO Requirements for Bodies Certifying Products, Processes and Services (ISO/IEC 17065:2012), and ISO General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies (ISO Guide 17011:2004).

[931] See T. Kleinlein, *Non-State Actors from an International Constitutionalist Perspective: Participation Matters!*, in; J. d'Aspremont (ed.), *Participants in the International Legal System*, cit., 41-53.

[932] As Helmut Willke posits, "[a] general strategy for enhancing the resilience of democracy is to reinvigorate its original impulse of deconstructing monolithic power structures, thus distributing responsibilities for public affairs on many actors instead of a few, and dispersing responsibilities for societal decision-making in many arenas" (H. Willke, *Governance in a Disenchanted World*, cit., at 30). See also W. Mattli and N. Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, cit., at 15.

[933] See E. Meidinger, *Competitive Supragovernmental Regulation*, cit., at 526.

norms that are imposed to developing countries and that do not fit in local contexts and conditions. Conversely, if carefully designed and kept in check, transnational private regulation can both be internationally grounded and take account of transnational externalities.

In order for a norm to be legitimate it "must be cognisant of and, responsive to the legitimacy demands of those actors whose behaviour th[is] norm[…] seek[s] to shape"[934]. Thus output legitimacy points at an *ex post* consensus that relates to continuously questioning and adapting the norm to evolving circumstances and needs. In this way, it drives the effectiveness of the norm while achieving the underlying objectives it seeks to pursue. As we observed in Chapter Two, many private norms overcome weak or lacking governmental and inter-governmental regulation. In this sense, it is important the normative closeness of a private norm to existing relevant national and international law and regulation by way of direct substantive reference and incorporation or demonstration of equivalence. Hence, tapping into law would further enhance the legitimacy and take-up of the norm.

Altogether, while international law is driven by "thin (state) consent"[935], new sites and sources of regulations are increasingly based on "thick (stakeholder) consensus"[936]. In the effort to capture the particular tension between de-formalised processes of decision-making, on the one hand, and the aim towards effectiveness, on the other, transnational private regulation shares the characteristic of informal law making of being "rough consensus and running code"[937]. Such a concept combines a deliberative perspective with a regulatory one. Indeed, "[d]rawing on […] stakeholder knowledge, the regulating body […] will seek to identify an evolving – *rough* – consensus in light of which it will put forward an experimental draft body of norms. These, in turn, will receive feedback and remain open to adaptation and change, constituting a *running code*"[938]. Private norms remain thereby "fully assessable from any factual or normative standpoint, while not sacrificing their ongoing regulatory function"[939].

31.3. Mutual recognition of equivalence and harmonisation

Finally, private regulatory instruments within and across regimes generally show competitive relationships with each other. Competing claims to offer 'the' norm in a given area might substantially undercut their attempts to get recognition by the international legal system. Thereby, could international law recognise as legally relevant regulatory instruments that, apart from lacking the recognised conventional forms, tend to be also mutually exclusive? Whereas showing an increasing interest towards transnational private regulation, governments

[934] D. Casey and C. Scott, *The Crystallization of Regulatory Norms*, cit., at 91.
[935] J. Pauwelyn, R.A. Wessel, and J. Wouters, *The Stagnation of International Law*, cit., at 21.
[936] *Ibidem*.
[937] P. Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International'*, cit., at 67-73.
[938] *Ibidem*, at 69 (emphasis in the original).
[939] *Ibidem*.

have been reluctant so far to choose between competing private norms, although this happens especially in the environmental and social areas.[940]

In our 'better regulation' analytical framework, therefore, different transnational private regulatory schemes need to improve their "mutual recognition"[941], which is "a reflexive practice with intertwined extra- and intra-regime dimensions"[942]. One of the most visible and far-reaching mode of mutual recognition aimed at avoiding conflicts would be some form of 'regulatory comity', which extend to formalised mutual recognition agreements. The high degree of interrelation and coordination between norms so produced would come to reinforce their effectiveness. In some issue-areas there is evidence that transnational private regulatory schemes are coalescing into more harmonised and structured regulatory forms. This is so for those initiatives aiming at harmonising different norms by favouring legal transplants through cross-fertilisation of norms and sharing of substantive patterns. In the food safety area this is proven by the emergence of collective standards such as BRC Global Standard for Food Safety at the national level and GlobalGAP and even more GFSI at the global level. These processes are facilitated by the deeply imitative nature of transnational regulation, which is prone to be substantively assimilative. Indeed, virtually all regulatory processes absorb principles, standards and criteria that have been developed in public settings and other private forums and that are then refined for tailored application in their respective areas of operation. Such reference to tested instruments suggests how transnational regulation is firmly connected to broader governmental and non-governmental processes and actively seeks areas of overlapping consensus.

However, evidence for the emergence of similar patterns of harmonisation and mutual recognition is limited along both sectoral and functional lines. In the food sector currently too few benchmarked national GAP standards exist to draw conclusions on their success. Different schemes continue to be at odds with each other and actually it is in the interest of at least some of them not to have a single system emerge. It is in this respect that the role of international economic law not only cannot be superseded but rather becomes crucial. Since checks-and-balances are rarely developed internally within each regulatory regime, a situation of increasing prevalence in the marketplace and support or endorsement or use by individual

[940] In one notable case, ILO rejected a US proposal to certify countries rather than firms with a 'global social label', following the concern voiced by a number of developing countries that this would constitute a NTB and contravene WTO disciplines. Similarly, in 2004 the World Bank had to defend itself against criticism for testing a forest certification assessment tool that PEFC argued appeared as favouring exclusively FSC. In 2003 the European Commission abandoned the drafting of some guidelines to help European consumers select between various systems of sustainable trade, because such guidelines were contested as being unduly discriminatory in favour of already well-developed standard systems.

[941] Mutual recognition initially referred to agreements among private bodies exclusively; only later it has been applied to agreements among or involving public authorities. See E. Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, in: C. Brütsch and D. Lehmkuhl (eds.), *Law and Legalization in Transnational Relations*, Oxford/New York: Routledge, 2007, 121-143; K. Nicolaïdis and G. Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government?*, (2005) Law & Contemporary Problems 68: 263-317; and, K. Nicolaïdis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, Jean Monnet Working Paper no. 7/97, at http://www.jeanmonnetprogram.org/archive/papers/97/97-07.html.

[942] J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit., at 139.

States suggests an unavoidable need for inclusion and regulation of transnational private regulation within the international legal system. Legitimacy and effectiveness of transnational private regulation is centrally dependent on a normative and institutional background of international law, which may either mandate or facilitate or even prevent cooperation among and with competitive private regulatory regimes.[943] Control by international law over out-of-the-box norms can indeed exercise an 'upward pull' on the activities of private actors. After all, the stake is high for each private regulatory scheme since a lack of recognition would leave other competing schemes as safer legally relevant alternatives. The role of conventional international legal subjects seems thus to be transformed, increasingly carrying out a background function described as "managing, orchestrating, facilitating or steering, departing from a monopolist application of political authority"[944]. Specifically, in consideration of the territorially-bound jurisdiction of the State and the variety of internal and external interests involved in and affected by transnational regulatory processes, it is especially for international rather than domestic institutions to "increasingly use their capacity for steering or 'orchestration' to enrol the capacity of private actors in transnational governance"[945].

32. 'Free markets & enabling institutions': Enhancing the international legal order for better global regulatory governance

There is increasing recognition that the collective action problems posed by globalisation and the associated emerging transnational level of governance require private-public partnerships and collective burden-sharing. In this respect, whereas the exclusion of non-State actors from formal international law-making illustrates a model of 'disconnected' governance unable to solve those collective action problems, the institutionalisation process seeks, at least in part, to overcome the weaknesses of the Westphalian order that is still based on and constrained by the sovereignty principle. In this context, as the new institutional centre of a properly global economic system international economic institutions are an irreplaceable element of responding to the reallocation of regulatory authority beyond the State. They can no longer be exclusively a branch of international law that only regulates the conduct of State and State actors. Instead, they are called to provide regulatory mechanisms that touch upon a broad range of socio-economic issues. Of course, the system still being formally State-centred, it is unlikely that the same States will agree to recognise the end of their quasi-monopoly and to

[943] See J. Pauwelyn and G. Pavlakos, *Principled Monism and the Normative Conception of Coercion under International Law*, in: M. Evans and P. Koutrakos (eds.), *Beyond the Established Orders: Policy Interconnections between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, 317-341.

[944] L. Andonova and M. Elsig, *Informal International Public Policy Making: A Conceptual View from International Relations*, in: J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking*, cit., 63-80, at 66. See also, K. Abbott and D. Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration*, (2010) Review of International Organizations 5: 315-344; and, P. Genschel and B. Zangl, *Transformations of the State: From Monopolist to Manager of Political Authority*, TranState Working Papers Series no. 2008/76, at: http://www.gsi.uni-muenchen.de/personen/professoren/zangl/publ/sfb_transformations.pdf.

[945] C. Scott, F. Cafaggi, and L. Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, (2011) Journal of Law and Society 38: 1-19, at 18.

accept sources of international law that are entirely outside of their sphere of influence. In light of that, the traditional political economy mind-set centred on 'free' markets and 'enabling' institutions still provides a pertinent background and context for an analysis of self-regulating markets 'in the shadow', as it were, of an allegedly formal framework, offering legitimacy safeguards and an effective institutional foundation associated with the States and State-based institutions' authority to make law.

Apparently, the institutionalisation of transnational private regulation leads to a paradox. Although this is established essentially to face global needs in the absence of an effective inter-governmental governance framework, the de-formalisation of the regulatory function allows States and State-based institutions to retain their control in a way that would not be possible if more formalised techniques of global governance were adopted.[946] This could appear even more surprising if one considers that the validation rules of international law do not care about either the structural features of the law-making process (transparency, inclusiveness, participation) or the substantive content (coherence and effectiveness) of what is agreed on. On the other hand, this shift in State consent from the norm generation to norm recognition stage makes it possible to engage effectively in a delicate balancing between taking cognisance of non-traditional sources (thereby mitigating the risk of confined or 'within-the-box' international economic law) and not by-passing State consent as the main element defining the international legal 'core' and the threshold for a norm to be international law, at least in the current state of its development.[947] Such a balance between competing goals of legitimacy (ensured by State actors) and effectiveness (ensured by non-State actors), building upon procedural requirements that different actors can "sign up to without betraying loyalty to their own rationalities"[948], ultimately results in a calibrated approach that, on the one hand, is construed as entirely procedural and lacking any substantive rationality, and, on the other, is not made dependent on meeting the requirements for legitimacy as State-based regulation under international law. Rather, it creates spaces within which methods of legitimatisation alternative to the traditional distinction between the legitimating power of democratically enacted institutions and the democratic deficits of any other forms of norm making could arise.

In conclusion, the ever-growing need for adjustment and governance responses required by globalisation, together with the structural inability of the Westphalian State to lay down global regulation and the significant increase in regulatory governance taking place outside of

[946] See in this sense, A. Marx, N. Maertens, J. Swinnen, and J. Wouters (eds.), *Private Standards and Global Governance. Economic, Legal and Political Perspectives*, Cheltenham/Camberley/Northampton: Edward Elgar, 2012. For a different view see, S. Bernstein and E. Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, (2008) Journal of International Economic Law 11: 575-608, at 606 (espousing the approach "to carve out 'negative' space rather than take 'positive' action that will require active policy making or high-level political consensus on specific CSR or NSMD mechanisms").

[947] See J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, (2004) Michigan Journal of International Law 25: 1229-1250.

[948] J. Bomhoff and A. Meuwese, *The Meta-Regulation of Transnational Private Regulation*, cit., at 139. Similarly see, C. Joerges, *Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO*, in: C. Joerges and E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart Publishing, 2nd edition, 2011, 492-527, at 505.

the conventional forms, have all "chipped away at the relatively fragile (perhaps already crumbling) theoretical foundations of the international legal system"[949]. Nevertheless, this does not spells automatically the end of this system as it has built over centuries. Rather it calls for a redefinition and refocusing of its foundations. As has been claimed, "[i]f Westphalia is the story of a move from vertical order to a horizontal order based on state consent, managing diversity in today's world does not mean recovering the 'paradise lost' of Westphalian State sovereignty, but rather deepening and expanding the horizontality that started with the Peace of Westphalia, through management of differences at the global level using both laws and institutions"[950].

We posit that State sovereignty and global regulatory governance are not mutually exclusive; rather they are mutually constitutive. While it is for private normative orders to provide the regulatory dynamic in the global economic system and make regulation more efficient, they cannot be conceptualised as creating forms of decentred norm-making which come to construct a sort of 'global law without a State'[951]. In view of making this mutual relationship working, State regulation needs to be supplemented, even corrected, but not entirely replaced, by more cost-effective norms that originate from other processes and actors. Indeed, there can be spill-over effects from the operations of private regulation on public regulation and institutions. Therefore, since the State has not been crowded out but remains at the centre of a more crowded regulatory space, it may still serve as the main channel for the diversification of sources of law. In other words, remaining the sole authoritative norm-maker and the pivotal entity of legitimation and control, the State is and remains quintessential for the stability of the global economic system; conversely, instability, unpredictability and anarchy and inevitable.

Through the 'better regulation' paradigm, which does not require the use of traditional 'checks-and-balances' operating at the domestic level or even judicial review, the decrease in formal law-making exhibited by non-conventional forms of regulation is compensated through laying out formal institutionalisation and proceduralisation conditions under which State consent is by-passed as a condition for norm formation, but is still required as a condition for legitimacy. In this sense, 'better regulation' seems to embrace Benedict Kingsbury's concept of 'extended positivism', that is, the idea that "in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law"[952].

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[949] J.H. Jackson, *International Economic Law: Complexity and Puzzles*, cit., at 12.

[950] K. Nicolaïdis and J.L. Tong, *Diversity or Cacophony?*, cit., at 1371.

[951] See G. Teubner (ed.), *Global Law without a State*, cit.

[952] B. Kingsbury, *International Law as Inter-Public Law*, in: H. Richardson and M. Williams (eds.), *Moral Universalism and Pluralism*, New York: New York University Press, 2009, 167-204, at 197. See also *Id.*, *Legal Positivism as Normative Politics*, (2002) European Journal of International Law 13: 401-436.

33. Limitations of results and directions for future research

The reconfiguration of the regulatory space as global multi-layered regulatory governance populated by a broad range of both public and private actors, sources of regulation, and processes, that interface each other is made more complex by the remarkable variation that private regulation exhibits with respect to its institutional form, the objectives it addresses, the forms it takes, and so forth. Because of these complexities, it is neither possible for a single research work to cover all possible forms of private regulation nor to draw general conclusions.

The present research work has focused on the conceptualisation of the 'better regulation' approach to regulatory governance in the specific sector of food safety. Nonetheless, we cannot consider the results achieved by this work as either exhaustive or definitive. Assessing optimal ways to regulate global issues calls for further research in relation to the applicability of this analytical framework to other fields in the regulatory space, from the closest ones to food safety like food quality to other related fields like environmental protection, social and ethical concerns, and so forth, up to considering radically different regulatory fields like finance, for instance. Other matters that require further research in this same analytical setting even though outside of a purely legal perspective are the rational selection of regulatory tools, the political economy of a given area of regulation, and cost-benefit analysis.

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BRC Global Standards	http://www.brcglobalstandards.com/
Canada Treaty Information	http://www.treaty-accord.gc.ca/procedures.aspx
CAC	http://www.codexalimentarius.org/
EHI	http://www.ehi.org/
ETI	http://www.ethicaltrade.org/
EU	http://www.europa.eu/
FAO	http://www.fao.org/
GFSI	http://www.mygfsi.com/
GlobalGAP	http://www.globalgap.org/
GlobalGAP Africa Observer	http://www.africa-observer.info/
EHI Retail Institute	https://www.ehi.org/
ILO	http://www.ilo.org/
IFS	http://www.ifs-online.eu/
IFSQN	http://www.ifsqn.com/
ISO	http://www.iso.org/

ISEAL Alliance Code	http://www.isealalliance.org/code
ITC	http://www.intracen.org/
ITC Standards Map	http://www.standardsmap.org/
MSC	http://www.msc.org/
MTDSG	http://treaties.un.org/pages/DB.aspx?path=DB/MTDSG/page1_en.xml&menu=MTDSG
OECD	http://www.oecd.org/
OIE	http://www.oie.int/
QS	http://www.q-s.info/
SQF	http://www.sqfi.com/
Synergy PRP	http://www.synergy-gss.org/
UN	http://www.un.org/
UNTS database	http://treaties.un.org/pages/UNTSOnline.aspx?id=1
World Bank	http://www.worldbank.org/
WHO	http://www.who.org/
WTO	http://www.wto.org/