

## **Private (Commercial) Standards and the SPS Agreement**

Remarks at The Round Table on

### ***The Role of Standards in International Food Trade***

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As of June 2005, a recurrent issue of discussion in the meetings of the WTO's Committee on Sanitary and Phytosanitary Measures (the SPS Committee) has been the issue of private (commercial) standards. By private or commercial standards, we are referring to everything from individual retailer labels (eg, Tesco Nature's Choice) to collective national and international schemes such as EurepGAP, a coalition between the major European retailers. These private standards may cover any and all stages from farm to processing to distribution. They may also address all sorts of consumer interests including food safety, environment, social or labor conditions, corporate responsibility, and of growing interest recently, the "carbon footprint" of products or their associated "food miles".

The advent of private standards for foods is associated, at least in Europe, with the rapid growth in the concentration of very large supermarkets. Not many years ago, the European food sector was characterized by numerous wholesalers and a plethora of very small retailers – the European version of the "Mom and Pop" corner grocery store. Now a handful of large supermarkets exercise tremendous market and purchasing power and increasingly by-pass middlemen to source directly from domestic and foreign suppliers alike.

Along with this consolidation of power over the supply chain and marked reduction in the number of players – and particularly smaller players – has come a shift in consumer expectations. Food represents an ever shrinking proportion of the average European

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<sup>1</sup> The views expressed in this paper are those of the author only and do not necessarily represent the views of the World Trade Organization nor of its Members.

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family budget, and shoppers are demanding not only more variety and year-round availability, but also are becoming more selective. Taste, freshness and quality are no longer enough, consumers also want their food purchases to reflect their personal values – social, ethical, environmental – and consumers are becoming more directly concerned about food safety. Food scares – including BSE in Europe and the US, dioxins in Belgium, Sudan red dye in curries, and salmonella in spinach – have contributed to a loss of consumer confidence in government regulation and control of food safety.

One response of governments has been to shift food safety controls from the testing of final retail products to the much lauded, more holistic farm-to-fork or stable-to-table approach. This new approach requires the food industry to put in place risk management systems that ensure food safety at all stages of the chain – from the farm level to final retail sale.

Another major event was the introduction of the "due diligence" clause in the United Kingdom 1990 Food Safety Act. This requires all players along the supply chain to be able to prove that they have undertaken all possible steps to ensure that their product is safe and will not cause harm. This liability clause has had far-reaching repercussions, first in the United Kingdom, and later throughout Europe and other parts of the world. To be able to provide this proof of due diligence, the food industry developed systems of self-regulation. These started with codes of practice, or "private voluntary standards", such as Good Agricultural Practices (GAP) schemes, and a protocol of good hygiene practices (later the British Retailer Consortium Global Standard). Over the years the use of private standards by the food industry has proliferated, and they now play a major role in international food trade.

Although these standards are technically "voluntary" in that they are not required by law, in many cases they effectively set the conditions for the import or sale of products, and in practice can take on a mandatory nature.

There is no doubt that private standards can have positive benefits for producers and traders by providing step-by-step guidelines showing what needs to be done to meet regulations and market conditions. Several studies have shown that following the risk management approach defined by some of the private standards schemes results in better overall farm and business management as well as increased efficiency and profitability.

However, the standards can also have significant negative effects. Producers must be certified as meeting the private standards, and becoming certified is a very expensive business. It is particularly difficult for small and medium-scale producers who do not have the necessary capital and cannot afford the initial investment costs and, once certified, cannot maintain the high costs of maintaining certification. While there is often no price premium for products who meet the private standards, those who do not are excluded from certain markets.

While these negative repercussions affect small producers in all countries, there are many more small producers in developing countries. In addition, small producers in developing

countries often lack basic infrastructure and support services. It is therefore not surprising that this issue was put on the agenda of the SPS Committee by a small, developing country – St. Vincent and the Grenadines. When, at a meeting in June 2005 St. Vincent and the Grenadines complained about the negative impact that the EurepGAP standards for pesticides on bananas was having on its export trade, it opened the flood gates of complaints and concerns by other developing countries.

The concerns of governmental trade officials, and particularly those of developing countries, with the proliferation of private standards has to be seen in the context of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement).

The SPS Agreement was negotiated by governmental food safety, plant and animal health regulators to impose significant disciplines on what actions could be taken against products moving in international trade in the name of health protection. The basic requirement under the SPS Agreement is that trade-affecting measures can be taken only to the extent necessary for health protection, with scientific evidence required to demonstrate this "necessity" (except for emergency situations when temporary actions may be taken).

Under the SPS Agreement, the preferred way of meeting the scientific justification requirement is through the use of internationally developed food safety, plant and animal health protection standards – that is, those adopted by the Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC) Commission on Phytosanitary Measures (CPM), and the World Organization for Animal Health (OIE). The harmonization of national requirements, on the basis of these international standards, facilitates trade by reducing the proliferation of distinct national requirements.

Alternatively, governments can justify national standards if these are based on an appropriate risk assessment, but the measures imposed must be the least restrictive of trade required to achieve the desired level of health protection. And the level of health protection sought by governments, while a sovereign decision, cannot be arbitrary and should be consistent in the face of similar health risks.

In addition, the SPS Agreement encourages the participation of developing countries in the preparation and adoption of international standards, which has been addressed through the creation of trust funds and various assistance programs. Other provisions of the SPS Agreement require consideration of the special needs of developing countries, through the provision of special and differential treatment.

The SPS Agreement also requires that there be no unjustified costs in testing, certification or approval procedures, to ensure that these do not function as barriers to trade.

Importantly, the SPS Agreement contains a number of provisions to ensure the transparency of sanitary and phytosanitary requirements. Not only must governments give advance notice of their intention to modify SPS measures, but they must take into

consideration any comments submitted by trading partners, provide associated documents upon request (including risk assessments and the scientific evidence underpinning measures), and ensure that all measures are published promptly.

The WTO subjects food safety requirements to a different set of legal obligations than what is applied to quality and environmental measures or measures adopted to avoid the deception of consumers. This, in addition to the notification requirements, pushes governments to identify the objectives of their requirements, and to more clearly separate and distinguish between requirements imposed for health protection and those imposed for other purposes.

Finally, the WTO agreement ensures that SPS requirements can be challenged by other trading partners, through the use of the WTO's unified dispute settlement procedures.

In contrast to these globally negotiated disciplines on governmental actions, private standards are seen by many developing countries as going in exactly the opposite direction. The private standards address a mix of SPS and other objectives – including social and environmental concerns that are not related to food safety or plant/animal health protection. These private requirements may have no scientific justification, but may address consumer perceptions of what is safe or unsafe. Or the requirements may reflect production practices familiar in developed countries but unknown and perhaps unsuitable for developing country producers.

There is a proliferation of distinct private requirements, with little harmonization. Horticultural producers in Guatemala, for example, have reported having to get certified against 16 different sets of private requirements. Certification is done by private, for profit companies, at much greater expense than governmental schemes which at most seek to recover costs. And certification must be renewed regularly, whether or not there is any reason to believe that the production conditions have changed.

Some of the private standard bodies have themselves recognized this problem and some efforts to "benchmark" or accept other private standard schemes as equivalent are now underway.

There is no apparent concern regarding the effects of these private standards on developing countries or the degree of their trade restrictiveness. Furthermore, there is very little involvement of developing countries in the development of the standards, hence they do not take into consideration the needs or resources of developing countries. Again, there have been some recent attempts by the private standards bodies to encourage more involvement of developing countries in their work.

Many developing countries find it difficult to produce goods that meet the internationally agreed food safety standards. So they are particularly frustrated to find that when they do meet this challenge, this is insufficient to gain access to many markets, as the private standards set requirements well in excess of those of the Codex, IPPC or OIE.

Private retailers impose and modify their requirements without any advance notice, and with no opportunity for producers in other countries to comment or complain. Hence, not only is there no transparency, neither is there any forum for challenging private standards.

While one may question whether a strictly inter-governmental forum such as the SPS Committee is the most appropriate place to address the issue of private standards, it is apparent from the outpouring of concerns by developing countries that a forum for discussion was needed. In addition to this becoming a regular feature on the agenda of meetings of the SPS Committee, on two occasions in the past two years informal, information sessions have been held in the margins of the Committee meetings. These have provided the opportunity for two-way education and awareness-raising: increasing the knowledge and understanding of government regulatory officials about the operation of various private standard schemes and their objectives, while at the same time making the operators of the private schemes aware of the concerns and effects of these on developing countries.

In the SPS Committee, the discussions so far have focused on three themes:

- 1) Market access: Some say that standards set by the private sector can help suppliers improve the quality of their products and gain access to high-quality markets. Others argue that private standards can be both more restrictive (e.g. requiring lower levels of pesticide residues) and more prescriptive (accepting only one way of achieving a desired food safety outcome) than official import requirements, thus acting as additional barriers to market access.
- 2) Development: The costs of complying with private standards, and the additional cost of certification, can make the development of export-oriented schemes virtually impossible for small-scale producers in developing countries.
- 3) WTO law: While some are of the view that setting standards for the products they purchase is a legitimate private-sector activity with which governments should not interfere, others are of the view that the SPS Agreement makes governments in importing countries responsible for the standards set by their private sectors. The latter maintain that the private standards do not meet WTO requirements such as transparency and scientific justification of food safety measures and are more trade-restrictive than necessary to protect health.

I think of most interest to you today is this last concern regarding the legal relationship between the SPS Agreement and these private standards. The SPS Agreement is applicable to "all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade". Its definition of a "sanitary or phytosanitary measure" does not seem to exclude the types of measures imposed by the private standards. But the obligations under the SPS Agreement are addressed to WTO Members. Does this include

actions taken by the private sector, or only those taken by governments (at national or sub-national levels)?

Article 13 of the SPS Agreement indicates that

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.

To date, there has been no WTO jurisprudence that would help in determining what are the "reasonable measures" available to ensure that non-governmental entities comply with the SPS Agreement.

It is difficult, at this point in time, to foresee what might be the eventual outcome of the SPS Committee's deliberations on this issue. I will thus only identify some possible actions, without speculating on whether they are likely to be pursued by the Committee.

Perhaps the mutual education and exchange will lead governmental officials to recognize the potential benefits from some private standards and the private standard setters to modify their procedures to take into account the legitimate concerns of developing countries. Perhaps the Committee will identify some actions that governments can take to reduce the negative effects of private standards. These could, for example, focus on the developmental aspects, such as projects to assist small holders meet certification requirements and maintain compliance with the private standards. Or on the transparency aspects, by creating a database of information regarding private standards, the products they affect and the markets involved. Perhaps one government or another will decide to bring a formal, legal challenge to the WTO with respect to private standards that are particularly damaging to its export interests. Or the SPS Committee could recommend revision of the SPS Agreement, to clarify the extent to which its provisions do, or do not apply, to private standards. Perhaps the Committee will decide to refer the issue to some other forum that it considers a more appropriate place to address this issue, such as the WTO Committee on Technical Barriers to Trade, or the UNCTAD.

One 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.