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Private Standards in the Global Food Sector: Relationship to WTO Agreements

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INTRODUCTION

- This PowerPoint is an expanded version of a presentation that was given on March 24, 2008, to the Institute of International Economic Law at the Georgetown University Law Center.
- The presentation introduces the legal issues associated with the interplay between private and public standards in the global food sector via the World Trade Organization's (WTO) agreements on Sanitary and Phytosanitary measures (SPS) and Technical Barriers to Trade (TBT).
- The presentation first outlines the national and international food law systems, focusing especially on the WTO/SPS/TBT construct, and acknowledges the limitations of these systems.
- The presentation then introduces the emergence of private standards in the global food sector and examines the consequences of these private standards, especially for developing countries.
- The presentation then analyzes the relationship of these private standards to public standards, focusing on the specific language in relevant SPS/TBT agreement articles.
- The presentation concludes by examining possible solutions to the unique legal issues associated with private standards in the global food sector.



GLOBAL FOOD SYSTEM

The global food system offers an increasingly rich array of diverse and internationally sourced food products and ingredients

The international dessert of tiramisu, shown on this slide, demonstrates how even a small pastry consists of food components from various parts of the world

The next slide lists sources that document the development and scope of this global food system.



Sources: Global Food System

- “Consumers expect the world food system to provide them with a wide choice of products that are safe and nutritious and have other desirable qualities.” TIM JOSLING, DONNA ROBERTS, & DAVID ORDEN, FOOD REGULATION AND TRADE: TOWARD A SAFE AND OPEN GLOBAL FOOD SYSTEM 1 (2004).
- *See Global Food Markets: International Consumer and Retail Trends*, USDA ERS Briefing Rooms, <http://www.ers.usda.gov/Briefing/GlobalFoodMarkets/consumer.htm>.
- *See Converging Patterns in Global Food Consumption and Food Delivery Systems*, Amber Waves 22 (Feb. 2008).
- *See Food Traceability and Assurance in the Global Food System*, Farm Foundation’s Traceability and Assurance Panel Report (July 2004).



A NEW WORLD FOOD ORDER?



The quality and safety of food produced in this global food system is governed by different layers of public and now private standards. Our analysis of the implications of emerging private standards is developed as follows:

- National food law systems and their limitations
- International food Law system and its limitations
- Regulatory vacuum (the result of these limitations)
- Emergence of private standards (filling the vacuum): unintended consequences and WTO response via SPS/TBT agreements
- Solutions?



NATIONAL FOOD LAW SYSTEMS

- Each country regulates food to some extent
 - The safety and quality of the global food supply depends on the success of national food regulatory systems
- Regulatory scope of national food law systems:
 - Standards (establishing quality and safety standards)
 - Inspection (inspecting food system activities: production, distribution, processing, labeling and claims, etc.)
 - Enforcement (ensuring compliance with standards)
- Factors that affect national food law choices:
 - Culture
 - Policies
 - Legislative Traditions
 - Institutional Structures
 - Budgetary and Resource Constraints

For an analysis of the interplay between these factors and national food law systems, see JESSICA VAPNEK & MELVIN SPREIJ, PERSPECTIVES AND GUIDELINES ON FOOD LEGISLATION, WITH A NEW MODEL LAW (FAO Legislative Study) 151 (2005).

For a review of the particular effect of culture in the global regulation of food, see MARSHA ECHOLS, FOOD SAFETY AND THE WTO: THE INTERPLAY OF CULTURE, SCIENCE AND TECHNOLOGY (2001).



LIMITS TO NATIONAL FOOD LAW SYSTEMS

The limits of national food law systems in assuring the quality and safety of food product is well established. Points relevant to these limitations are set forth in this slide.

- **Limited to national boundaries** (A reminder that national food systems in a global food system are dependent on the success of other national food systems is vividly served in the recent food safety problems from food product exported from China to the U.S. See *generally Food from China: Can We Import Safely?* (U.S. House of Representatives Committee on Oversight and Investigations, Staff Trip Report, Oct. 4, 2007)).
- **National food regulatory institutions differ substantially among countries** (See INTERNATIONAL FOOD TRADE LAW 3 (Jocelyn Kellam & Elizabeth Toni Guarino eds. 2000) (“Although some progress is being made in harmonizing the laws of different jurisdictions, divergence remains a key feature in food regulation . . .”).
- **Stringency of regulations increase among wealthier countries** (See TIM JOSLING, DONNA ROBERTS, & DAVID ORDEN, FOOD REGULATION AND TRADE: TOWARD A SAFE AND OPEN GLOBAL FOOD SYSTEM 2 (2004)).
- **Divergent standards disrupt order of global food supply – makes trade of food product difficult** (WHAT’S THE BEEF ? THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 5 (Christopher Ansell & David Vogel eds. (2005)).



International Food Law System

- Result of limits to national food law systems in establishing uniform quality and safety standards to facilitate trade of food product, has lead to development of international food law system
- International food law system is comprised of legal instruments that establish governance rules, quality and safety standards, and enforcement mechanisms
- These legal instruments recognize special needs of developing countries and set forth governance rules to accommodate and assist developing countries



International Legal Instruments

- SPS/TBT Agreements
 - Rules for governance
 - Special treatment for developing countries
- Codex/OIE/IPPC (Codex Alimentarius Commission; World Organization for Animal Health; and International Plant Protection Convention)
 - Harmonize and establish standards for food quality and safety
 - Science based standards
- WTO enforcement
 - Resolve differences in national food quality and safety standards
- Although the focus in this presentation is on the WTO and SPS/TBT construct, reference should also be made to two other types of international legal instruments in the global food system:
 - Supranational agreement -- The European Union food law system centered on the General Food Law (Regulation 178/2002) and institutionalized in the European Food Safety Authority (EFSA). The only such supranational agreement involving the food sector. *See generally*, BERND VAN DER MEULEN & MENNO VAN DER VELDE, FOOD SAFETY IN THE EUROPEAN UNION (2004).
 - The U.S. and China recently reached a bilateral agreement concerning food safety that arose as a consequence of well-publicized problems with China food imports into the U.S. *See Agreement Between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China on the Safety of Food and Feed*, (Dec. 11, 2007), available at <http://www.globalhealth.gov/news/agreements/ia121107b.html>. It may be that this agreement could serve as a model for bilateral agreements between trade partners to ensure the safety of food product imported into the U.S. Michael T. Roberts, *An Introduction to Food Law in the People's Republic of China*, National Agricultural Law Center 13 (Nov. 2007), available at http://www.nationalaglawcenter.org/assets/articles/roberts_chinafoodlaw.pdf.



SPS and TBT Agreements: Introduction

- Food safety and their potential uses as barriers to trade of food products have been a long-time concern
- The *General Agreement on Tariffs and Trade (GATT)* in 1947 did not formulate or define an international agreement with regard to food safety
- With the formation of the WTO in 1995, specific rules and principles were conceived
- The SPS agreement ensures that countries apply measures to protect human and animal health (sanitary measures) and plant health (phytosanitary measures) based on scientific risk assessment
- The TBT agreement covers all technical requirements and standards applied to all commodities that are not covered by the SPS agreement

See World Health Organization, Food Safety and the Globalization of trade in Food: A Challenge to the Public Health Sector, 1998, available at http://www.who.int/foodsafety/publications/fs_management/globalization/en/index.html.



SPS Agreement

- Premise: domestic and phytosanitary standards based on international norms reduce trade conflicts
- Examples of conflicts: meat and poultry processing standards to reduce pathogens; residue limits for pesticides in foods; regulation of agricultural biotechnology
- Objective: balance rights of member countries to determine health and safety standards and obligations to other countries via harmonization of standards
- Content: general principles (enumerated and described in next slide)



SPS General Principles

- Transparency - Member nations are required to ensure their regulations do not unnecessarily hinder or distort trade
- Equivalence – Member nations must accept that SPS measures of another country are equivalent if they result in the same level of public-health protection, even if the measures themselves differ
- Science-based measures – SPS measures must be based upon risk assessment and must be chosen so as to minimize distortions to trade; countries may adopt a provisional measure to avoid risk, but must seek information and carry out a risk assessment to justify permanent use of a trade-reducing measure
- Regionalization – The concept of pest- or disease-free areas within an exporting country is recognized; exports can be allowed from such areas, even if other areas of an exporting country still have the disease or pest
- Harmonization – Member nations recognize the desirability of common SPS measures
- National sovereignty – Countries may choose a risk standard that differs from the international standard under certain conditions

See Sanitary and Phytosanitary Measures: Text of the Agreement, *available at* http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.



TBT Agreement

- TBT Agreement
 - “Protects the rights of Members to adopt measures which ensure the quality of exports; protect human, animal, or plant life; protect the environment; or prevent deceptive practices, as long as these measures do not breach the disciplines set forth in the [TBT] Agreement.”
 - Examples: food ingredient or labeling requirements, nutrition claims, quality attributes, animal welfare rules, and packaging requirements
 - Many of the disciplines of the TBT Agreement essentially are identical to those in the SPS Agreement
 - TBT barriers are a related but different category of potential trade barriers
TBTs are used by governments to regulate markets, protect consumers, and preserve natural resources (not all TBTs are food-related)
 - Agreement states a preference for product standards over standards for process and production methods
 - Content: general principles that are enumerated and described in next slide



TBT General Principles

- Equivalence – Members must ensure national treatment of like products of domestic and international origin
- Legitimate Objectives – Technical regulations must not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create
 - Legitimate objectives include national security requirements; the prevention of deceptive practices; and protection of human health or safety, animal or plant health life or health of the environment
- International Standards – International standards when they exist are used as a basis for regulation except when they would be an ineffective or inappropriate means of fulfillment of the legitimate objectives pursued
- Available Information – In accessing such risks, the country must consider available scientific and technical information, related processing technology or intended end-uses of products

See Technical Barriers to Trade, *available at*
http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm



Codes

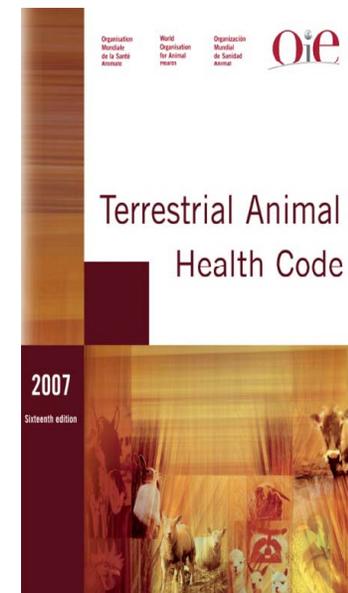
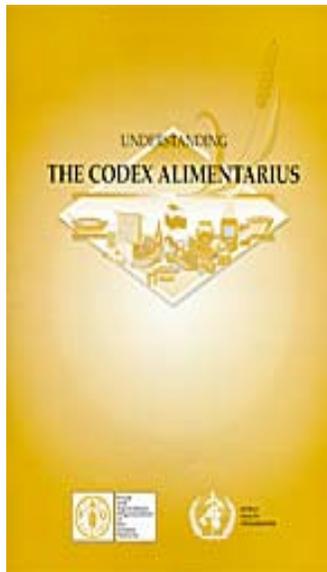
SPS and TBT agreements mandate that member countries rely on *scientific principles* as well as *recognized international standards, guidelines, or recommendations* when applying food safety regulations in world trade

The standards of the following three bodies are specified as providing the benchmark:

- 1) Codex Alimentarius Commission (“Codex”)
- 2) World Organization for Animal Health (“OIE”)
- 3) International Plant Protection Convention (“IPPC”)

Standards are basis for presumed compliance with the SPS and TBT agreements

Standards also provide forum for harmonization via technical discussions of variance in standards among national regulations



Codex Alimentarius Commission (Codex)

- Established in 1961
- In consultation with Food and Agriculture Organization (FAO) and the World Health Organization (WHO), responsible for implementation of the Joint FAO/WHO Food Standards Program, the purposes of which are:
 - Protect the health of consumers
 - Ensure fair practices in food trade
 - Promote coordination of all food standards work undertaken by international governmental organizations
 - Determine priorities and prepare draft standards
 - Finalize standards and, after acceptance by governments, publish standards in a Codex Alimentarius
 - Amend published standards when appropriate and practical

www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex.default.htm

See Codex Alimentarius Commission, available at http://www.codexalimentarius.net/web/index_en.jsp



World Organization for Animal Health (OIE)

- Established in 1924; affiliated with U.N.
- Main objectives:
 - Inform governments of occurrence and course of animal diseases throughout the world and ways to control these diseases
 - Coordinate at international level studies devoted to surveillance and control of animal diseases
 - Harmonize regulations for trade in animals and animal products among member countries
- Working relations with numerous other international organizations: FAO, WTO, WHO, etc.
- Issues an Animal Health Code and an International Aquatic Animal Health Code

World Organization for Animal Health, *available at* <http://www.oie.int/>



International Plant Protection Convention (IPPC)

- A multilateral treaty (1952) deposited with the director-general of the FAO and administered through the IPPC Secretariat located in the FAO's Plant Protection Service
- 110 governments contracted to IPPC
- Purpose is to prevent the spread and introduction of plant pests and diseases
- Provides framework and forum for international cooperation, harmonization, and technical exchange in collaboration with regional and national plant protection organizations

International Phytosanitary Portal, *available at*

<http://www.ippc.int/IPPC/EN/default.jsp>

www.fao.org/WAICENT/FaoInfo/Agricult/AGP/AGPP/PQ/



Treatment of Developing Countries

- SPS and TBT agreements recognize difficulties that developing countries have in complying with new food quality and safety measures
- SPS Agreement:
 - Article 9 Technical Assistance: special assistance (technical assistance, financial support) is foreseen for developing countries in order to help them meet technical requirements of SPS measures for trade
 - Article 10 Special and Differential Treatment: member countries agree to take into account the particular needs of developing countries when putting into place SPS measures, for instance by giving them a longer lead time to comply with new measures whenever possible
- TBT Agreement:
 - Article 11 (Technical Assistance to Other Members)
 - Article 12 (Special and Differential Treatment of Developing Country Members)



SPS Text: Technical Assistance and Special and Deferential Treatment

- Article 9: Technical Assistance

“Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.”

- Article 10: Special and Deferential Treatment

- “In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.
- Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
- With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.
- Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.”



World Trade Organization (WTO)

- Only international body dealing with the rules of trade between nations
- Foundation: WTO agreements, the legal rules for international commerce and for trade policy
- Agreements have three main objectives
 - Help trade flow as freely as possible
 - Achieve further trade liberalization through negotiation
 - Establish an impartial means of settling disputes

www.wto.org/



WTO Enforcement

Process

- Notification requirements – transparency provisions that ensure compliance with SPS and TBT agreements: must notify WTO of prospective measures
- Gives trading partners opportunity to raise questions or objections as violating WTO obligations
- Complaints filed (counter notifications)
- Formal request for consultation
- WTO panel ruling
- Appellate body



Examples

- EU Meat Hormone Dispute
 - 1989 EU ban on production and importation of meat from livestock treated with growth-promoting hormones. EU justified ban to protect health and safety of consumers. WTO dispute settlement panels ruled that ban lacked scientific justification and was inconsistent with WTO trade rules. EU refused to remove ban, and U.S. was granted right to retaliatory tariffs. Efforts to resolve long-standing dispute not successful.
- EU Biotechnology Approvals
 - In May 2003, in WTO dispute settlement, the U.S., along with Canada and Argentina, challenged EU's de facto moratorium since 1998 on biotechnology product approvals. On February 7, 2006, WTO dispute panel ruled that a moratorium had existed and that bans violated WTO rules. This dispute still exists.

LIMITS TO INTERNATIONAL LAW INSTRUMENTS

- Devolution of the State
 - Fiscal pressures: reduced funding for various food standards and regulations enforcement projects, including food safety
 - Shift in focus by government agencies from inspection to auditing systems
- Focus of international food law construct is nonresponsive to market changes
 - Retail concentration and power shift
 - As retailing becomes more oligopolistic, retailers prefer to minimize price competition and compete on basis of other qualities that are not necessarily science based
 - Concentration allows large supermarket chains to exert market power over upstream actors
 - Ethical consumerism
 - Concerns about impacts of agriculture on environment, labor conditions, animal welfare – consumption is viewed as a political practice
 - Gives rise to corporate social responsibility expectations for food companies
 - Ethically aligned consumption
 - High profile food safety concerns – problems of confidence in regulatory agencies
 - Coupled with controversies concerning genetically modified foods, animal cloning, etc. heighten consumer anxiety
 - Demand for information that relates to production that is not necessarily science-based
- Vacuum? Is it possible for public standards to meet these market changes?

SOURCES: *Relationship of Third-Party Certification (TPC) to Sanitary/Phytosanitary (SPS) Measures and the International Agri-Food Trade: Final Report*, USAID (Dec. 2005); *The Next Step in the Ethical Consumerism Revolution*, Datamonitor (2008);



Emergence of Private Standards

- Retail tools: filling the vacuum?
 - Offer quality requirements to meet market demand
 - Means of engaging in non-price competition
- Information: provides information about unique attributes of food product
- Third Party Certification (TPC): to ensure conformity, supermarkets use TPC
- Expanding scope: sustainability standards



SOURCE: Maki Hatanaka, Carmen Bain, & Lawrence Busch, *Third-Party Certification in the Global Agrifood System*, Science Direct (2005)



Sustainability Standards

- Derive from corporate sustainability standards
- Involves whole food supply chain See American National Standards Institute (ANSI) development of agriculture standards, Leonardo Academy , *available at* <http://www.leonardoacademy.org/Projects/SustainAgStdDevelopment.htm>
- Broad definition
 - “meets the needs of the present without compromising the ability of future generations to meet their own needs.” World Commission on Environment and Development, Brundtland Report, *available at* <http://www.are.admin.ch/themen/nachhaltig/00266/00540/00542/index.html?lang=en>
 - Included in definition: conservation, environment, biodiversity, animal welfare, economical viability, rural development, and social justice. *See generally Sustainable Agriculture: Definition and Terms*, National Agriculture Library, *available at* <http://www.nal.usda.gov/afsic/pubs/terms/srb9902.shtml>
 - Driver is ethical consumerism
 - Led to proliferation of codes and supply-chain contracts that permeate international boundaries



Examples of Private Standards

- Individual Firm Schemes
 - Tesco Nature's Choice
 - Carrefour Filière Qualité
- Collective National Schemes
 - Assured Food Standards
 - British Retail Consortium Global Standard – Food
 - QS Qualität Sicherheit
 - Label Rouge
 - Food and Drink Federation/British Retail Consortium Technical Standard for the Supply of Identity Preserved Non-Genetically Modified Food Ingredients and Product
- Collective International Schemes
 - EurepGAP
 - International Food Standard
 - Global Food Safety Initiative
 - ISO 22000: Food safety management systems
 - Safe Quality Food (SQF) 1000 and 2000
 - ISO 22005: Traceability in the feed and food chain

SOURCE: *Private Standards and the SPS Agreement*, WTO, Committee on Sanitary and Phytosanitary Measures (Jan. 24, 2007) (Table 1)



THEORETICAL BASIS

- Legal pluralism: multiple players:
 - Suggests that “more than one body of laws or set of norms can exist within a legal jurisdiction.” Orley Lobel, *The Paradox of Extralegal Activism: Critical Legal Consequences and Transformative Politics*, 120 HARV. L. REV. 938, 966 (2007).
- Neoliberalism Notion: “[P]rivate groups should be entitled to ‘exercise within the area of their competence an authority so effective as to justify labeling it as a sovereign authority.’” Mark Dewolfe Howe, *The Supreme Court, 1952 Term – Forward: Political theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).
- Leads to extralegal model: “voluntary corporate codes of conduct are in vogue” Owen E. Hernstadt, *Voluntary Corporate Codes of Conduct: What’s Missing?*, 16 Lab. Law 349, 349 (2001).
- Criticisms: devolution of the State and unintended consequences/lack of accountability. “The movement to extralegal activism has unwittingly aligned itself with concepts such as civil society revivalism, informality, and nongovernmental norm generation.” Orley Lobel, *The Paradox of Extralegal Activism: Critical Legal Consequences and Transformative Politics*, 120 HARV. L. REV. 938, 942 (2007).



Unintended Consequences of Private Standards

- Benefits: new markets, competitive edge, but who benefits? (EU and Chile in favor of private standards – expand trade because exporters that comply have an easy time entering markets)
- Disadvantages: trade barriers - defacto mandatory, expensive, difficult for developing countries
- No accountability (accreditation?)
 - Who are these accreditors?
 - Who is regulating the accreditors?
- Blurring of private standards and official SPS measures

SOURCES: *Private Standards and the SPS Agreement*, WTO, Committee on Sanitary and Phytosanitary Measures (Jan. 24, 2007); *Relationship of Third-Party Certification (TPC) to Sanitary/Phytosanitary (SPS) Measures and the International Agri-Food Trade: Final Report*, USAID (Dec. 2005).



Examples of Concerns Related to Private Standards

- Content Concerns
 - Multiplication of private standards both within and between markets
 - “Blurring” of official SPS measures with private standards
 - Relationship of private standards with the international standard-setting bodies referenced under the SPS Agreement
 - Lack of scientific justification for certain private standards
- Compliance Concerns
 - Costs capitalization and third-party certification, particularly for small enterprises and farmers in developing countries
 - Requirements of some private schemes to use only specified certification bodies
 - Lack of equivalence between schemes leading to repetition of certification audits
 - Lack of recognition of certificates issued and/or lack of recognized certification bodies in developing countries

See Private Standards and the SPS Agreement, WTO, Committee on Sanitary and Phytosanitary Measures (Jan. 24, 2007) (Table 1)

- WTO Committee on Sanitary and Phytosanitary Measures, Feb. 25, 2008: “The OIE Standards are developed on the basis of scientific risk assessment and adopted through the democratic procedures of the OIE. In contrast, private standards, which are mainly based on commercial quality schemes, are developed to meet the needs of commercial parties (especially supermarkets) and consumers and tend towards a non-scientific, zero-risk, marketing approach that is not consistent with the disciplines of the SPS Agreement. *Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety and Animal Welfare, WTO, Committee on Sanitary and Phytosanitary Measures (Feb. 25, 2008)*”



Case in Point: ANSI Sustainability Standards

- American National Standards Institute (ANSI)
 - Best known for developing and accrediting uniform standards for marketing
 - New to agriculture
- Leonardo Academy: handling sustainable agriculture standard on ANSI's behalf
 - Web site: "When there is market confusion, and an absence of government regulations, voluntary national standards serve as a vehicle for resolving differences to retain public confidence"
<http://www.leonardoacademy.org/>
- Scientific Certification Systems (SCS): recruited by Leonardo Academy to prepare draft standard for trial use (DSFTU) on sustainable agriculture
 - Aim: "phasing out of the use of dangerous agrochemicals; establishing targets for energy efficiency, greenhouse gas emission reductions and soil carbon storage; establishing a practical path for transition to organic practices; protecting water resources and the surrounding ecosystems; integrated waste management; protecting the health, safety and rights of workers and communities; and ensuring product quality and safety"
- Criticism: National Association of Wheat Growers: 1) sustainable and organic should not mean the same thing; 2) SCS will be doing the certifying – conflict of interest?
- Stakeholder involvement? Transparency? Harmonization?

Source: *Industry "antsy about ANSI" sustainable agriculture standard*, 49 Food Chemical News (Jan. 28, 2008)



Squaring Private Standards With Global Trade Construct

- Outpouring of concerns by developing countries/regular feature on agenda of meetings of SPS Committee
 - First raised at the SPS Committee meeting held on June 29-30, 2005. Saint Vincent and the Grenadines raised concern regarding operation of a EureGAP scheme in relation to trade in bananas with supermarkets in U.K.
 - Report issued by the SPS Committee. *See Private Standards and the SPS Agreement*, WTO, Committee on Sanitary and Phytosanitary Measures (Jan. 24, 2007)
 - Report issued by the SPS Committee. *See Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety and Animal Welfare* (Feb. 25, 2008)
- 3 themes in reports and meetings:
 - Market access
 - Focus is on whether private standards help suppliers improve quality of their products and gain access to high-quality markets or whether private standards are both more restrictive (e.g., requiring lower pesticide residues) and more prescriptive (accepting only one way of achieving food safety outcome) than official import requirements
 - Development
 - The costs of compliance and certification render the development of export schemes virtually impossible for small producers in developing countries
 - WTO law
 - Consistency with SPS and TBT Agreements



WTO Analysis: Private Standards Issues

- Legitimate private-sector activity, with which governments should not interfere?
- Or, does SPS/TBT agreements make governments in importing countries responsible for private standards?
 - Concern: private standards do not meet WTO requirements of transparency and scientific justification of food safety measures and are more trade-restrictive than necessary to protect health
 - Context: private standards phenomenon developed after negotiation of SPS/TBT agreements



Legal Relationship: SPS Agreement and Private Standards

- SPS Agreement applicable to “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade” Article 1
- But, Article 2 explicitly refers to the rights and obligations of “Members”
- Legal Relationship Issues:
 - Definition exclude the type of measures imposed by private standards?
 - Definition include actions by private sector?
 - Definition include only actions taken by governments?



SPS Agreement Article 13

- “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.” Emphasis Added.



Article 13: Analysis of “Non-Government Entities”

- Relationship between Article 13 and private standard-setting bodies depends on definition of “non-governmental entities”
- SPS agreement does not define “non-governmental entities”
- Application of TBT agreement, Point 6 of Annex 1 (WTO Agreement interpreted as an integrated whole): “Body other than a central government body or a local government body, including a nongovernmental body which has legal power to enforce a technical regulation.”
 - Only private entities which have been “entrusted” by government with performance of certain tasks or has special legal status or
 - Includes private bodies that are not “entrusted,” but that operate or are established within territory of a Member
- Issue remains open: what is the distinction between private standard-setting bodies and non-governmental entities?



ARTICLE 13: ADDITIONAL CONSIDERATIONS

- To date, no WTO jurisprudence that would help determine what are the “reasonable measures”
- Sustainability standards outside scope of SPS Agreement – beyond food safety
 - Do other agreements apply? Example: International Labor Organization
- Is a standard really a private standard or an official standard?
 - Meshing of public/private standards: where is the line crossed between what is public or private?
- Interpretative history of Article 13: intent?
 - Text may be pre-private standards, but could intent be broadly construed and adaptable?



TBT Agreement: Analysis

- Covers food trade standards that relate to packaging, labeling, or technical issues (broader than SPS agreement)
- If private standard falls within definition under TBT agreement, Article 4 applies: requires Members to take reasonable measures to ensure that non-government bodies accept and comply with Annex 3 (the Code of Good Practice)
- No such “reasonable measure” exists under SPS agreement; under TBT agreement, members are obliged to take such “reasonable measures” as may be available to them to ensure compliance by non-governmental organizations with the provisions of Article 2
 - But, there is again the issue of the scope of “reasonable measures”
- Article 8 relates directly to the obligations of Members concerning activities of non-government bodies that apply procedures for assessment of conformity

For a recent analysis concerning the applicability of the TBT agreement to private standards, see *Private Voluntary Standards Within the WTO Multilateral Framework*, WTO Committee on Sanitary and Phytosanitary Measures (Oct. 2007) (Submission by the United Kingdom)



TBT Agreement: Additional Considerations

- Fundamental legal question: is the TBT agreement applicable to processes and production methods that are not related to the product?
- Other WTO Agreements (General Agreement on Trade in Services, the Annex on Telecommunications, the Agreement on Subsidies and Countervailing Measures and the Agreement on Preshipment Inspection) are helpful to distinguish non-governmental from governmental activities



WTO Case Law

- Little WTO case law on the interpretation of Article 13 of the SPS agreement
- No case law in relation to “non-governmental entities”
- Panel report, *Australia – Measures Affecting Importation of Salmon – Recourse To Article 21.5 By Canada* (Panel Report, WT/DS18/RW of 18 Feb. 2000), sets forth relevant analysis: 1) look to Article 13 to determine whether there is “responsibility” of a Member; 2) determine whether the measure is an SPS measure; 3) whether there is a violation of SPS agreement
- Panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper* (WT/DS44R of 31 March 1998), seems to establish that a degree of government involvement is required to put a measure under the scrutiny of the WTO agreements



Structural Solutions?

- Formal legal challenge to WTO
 - Will a developing country challenge private standards via initiating dispute settlement proceedings?
 - Note: WTO dispute settlement is expensive, politically sensitive, and inefficient way to resolve issues
- Improve and/or revise Article 13, SPS agreement
 - Could clarify which provisions do or do not apply to private standards
 - Amend Article 13, but only if can get 100 countries to agree
 - Develop guidelines on implementation of Article 13, but they would be voluntary
- New legal instrument(s)
 - What would be the instrument and how would it eventuate?
 - Agreement of *ad hoc* obligations by means of a “plurilateral instrument” (allowing members to voluntarily adopt additional commitments that would regulate issues of private standards and their relation to trade)
 - Enter into memoranda of understanding with private organizations



Non-Structural Solutions?

- Harmonization of standards (stakeholders?)
 - What would be the leverage to bring a coalition of private and public players to the table? Would the exercise prove too unwieldy to accomplish harmonization?
- Information sharing: *ad hoc* consultations and sharing of information with private standard setters
- Enter dialogue with private organizations to encourage behavior consistent with SPS/TBT agreement principles and obligations
- Could leverage business risk for supermarkets of negative reaction by developing countries toward private standards
- Hold meetings between SPS/TBT committees and private organizations to raise concerns
- Encourage private organizations to offer technical assistance and accommodation to producers in developing countries



CONCLUSION

- Private standards are here to stay
- Unintended consequences of private standards invites legal scrutiny
- Interplay between private standards and public standards in the context of the SPS and TBT agreements raises significant legal issues
- Resolution of these issues from the language in the SPS and TBT agreements is problematic
- Possibility of practical solutions within the existing WTO/SPS/TBT construct needs to be explored
- Further studies, discussion, and analysis is needed in order for private standards to find optimal role in global food supply



THANK YOU!

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