

Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered.

The Application of the SPS Agreement to Transnational, Private Food Standards

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I. Introduction

With the advent of the WTO's SPS Agreement, the character of the hitherto non-binding food safety standards developed by the Codex Alimentarius Commission changed. Under some conditions, a WTO member may now actually be required to admit an imported product into its market on the basis of that standard.¹ Where the WTO member is able to show through a risk assessment or a demonstration that scientific evidence is insufficient to perform a risk assessment that a higher level of protection is warranted, it can derogate from admitting the imported product based on the Codex standard.²

The SPS Agreement suggests that food safety standards of the Codex Alimentarius Commission have an important role to play in governing food safety. However, even if the standards are based on sound science and enjoy high credibility, they may not actually be capable of having much of a role if they are incorrectly implemented or non-enforced in the country of export. The extent to which this happens depends partly on the choices of private operators.

In the food safety area, public and private regulatory governance have always co-existed. When public regulators specify maximum exposure levels or set safety targets through process standards, there is a need for firms to verify sources of hazards in their internal operations and take risk mitigation strategies in order to minimize legal and financial liabilities.³ What pattern of hybridity in regulation emerges depends on the content and form of public regulation and on the processing, management and

organizational structure of firms and their supply chain.⁴ Transnational market liberalization affects both parameters; public regulation and corporate form and management because it is bound to render supply chains more transnational and diversified.

The possibility for cutting costs encourages food retailers to source transnationally in order to compete more effectively, but food safety regulation that looks effective 'on the books' might be enforced in a weak manner in some countries of export. This creates new risks in the supply chain and might make retailers reluctant to source transnationally.⁵ Suppliers and upstream buyers consequently have an interest in ensuring and communicating adequate safety to each other through alternative means. In countries with adequate food safety governance, individual operators may have incentives to evade costly food safety management and free-ride on the good reputation of suppliers from that country. This exposes retailers to liabilities and risks of having to sue dispersed op-

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1 SPS Agreement, Article 3.1 in conjunction with Article 3.3

2 SPS Agreement, Article 3.3 in conjunction with Articles 5.1 and 5.7.

3 For an example of how strict liability of food operators in the UK triggered private governance mechanisms, see Spencer Henson & John Humphrey, "Private Standards in Global Agri-Food Chains", in Axel Marx et. al. (eds.), *Private Standards and Global Governance: Legal and Economic Perspective* (Cheltenham, Edward Elgar, 2012), pp. 98 *et seq.*, at p. 105.

4 Fabrizio Cafaggi, "Transnational Governance by Contract: Private Regulation and Contractual Networks in Food Safety", in Axel Marx, n. 1, pp. 195 *et seq.*, at p. 199.

5 Cafaggi, n. 4, at 199; Henson & Humphrey, n. 3, at 102.

erators. In the case of food safety governance in Europe, large supermarkets hold the key to effective market access in the form of access to the consumer retail level. While they have a principal interest in sourcing lower priced products from abroad, they also have to ensure food safety and preserve their market reputation. These liabilities can make them reluctant to source products transnationally.

In response to these problems, firms in the food production and retail supply chain create private mechanisms to gather information, mitigate risks, ensure compliance and communicate it to buyers, and to reallocate their consequent costs in the supply chain. Private standards become an attractive choice because they offer standard schemes that include substantive standards and certification,⁶ that is, they set risk management requirements and verify their observance. They are generally developed by consortia of big food retailers and suppliers and become implemented in the supply chain through supplier certification and as contractual specifications. Successful certification entitles a supplier to use the trade-mark protected label corresponding to the substantive, underlying standard. These labels can be business-to-business or business-to-consumer labels. Independent third party certification offers the advantage of a more distanced and rigorous assessment of compliance over first party self-certification by suppliers and the further advantage of shifting the cost of compliance onto the supplier instead of the retailers.⁷ Private standards enshrined in contractual specifications concentrate liability for dispersed food safety risks in the supply chain in wholesalers, rather than leaving residual risks with retailers. They offer the advantage of choice of applicable law and the possibility of commercial arbitration with quasi-automatic enforcement over the non-fulfilment of contractual specifications. Additionally, protection of the scheme against misuse by non-

certified firms is achieved through internal procedures of the standard-setter but also by giving trademark protection to the label underlying the standard. Trademarks in turn have to be protected by other WTO members against use by unauthorized third parties.⁸

Less laudably, proliferation of private standards can lead to the anti-competitive closure of the market.⁹ Private standards raise the rivals' costs (via the creation of mitigation, management and certification requirements or the increase in levels of protection that is particularly burdensome for small suppliers) and ensure rents to first movers through lock-in effects. Such effects are likely less present in horizontal, producer-driven (rather than vertical, retailer-driven) private standard-setting. In Europe, the retail level is dominated by a limited number of big national and transnational supermarket chains, which have been amongst the drivers for private food standards.¹⁰ The fact that many upstream buyers now require GlobalG.A.P. certification has created private regulatory barriers to market access and has prompted WTO members to launch discussions on how existing WTO law disciplines apply to private safety standards and whether they need to be strengthened to capture them.

The proliferation of standards leads to another coordination problem: substantively equal safety under a different scheme is not recognized. The Global Food Safety Initiative caters to this demand for meta-coordination by benchmarking public and private food safety standards against each other. Finally, food standards may also fragment markets in exporting developing countries. Wholesalers prefer sourcing from fewer but larger buyers rather than smallholders, because risks and hence costs tend to be more limited.¹¹ Additionally, for smallholder farms the per-unit cost of certification is comparatively larger because of the smaller output. Reliance on different standards could also become a problematic source of hazard in case of crises and pandemics where common principles must be complied with.¹² Food producers with sufficient resources in developing countries may adapt their products to the high safety requirements in developed countries whose market promises higher economic returns, leaving only small producers on the domestic market with insufficient resources to invest in making their products and production processes safer and stalling improvements in food safety there.

6 Henson & Humphrey, n. 3, at p. 108.

7 Henson & Humphrey, n. 3, at 100, 107.

8 WTO, TRIPS Agreements, Art. 16.

9 Cafaggi, n. 4, at p. 202.

10 Henson & Humphrey, n. 3, at p. 100.

11 Henson & Humphrey, n. 3, at 109-110; Miet Maertens & Jo Swinnen, "Private Standards, Global Food Supply Chains and the Implications for Developing Countries", in Axel Marx et.al., n. 3, pp. 153 *et seq.*

12 Cafaggi, n. 4, at 201.

The proliferation of private mechanisms can *de facto* fragment the market due to non-recognition of alternative schemes, raising rivals' costs and setting unnecessarily high standards competitors cannot meet. Market fragmentation can also become 'exported' to developing countries if exporters exclude smallholder farms from their purchases. Private food standards therefore have the potential to contribute to making food safety more effective, thereby bolstering positive integration, but they can also constitute private barriers to trade, undermining efforts to have commonly agreed upon international standards govern the market. The extent to which this is the case depends considerably on the type of standard developed, the obligations the SPS Agreement sets forth in respect of private standards as well as on the internal governance structure of private food standard setters. The following section analyses these questions.

II. GlobalG.A.P.: An Example of a Private Food Safety Governance Mechanism

GlobalG.A.P. sets business-to-business farm gate standards on food safety, environmental protection, animal welfare, occupational health and safety and labor standards, called Integrated Farm Assurance (IFA), and a narrower produce standard focused on food safety and traceability only, called Harmonised Produce Safety Standard (HPSS).¹³ As a farm gate standard, GlobalG.A.P. covers issues up to the moment where produce, animals or fish leave the farm gate.¹⁴ Processing and retail issues are not dealt with by GlobalG.A.P.¹⁵ The day-to-day management is performed by a Secretariat taking the legal form of the German FoodPlus GmbH owned by a subsidiary of the EHI Retail Institute.^{16,17} GlobalG.A.P. emerged out of EUREPGAP, an initiative by British and continental European food retailers to develop a harmonised standard of good agricultural practice.¹⁸ GlobalG.A.P. standards are revised every four years.¹⁹

GlobalG.A.P.'s membership is composed of food producers, suppliers, retailers and certification bodies, primarily of Western countries.²⁰ It is governed by an elected Board, responsible for long-term strategic planning and the adoption of terms of reference for new standardization projects.²¹ There are ten members whose ratio is fixed at a 50:50 division of retailers and suppliers respectively.²² The term is four years and can be renewed twice. Members are elect-

ed in their individual capacity.²³ The standards are elaborated by three Technical Committees, formerly called Sector Committees, on crop, livestock and aquaculture respectively.²⁴ Their members are elected amongst suppliers and retailers in a 50:50 proportion and include companies such as Migros, Sainsburys, ASDA, ALDI and various food producers and suppliers.²⁵ The actual drafting occurs in the Technical Committees and includes two phases in which stakeholder comments are sought.²⁶ The certification body committee harmonizes the interpretation of the standards.²⁷ National technical working groups adapt GlobalG.A.P. to specific local challenges and are an important source of information on local conditions.²⁸ Stakeholder input is organized in the form of stakeholder committees whose membership consists of a broader range of producers, suppliers, retailers, NGOs and researchers.²⁹ GlobalG.A.P. has made efforts to include smallholders in its standard-setting process through a smallholder ambassador and a smallholder observer who participate in Technical Committee meetings.³⁰

13 On IFA, see http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/globalg.a.p./; on HPSS see http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/harmonized-produce-safety/.

14 See IFA, n. 41.

15 Ibid.

16 http://www.globalgap.org/uk_en/who-we-are/governance/.

17 The EHI Retail Institute is a scientific research institute and German eingetragener Verein (registered association) with 700 members consisting of retailers, their industry associations, manufacturers and service suppliers from all sectors <http://www.ehi.org/en/about-us/members/list-of-members.html>.

18 http://www.globalgap.org/uk_en/who-we-are/history/.

19 Ibid.

20 Ibid.

21 Ibid.

22 GlobalG.A.P. Board Terms of Reference, available at http://www.globalgap.org/export/sites/default/.content/.galleries/documents/130128-GLOBALGAP_Board-ToR.pdf.

23 Ibid., Appendix 1.

24 http://www.globalgap.org/uk_en/who-we-are/governance/technical-committees/.

25 Ibid.

26 GlobalG.A.P. Board Terms of Reference, n. 22, Article 4.

27 http://www.globalgap.org/uk_en/who-we-are/governance/technical-committees/.

28 http://www.globalgap.org/uk_en/who-we-are/ntwgs/.

29 www.globalgap.org/cms/front_content.php?idcat=17.

30 Nicholas Hachez & Jan Wouters, "A Glimpse at the Democratic Legitimacy of Private Standards. Assessing the Public Accountability Gap of GlobalG.A.P.", 14 *Journal of International Economic Law*(2011), pp.677 et sqq.

Certification occurs through several on-site visits and has to be renewed each year.³¹ In order to obtain certification, a supplier has to comply with all major points and at least 95% of all minor points.³² Complaints and appeals against certification have to be directed to the certification body concerned. If the certification body does not respond adequately, the complaint can also be addressed to GlobalG.A.P.³³ In case of non-compliance by a farm, the GlobalG.A.P. General Regulations require certifiers to put in place differentiated enforcement measures depending on the severity of the infringement that can range from warnings, suspension of a product from the right to use the trademark and cancellation resulting in a total prohibition of use of the trademark for a 12-month period.³⁴ This sanction is foreseen for cases of fraud or illicit trademark misuse.³⁵ The appeals procedure of certification bodies is not further regulated by GlobalG.A.P.³⁶ Producer groups are also required to implement their own internal compliance and sanctioning mechanism, along the general GlobalG.A.P. guidelines.³⁷ GlobalG.A.P. conducts integrity reviews of approved certification bodies and any anomalies are brought before the Integrity Surveillance Committee, consisting of 5 members appointed by the Board but working independently, which can decide on appropriate sanctions, including fines and re-training requirements for minor infringements to 6-month public suspension or withdrawal of the license to use the trademark.³⁸ Any appeals against decisions by the Secretariat or the Integrity Surveillance Committee should first be addressed to these organs but a re-appeal in the form of an arbitration proceeding is possible.³⁹

GlobalG.A.P.'s certification provides access to multiple retailers in multiple markets. In that sense, it

can be seen as a way of enabling access by food producers to markets on the basis of internationally harmonized standards even if they operate in a domestic regulatory environment that is weak and fails to enforce food safety. It could be argued that Global G.A.P. contributes to having markets operate on common rules. However, GlobalG.A.P. has already resulted in an upward change of safety and quality requirements because some of its standards are stricter than existing Codex standards or foreclose different possibilities for complying with Codex standards. GlobalG.A.P. thus potentially excludes competitors from market access for whom compliance with the new requirements may be costly or impossible, undermining efforts at positive harmonization if the higher standards are no longer scientifically supported. The fragmentation of domestic food markets due to the availability of certification of individual operators can also be seen in a more positive light from the perspective of positive integration of markets because it means that a developing country with fewer governmental and tax resources for implementing changes to their domestic food safety laws as a result of Codex standards (which may not be badly needed for the domestic situation, given other problems) can actually still preserve opportunities for credible market access abroad for their suppliers who are able to take on the cost of certification to GlobalG.A.P. standards. This raises the question how the provisions of the SPS Agreement apply and relate to private food safety standards. The following section turns to this question including *sensu latu*, in that it not only investigates whether the SPS Agreement regulates private measures but also whether it gives them any indirect recognition.

III. Legal Assessment under the SPS Agreement

The SPS Agreement applies to governmental SPS measures, which its Annex 1A defines as laws, decrees, regulations, requirements and procedures. The terms "requirements" and "procedures" taken on their own are ambiguous as to the necessary governmental involvement but the preceding terms of "laws", "decrees" and "regulations" as legal context for their interpretation impart meaning to the terms "requirements" and "procedures", suggesting that these must be significantly infused with governmental au-

31 General Regulations, Part I, Article 6.7, available at http://www.globalgap.org/export/sites/default/.content/.galleries/documents/130315_gg_gr_part_i_v4_0-2_en.pdf.

32 General Regulations, Part I, n. 103, Article 6.2,

33 *Ibid*, Article 6.3 in conjunction with Part III, Article 6.3.

34 *Ibid*, Article 6.4.

35 *Ibid*, Article 6.4.3.

36 *Ibid*, Article 6.5.

37 General Regulations, Part II, Article 1.7, available at http://www.globalgap.org/export/sites/default/.content/.galleries/documents/130315_gg_gr_part_ii_v4_0-2_en.pdf.

38 http://www.globalgap.org/uk_en/who-we-are/governance/integrity-surveillance-comm.

39 General Regulations, Part III, Article 8.1(b).

thority to give them their obligatory character without necessarily being formally legally binding. In fact, the decision of the Appellate Body in *US-Tuna* on the related TBT term of “mandatory” suggests that where a government conclusively lays down a single set of conditions for accessing what becomes an advantage due to adverse consumer selection it has turned a voluntary norm into a mandatory requirement. This finding might not necessarily apply if several private food standards were governmentally recognized for the purpose of meeting retailers’ or importers’ quality specifications in a piece of legislation. Moreover, to the extent that retailers demand compliance with private food standards completely of their own volition through contractual purchasing specifications, such wholly private conduct cannot be considered to be an SPS measure.

The other provision governing a WTO member’s obligation in respect of private standards is Article 13. It provides 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. 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.

GlobalG.A.P. being a German GmbH and FSSC 22000 being a vehicle owned by a foundation under Dutch law, the obligations of the first sentence apply to the EU but not necessarily other WTO members whose companies demand GlobalG.A.P. of FSSC22000 certification. For this provision to apply to retailers or other companies, they would have to be considered as “non-governmental entities”. It is doubtful that such a broad interpretation of the term “non-governmental entities” can be sustained because the last sentence of Article 13 as well as the object and purpose of the SPS Agreement in the preamble, which refer throughout to SPS measures and which Annex

A1 in turn defines as measures with a degree of governmental involvement, suggest that these governmental entities must somehow be exercising regulatory authority. A mere contractual specification by a retailer requiring certification to a private standard is not in the nature of exercising regulatory authority but more in the nature of exercising market choice, which should remain unaffected by WTO law. To interpret Article 13 as obliging WTO members to regulate possibly anti-competitive conduct in the nature of vertical restraints put in place through contractual specifications would also be contrary to principle that states should not be assumed to have taken on the more onerous obligation if the provision leaves some doubt about its interpretation. Additionally, the last sentence of Article 13 requires the WTO member to take measures to ensure that the non-governmental entities comply with the relevant provisions of the SPS Agreement. These provisions apply – as Article 1.1 and Annex A1 makes clear – to measures that are infused with governmental authority. As context for the interpretation of the first sentence of Article 13, these provisions suggest that the scope of the first sentence of Article 13 is limited to situations in which some degree of public authority vests with the private entity through some form endorsement or possibly a significant failure to regulate food safety, leaving private entities with no choice but to come up with their own regulation. The mere availability of an add-on to public SPS measures in the form of a private standard does not become infused with governmental authority merely in virtue of its existence. Additionally, the first sentence of Article 13 is a best-efforts provision and an obligation of conduct, not result. The concept of reasonableness suggests that the severity of the obligation increases the more a non-governmental entity actually enjoys market power. However, a complication is that the provision presumes knowledge on the part of the government about the extent to which private food standards actually govern the market. Given that GlobalG.A.P. standards are business-to-business standards only, this information may not be in the public domain to a significant extent. As a result, the provision in the first sentence of Article 13 is difficult to enforce in respect of governmental failure to regulate private food standards to ensure observance of the provisions of the SPS Agreement.

Next to a weak application to private standards, the SPS Agreement actually gives some indirect

recognition to private food safety standards. Because the SPS Agreement requires scientific evidence for a WTO member to adopt a higher standard of protection than that enshrined in an international standard, evidence about the general low level of enforcement of SPS regulations in a country may no longer be sufficiently specific to the actual risk at issue for blocking imports from these countries as a whole if private certification systems are available and are actually used in the country.⁴⁰ Article 5.2 notably requires that in assessing risks, the importing WTO member takes account of relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment. GlobalG.A.P. standards affect processes and production methods, via certification they also constitute inspection, sampling and testing methods and if applied in a widespread manner, they can also contribute to constituting areas in which plant pests and zoonoses have been eradicated.

Additionally, the obligation of WTO member in Article 5.6 of the SPS Agreement not to use SPS measures more trade-restrictive than necessary to establish their appropriate level of protection would also require the importing WTO member to apply bans on imports from countries where food safety governance and implementation of Codex standards is weak in a sufficiently narrow manner so that products which actually are compliant with Codex standards and which the importing member recognizes as sufficiently safe can still obtain market access. A similar result obtains because of the provision in Article 2.3 of the SPS Agreement, which contains language similar to the chapeau of Article XX of the GATT in that it prohibits arbitrary or unjustifiable discrimination between WTO members where similar conditions prevail and disguised restrictions on trade through the application of SPS measures.⁴¹ Article 6 of the SPS Agreement further implements

these provisions because it calls on members to take account of local conditions and variations in the country of export, including through the application of effective pest control measures and pest- and disease-free areas.⁴²

In respect of inspection, control and approval procedures, Annex C of the SPS Agreement prohibits discrimination in their application between domestic and like imported products and that requires they are limited to what is reasonable and necessary.⁴³ To the extent that GlobalG.A.P. standards are based on sound science and recognized as being effectively implemented and enforced on a global level, an importing WTO member might be violating the provisions of Annex C if it applies additional testing requirements and these are not necessary or not applied to domestic products which achieve the same level of food safety protection but without being based on GlobalG.A.P. standards.

Lastly, an interesting albeit still largely theoretical possibility for infusing GlobalG.A.P. standards with a stronger public dimension arises through the mutual recognition provision in Article 4 of the SPS Agreement. It creates an obligation to recognize the SPS measures of the exporting member as equivalent on the condition that the exporting member objectively demonstrates that its measures achieve the appropriate level of protection of the importing member. If an exporting member recognizes GlobalG.A.P. standards in its food safety regulation as one possibility of achieving food safety and is capable of demonstrating that the standards are complied with and effectively enforced, it may be able to gain a partial mutual recognition status.

IV. Conclusion

The SPS Agreement sends a mixed message in respect of transnational private food standards. On the one hand, it views them with some circumspection as potential restrictions to market access not based on sound science. On the other hand, it also recognises their potential for effective food safety implementation. This case-by-case approach is appropriate as the devil is bound to be in the details. One lacuna in respect of Article 13 is that public knowledge about the extent to which GlobalG.A.P. compliance is actually required may not be available, resulting in Article 13 not being triggered. In order sensibly to apply

40 The principle that risk assessment has to be sufficiently specific in light of the scope of the measure and the actual risk and exposure that it seeks to target has been established in a long line of cases starting with *EC-Hormones*.

41 SPS Agreement, Article 2.3.

42 SPS Agreement, Article 6.1 and 6.2.

43 SPS Agreement, Annex C.1(a) and (e).

the provision of the SPS Agreement, a great detail of information about private food standards is needed. In this sense, a greater exchange of information be-

tween WTO members in respect of public *and* private food safety measures can only help in making the provisions of the SPS Agreement more effective.