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PRIVATE VOLUNTARY STANDARDS WITHIN THE WTO MULTILATERAL FRAMEWORK

Submission by the United Kingdom

The following communication, received on 1 October 2007, is being circulated at the request of the Delegation of the United Kingdom.

The Department for International Development (DFID) of the United Kingdom Government working in collaborations with the UK SPS Enquiry Point is pleased to make available a recent study entitled, "Private voluntary standards within the WTO multilateral framework". This study was carried out by Mr. Digby Gascoine in collaboration with O'Connor and Company, a legal firm based in Brussels.

This work is part of a wider initiative on the role that public and private agricultural product regulations and standards play in helping and/or hindering developing countries' access to international markets. The United Kingdom is keen to develop a public-private process that results in supermarket procurement with an enhanced development impact on small scale producers and the rural poor. Other activities include project research into mapping fresh produce movements, encouraging dialogue between public regulatory bodies and private standard setting bodies and working with private standard-setters to help them consider the development impact of new and revised standards.

The particular objectives of this study were as follows:

- To investigate the position of non-government bodies' standards within the WTO's Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements;
- To ascertain how delegations to the TBT and SPS Committees include the views of industry or private standard-setting bodies in their positions;
- To examine the pros and cons of better defining the position of non-government bodies' standards within the SPS Agreement and TBT Agreement (which may cover non-food safety aspects of these standards e.g. product size);
- To make suggestions on how the relationship between the SPS Agreement and non-government bodies' standards might be improved, e.g. adopting a decision or guidance on how to implement Article 13.

The views expressed do not necessarily represent those of the Department for International Development or the United Kingdom or of the European Communities, but provide information and clarity on issues related to the debate on private standards and standard setting processes within a WTO framework. The report does not make recommendations on a way forward.

PRIVATE VOLUNTARY STANDARDS WITHIN THE WTO MULTILATERAL FRAMEWORK

A report prepared by

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and

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This report was written by Digby Gascoine as lead consultant, and by Paolo Vergano and Ignacio Carreño of O'Connor and Company, European Lawyers, who prepared the legal advice contained in Annexes 5 and 6.

The views expressed do not necessarily represent those of the Department for International Development.

The contributions of those persons interviewed during the preparation of the report are gratefully acknowledged, as is the guidance provided by Tim Leyland of DFID.

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Abbreviations and acronyms

BRC	British Retail Consortium
CIES	Comité International d'Entreprises à Succursales (International Committee of Food Retail Chains)
DFID	Department for International Development (UK)
EurepGAP	Euro-Retailer Produce Working Group Good Agricultural Practice
GAP	Good agricultural practice
GATT	General Agreement on Tariffs and Trade
GFSI	Global Food Safety Initiative
GMP	Good manufacturing practice
HACCP	Hazard analysis and critical control points
ISEAL Alliance	International Social and Environmental Accreditation and Labelling Alliance
ISO	International Organisation for Standardisation
OECD	Organisation for Economic Cooperation and Development
PPMs	Process and production methods
SPS	Sanitary and phytosanitary (measure; Agreement; etc.)
SPS Committee	The Committee on Sanitary and Phytosanitary Measures
TBT	Technical barriers to trade
TBT Committee	The Committee on Technical Barriers to Trade
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

I. EXECUTIVE SUMMARY

1. This report responds to a brief by the UK Department for International Development, whose purpose is to learn lessons from the Technical Barriers to Trade (TBT) Agreement about how to work with private standard-setters, and to clarify the position of private standard-setters within the SPS Agreement. It is based on a selective literature review, interviews with representatives of several international organisations, standard-setting bodies and the private sector, and a legal analysis carried out by O'Connor and Company.

2. At the national level there is no apparent legal impediment to prevent buyers from defining and applying specific technical requirements to the products that they purchase; and in the case of food wholesalers and retailers there are many good reasons why the application of such requirements is justified in order to manage business risks. However for suppliers, and in particular those in developing exporting countries, the proliferation and strengthening of private standards is an increasing concern. A short list of possible issues of concern about private voluntary standards includes:

- While private voluntary standards may in many instances provide a stimulus to improved production practices and performance in exporting countries, and potentially give a competitive advantage to complying producers, they may also act as significant barriers to market access for some industries in some countries – especially least developed countries. There may also be a proportionately greater disadvantage to smaller-scale producers.
- These barriers to trade are associated with a number of factors including up-front capital costs, initial and on-going costs of third-party certification, higher operating costs for producers, and reduced profit margins.
- The burden on exporters is heavier where (for example):
    - private voluntary standards are developed without consultation with suppliers;
    - there are different private requirements that must be met for different markets and for different purchasers in the same export market;
    - third party certification can only be obtained at developed-world prices;
    - purchasers do not offer long-term purchase contracts to reduce uncertainty for those willing suppliers who must invest in order to meet private voluntary standards.

Producers may also feel aggrieved if there is no objective justification for ostensibly stricter private standards, or if it is difficult to reconcile importers' requirements that are not related to product attributes with local circumstances, values and practices.

3. The taking up of consumer concerns about animal welfare, environmental, occupational health and safety and consumer safety aspects of foods, for example, in private voluntary standards is a phenomenon that largely post-dates the negotiation of the SPS and TBT Agreements; and it is a development that parallels the rapid increase of market penetration by very large supermarket chains. The possible application of the SPS Agreement to the development of private voluntary standards or conformity assessment against such standards was never anticipated. The TBT Agreement, on the other hand, deals not only with the development and implementation (including "conformity assessment") of mandatory technical regulations by governments but also, explicitly, with private activities to develop and adopt standards and to conduct conformity assessment. The General Agreement on Tariffs and Trade does not define a role for non-government bodies.

A. INTERACTIONS OF PRIVATE STANDARD-SETTING BODIES WITH THE WTO AND ITS MEMBERS

4. In general, because the Members of the WTO are national governments and the disciplines of the covered agreements apply to what Members do, the relationships between the WTO and private bodies (to the limited extent that they may from time to time exist) are mostly about mutually beneficial information-sharing. In those countries that have mechanisms for consultation between government and interested parties on issues arising in the SPS or TBT Committees, it would be normal for there to be information exchange with private standard-setting bodies in advance of any meeting where private voluntary standards might be discussed. However it is not an obligation on WTO Members to represent private bodies in the proceedings of the WTO committees. It is open to the Committees to arrange for ad hoc consultations and information sharing with private standard setters, and such a process has been initiated by the SPS Committee.

B. USE OF CODES OF PRACTICE

5. Various codes of practice for standardisation and conformity assessment are available as guides that might be followed by private standard setters and implementers, including the ISEAL Alliance's *Code of Good Practice for Setting Social and Environmental Standards* and the TBT Agreement's *Code of Good Practice for the Preparation, Adoption and Application of Standards*. It is questionable whether the widespread observance of such codes would make a significant difference to the circumstances of developing country exporters in relation to private voluntary standards. A study would be necessary to analyse a sample of the relevant environmental, labour and other standards, identify their objectionable features from the exporters' point of view, and make a judgment as to whether a better structured process for the formulation of the standard might have produced a more mutually satisfactory outcome. It is tempting to guess that the conclusion of such a study 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. One major point of difference between the standard setters and the standard compliers would almost certainly be the justification of the need for a standard and the clear specification of its objectives. Similar considerations apply to codes of practice concerning conformity assessment, where the central problem may be that in developing exporting countries credible local conformity assessors who charge local rates rather than international parity may be few and far between.

C. IMPROVING THE SPS AGREEMENT

6. The key provision of the SPS Agreement is Article 13, which commits Members to take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories comply with the relevant provisions of the Agreement. There are legal questions about the scope of the term "reasonable measures", and as to whether "non-governmental entities" includes the various private standard-setting bodies and standard-implementing bodies. It appears highly unlikely that Article 13 of the SPS Agreement will be amended by WTO Members to make a clear obligation to apply the Agreement to the development and use of private voluntary standards, even if only on a best endeavours basis. Amongst other things, there would be the problem of obtaining the agreement of about 100 countries to the wording of any proposed amendment. In any event, the perceived problem is not yet so significant as to warrant such a major step, and other initiatives, both within the framework of the WTO and amongst the private bodies concerned, may be able to ameliorate particular difficulties more conveniently.

7. An alternative approach is to consider the feasibility of developing guidance on the implementation of Article 13 of the Agreement. Both developed as well as developing countries would need to perceive a clear need for an initiative along these lines, and there would have to be broad consensus as to what should be done. Any proposition that WTO Members should morally

commit themselves, via an agreed interpretation of the SPS Agreement, to shape or curb the implementation of private voluntary sanitary standards would almost certainly fail, because in many developed countries the businesses that develop and apply private voluntary standards (because of the benefits that accrue to their commercial interest) would see no advantage and some significant disadvantages to their interests in such an initiative, and would therefore prevail upon their governments to oppose it.

8. If all of the Members of the WTO could not agree on an interpretation of the SPS Agreement in this field, another option theoretically available would be for a subset of like-minded Members to voluntarily enter into an agreement amongst themselves to behave in a certain way in relation to private voluntary standards. Precedents for this approach are the GATT Standards Code, to which a number of GATT signatories adhered, and the four plurilateral agreements negotiated in the Uruguay Round. However, since the practice has been that such agreements are negotiated as part of a negotiating round, and negotiation is typically a protracted procedure, no new plurilateral agreement is likely to be achievable in the near future.

9. A more practical approach might be available via the TBT Agreement. The SPS Agreement covers only those measures defined in Annex A of that Agreement; all other sanitary and phytosanitary technical regulations and standards are covered by the TBT Agreement in accordance with the definitions in its Annex A. Rather than attempting to modify the SPS Agreement to do what it was not originally intended to achieve, it would be better to consider how the TBT disciplines, such as they are, could be used to address the concerns that have arisen in relation to private voluntary standards.

D. USING THE TBT AGREEMENT

10. Notwithstanding that the TBT Agreement specifically addresses private standard-setting and conformity assessment activities, there remain difficulties in the path of its effective application in this sphere. Members are obliged to take such reasonable measures as may be available to them to ensure compliance by non-governmental organisations with the provisions of Article 2 of the Agreement, but there is again the issue of the scope of "reasonable measures". Many developing countries believe that eco-labelling requirements that relate to matters other than attributes incorporated into products (e.g. pesticide residues) are proscribed under WTO rules; other Members do not agree. O'Connor and Company believe that from the language of the TBT Agreement there is reason to doubt that the Agreement is applicable to processes and production methods which are "not related to the product". The legal advice goes on to say that there is no case law that assists understanding of the applicability of the TBT Agreement to voluntary standards that are not product-related. And, as mentioned above, it is possible that widespread conformity with the TBT Code of Practice would not make a significant difference to the circumstances of developing country exporters in relation to private voluntary standards.

11. Nonetheless there are many initiatives that governments might take to encourage observance of the TBT Agreement's provisions on standard-setting and conformity assessment :

- disseminating information about the TBT Agreement and its provisions applicable to private standard-setting;
- developing and circulating a national policy, whether hortatory or for mandatory application, in relation to compliance with these provisions;
- dialogue with the responsible private organisations to encourage behaviour consistent with the provisions of the TBT Agreement;
- entering into memoranda of understanding with the private organisations;
- providing financial incentives to encourage compliance by private organisations.

Such initiatives do not depend upon any particular legal interpretation of obligations under the TBT Agreement.

E. OTHER POSSIBLE APPROACHES

12. Representatives of very large supermarket chains acknowledge that there is a business risk associated with the negative reaction of developing countries to their private voluntary standards. The WTO offers an arena in which this tension between importers and exporters over private voluntary standards can be dramatized, information can be shared and mutually acceptable solutions explored. There is a range of possible initiatives in the SPS and TBT Committees that would continue to keep the issue before Member governments, who in turn connect with stakeholders at the national level. For example:

- It could be proposed to the SPS and TBT Committees that Members be invited to submit reports on their national experience of private standards as barriers to trade, including with respect to such issues as opportunities for involvement in the setting of private standards, other consultation, equivalence, conformity assessment/auditing, market access gained or retained, etc.
- Members could be requested to report to the Committees examples of the reasonable measures that they have implemented in conformity with Article 13 of the SPS Agreement and Articles 3, 8 and 9 of the TBT Agreement.
- The SPS Committee might have a useful discussion on how Members in establishing or revising their official SPS measures take into account the contribution to risk management that is made by the voluntary initiatives of private producers and retailers.
- There could be periodic informal joint meetings between SPS/TBT Committee delegates and private standard-setting bodies to allow developing country delegates to raise their concerns, and perhaps to allow private standard-setting bodies to report on what actions they may have taken.
- Members could be invited to report to the Committees any initiatives they have taken to provide technical assistance relevant to compliance with private standards.

In the near term this kind of activity is certainly the most important opportunity offered by the WTO framework for action in relation to private standards. If the SPS and TBT Committees do maintain the private standards issue on their agendas for a period of time, some donors may find it appropriate to facilitate the participation of developing countries who have relevant experience to share.

13. In parallel, other technical assistance activities relevant to private standards could be continued. There have been several main strands of technical assistance in this area: studies to identify and evaluate the incidence and effects of private standards; and on-the-ground support of production and marketing activities aimed at assisting compliance with private standards in developing countries. With respect to further studies on the issue, it would be useful to open up a new strand of work which would subject key private standards to detailed scrutiny on aspects such as their scientific underpinning, their relationship to official standards applying in key markets, their effectiveness in terms of human health and consumer protection outcomes, and so forth. Such studies would assist private sector organisations to improve the relevance and precision of their standards. They would also enable better informed discussion of issues by Members in the WTO, by NGOs, and elsewhere. At an appropriate time it may be valuable to sponsor an international conference to bring the many interested parties together to review the scene and explore possibilities for cooperation in the design and implementation of private standards.

The legal findings

14. O'Connor and Company were contracted to report on three issues:

a. Review and legal analysis of the relevant WTO provisions, principally within (but not limited to) the SPS and TBT Agreements.
b. Relevant WTO case law and interpretative guidance in the form of ad hoc decisions, or preparatory works on the SPS and TBT Agreements.
c. Legal options and possible suggestions for amendments to be brought to the provisions of the SPS and/or TBT Agreements.

Their report on the first two points is at Annex 5; the report on the third point is at Annex 6.

15. Their conclusions in relation to the first point are as follows:

(i) Application of the provisions of the SPS Agreement to non-governmental standard setting and standard applying entities *in the light of Article 13 of the SPS Agreement* depends very much on the definition of "non-governmental body".

(ii) It may be argued that only private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special legal status fall under the definition of non-governmental entity under the SPS Agreement.

(iii) On the other hand, it can also be argued that "non-governmental entity" under the SPS Agreement is broader and also includes other private bodies which have not been entrusted by government with certain tasks but *which operate within the territories of a WTO Member.*

(iv) From the literary interpretation of Article 13 of the SPS Agreement, the question of the definition of "non-governmental entity" remains open.

(v) Even if non-governmental entities are not directly addressed by the provisions of the SPS Agreement, *in the light of Article 13 of the SPS Agreement*, WTO Members have a responsibility to ensure that the activities of non-governmental entities comply with the Agreement.

(vi) Under Article 4 of the TBT Agreement, WTO Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with this Code of Good Practice. Furthermore, WTO 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 Code of Good Practice.

(vii) Article 8 of the TBT Agreement relates directly to the obligations of WTO Members concerning activities of non-governmental bodies that apply procedures for assessment of conformity.

(viii) Other WTO Agreements, such as the 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 in order to delimit non-governmental from governmental activities.

16. The conclusions in relation to the second point are as follows:

(i) There is no WTO case law in relation to non-governmental entities and Article 13 of the SPS Agreement. However, a Panel report which did not concern non-governmental bodies, permits to draw some indications on how a Panel could analyse a possible violation of the SPS Agreement by a non-governmental body. First, it would look at Article 13 of the SPS Agreement to determine whether there is "responsibility" of a WTO Member; then, "reading in the light of Article 1.1 of the SPS Agreement" it would establish whether the measure at stake is an SPS measure; finally, it would decide whether there is a violation of the SPS Agreement.

(ii) According to other WTO case law, a degree of government involvement is required to put a measure under the scrutiny of the WTO Agreements. Furthermore, case law on the entrustment and direction provisions of the Agreement on Subsidies and Countervailing Measures concluded that the ordinary meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command."

(iii) Other interpretative information, such as the preparatory works to the TBT and SPS Agreements or the work in the respective WTO Committees, does not add much interpretation in relation to the activities of non-governmental standard-setting and standard-applying organisations. Distinguishing between private bodies and non-governmental entities appears to be a crucial step that may need to be taken at WTO level.

(iv) From the negotiating history of the SPS Agreement, it appears that there were no propositions by any individual or country that the SPS Agreement would have application to the activities of private sector organisations.

(v) In addition, there has not been, to date any other examination of this matter under WTO law within the SPS Committee or in the WTO in general.

17. The conclusions in relation to the third point are as follows:

(i) Concerning WTO Members' constitutional systems and the direct effect of WTO law:

- Imposing provisions of WTO law to private entities without public/governmental intervention by the individual WTO Member having jurisdiction on those private entities would require the direct effect of WTO law.

- WTO agreements have remained neutral on the issue of whether their rules should produce direct effect and it is for each WTO Member to decide how to incorporate WTO law into its national legal order.

- Some of the contracting parties have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

(ii) There may be a domestic competition issue with private standards (e.g. the abuse of a dominant position or collusion by retailers) that could be worth looking at and studying further as a possible way forward.

(iii) The issue of private or non-governmental body standards could also be addressed by seeking interpretative guidance, for example in the form of an ad hoc decision within the WTO system and, in particular, the SPS and TBT Agreements. While this approach is theoretically possible and maybe even to be encouraged, in practice the discussion and adoption of such an ad hoc decision appears difficult to be achieved because of the difficulty of triggering the necessary procedural mechanisms within the WTO system, the complexity of the discussions and negotiations, the foreseeable disagreement among WTO Members as to the need for such step and the likely opposition of powerful lobbies to any such development.

(iv) Steps could be taken to provide an institutionalised forum for discussion within the WTO on the issue of private or non-governmental body standards and their relation to trade. For this to happen, the WTO Members would have to agree on relevant language to be added to the SPS and/or TBT Agreements (by means of amendment or a stand-alone legal instrument). This appears to be a possible but probably unrealistic avenue.

(v) A similar option could be to seek agreement on the issue of private or non-governmental body standards and their relation to trade, between a selected group of WTO Members that would draft, adopt and commit to certain *ad hoc* obligations by means of a "plurilateral instrument". An example of such plurilateral effort in the WTO system is provided by the *Reference Paper on Telecommunications Services*. This legal instrument would offer the opportunity to regulate certain key aspects of private or non-governmental body standards while not imposing them on the WTO Membership as a whole, but allowing WTO Members to voluntarily adopt such additional commitments. Again, the practical feasibility of such approach appears somewhat remote.

(vi) Formal WTO dispute settlement could also be considered as a possible legal avenue through which to address the matter of private standards. Although not very likely, a developing country could initiate dispute settlement proceedings against another WTO Member in relation to a private standard which is presumably not based on science, which is widely used by a number of retailers, and which is *de facto* required for accessing that WTO Member's market. WTO dispute settlement is expensive, politically sensitive, and often incapable of delivering the expected results.

(vii) To address the issue of standards of non-governmental bodies (and other issues relating to NGOs), a specific committee could be established within the WTO system, as a means of consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO. It is difficult to imagine that an NGO could be identified and organized to capture the discontent of developing countries' traders in relation to the issue of private or non-governmental body standards. In addition, the lobbies that have opposite interests and agendas would likely to set-up similar NGOs in order to have their contrasting voices heard in the debate.

(viii) A formal amendment of one or more of the covered Agreements (SPS, TBT Agreement) could be another way to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system. In essence, a proposal to amend WTO agreements such as the SPS or the TBT Agreement would need to be submitted to the WTO Ministerial Conference, which would then submit the proposed amendment to the WTO Membership for discussion and possible acceptance. Article X of the WTO Charter describes which majorities are needed for

a formal amendment. In practice, the procedure to follow and the majorities to be reached clearly indicate that amendments to the WTO Agreements would be particularly difficult to achieve.

II. MAIN REPORT

A. TERMS OF REFERENCE

1. The terms of reference for this project (set out in full at Annex 1) require the following tasks to be performed in order to inform DFID Policy Division and its partners:

- review of how the TBT and SPS and GATT Agreements evolved to include and define the role of non-government bodies;
- brief review of how other relevant relationships with private bodies are considered within the WTO as well as Members' positions and agreements on this issue;
- analysis of the relationship between government and non-government bodies in the TBT Agreement with both legal and practical examples (based on discussions with key players and textual research);
- brief analysis of how WTO Members represent the interests of private standard-setting bodies in the WTO TBT and SPS Committees;
- examination of the use of the TBT 'code of good practice' by non-governmental bodies, and other relevant non-governmental schemes such as the ISEAL Alliance, and consideration of the appropriateness of a similar system for the SPS Agreement / private food safety schemes;
- investigation of pros and cons of better defining the role of non-government standard-setting bodies within the SPS Agreement (based on discussions with key players including private standard setting bodies)
    - with consideration of some of the policy questions raised in the recent OECD[1] report on this subject including;
        - 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/retailers and government responsibilities towards society?
- conclusions on any possible process by which the SPS Agreement could be improved to enhance interactions with private standard setting bodies.

2. As well a legal analysis is called for. The terms of reference for this part of the project require:

a. review and legal analysis of the relevant WTO provisions, principally within (but not limited to) the SPS and TBT Agreements;
b. relevant WTO 'case law' and interpretative guidance in the form of ad hoc decisions, or preparatory works on the SPS and TBT Agreements;
c. legal options and possible suggestions for amendments to be brought to the provisions of the SPS and/or TBT Agreements.

The full text of the terms of reference for the legal team is at Annex 2.

B. METHODOLOGY

3. This report is based on three main sources:

- interviews with the persons listed in Annex 3;
- the references listed in Annex 4;

[1] OECD 2006.

- the legal analysis conducted by Paolo Vergano and Ignacio Carreno of O'Connor and Company (Annexes 5 and 6).

C. BACKGROUND TO THE ISSUE

4. The background to the project is set out in the terms of reference at Annex 1. In brief, the project responds to concerns expressed by some developing countries about the costs and the increased difficulty of access to developed country markets for their agricultural produce associated with the imposition of strict conditions by purchasers, in particular very large supermarket chains in the importing countries. These conditions may deal with production methods as well as actual product attributes, and may cover not only food safety (traditionally the function of government authorities in importing countries) but also food quality, animal feedstuffs, animal welfare, environmental protection, labour practices and occupational health and safety. Even in relation to food safety, where regulatory authorities in the importing countries could be expected to insist that official requirements are fully adequate to protect consumers' health, standards imposed by buyers may be yet more stringent. For their part, private interests in the importing countries assert that their private voluntary standards (PVS)[2] are necessary to ensure compliance with official requirements, to complement or reinforce official import controls, to respond to consumer concerns, and (most important of all) to protect the value of private brands and retailers' reputations.

5. In reaction to the trend towards increasingly strict and comprehensive private voluntary standards over the past decade, developing countries have turned to the World Trade Organisation to explore whether relief may be available under the provisions of the relevant covered agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) and the Agreement on Technical Barriers to Trade (the TBT Agreement). Representatives of very large supermarket chains acknowledge that there is a business risk associated with the negative reaction of developing countries to their private voluntary standards.

1. Some examples of private voluntary standards

6. The WTO Secretariat's background paper[3] for the February 2007 meeting of the SPS Committee provides a tabulation of some of the more prominent private voluntary standards schemes:

[2] In the literature the terms "private standards" and "private voluntary standards" are used interchangeably. Both terms refer to requirements that are conditions of purchase of goods established by private buyers. These requirements are voluntary in the sense that they are not mandated by law; at the same time, however, a supplier in practice may have no option other than to meet the norms in order to sell to the major purchasers of particular commodities for particular markets. As the terms of reference of this project have noted, in this latter respect compliance with the private standards may be *de facto* compulsory. In this report "private standards", "private voluntary standards" and are used, with no difference in meaning.

[3] WTO: *Private Standards and the SPS Agreement* (G/SPS/GEN/746).

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

7. Private voluntary standard schemes typically began with a focus on product integrity issues (on- and post-farm), and increasingly have moved on to include provenance issues (environmental, labour/occupational health and safety, etc.). Some schemes (like EurepGAP) are particularly concerned with good agricultural practice and so relate primarily to on-farm activities, while others (like the BRC Global Standard) are concerned with subsequent phases of the food production and distribution chain. Many schemes emphasise process control by means of food safety systems built around HACCP or other approaches. Some schemes (like the Global Food Safety Initiative) have the main purpose of harmonising or benchmarking a range of individual schemes; other schemes provide for benchmarking against themselves. Some schemes (like Tesco's Nature's Choice) are developed and implemented by individual firms for their own exclusive use; others (ISO 22000) are intended for general application. Most schemes depend for their implementation on third party auditing by accredited certifying bodies. Notwithstanding that there are myriad differences (major and minor) between the various schemes, for the purposes of this study no distinction will be made between the three categories of scheme identified in the table above unless such a distinction is significant in relation to the appropriate response to the terms of reference.

D. COMMENTARIES AND EMPIRICAL STUDIES

8. In recent years an extensive literature has accumulated on the subject of private voluntary standards, including a number of empirical studies on specific industries and countries. It is not a purpose of this report to survey and summarise this literature; and there are in any case several recent commentaries which provide excellent overviews[4]. Nevertheless the analysis in this report must be based on an appreciation of the nature of the problem (if there is one), its particular characteristics, and its scale.

[4] See for example Jaffee and Henson 2004, OECD 2006, Chia-Hui Li 2006

9. According to an OECD study[5] based on interviews with leading food retailers, standards owners and selected manufacturers and surveys of farmer associations:

> "Ensuring food safety is considered a basic requirement to doing business in the food sector. Over 85% of the retailers reported that their required standard 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."

In summary:

> "Overall the study finds that private voluntary standards schemes can contribute to improving food system efficiency so as to deliver and ensure specific product and process attributes at reasonable cost to consumers. Nevertheless, these standards may also be exclusionary for certain producers. Compliance with private voluntary standards schemes may exclude those producers who, due to lack of potential scale economies or otherwise can not easily meet the standards' requirements and remain economically viable. The study also notes that this issue may potentially be more important for small holders in developing countries, which must also contend oftentimes with a lack of well functioning institutional and physical infrastructure services. This development is not, however, exclusively due to private standard schemes, but is likely to be part of general trends in industrial organisation (*e.g.* concentration, search for scale economies or new ways of doing business) which are occurring in all sectors of the economy."

The study also concluded that:

> "Survey results of farmer associations confirmed the high emphasis on food safety but also on other production process characteristics, particularly agri-environmental practices. Meeting private standards was considered a condition to do business with both manufacturers and retailers. However many responses noted the overlap of requirements among standards and expressed the wish for harmonization among standards. The reported effects of standards on income and environment were ambiguous."

10. Spencer Henson (IATRC paper 2006) reports that:

> "Examining first the potential for private food safety and quality standards to impede trade, it is evident that the associated enhanced systems of food safety and quality management, which in many cases go well beyond regulatory requirements, can impose significant costs of compliance on exporters. In turn, these costs are likely to be greater for exporters in countries where public and/or private food safety standards are less well-developed. … At the same time, however, in many agricultural and food product markets, public standards remain the predominant form of governance (for example bulk grains, vegetables and fruit for processing, etc) such that business-to-business and collective private food safety and quality standards are unlikely to be a major impediment to trade at the current time. Likewise, there

[5] Committee for Agriculture: *Final report on private standards and the shaping of the agro-food system*, OECD Directorate for Food, Agriculture and Fisheries, Paris, 2006. Lisa Fulponi was the contact officer for this study.

> are many countries in the world where private standards are less evolved (for example Japan) and public regulations are the dominant influence on trade."

In another paper Henson and Reardon[6] point out that:

> "Communicating 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."

11. According to a major World Bank study[7]:

> "*Although new or more stringent standards can serve as a trade barrier, they act more often as a catalyst for progressive change.* Stricter standards can provide a stimulus for investments in supply-chain modernization, provide increased incentives for the adoption of better safety and quality control practices in agriculture and food manufacturing, and help clarify the appropriate and necessary roles of government in food safety and agricultural health management. Rather than degrading the comparative advantage of developing countries, the compliance process can result in new forms of competitive advantage and contribute to more sustainable and profitable trade over the long term, as shown by the case studies of Thai and Kenyan horticulture, Thai and Nicaraguan shrimp, and Indian spices."

And again:

> "Developing countries as a group are not suffering from the tightening of SPS standards. Yet, differential approaches to the challenge of compliance, and technical and administrative difficulties in ensuring compliance, are affecting the relative competitiveness of some countries in high-value food markets. Larger, incumbent suppliers tend to have an incremental advantage, because they can realize economies of scale, have better access to information, and benefit from well-established reputations (for example with overseas inspectors). Still, effective action can make a difference. There are examples of well-organized industries and well-managed firms and supply chains in low-income countries (such as Kenya) that have maintained or even enhanced their competitiveness and market share during this period of more stringent standards."

12. The World Bank authors caution that the environment in which standards are being applied is complex and dynamic, and it is not easy to generalise: the balance between standards-as-barriers and standards-as-catalysts is specific to particular commodities in particular markets.

13. A major study for the US Agency for International Development[8] on the relationship of third-party certification (TPC) to sanitary/phytosanitary measures and the international agri-food trade included three country case studies. The study report comments (in Annex 4 on the relationship between US food retailers and TPC) that:

> "The question of who pays for TPC is easy to answer: the supplier. All participants [representatives of US retailers] explained that suppliers are expected to pay the entire cost of implementing TPC and the subsequent follow-up costs for annual audits. It was noted that normally such costs would be passed on down the supply chain, but that in such a competitive environment where there are so many suppliers and so few buyers, it is very difficult for suppliers to pass on such costs. Retailers were aware that it is not unusual for suppliers in

[6] Henson and Reardon 2005
[7] World Bank 2005
[8] See Development Alternatives, Inc. 2005

developing countries to be required to fly in auditors to places where no local third-party auditing company exists. Realizing that TPC could be exorbitantly expensive and that this placed an enormous burden on suppliers, some participants were trying to find ways that did not burden suppliers with any more unnecessary costs. This was one of the main reasons for encouraging the development of standards for auditing, and for using an auditor's standard rather than those of an individual retailer—so that suppliers would only have to have in place one audit, rather than multiple audits, which would satisfy all of their buyers in a cost effective manner.

In general, however, participants believed that the benefits of TPC outweigh the costs. First, TPC could be used as a marketing device to promote their products (although none of the participants had said that they respond to such marketing campaigns). Second, TPC grants buyers access to the largest retail chains. Hence, if buyers want to participate in these markets, they will have no choice but to implement TPC."

1. Issues of concern

14. This small sample[9] of views expressed in some of the relevant literature suggests the following as a short list of possible issues of concern:

- While private voluntary standards may in many instances provide a stimulus to improved production practices and performance in exporting countries, and potentially give a competitive advantage to complying producers, they may also act as significant barriers to market access for some industries in some countries – especially least developed countries. There may also be a proportionately greater disadvantage to smaller-scale producers
- These barriers to trade are associated with a number of factors including:
    - up-front capital costs for new buildings and other facilities, for development of enterprise HACCP and other food safety plans, and so forth;
    - initial and on-going costs of third-party certification;
    - higher operating costs for producers;
    - reduced profit margins.
- The burden on exporters is heavier where (for example):
    - private voluntary standards are developed without consultation with suppliers;
    - there are different private requirements that must be met for different markets and for different purchasers in the same export market;
    - third party certification can only be obtained at developed-world prices;
    - purchasers do not offer long-term purchase contracts to reduce uncertainty for those willing suppliers who must invest in order to meet private voluntary standards.

Producers may also feel aggrieved if it is plain that there is no objective justification for ostensibly stricter private standards, for example in the case where a European supermarket chain insisted that it would require pesticide residues to be limited to no more than one third of the official requirement[10]. Similarly producers may find it difficult to reconcile importers' requirements that are not related to

[9] It is not implied that the sample is in any way representative.

[10] See Chia-Liu (2006), p. 27. Such an action implies either that the retailer was ignorant of the technical basis on which maximum residue limits are normally established – as far below the scientifically-determined safe level as good agricultural practice will allow – or that the retailer intended to deceive customers by claiming that its offerings were safer by virtue of its more stringent private standards, or both. Another major European retailer says that it simply will not allow the application of a particular agricultural chemical to products that it purchases, even if the chemical is safe when properly used, "if our customers don't like it".

product attributes (for example, animal welfare or environmental protection requirements – so-called "credence characteristics") with local circumstances, values and practices.

15. The list of issues set out above is not intended to be exhaustive; its purpose is simply to give focus to the discussion which follows on dealing with the broad issue of private voluntary standards in the context of the World Trade Organisation.

E. GATT/SPS/TBT NEGOTIATING HISTORY

- ***review of how the TBT and SPS and GATT Agreements evolved to include and define the role of non-government bodies;***[11]

1. Overview of the SPS Agreement

16. The rationale for the negotiation of the SPS Agreement during the Uruguay Round was to establish disciplines on the potential use of technical measures (food standards, quarantine controls, and so forth) so as to prevent their arbitrary or unjustified use as barriers to trade. Similar objectives lay behind the development of the TBT Agreement to replace the voluntary GATT Standards Code negotiated in the Tokyo Round and adopted in 1979.

17. The SPS Agreement confirms the right of WTO Members to apply any measures that they deem to be necessary to protect human, animal and plant life or health against certain specified risks. At the same time it imposes obligations on WTO Members to achieve their appropriate level of protection in a manner that does not result in arbitrary or unjustified restrictions on trade. Consequently SPS measures (laws, regulations, standards, official requirements for inspection, certification, sampling, testing, and so forth) must be applied only to the extent necessary, and they cannot be maintained without sufficient scientific evidence. Nor can measures be maintained in a discriminatory way, taking into account relative risks. Measures that are based on international standards, guidelines and recommendations are deemed to meet these requirements, and Members are obliged to base their measures on international norms, where available, unless they have a scientific justification for adopting a stricter approach or a stricter approach is necessary in order to achieve the appropriate level of protection. Measures not based on international norms must be based on a risk assessment that is appropriate to the circumstances and they must reflect a consistent approach to achieving the acceptable level of risk. Measures may be applied on provisional basis where insufficient scientific evidence is available to allow a proper risk assessment, but the necessary information must be sought for a more objective assessment of risk, and provisional measures must be reviewed within a reasonable period of time.

18. There are special provisions in relation to the recognition of areas that are free of pests and diseases or where the incidence of pests and diseases is low, and in relation to the acceptance by importing countries of measures used by exporting countries that are different from but which achieve the same level of protection as the measures specified by the importing country (and which are therefore ***equivalent***).

19. The SPS Agreement contains detailed provisions regarding ***transparency*** to ensure that all Members can access information about SPS measures actually or potentially affecting their trade with other WTO Members. In particular each Member must maintain an enquiry point for the use of other Members, and new measures not based on international norms must be notified in advance to other Members so that their comments can be taken into account. For the latter purpose a single national notification point must be designated.

[11] For convenience, the text of the relevant part of the terms of reference for this project is quoted in this manner at the beginning of each corresponding section.

20. The international standards, guidelines and recommendations referenced by the SPS Agreement are the relevant norms promulgated by the Codex Alimentarius Commission (for food safety), the OIE (the world organisation for animal health), and under the International Plant Protection Convention. It is important to note that the term ***standard*** in this context does not have the same meaning as it does in the text of the parallel WTO Agreement on Technical Barriers to Trade (the TBT Agreement). In the SPS Agreement a standard is a normative specification that is given mandatory application; in the TBT Agreement a standard is a normative specification that is for voluntary application, whereas mandatory norms – whether official or private - under the latter Agreement are termed ***technical regulations***.

21. The provision of the SPS Agreement that appears potentially to relate most directly to the issue of private standard-setting and implementation is Article 13 on implementation:

> *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*** [emphasis added] *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.*

The applicability of this provision to private standard-setting and implementation depend on whether the term "non-governmental entities" is to be taken to include private bodies.

2. Overview of the TBT Agreement

22. Under the TBT Agreement WTO Members are expected to base their technical regulations affecting imported goods (like product quality requirements or rules concerning communications equipment) on international standards where available and relevant. If technical regulations are not based on an international standard but could significantly affect trade they must be made in a transparent manner and the comments of other countries must be invited and taken into account before finalization. Technical regulations must have a legitimate objective, and they should be no more trade restrictive than is necessary to achieve that objective having regard to the possibility of adverse outcomes in the event of non-compliance. The measures applied should not discriminate in favour of domestically produced goods, nor in favour of the goods from one exporting country over similar goods from another exporting country. There are parallel provisions concerning conformity assessment procedures (mechanisms mandated by an importing country to verify that a product conforms with the relevant national requirements). The TBT Agreement contains transparency provisions broadly similar to those in the SPS Agreement.

23. Article 3 of the TBT Agreement deals with the preparation, adoption and application of technical regulations by local government bodies and non-governmental bodies (defined as including, but not limited to, a non-governmental body which has legal power to enforce a technical regulation). Broadly, Members are obliged by this article to use reasonable measures available to them to ensure compliance by non-governmental organisations with the provisions of Article 2 of the Agreement (other than the notification aspect) – that is, to ensure compliance with the matters outlined in the paragraph above this. In parallel, Article 8 says that Members must use their best endeavours to ensure that non-governmental bodies operating conformity assessment procedures comply with the

provisions of the Agreement concerning conformity assessment by government bodies. And Article 4 applies the same best endeavours obligation to compliance by non-governmental standardising bodies with the Code of Good Practice for the Preparation, Adoption and Application of Standards that is annexed to the Agreement. (Article 4 makes it mandatory for central government standardising bodies to accept and comply with the Code of Good Practice.)

24. The Code of Good Practice provides that standardising bodies should follow the principles of non-discrimination, avoidance of unnecessary obstacles to international trade, alignment with existing international standards, engagement with relevant international standardising bodies, avoidance of duplication of the work of other standardising bodies, specification of standards for product requirements in terms of performance rather than design or descriptive characteristics, transparency and consultation with interested parties. Standardising bodies that accept the Code must notify the ISO/IEC Information Centre, which regularly publishes a list of such bodies. There were standardising bodies from 113 countries as well as Hong Kong China and European organisations on the list published in January 2006.[12] The majority of the bodies on the list are central government standards agencies, and most of the rest are broad-based national standards bodies whose activities are not confined to a single sector of industry. A few industry-specific bodies are listed, for example in Australia, Japan and Korea, and these are mainly concerned with electrical, electronic and telecommunications standards. No non-governmental standard-setting bodies concerned with sanitary or phytosanitary standards, or with food standards specifically, were included in the January 2006 list.

3. Consideration of private standards and the role of non-government bodies

25. The SPS and TBT Agreements were negotiated in the Uruguay Round, between 1986 and 1994. While private voluntary standards were extensively in use before and during this period, safety standards were typically considered to be a matter for action by governments in the form of technical regulations (in the terminology of the TBT Agreement) or sanitary measures (in the terminology of the SPS Agreement). The taking up of consumer concerns about animal welfare, environmental, occupational health and safety and consumer safety aspects of foods, for example, in private voluntary standards is a phenomenon that largely post-dates the negotiation of the SPS and TBT Agreements; and it is a development that parallels the rapid increase of market penetration by very large supermarket chains ("multiples" in UK terms). In the recollection of two individuals who were centrally involved in the negotiations that produced the SPS Agreement[13], the possible application of the Agreement to private voluntary standards was never mentioned either in formal negotiating meetings or in informal discussions. As discussed further below, the reference to "non-governmental entities" in Article 13 of the Agreement did not, therefore, specifically contemplate the application of the SPS Agreement to the development of private voluntary standards or conformity assessment against such standards.

26. The TBT Agreement, on the other hand, deals not only with the development and implementation (including "conformity assessment") of mandatory technical regulations by governments but also, explicitly, with private activities to develop and adopt standards and to conduct conformity assessment. There were antecedents for these WTO obligations in relation to private activities in the GATT Standards Code, which contained provisions concerning the preparation, adoption and application of technical regulations and standards by non-governmental bodies, and concerning procedures for assessment of conformity by non-governmental bodies. Major additions in the TBT Agreement were the Code of Good Practice for the Preparation, Adoption and Application of Standards, and the substantially expanded provisions on conformity assessment. The latter could be regarded as a direct response to prior, notorious instances in which, for example, a European country

[12] ISO/IEC 2006

[13] Gretchen Stanton, who chaired almost all of the negotiating meetings, and the principal author of this report (Digby Gascoine), who represented Australia throughout the negotiations.

required post-arrival conformity assessment on certain imported consumer electronic equipment but limited the availability of that conformity assessment to a single site remote from entry ports, while also ensuring that there were significant delays in assessment procedures. (More detailed information on the negotiating history of the TBT Agreement is contained in section 2.1.1 of the legal advice at Annex 5, and in the WTO Secretariat's paper of 1995.)

4. GATT

27. The General Agreement on Tariffs and Trade does not define a role for non-government bodies.

F. THE WTO AND PRIVATE BODIES

- ***brief review of how other relevant relationships with private bodies are considered within the WTO as well as Members' positions and agreements on this issue;***

28. In general, because the Members of the WTO are national governments and the disciplines of the covered agreements apply to what Members do, the relationships between the WTO and private bodies (to the limited extent that they may from time to time exist) are mostly about mutually beneficial information-sharing. The WTO's Members, through a decision of the General Council around ten years ago, decided not to give non-government organisations observer status in the various WTO committees; an exception, however, is the ISO (whose membership is a mixture of governmental and non-governmental bodies) which participates as an observer in the SPS and TBT Committees[14].

G. WTO MEMBERS AND PRIVATE STANDARD-SETTING BODIES

- ***brief analysis of how WTO Members represent the interests of private standard-setting bodies in the WTO TBT and SPS Committees;***

29. Given that the SPS Agreement contains no direct mention of private standard-setting bodies it is unsurprising that there was no reference to these organisations in the proceedings of the SPS Committee before the interventions of St. Vincent and the Grenadines and others[15] in June 2005 in relation to EurepGAP and banana (and other product) exports. The European Union's reaction on that occasion was summarized as follows:

> "The representative of the European Communities clarified 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. This issue was one the EC was willing to discuss at the information seminar to be held on 19 July 2005 in Brussels. 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."[16]

Subsequently an information session was organized in the margins of the October 2006 SPS Committee meeting with representatives of EurepGAP and UNCTAD.

[14] ISO had similar status in relation to the former Standards Code.
[15] Jamaica, Peru, Ecuador, and Argentina.
[16] WTO: G/SPS/R/37.

30. In February 2007 Members of the SPS Committee again discussed the issue. Papers were presented by the Secretariat, St. Vincent and the Grenadines, the Bahamas, UNCTAD, ISO and OECD. In the debate, most delegations who spoke thought private standards were a mixed blessing – providing some benefits for those who can meet the standards in terms of better market access, but raising considerable concerns regarding additional certification costs, lack of accountability, lack of participation of developing countries in developing the standards, etc. Nonetheless, private standards were here to stay and larger exporters would find it easier to comply with them than smaller ones. Consequently there was a need to focus on assisting smaller producers and on ensuring more participation of developing countries in setting private standards. It was agreed to discuss the issue again at the June meeting of the Committee, which would be preceded by another informal meeting including representation of EurepGAP and the TBT Committee.

31. In those countries that have mechanisms for consultation between government and interested parties on issues arising in the SPS or TBT Committees, it would be normal for there to be information exchange with private standard-setting bodies in advance of a meeting such as the one planned for next June. This would be the case in most developed countries and probably also in many developing countries whose export industries are potentially affected by private standards. However it is not an obligation on WTO Members to represent private bodies in the proceedings of the WTO committees. On the other hand, in the event that Members were to decide that the provisions of either or both of the Agreements required a pro-active approach by government to discipline the activities of private standard-setters, the latter would certainly want their views to be made clear to the Committees as well as to Member governments, and it would be necessary to consider how this could be done. At the same time, by analogy with the provisions of the SPS Agreement and the TBT Agreement that require that Members participate so far as they can in the activities of the relevant international standard-setting bodies, Members might see a need to be more actively engaged with private standard-setting. Each of these hypothetical propositions is problematic.

H. DEFINING THE ROLE OF NON-GOVERNMENT STANDARD-SETTING BODIES WITHIN THE SPS AGREEMENT, INCLUDING POSSIBLE APPLICATION OF THE TBT CODE OF GOOD PRACTICE

- ***investigation of pros and cons of better defining the role of non-government standard-setting bodies within the SPS Agreement (based on discussions with key players including private standard setting bodies)***
  - ***with consideration of some of the policy questions raised in the recent OECD[17] report on this subject including;***
    - ***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/retailers and government responsibilities towards society?***
- ***examination of the use of the TBT 'code of good practice' by non-governmental bodies, and other relevant non-governmental schemes such as the ISEAL Alliance, and consideration of the appropriateness of a similar system for the SPS Agreement / private food safety schemes;***

1. Scope of the issue

32. The discussion of this term of reference sets aside the practical issue of whether the SPS Agreement could be changed in some way to better define the role of non-government standard-setting bodies; for this, see the next section. The central question at issue here is whether on balance it would be desirable to bring some kind of discipline, constraint or guidance to the development and

[17] OECD 2006

implementation of private voluntary standards that relate to sanitary and phytosanitary matters as covered by the SPS Agreement. The analysis will encompass not only private standard-setting bodies but also the private bodies that implement these standards. (Sometimes, as for some major supermarket chains, the standard setter is also the standard applier.)

2. Principles

33. Regulatory or other intervention by governments in private sector economic activity serves objectives such as improvement of the efficiency of resource utilization (for example, by facilitating competition in markets) or reducing disparities between private benefits and costs and social benefits and costs (the latter including externalities such as environmental damage). Governments also act to redress inequities in the distribution of income or wealth. The case for intervention is contingent on there being a practical and efficient form of intervention available that will provide an effective response to a significant problem.

34. In the framework of the WTO, the principal goal is to reduce, deter or prevent unjustified barriers to trade. Equity issues in this context relate not to individuals but to the imbalance between richer and poorer countries, recognised in various ways in a number of the covered agreements by provisions dealing with technical assistance, special and differential treatment, and so forth.

3. Positive attributes of PVS

35. Do private voluntary standards give rise to arbitrary or unjustified barriers to trade? The representatives of supermarket chains that are implementing private standards claim firstly that their action is necessary to ensure that official requirements are met. In at least some countries the legal onus is unequivocally on food traders to ensure that product is safe; they must exercise due diligence to guarantee conformance with official standards. There is intermittently evidence that official measures may not be effective all the time, so there is a rationale for food wholesalers and retailers to implement appropriate safety measures. In any event, it is part of the contemporary philosophy of food control that the primary responsibility for ensuring that food is safe rests with food producers, distributors and sellers, not with the official regulatory bodies whose role is increasingly one of auditing private actions in this regard. To the extent that private standards are aimed at meeting official requirements, it is hard to see a case for intervention to constrain the private bodies involved.

36. Secondly, it is argued that consumers demonstrate a desire for safer foods above and beyond what is achieved by official control systems. Some supermarket chains and other industry participants say that their private standards are a legitimate response to such demand. Although government agencies tend to frown on retailers using safety claims as a selling point (because of the implication that food sold by others may be less safe or even unsafe), it is difficult to make a conclusive case against the industry view if due weight is accorded to consumer sovereignty and so long as the safety measures adopted are not excessively costly in relation to what they actually achieve. It may even be the case that private bodies engaged in food production, distribution and sale have better knowledge of food safety risks than government agencies. There is no clear evidence that private voluntary standards operate significantly to the disadvantage of consumers, especially if the additional costs associated with additional safety measures required by retailers can be offset against reductions in other costs or profit margins back along the supply chain.

37. Thirdly, the retailers argue that their large investment in the development and marketing of their house brands justifies very stringent measures to prevent damage to their brands by a food safety breakdown. While this argument is self-serving, it is difficult to see a case for any intervention by governments through the WTO that would effectively substitute the opinion of government for that of the owners of the brands in this respect.

38. Fourthly, there is the argument that the effect of the imposition of stringent private requirements on producers is beneficial because it stimulates the acquisition of expertise and capital investment and raises product quality. This may be advantageous to the supplier not only in accessing the market for which compliance with the private standards is a pre-requisite, but potentially also in making access easier to a much wider range of markets. While this line of argument may be persuasive to some suppliers and some countries, other potential suppliers may still be unhappy, because they have not benefitted as much, or they may have experienced reduced market access for their products or reduced demand.

4. Negative attributes

39. There is a range of issues on the negative side of the issue. One is whether there should be some means of government intervention where a private sector initiative is blatantly trade distorting without adequate justification. Another concerns the openness and inclusiveness of the process by which standards are developed and implemented. A third concerns whether PVS appliers have been diligent enough in ensuring that there requirements can be met for least cost – for example, by harmonizing their requirements with other standards as much as possible, by ensuring a high degree of competition in the supply of auditing and certification services, and so forth.

5. Views of private organisations

40. No private organisation spoken to by the author saw any justification for bringing private standard-setting under any kind of WTO-based discipline. At the same time, however, it is clear that private interests are sensitive to criticism of their private voluntary standards, and they are willing to respond subject, of course, to the constraints of their competitive situation.

6. Other considerations

41. Under the model implicit in 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. It follows that, other things being equal, if new measures that significantly reduce food safety risks are introduced by the private sector it should be possible for the government to modify its measures commensurately so that the government measures are appropriate in the new circumstances created by the private initiative. For example, if private importers for their own purposes introduce new requirements to conduct or require laboratory tests to ensure that products conform to their safety-related specifications, the incidence of official testing by or for government regulatory agencies could be reduced while still ensuring that the national appropriate level of protection is met. Indeed, it could be argued that under the provisions of the SPS Agreement a government is obliged to make such an adjustment to avoid applying measures that are more stringent than necessary to achieve its appropriate level of protection. Certainly a WTO Member must keep its SPS measures under review and update them in response to changing circumstances.

7. Use of codes of practice

42. The International Social and Environmental Accreditation and Labelling (ISEAL) Alliance describes itself as "a formal collaboration of leading international standard-setting and conformity assessment organizations focused on social and environmental issues [which] supports credible standards and conformity assessment by developing capacity building tools to strengthen members' activities and by promoting credible voluntary social and environmental certification as a legitimate policy instrument in global trade and development." Its *Code of Good Practice for Setting Social and Environmental Standards* is intended to provide a benchmark to assist standard-setting organizations

to improve how they develop social and environmental standards. One objective is to avoid creating unnecessary hurdles to international trade. The Code draws upon the ISO/IEC Guide 59 *Code of good practice for standardization*, and the TBT Agreement's *Code of good practice*, which it complements.

43. The ISEAL Code requires that standard-setting organisations should:

- have documented procedures for the process under which each standard is developed, including "active involvement of a balance of interested parties";
- have a complaints resolution mechanism;
- publish a work programme at least every six months;
- publish a justification of the need for a standard and clear objectives that a standard seeks to achieve;
- ensure standards are relevant; are based on contemporary scientific and technical knowledge; include objective and verifiable criteria, indicators and benchmarks; are adaptable to local economic, social, environmental and regulatory conditions; are expressed in terms of a combination of process, management and performance criteria rather than design or descriptive characteristics; and are no more trade-restrictive than necessary to fulfil their legitimate objectives;
- 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, so that "no group of interested parties can dominate nor be dominated in the decision-making process"
    - with a fall-back mechanism in the event that consensus is not achievable;
- publish standards promptly and make them available at minimum cost;
- review standards periodically;
- actively pursue harmonization of standards and/or technical equivalence agreements between standards;
- participate within its means in the preparation of relevant international standards that are in line with the vision and objectives of the standard-setting organization.

44. The code is obviously consistent with the thrust of the TBT Code of Practice (outlined in para. 24 above) and is unexceptionable in its intent[18]. The question is whether the widespread observance of such a code would make a significant difference to the circumstances that developing country exporters find themselves in. A convincing response to this question would require analysis of a sample of the relevant environmental, labour and other standards, identification of their objectionable features from the exporters' point of view, and judgment as to whether a better structured process for the formulation of the standard might have produced a more mutually satisfactory outcome. It is tempting to guess that the conclusion of such a study 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. One major point of difference between the standard setters and the standard compliers would almost certainly be the justification of the need for a standard and the clear specification of its objectives. Very likely the same conclusions would apply in relation to the application of the TBT Code to the making of private voluntary standards.

[18] There are, nonetheless, various points of detail in the ISEAL Code whose appropriateness is at least arguable. Examples include: the absence of an obligation in Article 5.5 to provide an explanation why a deviation from relevant international standards is necessary; the provision in Article 5.6 that procedures to guide decision-making in the absence of consensus shall ensure that no group of interested parties can dominate nor be dominated in the decision-making process; and the provision in Article 6.5 that standards shall be expressed in terms of a combination of process, management and performance criteria, rather than design or descriptive characteristics.

45. A particular problem is the cost of assessment of conformity against PPM standards, which for small scale exporters may be very high relative to export turnover and profits.[19] Article 8 of the TBT Agreement requires Members to take reasonable measures to ensure that non-governmental bodies conform with Articles 5 and 6 (concerning assessment and recognition of conformity assessment). If Article 8 were effectively implemented, Article 5 would then provide guidance on procedures for assessment of conformity with private standards, and Article 6 would provide guidance on recognition of conformity assessment. Article 6 encourages acceptance by a Member of the conformity assessment procedures of other Members if they assure conformity in the opinion of the (importing) Member. By analogy, this would seem to require private bodies that are imposing a conformity assessment requirement on an exporter to accept conformity assessment provided by a body nominated by the exporter provided that the importer was satisfied of the "adequate and enduring technical competence of the relevant conformity assessment [body]"[20] Quite possibly the application of such a provision would make little or no difference to the current situation on the ground in developing exporting countries, where credible local conformity assessors charging local rates rather than international parity may be few and far between.

I. IMPROVING THE SPS AGREEMENT

- ***conclusions on any possible process by which the SPS Agreement could be improved to enhance interactions with private standard setting bodies.***

46. The relevant term of reference asks for conclusions on "any possible process by which the SPS Agreement could be improved to enhance interactions with private standard setting bodies". This report gives a rather broad interpretation to this text, canvassing not only the possibility of changing the Agreement itself but also the practicality and utility of developing working interpretations of the relevant provisions of the Agreement; and "enhance interactions with private standard setting bodies" is taken to include the possibilities to use the Agreement to exercise suasion or even, in the extreme, discipline over the use of private standards.

47. To facilitate discussion of the legal/procedural options, as described in the following paragraphs, there is the question of what these options should be used to achieve. As discussed above and in the legal advice in Annex 5, the SPS Agreement was not drafted with application to private sector bodies in mind. To fully incorporate in the principal provisions of the Agreement wording applicable to activities involving private voluntary standards would require a substantial redraft which, from the earlier analysis does not appear to be justified. Therefore the issue around which discussion of improving the SPS Agreement is based is the clarification of Article 13, and within that provision the words quoted again here:

> *… Members shall take such **reasonable measures** as may be **available** to them to ensure that **non-governmental entities** within their territories … comply with the **relevant 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.*

The words which appear in bold are the terms and phrases whose meaning in particular would need to be made clear.

[19] See for example the USAID study conducted by Development Alternatives, Inc., and the two references by Andrew Graffham and others.

[20] TBT Agreement Article 6.1.1.

2. Amendment of the Agreement

48. Article 12.7 of the SPS Agreement says:

> *The* [SPS] *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.*

49. Under Article X of the Marrakesh Agreement Establishing the World Trade Organisation, the Council for Trade in Goods (or the General Council, or any Member) may submit proposals for amendment of the Agreement to the Ministerial Conference. Thereafter there are several possible pathways, but in broad terms: by two-thirds majority of the Members the Ministerial Conference then submits an amendment to Members for acceptance. The amendment comes into force for the Members that have accepted it when two-thirds of the Members have accepted, and thereafter for each other Member upon acceptance by it. (Amendments that do not alter the rights and obligations of Members come into force for all Members upon acceptance by two-thirds of Members.)[21]

50. No such proposals have been submitted in the first twelve years of operation of the Agreement; several draft proposals, relating to special and differential treatment, have been put before the SPS Committee, but there is no expectation that these will go forward as formal proposals for amendment of the Agreement.

51. The SPS Agreement was negotiated within the context of the Uruguay Round, when many other important agreements were also made. The parties to the GATT negotiated on the basis that "nothing was agreed until everything was agreed"; the various agreements were regarded as a package which each country would see as having advantages and disadvantages for its national interest. Amendment of any of the WTO's covered agreements therefore raises the question of whether to do so would disturb the overall balance of benefits to costs as viewed by one or more WTO Members, and therefore might bring more than just one agreement into play.

52. At the same time, "re-opening" the SPS Agreement to allow negotiation of amendments relevant to the development and implementation of private standards would potentially allow other matters to be brought forward by Members aggrieved for one reason or another by the operation of the Agreement since its inception in 1995. Since the Agreement is regarded by the great majority of WTO Members as robust and effective, many would likely oppose re-negotiation in case the disciplines of the SPS Agreement might be weakened.

53. For these reasons alone it appears highly unlikely that Article 13 of the SPS Agreement will be amended by WTO Members, and certainly not outside of the framework of a full round of trade negotiations. Additionally there would be the problem of obtaining the agreement of about 100 countries[22] to the wording of any proposed amendment.

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[21] For a more complete description of the amendment provisions, see the legal report at Annexes 5 and 6.

[22] There are currently 150 Members of the WTO, so that the two-thirds of Members referenced in Para. 49 above amount to 100 countries.

3. Interpretation of the Agreement

54. The SPS Agreement gives the SPS Committee no explicit authority to interpret the Agreement.[23] Legal interpretation of one of the WTO's covered agreements is available, in a formal sense, only from the Appellate Body established under the Understanding on Rules and Procedures Governing the Settlement of Disputes and the WTO's Dispute Settlement Body, and then only on the particular issues brought before those bodies by a Member appealing a decision by a dispute settlement panel.[24] As noted in the legal report at Annex 5,

> "There is little WTO case law on the interpretation of Article 13 of the SPS Agreement and, specifically, no case law in relation to *non-governmental entities* and Article 13 of the SPS Agreement."

It is possible that one or more of the countries that is aggrieved by the private voluntary standards issue could initiate a dispute against an importing country, and that subsequent to a panel decision authoritative interpretation of the SPS or TBT Agreements as to their application to PVS might be sought from the Appellate Body. It is possible, but for a number of reasons very unlikely. One key reason is that to date the WTO Members who are raising the issue in the SPS Committee are typically developing countries, for whom the technical difficulties and costs of mounting a WTO dispute case are very large relative to their resources.

55. As an alternative to formal legal interpretation, Article IX of the Marrakesh Agreement gives the Ministerial Conference and the General Council the (exclusive) authority to adopt, by a three-fourths majority of the Members, interpretations of the SPS Agreement recommended by the Council for Trade in Goods. This provision cannot be used as an alternative to the formal amendment procedures. Presumably it would be possible by this procedure to adopt non-controversial interpretations of a provision such as Article 13 of the SPS Agreement, but a Member strongly opposed to such an interpretation would be likely to claim that rights and/or obligations would be affected by the interpretation and therefore a formal amendment should be proposed instead.

56. Guidance on implementation of a provision of the SPS Agreement does not have the same legal force as the provision itself. Certainly the endorsement of the guidance by WTO Members in the General Council accords a moral imperative to it; and such guidance would certainly be taken into account by a dispute settlement panel if the matter arose in the context of a dispute. But a WTO Member is not obliged to follow the guidance.

57. In recent years the SPS Committee has been successful in negotiating guidelines for the implementation of Article 4 of the Agreement, on equivalence (i.e. an exporting country using different measures than the ones specified by an importing country provided that the exporter can demonstrate that its measures have the same effect as the importer's). In this case strong impetus came from developing countries for the development of guidance, but there were also some developed

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[23] Article 5.5 of the Agreement gives Members the obligation to cooperate in the Committee to develop guidelines to further the practical implementation of that provision, concerning consistent application of the concept of the appropriate level of protection. Of its own initiative the Committee has developed guidance on the implementation of Article 7 on transparency and Article 4 on equivalence (with, in the latter case, a belated mandate from the Doha Ministerial Conference "to develop expeditiously the specific programme to further the implementation of Article 4"). The development by the Committee of guidance on the implementation of Article 6 on adaptation of measures to regional conditions has also been discussed.

[24] The reports of the Appellate Body have no legal standing until they are adopted by the Dispute Settlement Body. They are not designed to stand alone but must be read in conjunction with the panel reports which they either uphold, modify or overturn. Hence, formally speaking, legal interpretation is available only from the Dispute Settlement Body in the context of its adoption of specific panel and Appellate Body reports.

countries that, for their own reasons, wanted to see a practical approach agreed for the implementation of Article 4. Some years of preparatory effort by a small group of developed countries, both informally and under the auspices of the Codex Committee on Food Import and Export Inspection and Certification Systems, provided the basis for the agreement eventually reached in the SPS Committee.

58. The feasibility of developing such guidance on the implementation of Article 13 of the Agreement is moot. Both developed as well as developing countries would need to perceive a clear need for an initiative along these lines. More importantly, there would have to be broad consensus as to what should be done. Any proposition that WTO Members should morally commit themselves, via an agreed interpretation of the SPS Agreement, to shape or curb the implementation of private voluntary sanitary standards would almost certainly fail. It seems probable that in many developed countries the businesses that develop and apply private voluntary standards (because of the benefits that accrue to their commercial interest) would see no advantage and some significant disadvantages to their interests in such an initiative, and would therefore prevail upon their governments to oppose it. As the legal advice at Annex 6 succinctly puts it:

> "While this approach is, theoretically possible and maybe even to be encouraged, in practice the discussion and adoption of such an ad hoc decision appears difficult to be achieved for the difficulty to trigger the necessary procedural mechanisms within the WTO system, the complexity of the discussions and negotiations, the foreseeable disagreement among WTO Members as to the need for such step and the likely opposition of powerful lobbies to any such development."

4. Other options

59. If all of the Members of the WTO could not agree on an interpretation of the SPS Agreement in this field, another option theoretically available would be for a subset of like-minded Members to voluntarily enter into an agreement amongst themselves to behave in a certain way in relation to private voluntary standards. Precedents for this approach are the GATT Standards Code, to which a number of GATT signatories adhered, and the four plurilateral agreements negotiated in the Uruguay Round (of which the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement are still extant). However, since the practice has been that such agreements are negotiated as part of a negotiating round, no new plurilateral agreement is likely to be achievable in the near future.

60. An alternative, and more practical approach might be available via the TBT Agreement. The SPS Agreement covers only those measures defined in Annex A of that Agreement; all other sanitary and phytosanitary technical regulations and standards are covered by the TBT Agreement in accordance with the definitions in its Annex A. It is doubtful that the SPS Agreement was intended to apply to private voluntary standards, and an attempt to make it apply would encounter the various difficulties outlined above. Therefore it would be better to accept that view and consider how the TBT disciplines, such as they are, could be used to address the concerns that have arisen in relation to private voluntary standards.

J. GOVERNMENT AND NON-GOVERNMENT BODIES IN THE TBT AGREEMENT

- ***analysis of the relationship between government and non-government bodies in the TBT Agreement with both legal and practical examples (based on discussions with key players and textual research);***

61. What implications do the provisions of the TBT Agreement have for private bodies that make and apply private voluntary standards? As summarized in paras. 23 and 24 above:

- Article 3 says that Members are obliged to take such reasonable measures as may be available to them to ensure compliance by non-governmental organisations with the provisions of Article 2 of the Agreement (other than the notification aspect);
- Article 8 says that Members are obliged to take such reasonable measures as may be available to them to ensure that non-governmental bodies operating conformity assessment procedures comply with the provisions of the Agreement concerning conformity assessment by government bodies;
- Article 4 applies the same best endeavours obligation to compliance by non-governmental standardising bodies with the Code of Good Practice for the Preparation, Adoption and Application of Standards, such that they –
    - follow the principles of non-discrimination,
    - avoid unnecessary obstacles to international trade,
    - align with existing international standards,
    - engage with relevant international standardising bodies,
    - avoid duplication of the work of other standardising bodies,
    - specify standards for product requirements in terms of performance rather than design or descriptive characteristics,
    - ensure transparency and consultation with interested parties.

62. However it is not clear to what extent the Agreement applies to private voluntary standards. An example is supplied by standards for labelling of goods for environmental purposes ("eco-labelling"). Under the heading *trade and environment* the Doha Ministerial Declaration of November 2001 instructed the Committee on Trade and Environment to give particular attention to the issue of labelling requirements for environmental purposes. (The CTE had discussed related issues on previous occasions.) As well, over a period of some years the TBT Committee has had a series of discussions about PPMs, and in particular environmental labelling. It emerges from these various discussions that many developing countries believe that eco-labelling requirements that relate to matters other than attributes incorporated into products (e.g. pesticide residues) are proscribed under WTO rules. At the same time it is said that most Members believe that the TBT Agreement is 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.

63. Meanwhile, according to the legal advice attached at Annex 5 (see 1.2.2):

'The TBT Agreement defines "standard" in paragraph 2 of Annex 1 as a:

> *"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."*

Therefore the language of the TBT Agreement seems to indicate that the Agreement is not applicable to processes and production methods (hereinafter PPMs) which are "not related to the product".

In this 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.'

The legal advice goes on to say that 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 Secretariat's note on the relevant negotiations that led to the Agreement 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.[25]

2. "Reasonable measures" to ensure NGO compliance with Article 2

64. A *reasonable measure* as the term is used in Articles 3, 4 and 8 of the Agreement might be along the following lines:

> "Standards Australia has a policy of basing Australian Standards on International Standards 'to the maximum extent feasible' and to use the WTO TBT Agreement as a benchmark. A similar obligation is imposed upon accredited Standards Development Organisations by the Standards Accreditation Board of Standards Australia. The expectation therefore is that Australian Standards should be adoptions of International Standards, unless there are good reasons to the contrary. This also ensures that the Australian Government's WTO obligations would be met if any such standard were adopted by a government agency as a technical regulation.
>
> In addition, Standards Australia has a commitment to comply with Annex 3 of the WTO TBT Agreement, the *Code of Good Practice for the Preparation, Adoption and Application of Standards*, which is applicable to non-government standardizing bodies such as Standards Australia ….. Standards Australia has notified the WTO of its voluntary adherence to both the WTO TBT Agreement and the Code of Good Practice.
>
> Consistent with Standards Australia's policies, the [Memorandum of Understanding] between Standards Australia and the Australian Government (Article 3.3) requires Standards Australia to:
>
> > … ensure that its practices comply with the World Trade Organization Agreement on Technical Barriers to Trade and the Code of Good Practice at Annex 3 of that Agreement to which Standards Australia has declared its adherence."[26]

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[25] WTO, WT/CTE/W/10-G/TBT/W/11, 29 August 1995: *"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."* The Note says, inter alia:

> "Standards that are based on processes and production methods (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. 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."

[26] Australian Government Productivity Commission Research Report: *Standard Setting and Laboratory Accreditation*, 2 November 2006

65. No doubt there have been comparable initiatives by many other WTO Members. What is not clear is where the boundary lies between *reasonable measure* and measures that would be regarded as not reasonable – that is, measures that it would not be reasonable to expect a Member to undertake. There is no relevant WTO case law on this point, at least in relation to the TBT Agreement, nor any consensus within the TBT Committee (which, to be fair, has not yet attempted to find it). One obvious difficulty is that what is reasonable in one country, for example because the central government has legal authority to coerce private standard setters, may not be reasonable in another country that has different legal and constitutional arrangements. In any event views on what is reasonable are likely to be somewhat subjective.

66. Then in relation specifically to private voluntary standard setting and implementation, such as is carried out by supermarket chains, it is again possible to identify some initiatives that governments might take:

- disseminating information about the TBT Agreement and its provisions applicable to private standard-setting;
- developing and circulating a national policy, whether hortatory or for mandatory application, in relation to compliance with these provisions;
- dialogue with the responsible private organisations to encourage behaviour consistent with the provisions of the TBT Agreement;
- entering into memoranda of understanding with the private organisations;
- providing financial incentives to encourage compliance by private organisations;

and so forth. But does *reasonable measure* extend so far as making a new law to require compliance by private organisations with the TBT Agreement, if it is in the legal competence of the Member government to do so? And what might individual Members do about private organisations that are multi-national consortia? There would be considerable difficulty in defining the limit of the reasonable measures that national governments might take.

67. As mentioned above, standardising bodies that accept the Code of Good Practice must notify the ISO/IEC Information Centre. There were standardising bodies from 113 countries as well as Hong Kong China and European organisations on the list published by ISO/IEC in January 2006.[27] The majority of the bodies on the list are central government standards agencies, and most of the rest are broad-based national standards bodies whose activities are not confined to a single sector of industry. A few industry-specific bodies are listed, for example in Australia, Japan and Korea, and these are mainly concerned with electrical, electronic and telecommunications standards. No non-governmental standard-setting bodies concerned with sanitary or phytosanitary standards, or with food standards specifically, were included in the January 2006 list (nor in the Secretariat's addendum listing additions during 2006) although it is believed that there are some hundreds of different private bodies so engaged.

Canberra,
April 2007

[27] ISO/IEC 2006.

Annex 1

Terms of reference

Title: Proposal for consultancy project to study the position of private standards within the World Trade Organisation's (WTO) multilateral framework

Purpose

- To learn lessons from the Technical Barriers to Trade (TBT) Agreement about how to work with private standard-setters. To clarify the position of private standard-setters within the SPS agreement (in light of comments by St Vincent and the Grenadines and others at the June 2005 and subsequent SPS Committee meeting). The purpose is not to change the terms of the SPS Agreement but to inform DFID Policy Division and its partners.

Objectives

- To investigate the position of non-government bodies' standards within the WTO's Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements,
- To ascertain how delegations to the TBT and SPS Committees include the views of industry or private standard-setting bodies in their positions
- To examine the pros and cons of better defining the position of non-government bodies' standards within the SPS Agreement and TBT Agreement (which may cover non-food safety aspects of these standards e.g. product size)
- To make suggestions on how the relationship between the SPS Agreement and non-government bodies' standards might be improved e.g. adopting a decision or guidance on how to implement Article 13

This proposal takes forward the commitment in DFID's Agricultural Policy paper to:

- Focus on creating effective markets through encouraging private sector participation by putting in place effective standards for quantifying and grading products,
- Work in partnership with international standard-setting organisations to ensure that new product standards are based on assessments of risk and are not attempts to protect markets

DFID acknowledges that there are both advantages and disadvantages of private-sector standards and have agreed to work together with private-sector standard setters, as we do with the public regulators, to increase opportunities for small-scale and poor farmers to meet their standards.

Public SPS regulations are subject to certain disciplines under the WTO SPS Agreement e.g. they must be transparent, based on risk assessments and be notified. The TBT Agreement has mechanisms which involve private standard-setters for example in many countries private standard-setters/conformity bodies have separate enquiry points where potential importers can find out about standards. The TBT also has a 'code of good practice' which is open to all standard-setters.

Background

Traditionally, government bodies regulated food safety. However, since the 1990s private food safety standards such as the Global Food Safety Initiative and the Euro-Retailer Produce Working Group's Good Agricultural Practice standards (EurepGAP) have been put in place and continue to evolve. These standards were developed to:

- respond to a lack of consumer confidence in national regulations resulting from a number of high profile food safety incidences i.e. BSE, salmonella
- respond to the increased liability of retailers for the safety of their products
- give retailers scope for firm and product differentiation on the basis of food safety and quality
- include other attributes that consumers may be concerned about i.e. environment, that regulations do not / cannot include.

These standards are often based on public regulations, but go beyond them by being more stringent or including additional criteria i.e. sustainable use of water / hygiene. Private standards are voluntary; however, the fact that supermarkets control such large market shares has resulted in some standards becoming *de facto* mandatory. Private standards have been criticised by developing countries as being too stringent and confusing. However, they can have certain benefits such as providing assurances of quality, and agricultural extension services through outgrower support schemes. Other important benefits include enhanced occupational safety, environmental benefits, and reduced cost of agro-chemicals through better management of inputs.

The World Trade Organisation's Agreement on the Application of Sanitary and Phytosanitary Agreement Measures[28] regulates public food safety measures such as those of national governments. The Agreement seeks to ensure that SPS measures are based on sound science, are fair and transparent and do not act as unnecessary barriers to trade. The SPS Agreement ensures that all new SPS regulations are notified and provides a forum for other WTO Members to comment on, and if necessary raise concerns about, SPS measures.

To date the SPS Agreement has not been thought to include private food safety schemes. In June 2005 St Vincent and the Grenadines, Jamaica, Peru and Argentina disputed this at the SPS Committee meeting. They argued that Article 13[29] obligated Members to ensure that non-government bodies within their territory acted in a manner consistent with the SPS Agreement. The European Commission (EC) responded by stating that EurepGAP was a private body and therefore not subject to government controls. Further analysis by the EC argues that within the TBT Agreement the meaning of a non-governmental body is one that is entrusted with legal power to enforce a technical regulation. Hence, in their view 'non-governmental bodies' do not refer to individual economic operators such as EurepGAP or other private standard setting bodies. However, this interpretation is not universally accepted and this project will look at this in further detail.

The text of the TBT Agreement[30] better defines the role of non-government bodies, for example, the TBT 'code of good practice' is open to any standardizing body within the territory of a member of the WTO[31]. This better definition[32] may be due to the historic close involvement of private industry in setting technical regulations e.g. BSI and ISO. It would therefore be telling to look at how the position of non-government bodies was formulated within the TBT Agreement, how this is implemented practically and how the TBT Committee keeps up with rapidly changing private standards. Lessons learnt from this analysis may be applicable to the SPS Agreement.

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[28] For more background to the SPS Agreement see http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/intro1_e.htm

[29] Extract from Article 13 of the SPS Agreement '…Members shall take such reasonable measures as may be available to them to ensure that non-government 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. …'

[30] For more background to the TBT Agreement see http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

[31] The TBT code of good practice is about standard setting generally and may be applicable to standard setting in the food safety area

[32] From the 1979 GATT Agreement on Technical Barriers to Trade (the so called "standards code").

Some voluntary standard setting organisations have already drawn upon the TBT agreement's 'code of good practice'[33]. The International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, for example, has a 'code of good practice for setting social and environmental standards' which was formulated from the TBT Code and the ISO/IEC Guide 59[34]. Should other private standard setting organisations, particularly those working on SPS issues, be taking similar steps and adhere to codes of good practice. Could the SPS Committee endorse these codes?

As global integration shapes markets, private standards are becoming more international and are increasingly used by food importers as evidence that their imports comply with public regulations. This presents both opportunities (e.g. co-regulation and wider use of good agricultural practices) and constraints (e.g. the increasing costs of certification). One of the possible ways of addressing concerns about these is by improving the interaction between the private standard-setters and the WTO Agreements without constraining the ability of private schemes to respond quickly to their markets. Given the growth in the number and/or scope of private food safety schemes DFID and its partners believe it is worthwhile investigating the options and possible responses.

Context

This strand of work is part of a wider project on the role that public and private agricultural product regulations and standards play in helping and/or hindering developing countries' access to international markets. DFID is keen to develop a public-private process that results in supermarket procurement with an enhanced development impact on poorer producers in Africa. Other activities include project research into mapping fresh produce movements, encouraging dialog between public regulatory bodies and private standard setting bodies and working with private standard-setters to help them consider the development impact of new and revised standards.

Specific Tasks

- Review of how the TBT and SPS and GATT Agreements evolved to include and define the role of non-government bodies
- Briefly review how other relevant relationships with private bodies[35] are considered within the WTO as well as Members positions and agreements on this issue
- Analysis of the relationship between government and non-government bodies in the TBT Agreement with both legal and practical examples (based on discussions with key players and textual research)
- Based on initial review and analysis, draft terms of reference for an input from legal experts into this study, specifying particular areas where input will be required and deliverables. These terms of reference must reflect proposal budget.
- Brief analysis of how WTO Members represent the interests of private standard-setting bodies in the WTO TBT and SPS Committee's
- To examine the use of the TBT 'code of good practice' by non-governmental bodies, and other relevant non-governmental schemes such as the ISEAL Alliance, and consider the appropriateness of a similar system for the SPS Agreement / private food safety schemes
- Investigation of pros and cons of better defining the role of non-government standard-setting bodies within the SPS Agreement (based on discussions with key players including private standard setting bodies)

[33] TBT Agreement Annex 3.
[34] 'code of good practice for the preparation, adoption and application of standards'
[35] For example, there is a working group on the Interaction between Trade and Competition Policy in the WTO that looks at issues relating to private enterprise.

- This should also consider some of the policy questions raised in the recent OECD[36] report on this subject including;
  - 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/retailers and government responsibilities towards society?

- Draw conclusions on any possible process by which the SPS Agreement could be improved[37] to enhance interactions with private standard setting bodies.

Deliverables

1. Draft terms of reference for legal expert
2. One draft report for comment by DFID
3. One final report of no more than 25 pages

Partners
WTO SPS and TBT Secretaries (Gretchen Stanton and Vivien Liu)
Defra and DTI lawyers
European Commission
UK TBT and SPS contact points
Private standard setting bodies i.e. EurepGAP, ISAEL and Supermarkets

Resources
SPS Agreement (http://www.wto.org/english/docs_e/legal_e/15-sps.doc)
TBT Agreement (http://www.wto.org/english/docs_e/legal_e/17-tbt.doc)
DG Trade's paper 'Private Food Standards and their Impacts on Developing Countries' (http://trade.ec.europa.eu/doclib/docs/2006/june/tradoc_127969.pdf)
WTO's World Trade Report 2005 (http://www.wto.org/english/news_e/pres05_e/pr411_e.htm
UNCTAD Presentation on standards http://www.unctad.org/trade_env/test1/meetings/ctf3/TBT%20-%20standards.pdf#search=%22UNCTAD%20WTO%20rules%20and%20transparency%22
OECD paper http://www.regoverningmarkets.org/en/resources/policy_makers/oecd_final_report_on_private_standards_and_the_shaping_of_the_agro_food_system

[36] OECD report on private standards and the shaping of the agro-food system – see resources for full reference

[37] The Committee cannot change the text of the Agreement. In the context of the next review of the SPS Agreement (in 2009), it could theoretically submit a proposal to amend the Agreement to the Council for Trade in Goods (see Article 12.7). Otherwise, it would adopt a decision similar to G/SPS/15 on consistence or G/SPS/19/Rev.2. on equivalence.

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Annex 2

Terms of reference for legal aspects of the consultancy on non-government standards and standard-setting bodies within the context of the WTO

Objectives

The specified objectives of the project are:

a. to investigate the position of non-government bodies' standards within the WTO's Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements;
b. to ascertain how delegations to the TBT and SPS Committees include the views of industry or private standard-setting bodies in their positions;
c. to examine the pros and cons of better defining the position of non-government bodies' standards within the SPS Agreement and TBT Agreement (which may cover non-food safety aspects of these standards e.g. product size);
d. to make suggestions on how the relationship between the SPS Agreement and non-government bodies' standards might be improved e.g. adopting a decision or guidance on how to implement Article 13.[38]

Note that three of these objectives refer to non-government bodies' standards, rather than to the bodies themselves.

This proposal takes forward the commitment in DFID's Agricultural Policy paper to:

- Focus on creating effective markets through encouraging private sector participation by putting in place effective standards for quantifying and grading products,
- Work in partnership with international standard-setting organisations to ensure that new product standards are based on assessments of risk and are not attempts to protect markets

DFID acknowledges that there are both advantages and disadvantages of private-sector standards and have agreed to work together with private-sector standard setters, as we do with the public regulators, to increase opportunities for small-scale and poor farmers to meet their standards.

Public SPS regulations are subject to certain disciplines under the WTO SPS Agreement e.g. they must be transparent, based on risk assessments and be notified. The TBT Agreement has mechanisms which involve private standard-setters for example in many countries private standard-setters/conformity bodies have separate enquiry points where potential importers can find out about standards. The TBT also has a 'code of good practice' which is open to all standard-setters.

[38] Article 13 of the SPS Agreement, on *Implementation*, says:

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.

Background

Traditionally, government bodies regulated food safety. However, since the 1990s private food safety standards such as the Global Food Safety Initiative and the Euro-Retailer Produce Working Group's Good Agricultural Practice standards (EurepGAP) have been put in place and continue to evolve. These standards were developed to:

- respond to a lack of consumer confidence in national regulations resulting from a number of high profile food safety incidences i.e. BSE, salmonella
- respond to the increased liability of retailers for the safety of their products
- give retailers scope for firm and product differentiation on the basis of food safety and quality
- include other attributes that consumers may be concerned about i.e. environment, that regulations do not / cannot include.

These standards are often based on public regulations, but go beyond them by being more stringent or including additional criteria i.e. sustainable use of water / hygiene. Private standards are voluntary; however, the fact that supermarkets control such large market shares has resulted in some standards becoming *de facto* mandatory. Private standards have been criticised by developing countries as being too stringent and confusing. However, they can have certain benefits such as providing assurances of quality, and agricultural extension services through outgrower support schemes. Other important benefits include enhanced occupational safety, environmental benefits, and reduced cost of agro-chemicals through better management of inputs.

The World Trade Organisation's Agreement on the Application of Sanitary and Phytosanitary Agreement Measures[39] regulates public food safety measures such as those of national governments. The Agreement seeks to ensure that SPS measures are based on sound science, are fair and transparent and do not act as unnecessary barriers to trade. The SPS Agreement ensures that all new SPS regulations are notified and provides a forum for other WTO Members to comment on, and if necessary raise concerns about, SPS measures.

To date the SPS Agreement has not been thought to include private food safety schemes. In June 2005 St Vincent and the Grenadines, Jamaica, Peru and Argentina disputed this at the SPS Committee meeting. They argued that Article 13[40] obligated Members to ensure that non-government bodies within their territory acted in a manner consistent with the SPS Agreement. The European Commission (EC) responded by stating that EurepGAP was a private body and therefore not subject to government controls. Further analysis by the EC argues that within the TBT Agreement the meaning of a non-governmental body is one that is entrusted with legal power to enforce a technical regulation. Hence, in their view 'non-governmental bodies' do not refer to individual economic operators such as EurepGAP or other private standard setting bodies. However, this interpretation is not universally accepted and this project will look at this in further detail.

The text of the TBT Agreement[41] better defines the role of non-government bodies, for example, the TBT 'code of good practice' is open to any standardizing body within the territory of a member of the

[39] For more background to the SPS Agreement see http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/intro1_e.htm

[40] Extract from Article 13 of the SPS Agreement '…Members shall take such reasonable measures as may be available to them to ensure that non-government 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. …'

[41] For more background to the TBT Agreement see http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

WTO[42]. This better definition[43] may be due to the historic close involvement of private industry in setting technical regulations e.g. BSI and ISO. It would therefore be telling to look at how the position of non-government bodies was formulated within the TBT Agreement, how this is implemented practically and how the TBT Committee keeps up with rapidly changing private standards. Lessons learnt from this analysis may be applicable to the SPS Agreement.

Some voluntary standard setting organisations have already drawn upon the TBT agreement's 'code of good practice'[44]. The International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, for example, has a 'code of good practice for setting social and environmental standards' which was formulated from the TBT Code and the ISO/IEC Guide 59[45]. Should other private standard setting organisations, particularly those working on SPS issues, be taking similar steps and adhere to codes of good practice. Could the SPS Committee endorse these codes?

As global integration shapes markets, private standards are becoming more international and are increasingly used by food importers as evidence that their imports comply with public regulations. This presents both opportunities (e.g. co-regulation and wider use of good agricultural practices) and constraints (e.g. the increasing costs of certification). One of the possible ways of addressing concerns about these is by improving the interaction between the private standard-setters and the WTO Agreements without constraining the ability of private schemes to respond quickly to their markets. Given the growth in the number and/or scope of private food safety schemes DFID and its partners believe it is worthwhile investigating the options and possible responses.

Context

This strand of work is part of a wider project on the role that public and private agricultural product regulations and standards play in helping and/or hindering developing countries' access to international markets. DFID is keen to develop a public-private process that results in supermarket procurement with an enhanced development impact on poorer producers in Africa. Other activities include project research into mapping fresh produce movements, encouraging dialog between public regulatory bodies and private standard setting bodies and working with private standard-setters to help them consider the development impact of new and revised standards.

Specific Issues on which Legal Inputs are Required

The key legal issue is the meaning of the relevant texts of the WTO covered agreements, and in particular the SPS and TBT Agreements. "Relevant" means as they relate:

a. directly to the activities of non-government standard-setting and standard-applying organisations;
b. directly to the obligations of WTO Members concerning activities of non-government standard-setting and standard-applying organisations;
c. indirectly to the obligations of WTO Members concerning activities of non-government standard-setting and standard-applying organisations.

Accordingly it will be necessary to identify all potentially relevant texts and to describe their meaning in both theory and (to the extent possible) in a practical setting. Authoritative interpretation of WTO

[42] The TBT code of good practice is about standard setting generally and may be applicable to standard setting in the food safety area

[43] From the 1979 GATT Agreement on Technical Barriers to Trade (the so called "standards code").

[44] TBT Agreement Annex 3.

[45] 'code of good practice for the preparation, adoption and application of standards'

texts is available only from the rulings of the WTO's Appellate Body, and so any relevant decisions will have to be found. The WTO maintains a helpful compendium of such rulings.

In this examination of existing texts there will have to be a special focus on the possible interpretations of Article 13 of the SPS Agreement and in particular of the sentence that reads in part: "Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories … comply with the relevant provisions of this Agreement." One important consideration here may be that measures reasonably available may differ from one Member country to another.

In the event that this analysis does not demonstrate that there can be any effective discipline over potentially adverse consequences of the activities of non-government standard-setting and standard-applying organisations, there will be need for identification and analysis of options for remedying the situation within the framework of the WTO. Desirably these options would be presented in a graduated way, from the least substantive (in legal terms) up to formal amendment of one or more of the covered agreements.

Deliverables for Legal Advisers

The following reports will be prepared by the legal advisors to reflect the research and analysis conducted on the issues above:

(a) "*Review and legal analysis of the relevant WTO provisions, principally within (but not limited to) the SPS and TBT Agreements*". This report will review and analyse all WTO provisions dealing directly or indirectly with the issues outlined under paragraph 7. The analysis will include the review and analysis mandated under paragraph 8 above, which may entail general, but nevertheless complex, considerations on countries' constitutional systems and the ability to "impose" guidelines or working criteria to private entities within their constituencies.

(b) "*Relevant WTO 'case law' and interpretative guidance in the form of ad hoc decisions, or preparatory works on the SPS and TBT Agreements*". This report will review, consolidate and reference, as appropriate, all relevant interpretative information, whether arising in the context of the negotiation and drafting of the SPS and TBT Agreements, or subsequent to their entry into force in terms of WTO 'case law' and SPS or TBT Committee decisions (if any). The review of applicable WTO 'case law' will not be limited to instances of WTO dispute settlement proceedings directly involving SPS or TBT issues.

(c) "*Legal options and possible suggestions for amendments to be brought to the provisions of the SPS and/or TBT Agreements*". This report, which will build on the previous two legal assessments and on the work conducted by the lead consultant, will present and discuss any relevant legal options, possible suggestions, or courses of action (as the case may be) to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system and, in particular, the SPS and TBT Agreements.

Reporting Deadlines

The legal advisors must deliver draft reports on items (a) and (b) under 'Deliverables for Legal Advisers' above by 26 January 2007, subject to an agreement with DFID on contractual terms and conditions by 22 December 2006. Final reports, including the one mandated under item (c) of 'Deliverables for Legal Advisers' above, must be delivered by the end of February on the basis of a

timeframe for execution to be agreed with the lead consultant following submission of the first two drafts.

In relation to the proposed deliverables, a total provision of 10 working days is allowed.

The legal advisors will work in close consultation with the lead consultant, who will provide guidance as required.

Annex 3

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Annex 4

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www.agrifoodstandards.net

www.regoverningmarkets.org

Annex 5

O'CONNOR AND COMPANY
EUROPEAN LAWYERS

Private Standards within the WTO Multilateral Framework

Reports 1 and 2

by

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Report 1

"Review and legal analysis of the relevant WTO provisions, principally within (but not limited to) the SPS and TBT Agreements"

As mandated under the Terms of Reference, this report reviews and analyses WTO provisions dealing directly or indirectly with the issues outlined below:

> The key legal issue is the meaning of the relevant texts of the WTO covered agreements, and in particular the SPS and TBT Agreements. "Relevant" means that they relate:
>
> a. directly to the activities of non-governmental standard-setting and standard-applying organisations;
> b. directly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations;
> c. indirectly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations.
>
> Accordingly, it is necessary to identify all potentially relevant texts and to describe their meaning in both theory and (to the extent possible) in a practical setting.
>
> In this examination of existing texts there is a special focus on the possible interpretations of Article 13 of the SPS Agreement and in particular of the sentence that reads in part: "*Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories … comply with the relevant provisions of this Agreement."* One important consideration here is that measures reasonably available may differ from one WTO Member country to another.

1. WTO provisions

We have first looked at provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement) and the Agreement on Technical Barriers to Trade (hereinafter TBT Agreement) and finally at provisions of other WTO Agreements.

The TBT Agreement and the SPS Agreement replaced the 1979 Standards Code formulated during the Tokyo Round which covered mandatory and voluntary technical specifications, mandatory technical regulations and voluntary standards for industrial and agricultural goods. The TBT Agreement was introduced with the objective of ensuring that mandatory "technical regulations" and voluntary "standards" (as well as testing and certification procedures), used by countries, do not create unnecessary obstacles to trade. The SPS Agreement was established as a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade, using harmonized sanitary and phytosanitary measures between WTO Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations.

1.1 SPS Agreement

The provisions of the SPS Agreement have been reviewed as to whether they may be relevant for activities of non-governmental standard-setting and standard-applying organisations.

1.1.1 Provisions of the SPS Agreement which relate directly to the activities of non-governmental standard-setting and standard-applying organisations:

There are no provisions of the SPS Agreement that are addressed to non-governmental standard-setting and standard-applying organisations. The provisions are, in general, addressed to the WTO Members.

1.1.2 Provisions of the SPS Agreement which relate directly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations – Article 13 of the SPS Agreement

Article 13 of the SPS Agreement concerns, inter alia, the relationship between national governments and non-governmental bodies in relation to SPS measures and potentially the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations.

Article 13 of the SPS Agreement provides the following:

> *"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 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".*

1.1.2.1 Definition of "non-governmental entities"

Article 13, sentence three of the SPS Agreement provides that *"Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, (…), comply with the relevant provisions of this Agreement."*

The term "non-governmental entities" is not defined in the SPS Agreement.

The WTO Agreement is a single agreement and the individual parts of which it is composed – the agreements annexed to it – should be interpreted as an integrated whole. The various provisions of the WTO Agreements apply cumulatively and should be interpreted consistently.[46] Therefore, provisions of other WTO Agreements may be used for interpretation purposes.

Point 6 of Annex 1 ("Terms and their definitions for the purpose of this Agreement") of the TBT Agreement defines "non-governmental body" as follows:

> *"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."*

It has been suggested that the definition of non-governmental body of the TBT Agreement may be used for purposes of the SPS Agreement:

> *"The concept of "non-governmental entities" is not sufficiently defined in the SPS Agreement. The TBT Agreement, which is also applicable for agricultural products, renders a more precise definition of "non-governmental entities." In Art. 4.1 of the TBT Agreement, in a similar spirit to Art. 13 in the SPS Agreement, speaks of "non-governmental standardizing bodies". Here, clearly, "non-governmental entity" means "non-governmental norm-setting organizations."*
>
> *In the same spirit, there is a definition of "non-governmental body" in point 8 of Annex 1 to the TBT Agreement, which reads, "Body 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". Although this definition is rather vague and open-ended, it is possible to argue that, in the light of the context and purpose of the SPS and the TBT agreements, "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 SPS/TBT rules (…)."*[47]

Thus, through a restrictive interpretation of the definition of the TBT Agreement, it is argued that only private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special legal status fall under the definition of non-governmental entity under the SPS Agreement.

However, it can also be argued that "non-governmental bodies" do not necessarily need to be entrusted by government with the performance of certain tasks in order to fall under the definition of non-governmental entity provided in the TBT Agreement. Concerning the SPS Agreement, with the wording of its Article 13 ("*within the territories")*, it can be argued that "non-governmental entity" under the SPS Agreement is wider and also includes other private bodies which have not been entrusted by government with certain tasks but *which operate or are established within the territories of a Member.*

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[46] The Appellate Body stated in *Korea – Dairy Safeguards*: "It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously.(…) Article II:2 of the WTO Agreement provides that: The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members…" (Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Dairy Safeguards"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 74).

[47] Grace Chia-Hui Lee, European Commission, DG Trade Unit G2, *Private Food Standards and their Impacts on Developing Countries*, Part VIII. Legality of Private Food Schemes in the WTO, p. 34 and 35.

There is no definition of non-governmental entity in other WTO Agreements.

In conclusion, it is arguable that private standard-setting bodies are non-governmental entities under Article 13 of the SPS Agreement. However, private standard-setting bodies and non-governmental entities are not necessarily the same. This study intends to develop ideas for a definition of "non-governmental entity" under Article 13 of the SPS Agreement and for a possible distinction from "private bodies".

1.1.2.2 Literary interpretation of Article 13 of the SPS Agreement

Even if non-governmental organisations are not directly addressed by the provisions of the SPS Agreement, WTO Members have a responsibility to ensure that the Agreement is complied with even to the extent of introducing positive measures and mechanisms in order to achieve its observance.

Sentence one of Article 13 of the SPS Agreement provides an absolute obligation on WTO Members:

> *"Members are fully responsible under this Agreement for the observance of all obligations set forth herein.*

Sentence two sets out a requirement to be proactive by positive measures in relation to non-governmental bodies:

> *"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.*

The provision refers to "*other than central government bodies*". The question is whether "*other than central government bodies"* includes non-governmental bodies. Article 13 of the SPS Agreement addresses three types of organisations:

- Regional bodies;
- Non-governmental entities;
- Local governmental bodies.

It can be argued that "*other than central government bodies"* include all three types of bodies, including non-governmental bodies.

Sentence three of Article 13 of the SPS Agreement provides for a slightly lesser but still positive obligation towards non-governmental 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 territories are members, comply with the relevant provisions of this Agreement".*

Sentence four provides for an obligation to WTO Members not to encourage non-governmental organisations to breach the SPS 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".

Finally, sentence five provides again for a positive obligation on WTO Members to act:

"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".

The conclusion of this textual analysis of Article 13 of the SPS Agreement is that WTO Members appear to have positive obligations in relation to making sure that non-governmental actors do not act inconsistently with the SPS Agreement.

1.1.3 Provisions of the SPS Agreement which relate indirectly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations.

There are a number of provisions in the SPS Agreement which may relate indirectly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations.

As stated above, even if non-governmental entities are not directly addressed by the provisions of the SPS Agreement, *in the light of Article 13*, WTO Members have a responsibility to ensure that the activities of non-governmental entities comply with the Agreement. This obligation may thus extend to standard-setting and standard-applying organisations, provided that they fall under the definition of "non-governmental entities" under the SPS Agreement.

1.1.3.1 Definition of SPS measure

The SPS Agreement provides that no WTO Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health. At the same time, these measures should not be applied in a manner that constitutes a means of arbitrary or unjustifiable trade discrimination. The scope of the SPS Agreement is stated in Article 1.1 of the SPS Agreement and reads as follows:

"This Agreement applies to all sanitary and phytosanitary measures, which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement".

Annex A point 1 to the SPS Agreement defines SPS measure as follows:

*"Any 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.*
>
> ***Sanitary or phytosanitary measures include 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." (emphasis added)*

One relevant part of the definition (for the purpose of this report) is that *"sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures"*.

From a textual point of view, "laws", "decrees" and "regulations" are by nature "governmental". It appears that "requirements" and "procedures" may also well be "non-governmental", however, in the Codex Alimentarius "Principles for food import and export inspection and certification"[48] requirements are defined as governmental (*"set by competent authorities*"):

> *"Requirements are 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."*

The General Agreement on Trade in Services (hereinafter, GATS) defines when a measure affecting the trade in services is considered to be a measure taken by a WTO Member. According to Article I.3, for the purposes of GATS:

> "(…) *"measures by Members" means measures taken by:*
> *(i) central, regional or local governments and authorities; and*
> *(ii)* ***non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities****;*
> *In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory*" (emphasis added).

Therefore, measures taken by non-governmental bodies fall within the scope of application of the GATS only if they are taken *"in the exercise of powers delegated by central, regional or local governments or authorities."*

In conclusion, from the textual analysis of both the SPS Agreement and the GATS, it can be argued either that an SPS measure needs, or that it does not need an involvement of a government (see further references to case law and interpretative documents in Report 2 of this study).

The second important matter within the definition of "*measure"* is that it relates to "any measure *applied*". It could be argued that non-governmental standard-setting bodies usually do not *apply* measures, and to that extent at least they are not covered by the provisions of the SPS Agreement dealing with the *application* of measures. A supporting argument could be made along the lines that international standard-setting organisations as defined in the SPS Agreement are not in any way disciplined by the Agreement and the position of non-governmental standard-setting bodies ought to

[48] Document CAC/GL 20–1995.

be congruent with this. Thus the focus of this legal analysis is mainly on the non-governmental entities that are *applying* private standards *(as opposed to **taking** measures)*, on the basis that it is the application of standards that is subject to discipline under the SPS Agreement.

Following this line of argumentation, sections 1.1.3.2 to 1.1.3.9 below describe, for each provision of the SPS Agreement, what the obligation of a WTO Member would be under the assumption that the provision relates to non-governmental bodies that are *applying* SPS measures. This process of systematic interpretation leads, in general, to realize that it would result in a set of absurd and disproportionate requirements on non-governmental bodies (if these entities were to include private operators).

1.1.3.2 Basic rights and obligations under the SPS Agreement

Article 2 of the SPS Agreement sets out the "Basic Rights and Obligations". In brief, WTO Members have the right to take SPS measures, provided that the measures are based on scientific principles and are not arbitrary. The measures must not discriminate between WTO Members, nor constitute disguised restrictions of international trade:

> *"1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.*
> *2. Members shall ensure that any sanitary or phytosanitary measure is **applied** only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.*
> *3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be **applied** in a manner which would constitute a disguised restriction on international trade"(emphasis added).*

In the light of Article 13 of the SPS Agreement, these provisions may relate indirectly to the obligations of WTO Members concerning *"measures"* of non-governmental standard-setting and standard-applying organisations.

Below we describe what the implied obligation of a WTO Member would be under each obligation of the SPS Agreement, provided that non-governmental bodies applying measures were covered by Article 13 of the SPS Agreement. So, for example, the interpretation of Article 2.2 as it might apply to SPS measures of non-governmental bodies would be along these lines:

> *"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories any sanitary or phytosanitary measure that is applied by non-governmental entities is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."*

Similarly the implied extended interpretation of Article 2.3 of the SPS Agreement would be as follows:

> *"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their*

territories the sanitary and phytosanitary measures that are applied by non-governmental entities do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Such sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."

1.1.3.3 Harmonisation

Article 3 of the SPS Agreement provides for the principle of harmonization which means that measures must be based on international standards (where they exist), although WTO Members are at liberty to formulate measures of higher standards if there is scientific justification, or as a consequence of the level of sanitary or phytosanitary protection:

"1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
(…)
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement."

In the light of Article 13 of the SPS Agreement, this provision may relate indirectly to the obligations of WTO Members concerning compliance of measures applied by non-governmental standard-setting and standard-applying organisations. The implied extended interpretation of Article 3.2, in the light of Article 13 of the SPS Agreement, would be as follows:

"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories the sanitary and phytosanitary measures that are applied by non-governmental entities and which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, have a scientific justification"

However, it appears uncertain how Article 3 of the SPS Agreement can pertain in any way to private standards or their application unless – improbably – such standards have been recognised via the procedure set out in point (d) of the definition below. The SPS Agreement defines the term international standards, guidelines or recommendations as follows:

(a) for food safety, 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;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

1.1.3.4 Equivalence

Article 4 of the SPS Agreement relates to equivalence:

> *"1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.*
> *2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures."*

The implied extended interpretation of Article 4, in the light of Article 13 of the SPS Agreement, would be along the following lines:

> *"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories, in applying SPS measures, the non-governmental entities accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.*

1.1.3.5 Risk assessment

According to Article 5 of the SPS Agreement, measures shall be based on a risk assessment:

> *"1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations."*

The obligation established by Article 5 of the SPS Agreement may apply towards non-governmental standard-setting and standard-applying organizations in the light of Article 13 of the SPS Agreement. If WTO members have obligations in relation to the application of SPS measures by non-governmental entities then the implicit meaning of this provision would be the following:

"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories the sanitary and phytosanitary measures that are applied by non-governmental entities are based on an assessment, as appropriate to the circumstances of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations."

1.1.3.6 Regional conditions

Article 6.1 of the SPS Agreement concerns the adaptation to regional conditions including pest- or disease-free areas and areas of low pest or disease prevalence:

"Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary 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. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, 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 organizations."

The implied extended interpretation of Article 6.1, in the light of Article 13 of the SPS Agreement, would be something like:

"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories the sanitary and phytosanitary measures that are applied by non-governmental entities are adapted to the sanitary or phytosanitary 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 ."

1.1.3.7 Transparency – notification of SPS measures

It appears that the transparency obligations (Article 7 and Annex B to the SPS Agreement) only apply to "sanitary and phytosanitary measures such as laws, decrees or ordinances *which are applicable generally* (see paragraph 1 and footnote 5, at Annex B to the SPS Agreement), as follows:

"Members shall ensure that all sanitary and phytosanitary regulations (footnote 5: Sanitary and phytosanitary measures such as laws, decrees or ordinances ***which are applicable generally****) which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them (emphasis added)."*

Thus, it does not seem to apply to voluntary standards set by non-governmental entities. On the other hand, as the footnote explicitly refers to measures *which are applicable generally*, this provision also seems to indicate that there are *other* SPS measures than those *which are generally applicable*. This may refer to standards adopted by governmental and non-governmental entities.

1.1.3.8 Control, inspections and approval procedures

Control, inspection and approval procedures are dealt with in Article 8 of the SPS Agreement:

> *"Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement."*

The implied extended interpretation of Article 8, in the light of Article 13 of the SPS Agreement, would be along the following lines:

> *"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories non-governmental entities observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement."*

1.1.3.9 Special and differential treatment

Article 10.1 of the SPS Agreement concerns special and differential 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."*

The implied extended interpretation of Article 10, in the light of Article 13 of the SPS Agreement, would be something like:

> *"Members shall formulate and implement positive measures and mechanisms and take such reasonable measures as may be available to them to ensure that within their territories the sanitary and phytosanitary measures that are prepared and applied by non-governmental entities take account of the special needs of developing country Members, and in particular of the least-developed country Members."*

1.2 TBT Agreement

The main purpose of the TBT Agreement is to discipline the application of technical regulations by WTO Members so that they do not constitute an arbitrary or unjustified barrier to trade. The TBT Agreement deals with the development of standards to promote international trade as ancillary to this central objective.

1.2.1 Provisions of the TBT Agreement which relate directly to the obligations of WTO Members concerning activities of non-governmental standard-setting and standard-applying organisations

Article 2 is the key provision of the TBT Agreement and includes, *inter alia*, the following provisions: Article 2.1 of the TBT Agreement includes the Most-Favoured-Nation (MFN) and national treatment obligations and states that *"in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country"*. Under Article 2.2 of the TBT Agreement, WTO Members "*shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective* (examples are listed in Article 2.2)*, taking account of the risks non-fulfilment would create."*

The TBT Agreement encourages WTO Members to use existing international standards for their national regulations, or for parts of them, unless *"their use would be ineffective or inappropriate"* to fulfil a given policy objective. This may be the case, for example, *"because of fundamental climatic and geographical factors or fundamental technological problems"* (Article 2.4). The TBT Agreement encourages WTO Members "*to participate, within the limits of their resources, in the work of international bodies for the preparation of standards*" (Article 2.6). Under Article 2.7 of the TBT Agreement, WTO Members must give positive consideration to accepting as equivalent technical regulations of other WTO Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

Article 2 of the TBT Agreement is applied through the provisions of Article 3 to the preparation, adoption and application of technical regulations by local government bodies and non-governmental bodies:

> *"With respect to their local government and non-governmental bodies within their territories:*
> *3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.*
> *3.4 Members shall not take measures which require or encourage local government bodies or nongovernmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.*
> *3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies."*

Article 4.1 of the TBT Agreement deals with the "Preparation, Adoption and Application of Standards" by central government standardizing bodies, local government and non-governmental standardizing bodies, as well as regional standardizing bodies:

> *"Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). 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 Code of Good Practice. 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 Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice."

In essence, WTO Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with this Code of Good Practice. Furthermore, WTO 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 Code of Good Practice.

The Code of Good Practice for the preparation, adoption and application of standards is established in Annex 3 to the TBT Agreement. In broad terms, the Code states that standards should be non-discriminatory as between the products originating in different countries, and should not create unnecessary obstacles to trade; that national or other standards should, wherever appropriate, be based on relevant international standards; that standardizing bodies should avoid duplication of effort of other standardizing bodies; that standards should be performance-based rather than expressed in terms of design or product description; and that standards should be developed in a transparent manner and standardizing bodies should seek and be responsive to comments by interested parties during the development process.

According to point B of the General Provisions, the Code is open to acceptance by non-governmental bodies as well:

"This 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; to any governmental regional standardizing body one or more members of which are Members of the WTO; 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 (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body")."

As stated above, point 6 of Annex 1 ("Terms and their definitions for the purpose of this agreement") defines "non-governmental body" as follows:

"Body 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."

This definition seems to acknowledge by implication the existence of non-governmental bodies which do *not* have the legal power to enforce a technical regulation, as it defines "non-governmental body" as *"body (…) including a non-governmental body which <u>has</u> legal power to enforce a technical regulation."* This definition seems to refer to two different types of non-governmental bodies. It could be argued that if there are non-governmental bodies which have legal power to enforce a technical regulation, there must be non-governmental bodies who do not have legal power to enforce a technical regulation, thus which adopt or implement voluntary standards. The question remains open as to whether the TBT Agreement applies to both types of non-governmental bodies.

The basic rules in regard to the conduct and recognition of conformity assessment by central governmental bodies are set out in Article 5 and 6 of the TBT Agreement. Articles 8 applies these rules, somewhat modified, to non-governmental bodies.

Article 5.1 of the TBT Agreement (Procedures for Assessment of Conformity by Central Government Bodies) provides the following:

> *"Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members: (…)"*

According to one WTO scholar, *"the typical situation in which Article 5 applies is that where a central government body is required to assess the conformity of a product with a regulation or standard. However, it can happen that, even where the rules are issued by the central government, the task of conformity assessment is allocated to a local government or non-governmental body. Such action constitutes a form of accreditation, and therefore falls within the TBT Agreement's definition of "conformity assessment". Article 5 imposes obligations on central governments regarding conformity assessment, but the activities which it regulates suggest that its scope does not include accreditations. In any event, such a delegation of responsibility constitutes a good example of a central government "relying on" a non-governmental body, and consequently would be covered by Article 8 of the TBT Agreement."* [49]

Article 8 of the TBT Agreement relates directly to the obligations of WTO Members concerning activities of non-governmental bodies that apply procedures for assessment of conformity. Paragraph 1 therefore provides that:

> *"Members shall take such reasonable measures as may be available to them to ensure that nongovernmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6."*

Article 8.2 of the TBT Agreement provides that:

> *"Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures."*

Article 10 of the TBT Agreement sets out obligations of WTO Members concerning the "Information About Standards and Conformity Assessment Procedures". This includes for example information on standards adopted or proposed within their territories by non-governmental standardizing bodies:

> *"10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:*

[49] Edmond Mc Govern, *International Trade Regulation*, Globefield Press (loose leaf, Issue 20 May 2006), at paragraph 7.244.

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements."

Articles 10.1.1 and 10.1.3 of the TBT Agreement concern the obligations of WTO Members regarding certain activities of non-governmental bodies which have legal power to enforce a technical regulation.

Finally, Article 11.5 (Technical Assistance to Other Members) provides that WTO Members shall advise other WTO Members on conformity assessment operated by non-governmental bodies within the territory of the Member.

"11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request."

There is no provision in the TBT Agreement on technical assistance to other WTO Members in relation to the adoption or preparation of (voluntary) standards.

1.2.2 Applicability of the TBT Agreement to certain non-product related non-governmental standards

The TBT Agreement defines "standard" in paragraph 2 of Annex 1 as a:

"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."

Therefore the language of the TBT Agreement seems to indicate that the Agreement is not applicable to processes and production methods (hereinafter PPMs) which are "not related to the product".

In this 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.

1.3 Other WTO agreements

For the purpose of the study we also analysed other WTO Agreements and looked particularly for any definitions or mentions of the following terms: "non-governmental", "governmental" (as opposed to "non-governmental"), "bodies", "organizations", "enterprises", "entities", "private", "public" (as opposed to "private"), "standards", "measures".

No relevant reference to any of those terms was found in the following agreements: GATT, Agreement on Agriculture, Agreement On Trade-Related Aspects Of Intellectual Property Rights (TRIPS), Agreement On Import Licensing Procedures, Agreement on Textiles and Clothing, Agreement on Trade-Related Investment Measures (TRIMs), Anti-dumping Agreement, Agreement on Safeguards.

1.3.1 General Agreement on Trade in Services

As stated above, Article I.3 ("Scope and Definitions") of the General Agreement on Trade in Services (hereinafter, GATS) defines when a measure affecting the trade in services is considered to be a measure taken by a WTO Member. According to Article I.3, for the purposes of GATS:

> "(…) *"measures by Members" means measures taken by:*
> *(i) central, regional or local governments and authorities; and*
> *(ii)* ***non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities****;*
> *In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory*" (emphasis added).

Therefore, measures taken by non-governmental bodies are within the scope of application of the GATS but only if they are taken *"in the exercise of powers delegated by central, regional or local governments or authorities."*

Article VII.5 of the GATS also mentions "non-governmental bodies" in relation to the recognition of certificates, licences, education, etc. According to it *"…****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*" (emphasis added).

1.3.2 Annex on Telecommunications

The Annex on Telecommunications in its paragraph 7 states that WTO Members need to consult intergovernmental and non-governmental organizations on matters arising from the implementation of the Annex:

> *"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" (emphasis added)*

1.3.3 Agreement on Subsidies and Countervailing Measures

In the Agreement on Subsidies and Countervailing Measures (SCM Agreement) there are the entrustment and direction provisions (Article 1.1 (a) (iv) SCM) covering subsidies granted within the territory of a WTO Member by private parties but deemed to be governmental action:

"Article 1 Definition of a Subsidy
1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
(iii) a government provides goods or services other than general infrastructure, or purchases goods;
(iv) 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 illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
or
(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
and
(b) a benefit is thereby conferred" (emphasis added).

1.3.4 Agreement on Preshipment Inspection

In its Article 1 (Coverage – Definitions), the WTO Agreement on Preshipment Inspection provides that preshipment activities may be carried out by (private) preshipment inspection entities" contracted or mandated by the government, or any government body, of a WTO Member:

"1. This Agreement shall apply to all preshipment inspection activities carried out on the territory of Members, whether such activities are contracted or mandated by the government, or any government body, of a Member.
2. The term "user Member" means a Member of which the government or any government body contracts for or mandates the use of preshipment inspection activities.
3. Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member.
4. The term preshipment inspection entity" is any entity contracted or mandated by a Member to carry out preshipment inspection activities.

Article 2 provides for obligations on user members, to ensure matters such as non-discrimination (Article 2.1): *"They shall ensure uniform performance of inspection by all the inspectors of the preshipment inspection entities contracted or mandated by them"* or transparency (Article 2.6) in inspection activities carried out by (private) preshipment inspection entities: *"User Members shall*

ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The preshipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of user Members relating to preshipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under paragraph 21. (…)"

1.4 Conclusions

From the textual analysis of the SPS, TBT and other WTO agreements, the following can be concluded:

Application of the provisions of the SPS Agreement to non-governmental standard setting and standard applying entities *in the light of Article 13 of the SPS Agreement* depends very much on the definition of "non-governmental body".

It may be argued that only private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special legal status fall under the definition of non-governmental entity under the SPS Agreement.

On the other hand, it can also be argued that "non-governmental entity" under the SPS Agreement is broader and also includes other private bodies which have not been entrusted by government with certain tasks but *which operate within the territories of a WTO Member.*

From the literary interpretation of Article 13 of the SPS Agreement, the question of the definition of "non-governmental entity" remains open.

Even if non-governmental entities are not directly addressed by the provisions of the SPS Agreement, *in the light of Article 13 of the SPS Agreement*, WTO Members have a responsibility to ensure that the activities of non-governmental entities comply with the Agreement.

Under Article 4 of the TBT Agreement, WTO Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with this Code of Good Practice. Furthermore, WTO 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 Code of Good Practice.

Article 8 of the TBT Agreement relates directly to the obligations of WTO Members concerning activities of non-governmental bodies that apply procedures for assessment of conformity.

Other WTO Agreements, such as the 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 in order to delimit non-governmental from governmental activities.

Report 2

"Relevant WTO 'case law' and interpretative guidance in the form of ad hoc decisions, or preparatory works on the SPS and TBT Agreements"

As requested under the Terms of Reference, this report reviews, consolidates and references, as appropriate, all relevant interpretative information, whether arising in the context of the negotiation and drafting of the SPS and TBT Agreements, or subsequent to their entry into force in terms of WTO "case law" and SPS or TBT Committee decisions (if any). The review of applicable WTO "case law" has not been limited to instances of WTO dispute settlement proceedings directly involving SPS or TBT issues.

1. Consideration of WTO case law

1.1 Case law on Article 13 of the SPS Agreement

There is little WTO case law on the interpretation of Article 13 of the SPS Agreement and, specifically, no case law in relation to *non-governmental entities* and Article 13 of the SPS Agreement.

In the report of the Panel in *Australia – Measures Affecting Importation Of Salmon – Recourse To Article 21.5 By Canada* - [50] Canada claimed that Australia was legally responsible for the Tasmanian ban (import prohibition on Canadian salmon) under Article 13 of the SPS Agreement and Article 27 of the Vienna Convention on the Law of Treaties.

The Panel stated as follows:

> *68. "(…) we are of the view that the Tasmanian ban is to be regarded as a measure taken by Australia, in the sense that it is a measure for which Australia, under both general international law and relevant WTO provisions, is responsible.[51] We note also that the Tasmanian measure is a sanitary measure applied within the territory of Australia that directly affects international trade and thus, pursuant to Annex A, paragraph 1, and Article 1.1 of the SPS Agreement, is subject to the SPS Agreement.*
>
> *69. As recognized by Australia in its letter of 9 December 1999, the Tasmanian measures "could be characterized as … measures taken by 'other than a central government body' in the sense of Article 13 of the SPS Agreement, and would constitute measures 'taken by a regional government' within Australia's territory, in the sense of Article 22.9 of the DSU". Article 13 of the SPS Agreement provides unambiguously that: (1) "Members are fully responsible under [the SPS] Agreement for the observance of all obligations set forth herein"; and (2) "Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than*

[50] Panel Report, *Australia – Measures Affecting Importation Of Salmon - Recourse To Article 21.5 By Canada*, WT/DS18/RW of 18 February 2000.

[51] In respect of general international law, see Article 27 of the Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty") and Article 6 of the Draft Articles on State Responsibility of the International Law Commission ("The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State", Yearbook of the ILC, 1996, Chapter III).

> *central government bodies". Reading these two obligations together, in light of Article 1.1 of the SPS Agreement referred to earlier, we consider that sanitary measures taken by the Government of Tasmania, being an "other than central government" body as recognized by Australia, are subject to the SPS Agreement and fall under the responsibility of Australia as WTO Member when it comes to their observance of SPS obligations. In addition, Article 22.9 of the DSU states clearly that "[t]he dispute settlement provisions of the covered agreements [including the DSU itself] may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member", including, as acknowledged by Australia, the measures taken by Tasmania at issue here. As a Panel acting under these dispute settlement provisions, we are thus entitled to consider whether the Tasmanian measures observe the SPS Agreement."*[52]

In summary, the Panel found that the Tasmanian measure was inconsistent with Articles 5.1 and 2.2 of the SPS Agreement and it did not further examine any other Canadian claim in this respect, in particular the Panel found that Canada had not substantiated a claim under Article 13 of the SPS Agreement obliging WTO Members to formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies.

Therefore, the Panel did not decide here whether Australia has met this obligation. However, this did not prevent the Panel from making reference to Article 13 in support of the finding that the Tasmanian measure is subject to the SPS Agreement and falls under the responsibility of Australia.[53]

Although this report of the Panel did not concern non-governmental bodies, it permits to draw some indications on how a Panel could analyse a possible violation of the SPS Agreement by a non-governmental body. First, it would look at Article 13 to determine whether there is "responsibility" of a WTO Member and then, "reading in the light of Article 1.1 SPS," whether the measure at stake is an SPS measure and, finally, whether there is a violation of the SPS Agreement.

1.2 Other case law

There is no relevant case law under the TBT Agreement in relation to non-governmental bodies.

The question of governmental versus private action has been analysed in the Report of the Panel in *Japan – Measures Affecting Consumer Photographic Film and Paper*[54]:

> *"As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term measure in Article XXIII:1(b) 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. But 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*

[52] Panel Report, WT/DS18/RW, Paragraphs 7.12 and 7.13.
[53] Panel Report, WT/DS18/RW, Paragraph 7.162.
[54] Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R of 31 March 1998.

to a government because of some governmental connection to or endorsement of those actions."[55]

The Panel gave, as an example, a 1989 Panel Report on *EEC – Restrictions on Imports of Dessert Apples*[56]. This Panel noted the following:

"The 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".

That Panel found that both the buying-in and withdrawal systems established for apples under the EEC regulation could be considered to be governmental measures for the purposes of Article XI:2I(i).

The Panel in *Japan – Measures Affecting Consumer Photographic Film and Paper*[57] concluded the following:

"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."

Thus, it appears that a degree of government involvement is required to put a measure under the scrutiny of the WTO Agreements. "A degree of governmental involvement" could be useful as a requirement to delimit "non-governmental bodies" from "private bodies".

1.2.1 Case law on the direction and entrustment provisions of the SCM Agreement

The Panel in *EC – DRAMS Countervailing Measures*[58] stated that it "share[d] [the Export Restraints] panel's basic understanding of the terms 'entrust' or 'direct' as requiring a government action which 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"; and said that "the investigating authority will need to ensure that the evidence of entrustment or direction is probative and compelling and this will obviously differ from case to case".

The Appellate Body in *U.S. – DRAMS CVD Investigation*[59] concluded that "'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," and thus modified the Panel's interpretation of Article 1.1(a)(1)(iv) "to the extent that it may be understood as limiting the terms 'entrusts' and 'directs' to acts of 'delegation' and 'command'".

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[55] Panel Report, WT/DS44/R, Paragraph 10.52.

[56] Panel Report, *EEC - Restrictions on Imports of Dessert Apples* (Complaint by Chile), adopted on 22 June 1989, BISD 36S/93, 126.

[57] Panel Report, WT/DS44/R, Paragraph 10.56.

[58] Panel Report, *European Communities - Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R of 3 August 2005, see paragraphs 7.18-146.

[59] Appellate Body Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, see paragraphs 102-197.

The Panel in *U.S. – DRAMS CVD Investigation*[60] concluded that, "[a]s a matter of law, … we do not consider that the plain meaning of Article 1.1(a)(1)(iv) of the SCM Agreement requires an investigating authority to demonstrate an explicit government action addressed to a particular entity, entrusting or directing a particular task or duty".

The Panel in *Korea – Vessels ("Shipbuilding Subsidies")*[61] discussed in context of SCM Agreement Article 1 – Existence of Subsidies and noted that the words "entrust" and "direct" indicate that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction), but stated that the entrustment or direction need not be "explicit".

The Panel in *U.S. – Export Restraints*[62] rejected the argument that an export restraint is "functionally equivalent" to an entrustment of, or direction to, a private body to provide goods domestically; and concluded that the ordinary meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command."

In line with this case law, the requirements of "entrusting" or "directing" could be useful to delimit "non-governmental bodies" from "private bodies".

1.3 Application of case law to SPS measures

The question is whether the aforementioned case law applies to SPS measures. Article 13 of the SPS Agreement states that "*Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories (…) comply with the relevant provisions of this Agreement. "*

Annex A to the SPS Agreement defines SPS measure as

> *"Any 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;*
> *I 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.*
>
> *Sanitary or phytosanitary measures include 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;*

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[60] Panel Report, *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R of 20 July 2005, see paragraphs 7.10-178.

[61] Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R of 7 March 2005, see paragraphs 7.350-426.

[62] Panel Report, *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R of 29 June 2001, see paragraphs 8.15-75.

> *provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety. "*

Again, the emphasis is on *"measure applied within the territory of the Member"*. Finally, concerning the type of measure, further to "all relevant laws, decrees and regulations", sanitary or phytosanitary measures under the SPS Agreement include "requirements and procedures", which may not necessarily be governmental measures such as laws, decrees and regulations.

In determining the scope of measure, a look into other WTO agreements may provide interpretative guidance.

Article I:3 of the General Agreement on Trade in Services (GATS) defines measures by WTO Members as:

> *"Measures taken by:*
> *(i) central, regional or local governments and authorities; and*
> *(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.*
> *In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory."*

Therefore, measures taken by non-governmental bodies are within the scope of application of the GATS, however, only if they are taken *"in the exercise of powers delegated by central, regional or local governments or authorities."*

The SPS Agreement does not explicitly refer to measures by non-governmental bodies "*in the exercise of powers delegated by central, regional or local governments or authorities."* It just states that "*non-governmental entities within their territories"* shall *comply with the relevant provisions of this Agreement"* and that sanitary or phytosanitary measures may include other measures than governmental legislation (for example in the form of "*requirements" and "procedures").*

In conclusion, there are also arguments which permit the possibility of analyzing private standards, established by "non-governmental entities, under WTO rules, particularly under the SPS Agreement.

However, the Panel in *EC – Biotech Products*[63] established that an "SPS measure" consists of three elements: the purpose of the measure, its legal form and its nature":

> *"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)*

[63] Panel Report in *European Communities – Measures affecting the approval and marketing of biotech products*, adopted on 29 September 2006 [WT/DS291/R, WT/DS292/R, WT/DS293/R] at paragraph 7.149. Furthermore, in paragraph 7.162 the Panel gives an example and states : that 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).*"

("requirements and procedures, including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; [etc.]")."

Thus, according to this very recent report of a Panel, to comply with the second requirement (the form element) it appears that SPS measures can only be in form of laws, decrees and regulations, while "requirements and procedures" are only an additional "nature element".

However, a recent Note of the Secretariat to the Committee on Sanitary and Phytosanitary Measures on Private Standards and the SPS Agreement"[64] goes against the interpretation of the Panel. The Secretariat stated that "(…), 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."

Therefore, a WTO Panel and the WTO Secretariat have expressed different opinions as to whether measures which have not been adopted by a government can be defined as SPS measures.

2. Interpretative information

2.1 Interpretative information in the context of the negotiation and drafting of the SPS and TBT Agreements

2.1.1 Preparatory works on the TBT Agreement

On 29 August 1995 the Committee on Trade and Environment (Committee on Technical Barriers to Trade) drafted a document on the "Negotiating history of the coverage of the Agreement on Technical Barriers to Trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics".[65] The document focuses on these selected number of issues, and does not attempt to provide a comprehensive review of the negotiating history of all disciplines in the Tokyo Round and WTO Agreements on Technical Barriers to Trade ("the TBT Agreement").

For the purpose of this study, considerations in relation to the negotiating history of the definitions of the terms "standard" and "standardizing body" and in relation to disciplines for the preparation, adoption and application of standards by non-governmental bodies were of particular interest.

2.1.1.1 Definitions

Initially, in the Tokyo Round negotiations, the term standard was used to denote both mandatory and voluntary standards, and different obligations regarding preparation, adoption and use of standards were considered for three categories: mandatory central government standards, mandatory local government standards, and voluntary standards.

For mandatory central government standards, the Draft Standards Code specified first level of obligations on the signatories (i.e., mandatory obligations). Second level of obligations were specified for the other two categories of standards (i.e., signatories were to use all reasonable means within their power to ensure that the relevant obligations were met). One of the main concerns during the negotiations was the question of balance of rights and obligations amongst the signatories, for instance, the alleged inequality of obligations which would apply between countries with a large

[64] G/SPS/GEN/746 of 24 January 2007.
[65] WT/CTE/W/10; G/TBT/W/11 of 29 August 1995.

proportion of standardization work carried-out by private sector bodies producing voluntary standards and those where all standards were mandatory.

After several years of negotiation, the final text of the Tokyo Round TBT Agreement, Annex 1 (Terms and their Definitions for the Specific Purposes of the Agreement) contained the following definitions:

Standard:

> *"A technical specification approved by a recognized body for repeated or continuous application with which compliance is not mandatory."*
>
> *Explanatory Note to the definition of standard:*
> *"The corresponding ECE/ISO definition contains several normative elements which are not included in the above definition. Accordingly, 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."*

Standardizing body:

> *"A governmental or non-governmental body, one of whose recognized activities is in the field of standardization."*

The definitions under the Tokyo Round TBT Agreement differed from those used by the Economic Commission for Europe and the International Organization for Standardization in the ECE/ISO standards.

The definition of "standard" that appeared in the final text of the WTO TBT Agreement, after the negotiations in the Uruguay Round, reads as follows:

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.*
>
> *Explanatory note:*
> *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".*

No specific definition of "standardizing body" was given in the revised Annex 1 of the WTO TBT Agreement. However, Annex 1 contains the statement that "[t]he terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the

definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement". The definition of "standardizing body" in the ISO/IEC Guide 2: 1991 remains unchanged from the previous version of the Guide (i.e. from the fifth edition of the Guide is as follows: *"body that has recognized activities in standardization")*.

2.1.1.2 Disciplines for the preparation, adoption and application of standards

In the Tokyo Round of negotiations, Section 4 of the Draft Standards Code contained disciplines with regard to preparation, adoption and use of voluntary standards. The focus was on preventing voluntary standards from becoming obstacles to international trade, cooperation in preparation of international standards, use of international standards, providing notice and taking account of comments when voluntary standards are not substantially the same as international standards, exceptions to certain disciplines in case of urgent problems, and compliance of regional standards bodies with the relevant disciplines. These disciplines were specified in terms of "best efforts" or second level of obligations. For example, the first paragraph of Section 4 stated that:

> *"Adherents shall use all reasonable means within their power to ensure that voluntary standards are not prepared, adopted or applied with a view to creating obstacles to international trade. They shall likewise use all reasonable means within their power to ensure that neither the voluntary standards themselves, nor their application have the effect of creating an unjustifiable obstacle to international trade."*

In the Uruguay Round, several delegations wanted enhancement of the disciplines on preparation, adoption and application of standards in the Tokyo Round TBT Agreement. A number of proposals addressed increased transparency and participation in the standards-related activities of different types of standardizing bodies (i.e. central government, local, regional or non-governmental standardizing bodies).

India proposed[66] notification of voluntary draft (or proposed) standards, including those draft standards which were not national standards, but whose wide adoption by the local industry gave them a status similar to national standards; notification of voluntary standards that were made mandatory by legislation or by statutory orders; and information to be provided on, and ensuring compatibility among, standards issued by recognized national bodies and other standardization bodies within the territory of a party.

India explained that many parties to the Agreement were not notifying voluntary draft standards even though they were national standards, or were being widely applied by the local industry which gave them a status similar to that of national standards. Also, it was difficult to obtain information on standards that had been made mandatory by legislation or on standards being formulated by different bodies in the country. India suggested that the standards prepared by local bodies be notified and that a national body be made responsible for providing information on, and ensuring compatibility of, standards issued by other recognized bodies in the country.

The EEC proposed[67] that the Agreement's disciplines pertaining to non-governmental standards bodies be enhanced, both at the national level and at the local level. For this purpose, it proposed a Code of Good Practice for Non-Governmental Standardizing Bodies as an annex to the Agreement.[68]

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[66] MTN.GNG/NG8/W/9, 45.
[67] MTN.GNG/NG8/W/8.
[68] TBT/W/110 of 7 July 1988. The EEC considered improvement of the above provisions desirable for the following reasons:

According to the EEC, the aim of this proposal included making "the obligations already laid down in Articles 4, 6 and 8 of the Agreement more concrete, and to provide some yardstick by which the performance of both Parties and **private bodies** could be measured" (emphasis added). The disciplines in the EEC's initial proposal for the Agreement covered transparency, non-discriminatory treatment, possibility to comment in writing, efforts to rely on international standards for adopting technical regulations and standards, determining conformity, and operating certification systems.

Subsequently, the EEC provided a more detailed proposal on the Code[69]. It stated the following: "The TBT Agreement imposes direct legal obligations only on central government bodies. The standardization, testing and certification activities of local government bodies and of **non-governmental bodies** are covered only indirectly, if at all, through the obligation of Parties to "take such reasonable measures as may be available to them" to ensure that those other bodies follow certain provisions of the Agreement to which reference is made. This has been called a "best effort" or "second level" type of obligation for Parties. Bodies other than central government bodies are, therefore, not addressed directly, and too few of them know that they are already to some extent covered by the Agreement. Even if they are aware of this, it is difficult for them to deduce from the Agreement what precise operational rules they are supposed to follow" (emphasis added)

The EEC clarified that acceptance of the Code by non-governmental bodies would be voluntary, subject to the Parties taking all practicable measures to ensure acceptance of and adherence to the Code by non-governmental standardization and certification bodies within their territory. However, while adherence to the Code would be voluntary, a stimulus would exist in the prestige attached to adherence. A code would also be self-enforcing, by denying certain benefits to non-parties. It would be self-policing, by granting other parties the right to comment and lodge complaints. The EEC also suggested that the following aspects of transparency to be included in the Code of Good of Good Practice for Non-Governmental Standardizing Bodies:

> *"(1) Annual information would have to be available on a body's programme for the adoption of standards or technical regulations in the coming year, and on its adoption of international standards during the previous year;*
> *(2) at least sixty days in advance, information would have to be available on any particular standard or technical regulation to be adopted, unless substantially the same as an international standard, as well as on a certification system to be introduced;*
> *(3) whether this information should be made available at a national enquiry point, obtainable for interested Parties on request, or should be notified to other Parties via an international central point (such as ISONET) is to be investigated further;*

(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 world-wide shift appears to be occurring towards a greater use of standards drawn up by non-governmental bodies and a lesser use of technical regulations drawn up by central government bodies. This includes the EEC. (…)
(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.
(d) This lack of success could be due to three factors:
    a. There may be insufficient incentives both for no-governmental bodies and Parties to fully abide by their substantive obligations;
    b. Those substantive obligations themselves may be insufficiently strict or elaborate;
    c. The 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."

[69] TBT/W/124 of 27 July 1989.

> *(4) the full text of a proposed technical regulation, standard or certification system should be available upon request;*
> *(5) Technical regulations and standards which have been adopted should be published promptly in such a manner as to enable interested Parties to become acquainted with them. They should be made available upon request subject to the usual commercial terms and conditions."*

The discussions in the TBT Committee showed diverse opinions on the proposals.[70] Based on the discussions, revised proposals were submitted by India[71] with regard to voluntary draft standards and by the EEC[72] with regard to the Code of Good Practice. The Code of Good Practice for non-governmental standardizing bodies proposed by the delegation of the United States would, according to a statement of the representative of the EEC, only apply to national bodies and did not foresee any real link with the Agreement. Private bodies would negotiate voluntary guidelines among themselves. Such voluntary guidelines might or might not have any link with GATT objectives. Adherence of the bodies to such guidelines would be assumed. As a result, any transparency or surveillance would be missing.[73]

In its first revision of the proposal for a Code of Good Practice for Non-Governmental Standardizing Bodies, the EEC covered non-governmental bodies at the regional, national and local levels.

By October 1990, the discussions resulted in agreement on the text of Article 4 and the Code of Good Practice, which was reflected in a draft of the Agreement. This text of Article 4 and the Code of Good Practice was the same as that in the final text of the WTO TBT Agreement.

2.1.2 Preparatory works on the SPS Agreement

We are not aware of any comprehensive document on the preparatory works on the SPS Agreement in general or on the negotiating history of Article 13 SPS in particular.

From interviews with first hand witnesses of the negotiations in the Uruguay Round, extending over five years, it appears that there were no indications that, at any time, any individual or country proposed during the negotiations that the SPS Agreement would have application to the activities of private sector organisations that impose SPS-type requirements for their own purposes. It appears that there was no substantive debate on any such proposition.[74] This appears to be confirmed by the lack of comments to this end in the preparatory works and minute of the negotiations which have been reviewed.

Therefore, from the negotiating history, it seems that it was not anticipated in any way that the SPS Agreement would be applied by WTO Member governments to constrain the practices of business enterprises (it can be argued 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).

[70] MTN.GNG/NG8/W 4, 6, 8, 10, 12, 16, 17 and 18.
[71] MTN.GNG/NG8/W/45.
[72] MTN.GNG/NG8/W/49 and 71.
[73] TBT/M/39 of 13 November 1990, paragraph 13.
[74] Interviews with Gretchen Stanton, Secretary of the SPS Committee and Digby Gascoine, who led the Australian delegation in the negotiation of the SPS Agreement in the Uruguay Round.

2.2 Interpretative information – expressed in WTO Committees

2.2.1 SPS Committee

In the WTO SPS Committee meeting on 29 and 30 June 2005 Saint Vincent and the Grenadines complained about private standards for bananas and other agricultural products, set by supermarkets or private retailers in the EC. Saint Vincent and the Grenadines were supported by Jamaica, Peru, Ecuador and Argentina. We believe that this is the first time that such a matter was raised in the Committee on Sanitary and Phytosanitary Measures.

Saint Vincent and the Grenadines' concerns were based on private sector standards or requirements for agricultural products required by European organizations such as EurepGAP. In particular, they challenged the so-called Good Agricultural Practices standard set by EurepGAP which exceeds whatever standards, if any, applied by the European Community. The complainants called for a clarification of Article 13 of the SPS Agreement, which provides that governments should ensure that non-governmental entities within their territories should comply with the relevant provisions of the agreement.

In response to the complaint, the European Community argued in the SPS Committee that those standard-setting organizations are private entities and reflect consumer demand. Furthermore, the European Community argued that EurepGAP is not the only body in setting standards. The European Community concluded that if there is any claim that these standards are formal governmental or EC standards, then WTO Members should raise the matter with the European Community and if the complainants were not claiming that the standards were official standards then any concerns should be raised with the non-governmental organizations concerned.

In response to the European Community's position, it has been argued that: *"private standards do not seem purely demand driven. This poses the question as to the degree to which private standards are consistent with the principles of the SPS Agreement. There currently seems to be little willingness from the EC (and other developed countries) to scrutinise more closely the private standard-setting procedures and to question the motives of the marketers who dominate sectors such as fruit and vegetables."*[75]

Private sector standards in the European Community were also discussed in the SPS Committee's meeting of 1-2 February 2006. However, as far as we are aware there has not been, to date, any other examination of this matter under WTO law within the SPS Committee or in the WTO in general, apart from the Note of the Secretariat of January 2007[76].

2.2.2 TBT Committee

In its *Second Triennial Review of the operation and implementation of the Agreement on Technical Barriers to Trade*[77] the TBT Committee noted that a diversity of bodies were involved in the preparation of international standards (i.e., intergovernmental or non-governmental bodies; specialized in standards development or involved also in other related activities), and that different approaches and procedures were adopted by them in their standardization activities. The review focuses only international standard-setting bodies and does not make any reference to voluntary standards elaborated by non-governmental bodies.

[75] Gideon Rabinowitz, *SPS Standards and Developing Countries – The Skeleton in the Closet for the Doha Round*, CUTS International Briefing Paper 1/2006.

[76] G/SPS/GEN/746 of 24 January 2007.

[77] G/TBT/9 of 13 November 2000, paragraphs 19 and 27.

At the *TBT Committee meeting held on 15 March 2002*[78] the EC drew the WTO Members' attention on the issue of "voluntary labelling". The EC noted that a number of labelling schemes were developed and applied by non-governmental bodies subjected to the Code of Good Practice (Annex 3 of the TBT Agreement). The Code provided disciplines for the transparency of these schemes and according to the EC Representative keeping those labelling schemes under review was a very important issue. Under the Agreement, however, such obligation is provided only for mandatory labelling and no such provision is contained in the Code of Good Practice for voluntary labelling. The EC called on the TBT Committee to consider discussing these issues.

At the *TBT Committee meeting held on 4 November 2004*[79] a representative of OECD introduced relevant work on good regulatory practice and market openness in the OECD. He pointed out that there had been a general move away from mandatory measures towards voluntary, industry-led standards and related conformity assessment procedures. This tendency was based on the realization that voluntary standards, being market driven, were more economically efficient, took less time to elaborate and offered more flexibility in implementation. He noted that an exception to this trend could be seen for certain consumer products which presented health and safety risks, or which might be characterized by information asymmetries. He also stressed the need for regulatory coordination between central and sub-central authorities, and with non-governmental parties, in order to strengthen the regulatory quality by involving technical expertise.

At the *TBT Committee meeting held on 22-23 March 2005*[80] the representative of Grenada reiterated the difficulties faced by developing countries regarding their participation in the work of international standard-setting organizations, due to the high cost of such participation which played as a potential barrier to international trade in that it made the recognition of conformity assessment more difficult. The representative called on the TBT Committee to find a way of addressing this issue because, in fact, in order to benefit from the system one had to be a member of it. The representative of Antigua and Barbuda added that ISO/IEC Standard on Supplier's Declaration of Conformity seemed to be proceeding the same way as ISO 9000: although purported to be voluntary, market forces were making it de facto mandatory.

At the *TBT Committee meeting held on 2 November 2005*[81], the United States Representative noted that in the WTO 2005 World Trade Report the term standards was used broadly to cover market-driven voluntary requirements as well as government regulations. The US raised its concern on the fact that the Report gave the impression that the standards developed by the ISO and IEC were recognized by the WTO, and given primary importance. She stressed that while the SPS Agreement recognized three specific standards-setting bodies, there was no similar identification in the TBT Agreement.

2.2.3 Other committees

The issue of voluntary environmental labels has also been discussed in the Committee on Trade and Environment, see for example document from Colombia of 9 March 1998 to the CTE and the TBT Committee[82] in which Colombia expresses the view that certain elements of voluntary eco-labelling schemes/programmes and criteria are covered by provisions of the TBT Agreement and the Code of Good Practice, including those on transparency. Furthermore, Colombia reiterated the importance of applying Article 4 of the TBT Agreement which states that the WTO Members shall take such

[78] G/TBT/M/26 of 6 May 2002, paragraph 127.
[79] G/TBT/M/34 of 5 January 2005, paragraphs 124-127.
[80] G/TBT/M/35 of 24 May 2005, paragraphs 49-52.
[81] G/TBT/M/37 of 22 December 2005, paragraph 148.
[82] WT/CTE/W/76 of 9 March 1998.

reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with the Code of Good Practice. In this particular case, no further action was taken in response to the issue raised by Colombia.

2.3 Interpretations expressed in the literature

2.3.1 Interpretation of Article 13 of the SPS Agreement

Further to the text of Article 13, Luff states that the SPS Agreement adds to the requirements of Article XXIV:12 GATT that that "members have transferred specific responsibilities to non-governmental entities":

> *"En 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 confie des taches de mise en œuvre d'une politique SPS.*
> *Cette disposition reprend partiellement les termes de l'Article XXIV :12 du GATT. Pour rappel, cet article engage les Membres de l'OMC a prendre "toutes les mesures raisonnables en [leur] pouvoir pour que sur [leur] territoire, les gouvernements et administrations régionaux et locaux observant le dispositions » [du GATT]. L'Accord SPS y ajoute la responsabilité du fait des entités non-gouvernementales auxquelles les Membres ont confié des responsabilités particulières."* [83]

Article XXIV (Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas):12 of the GATT 1947 provides the following:

> *"Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."*

Therefore Article XXIV:12 GATT seems to be the origin of Article 13 SPS.

In the chapter "Impact of the Agreement on Federal-State relations" Marsha A. Echols expresses the following:

> *"Exporters to a federal system may be faced with several layers of differing requirements, for example with the international standards being the least stringent, the federal standard being a middle ground and the subfederal standard being most stringent, While the Standards Code applied only to federal governments, the obligations of the SPS Agreement (e.g. scientific basis, limited harmonisation, definition of necessity, use of the appropriate level of protection, transparency) apply at the subfederal level when a local measure affects international trade.*

[83] David Luff, *Le droit de l'OMC - Analyse critique,* Bruylant, 2004, p. 269. English translation: "*Under Article 13 of the SPS Agreement, the SPS measures which are envisaged are those which are adopted by the central governments of the Members and by regional or local institutions or by non-governmental entities which have been entrusted by the Members with tasks to put in place an SPS policy. This provision partially uses the terms of Article XXIV:12 of the GATT. To remind, this article engages the WTO Members to take "such reasonable measures as may be available to then to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories." The SPS Agreement adds to those requirements the responsibility for the non-governmental entities to which the Members have given specific competences."*

While state and local governments – like national governments – remain free to protect at the level they consider appropriate, the Agreement does apply to them (As stated in the SPS Agreement "national governments are fully responsible for the observance of the Agreement by sub-national governments. This is a change from the GATT itself, which requires only "reasonable measures" to ensure observance of the GATT by subfederal governments, at least within the context of customs unions. Article XXIV:12. The Standards Code used the same "reasonable measures" language. See for example Article 3.1 (relating to the preparation, adoption and application of technical regulations and standards by local governments)). However the SPS Agreement does not require a federal government to impose an international standard on a subfederal governmental body and nothing in the Agreement requires a state or local government to meet or comply with a federal SPS measure. A measure must "support" the observance of the SPS Agreement by state and local governments.

In addition it must take measures reasonably available to it to ensure that non-governmental entities within its territory and regional bodies comply with the Agreement and must not take measures which support non-compliance by these entities. Only when a non-governmental entity complies with the Agreement may a Member rely on its services in implementing SPS measures.[84]

2.3.2 Applicability of the WTO agreements to private standards

It has been argued that *"while the process of notification under the SPS Agreement has contributed to increased transparency of official food safety and agricultural health measures, this has been accompanied by the proliferation of private standards that fall outside of the purview of the WTO."*[85]

In terms of their legal character, the national rules covered by the SPS Agreement include technical regulations and their conformity assessment procedures, but probably not standards produced by non-governmental bodies. [86]

Whereas much of the concerns about the impact of SPS standards on trade has concentrated on mandatory government requirements, there is growing awareness that voluntary standards can also impede trade. Firstly, compliance with established voluntary standards may be essential because consumers require compatibility with complementary products or services (for example plastic containers and microwave ovens). Secondly, voluntary standards may be closely related to consumer preferences (for example safety marks that are seen by consumers as an essential guarantee of minimum product quality). Thirdly, voluntary standards may be considered crucial for compliance with mandatory standards (for example ISO 9000 as a means of satisfying the requirements of food safety regulations). If such standards are so widely applied that they become *de facto* mandatory, there may in practice be little choice but for foreign suppliers to comply. [87]

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[84] Terence P. Stewart (editor), *The World Trade Organisation, The multilateral trade framework for the 21st century and U.S. implementing legislation*, Marsha A. Echols, *Sanitary and Phytosanitary measures*, p. 208.

[85] Steven M. Jaffee and Spencer Henson, *Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debate*, World Bank Policy Research Working Paper 3348, June 2004, p. 9.

[86] Mc Govern, *International Trade regulation*, Paragraph 14.41.

[87] Spencer Henson, *Sanitary and phytosanitary measures in a global context: trade liberalization versus domestic protection*, in: *Negotiating the future of agricultural policies – Agricultural trade and the millennium WTO round* [2000], edited by Sanoussi Bilal and Pavlos Pezaros.

In a recent paper, the World Bank addressed the possible adverse impact that both "public" and "private" standards may have on food exports from developing countries.[88] The WTO World Trade Report 2005 states that *"even if these standards are not protectionist in intent, they can have highly discriminatory consequences for trade partners"*[89].

2.3.3 Definition of measure

Under the heading "Measures", Mc Govern[90] states the following:

> *"WTO Agreements frequently use the word measure to refer to behaviour which 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. The Appellate Body has said that " a measure may be any act of a Member, whether or not legally binding, and can include even non-binding administrative guidance by a government", and can also be an omission or failure to act on the part of a Member. In fact, any act or omission attributable to a Member can be a "measure"*[91]*. The term 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."*

The WTO Dictionary of Trade Policy Terms defines measure as follows:

> *"Normally any law, rule, regulation, policy, practice or action carried out by government or on behalf of a government".*[92]

2.3.4 Application of the TBT Agreement

WTO Members must ensure that their central-government standardizing bodies[93] accept and comply with the Code of Good Practice. They must take reasonable measures to ensure the same response by their local governments and non-governmental standardizing bodies, as well as regional standardizing bodies of which they or bodies within their territories are members. In addition, they must not take measures which have the effect, directly or indirectly, of requiring or encouraging such bodies to act

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[88] Steven Jaffee et al. (2005), *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, Report no. 31207 of 10 January 2005, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, World Bank.

[89] Patrick Low et al (2005), World Trade Report, 2005, Part II, *Trade Standards and the WTO*". Available at:
http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf

[90] Mc Govern, *International Trade Regulation*, paragraph 1.1332; Appellate Body Report *Guatemala Cement*, paragraph 69, footnote 47.

[91] Mc Govern, International Trade Regulation, Para. 1.1332, quoting the Appellate Body Report *US-Corrosion-Resistant Steel Sunset Review*, paragraph 81.

[92] *WTO Dictionary of Trade Policy Terms*, fourth edition, Walter Goode [2003]

[93] There is no definition of "standardizing body". However, the terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement (Annex 1 to the TBT Agreement).

in a manner inconsistent with the Code. These obligations apply whether or not a standardizing body has accepted the Code.

The legal consequences of acceptance are indirect. The WTO provides no means of bringing proceedings against bodies which have behaved inconsistently with the Code, and the only obligations of WTO Members are those mentioned above.

The position of non-governmental bodies in regard to conformity assessment procedures is governed by Article 8. The obligation on WTO Members is essentially to take reasonable measures to ensure compliance with the basic rules (except for notifications and proposed procedures). Furthermore they must not require or encourage inconsistent behaviour.[94]

2.4 Conclusions

In conclusion, there is no WTO case law in relation to non-governmental entities and Article 13 of the SPS Agreement. However, a Panel report which did not concern non-governmental bodies, permits to draw some indications on how a Panel could analyse a possible violation of the SPS Agreement by a non-governmental body. First, it would look at Article 13 of the SPS Agreement to determine whether there is "responsibility" of a WTO Member; then, "reading in the light of Article 1.1 of the SPS Agreement" it would establish whether the measure at stake is an SPS measure; finally, it would decide whether there is a violation of the SPS Agreement.

According to other WTO case law, a degree of government involvement is required to put a measure under the scrutiny of the WTO Agreements. Furthermore, case law on the entrustment and direction provisions of the SCM Agreement concluded that the ordinary meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command."

Other interpretative information, such as the preparatory works to the TBT and SPS Agreements or the work in the respective WTO Committees, does not add much interpretation in relation to the activities of non-governmental standard-setting and standard-applying organisations. Distinguishing between private bodies and non-governmental entities appears to be a crucial step that may need to be taken at WTO level. In this context, the negotiation history of the TBT Agreement shows that the European Community switched in its terminology in its proposals from the term "private entities" to "non-governmental bodies.[95]

From the negotiating history of the SPS Agreement, it appears that there were no propositions by any individual or country that the SPS Agreement would have application to the activities of private sector organisations.

In addition, as far as we are aware, there has not been, to date, any other examination of this matter under WTO law within the SPS Committee or in the WTO in general, apart from the recent Note of the Secretariat of 24 January 2007.[96]

[94] Mc Govern, *International Trade Regulation*, Paragraph 7.243.
[95] See the EEC's proposals of 7 July 1988 (TBT/W/110) and of 27 July 1989 (TBT/W/124).
[96] G/SPS/GEN/746 of 24 January 2007.

Annex 6

O'CONNOR AND COMPANY
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Private Standards within the

WTO Multilateral Framework

Report 3

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Report 3: Legal options and possible suggestions, or courses of action to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system

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Report 3

"Legal options and possible suggestions, or courses of action, to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system"

Introduction

The general conclusion of Reports 1 and 2 is that the SPS Agreement does not provide interpreters with a definition of non-governmental bodies. There is also no case law on the term under the SPS Agreement.

Two lines of arguments are available. The first argues that, for a non-governmental body to be subject of the SPS Agreement, a certain degree of government involvement is necessary. Under the second line of argumentation, a non-governmental body does not need to have governmental involvement to fall under the SPS Agreement. Under both argumentative approaches, it needs to be considered that a non-governmental body is not necessarily the same as a private body.

In order to define a non-governmental body, it might be helpful to oppose the term to "governmental body". A governmental body would be any entity granted the power by law to enforce regulations (i.e., laws, decrees or ordinances). The essential aspect here is that the power of the entity derives from the law. The form and nature of the enforcing measures (adoption of secondary legislation, application of legal procedures, etc.) 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 the body at stake is acting within the limits of the delegated powers.

A non-governmental body would, under normal circumstances, not have the power to enforce regulations, unless it has been granted that power explicitly by a governmental body. Therefore, a non-governmental body appears to be any legal entity, which is recognised by the national law of a WTO Member as such.

It may be argued that a non-governmental body under the SPS Agreement is only a body which has legal power to enforce a technical regulation. This conclusion is drawn on the basis of the definition of non-governmental body contained in point 8 of Annex 1 to the TBT Agreement, which provides that a non-governmental body is a "body, 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".

Two main questions derive from this provision:
1) What is the coverage of the term non-governmental body under the TBT Agreement?
2) Can the definition provided in the TBT Agreement be applied analogically to the SPS Agreement?

From the literary reading of the provision, the conclusion may be reached that a non-governmental body is any entity other than a central governmental body or a local government body. The provision includes the entities which are empowered by law to enforce regulations. All the other bodies, which are not empowered by the law, also appear to fall within the scope of the definition. There is no doubt as to whether the definition of non-governmental body covers as well bodies which are legally empowered to enforce regulations (by a central or regional governmental body, not by law), since the provision expressly determines that those fall under the scope of the definition ("including a non-governmental body which has legal power to enforce a technical regulation").

A different approach may be argued following the GATS, even if this agreement does not provide a definition of non-governmental body. However, when determining the scope of the Agreement, the GATS states that a measure is considered to be a measure taken by a WTO Member when it is taken

by central, regional or local governments and authorities (i.e., bodies empowered by law to enforce regulations), or by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Therefore, not any measure taken by any non-governmental body would fall under the scope of the GATS. It needs to have been taken by a body to which specific powers have been delegated.

The question is whether the approach under the GATS can be applied analogically to the other WTO agreements (and, specifically, to the TBT and SPS Agreements)? Or should an argument "a contrario" be applied to get to the conclusion that the TBT and the SPS Agreements cover a wider definition of the term "non-governmental body" and do not limit it to the bodies acting in the exercise of delegated powers?

It appears that there are good arguments for the second approach ("a contrario"). Had the parties wanted to "narrow" the scope of the term, they would have explicitly done that. As already stated, the TBT Agreement contains a very broad definition of non-governmental body. The SPS Agreement does not provide a definition and it can be concluded that the term should be defined according to its common meaning which would cover any legal entity, other than governmental bodies. However, from the negotiating history of the SPS Agreement, it appears that it was not intended in any way that the SPS Agreement would be applied by WTO Member governments to constrain the practices of private bodies.

Therefore, after analysing the literary meaning of the provisions, looking at the case law and considering the negotiating history, the question on how to define a non-governmental entity under the SPS Agreement appears to remain open. This third Report, which builds on the previous two legal assessments and on the work conducted by the lead consultant (as discussed during the coordination meeting held in Brussels, Belgium on 5 February 2007), presents and discusses any relevant legal option, possible suggestions, or courses of action (as the case may be) to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system and, in particular, the SPS and TBT Agreements.

The first part of the report discusses how governments can impose standards on non-governmental organisations. It gives considerations on the WTO Members' constitutional systems and the direct effect of WTO law and suggests whether competition law could serve as domestic tool addressing the issue. Part 2 discusses the option of an interpretative guidance and part 3 of the report suggests plurilateral ways forward to address the issue. Finally, part 4 deals with dispute settlement, part 5 with the creation of an ad hoc committee dealing with NGO issues and part 6 with the formal amendment of the Agreements.

1. How can governments impose standards on NGOs?

1.1 Considerations on WTO Members' constitutional systems and the direct effect of WTO law

The idea that WTO agreements may "impose" guidelines or working criteria on private entities appears to be a significant and controversial assumption. The question here is how this would relate to the WTO Members' constitutional systems? Under the constitutional systems of most WTO Members, WTO agreements do not produce direct effects.

Certain WTO norms (especially the TRIPs Agreement and the SPS and TBT Agreements) define detailed individual rights and public obligations, although this does not necessarily mean that WTO

norms are directly applicable.[97] Imposing provisions of WTO law to private entities without public/governmental intervention by the individual WTO Member having jurisdiction on those private entities would require the direct effect of WTO law.

What does direct effect mean? In the European Community, direct effect or direct applicability means that a European Community law provision *"not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."* This is usually the case if a provision contains a *"clear and unconditional obligation"*.[98]

WTO agreements have remained neutral on the issue of whether their rules should produce direct effect and it is for EACH WTO Member to decide how to incorporate WTO law into its national legal order.[99] WTO Panels and the Appellate Body have consistently maintained this position in their reports, stating that *"[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect."*[100] Under such circumstances, directly effective law takes precedence over national law, meaning that such provisions "not only render automatically inapplicable any conflicting provision of current national law but… also preclude the adoption of new national legislative measures.[101]

In *United States - Sections 301-310 of the Trade Act*, the Panel remarked that the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or WTO Members and their national:

> *"Under 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, 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.(661) 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.*[102]
>
> Footnote 661: *We 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.*[103] *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."*

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[97] See for example: Markus Krajewski, Democratic Legitimacy and Constitutional Perspectives of WTO law, Journal of World Trade 35(1), p. 167-186 [2001].

[98] The citation is taken from ECJ Case 26/62, van Gend & Loos [1963] ECR, 1 (11-12).

[99] Alberto Alemanno, Judicial enforcement of the WTO hormones ruling within the European Community: toward EC liability for the non-implementation of WTO dispute settlement decisions?, Harvard International Law Journal, Volume 45, Number 2, Summer 2004..

[100] Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R of 22 December 1999, paragraph 7.72.

[101] ECJ Case 106/77, Simmenthal [1978], ECR [629], paragraph 17.

[102] Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R of 22 December 1999, paragraph 7.72.

[103] See Eeckhout, P., The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, Common Market Law Review, 1997, p. 11; Berkey, J., The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting, European Journal of International Law, 1998, p. 626).

Thus, in principle, WTO Members are free to decide whether WTO Agreements may produce direct effect within their jurisdiction. Accordingly, as a result of the Uruguay Round, the EC and the US prevented the invocation of WTO rules before domestic courts by expressly denying any direct effect in their respective ratification acts.

In the European Community, 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[104] provides the following:

> *"Whereas, 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."*

The European Court of Justice has historically shown a more assertive attitude by debating whether to recognise the direct effect of such rules within the EC legal order. Early ECJ case law denying the direct effect of GATT rules was mainly based on two arguments (1) the GATT had to be conceived as a trade/diplomatic tool, rather than a judicial one; and (2) the flexible and imprecise agreement is incapable of conferring community rights that citizens can invoke in domestic courts.[105] After the WTO was established, the ECJ revaluated its prior arguments in light of the newer, more rule-orientated organisation. However, the ECJ relied on concerns over the lack of reciprocity and upheld its prior case law denying direct effect.[106]

Under the "reciprocity argument" the EC courts find that none of the EC major trading partners gave direct effect to the WTO rules. This was a reason for the courts to deny direct effect to the WTO rules. In the Judgment of 23 November 1999, *Portuguese Republic v Council of the European Union*[107], the ECJ ruled as follows:

> *"As 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 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, such as the agreement which the Court was required to interpret in Kupferberg.*[108]"

[104] Official Journal of the Euroepan Union, L 336 , 23/12/1994, p. 1.

[105] ECJ Case C-21/72 International Fruit Co. v. Produktschap voor Groenten en Fruit, [1972] ECR [1219], 1224.

[106] ECJ Case C-149/96, Portuguese Republic v. Council, ECR [1999] I-8395.

[107] ECJ Case C-149/96. ECR [1999] Page I-8395.

[108] Judgment of the Court of 26 October 1982. Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.. Reference for a preliminary ruling: Bundesfinanzhof – Germany, Case C-104/81, ECR [1982], p. 3641.

Recognising direct effect or the existence of rights for 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 trade system.[109]

It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application, whereas the courts of the other party do not recognise such direct application, is not in itself an element constituting a lack of reciprocity in the implementation of the agreement.[110]

However, 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, referred to in paragraph 42 of the present judgment, may lead to disuniform [sic] application of the WTO rules."[111]

There are discussions on whether WTO law is directly applicable in certain Asian countries such as China.[112]

1.2. Competition law as domestic tool

The question here is whether the matter at stake must be seen and debated exclusively in light of the WTO framework or whether there are other international or domestic legal instruments available to address the issue of private standards and the position of non-governmental bodies' standards. We believe that competition law (antitrust law) may represent one such domestic tool and it has already been mentioned as a possible avenue.

The European Commission consultation document of 18 May 2006 "Towards a reform of the common market organisation for the fresh and processed fruit and vegetable sectors" [113] states the following:

> *"The move towards concentration in the agri-food industry is growing, especially in large-scale retailing. The number of supermarket chains is falling, with the result that their purchasing power on the market is growing stronger, along with their capacity to influence the supply chain. Able to buy huge quantities at very competitive rates, they are now in the position to impose specifications, the cost of which often falls to the producer."*

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[109] Alberto Alemanno, Judicial enforcement of the WTO hormones ruling within the European Community: toward EC liability for the non-implementation of WTO dispute settlement decisions? Harvard International Law Journal, Volume 45, Number 2, Summer 2004..

[110] Kupferberg, paragraph 18.

[111] ECJ Case C-149/96. ECR [1999], p. I-8395, paragraphs 42 – 45.

[112] See Article of Qinggjiang Kong, Enforcement of WTO Agreements in China – Illusion or Reality?, Journal of World Trade (2001) p. 1181-1214.

[113] European Commission's consultation document for impact assessment of 18 May 2006 "Towards a reform of the common market organisation for the fresh and processed fruit and vegetable sectors".

In relation to the question on "why food safety and quality standards are implemented?" the World Bank Report on "Food Safety and Agricultural Health Standards" [114]concludes the following:

> *"Private standards are implemented by businesses and other entities, individually or collectively. Such standards evolve for very different reasons. Often they are devised to enhance economic efficiency, by facilitating communication between buyers and sellers or by ensuring the compatibility of product components or products that are consumed jointly. Or they can be the basis of the competitive strategies of firms- a means to communicate with consumers and enhance reputation. Market signals are sufficient to induce the development of private standards. The role of the government is to ensure that such standards do not constitute or conceal anti-competitive practices."*

Also the WTO Secretariat has emphasised in its note of January 2007 on "Private standards and the SPS Agreement"[115] that consolidation in food retailing is a key factor to consider and that where a small number of food retailers account for a high proportion of food sales, the options for suppliers who do not participate in either an individual or collective retailer standard scheme can be considerably reduced:

> *"Private standards are not mandatory. Suppliers are not required by law to meet private standards. Compliance with private standards is a choice on the part of the supplier. Where private standards become the industry norm, however, choice is limited. Consolidation in food retailing may be a key factor to consider in this context. Where a small number of food retailers account for a high proportion of food sales, the options for suppliers who do not participate in either an individual or collective retailer standard scheme can be considerably reduced. Furthermore, the retailer scheme may be de facto applied as the industry norm by all actors in the supply chain. Thus the choice of whether or not to comply with a voluntary standard becomes a choice between compliance or exit from the market. In this way, the distinction between private voluntary standards and mandatory "official" or "public" requirements can blur."*

In combination with the concentration of certain retailer markets, such as in the Member States of the European Community, there seems to be a domestic competition issue with private standards (i.e., maybe the abuse of a dominant position or collusion of retailers) that could be worth looking at and studying further as a possible way forward.

2. Interpretative guidance

The issue of private or non-governmental body standards could also be addressed by seeking interpretative guidance, for example in the form of an *ad hoc* decision within the WTO system and, in particular, the SPS and TBT Agreements.

Such a decision by the SPS Committee, for example, could give guidance on how to interpret Article 13 of the SPS Agreement. It could also define terms such as "measures", "measures applied" and "non-governmental entity" in the sense of the SPS Agreement. This decision could also give

[114] S. Jaffee et al. (2005), "Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports," Report no. 31207 of 10 January 2005, Poverty Reduction & Economic Management Trade Unit and Agriculture and Rural Development Department, World Bank, Chapter 1, page 9. Available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/01/25/000160016_20050125093841/Rendered/PDF/31207.pdf .

[115] G/SPS/GEN/746 of 24 January 2007.

guidance as to what degree of governmental involvement is necessary, or which parameters are to be used so that a measure under the SPS Agreement can be defined as governmental.

While this approach is, theoretically possible and maybe even to be encouraged, in practice the discussion and adoption of such an *ad hoc* decision appears difficult to be achieved for the difficulty to trigger the necessary procedural mechanisms within the WTO system, the complexity of the discussions and negotiations, the foreseeable disagreement among WTO Members as to the need for such step and the likely opposition of powerful lobbies to any such development.

3. Other possible solutions

There may be other avenues available under the WTO system in order to deal with the issue of private or non-governmental body standards. Within the WTO system, useful examples are provided by references found in the language of the GATS, the Annex on Telecommunications, and the Agreement on Pre-shipment Inspections.

Article VII.5 of the GATS provides that:

> *"…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" (emphasis added).*

The Annex on Telecommunications, in its paragraph 7, states that WTO Members need to consult intergovernmental and non-governmental organizations on matters arising from the implementation of the Annex:

> *"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."*

The Agreement on Pre-shipment Inspection also provides for an NGO role and calls in Article 4 for the establishment of an "Independent Entity" to oversee binding arbitration between exporters and inspection entities. In 1995, the WTO established this Independent Entity through an agreement with the International Chamber of Commerce (ICC) and the International Federation of Inspection Agencies (IFIA). Furthermore, these two NGOs have assisted the WTO in its operational work on pre-shipment inspection. For example during 1998, the WTO Working Party on Pre-shipment Inspection held informal meetings with interested international organisations, the IFIA and the ICC.[116]

The previous examples indicate steps that could be taken in order to provide an institutionalised forum for discussion within the WTO on the issue of private or non-governmental body standards and their relation to trade. For this to happen, obviously, the WTO would have to agree on relevant language to be added to the SPS and/or TBT Agreements (by means of amendment or a stand-alone legal instrument). As seen in the previous section, this appears to be a possible but likely unrealistic avenue.

[116] Steve Charnovitz,, Trade Law and Governance, Cameron May [2002], Chapter 16, Opening the WTO to nongovernmental interests, p. 495, 503.

A similar option could be the one of seeking agreement, on the issue of private or non-governmental body standards and their relation to trade, between a selected group of WTO Members that would draft, adopt and commit to certain *ad hoc* obligations by means of a "plurilateral instrument". An example of such plurilateral effort in the WTO system is provided by the *Reference Paper on Telecommunications Services*. This legal instrument would offer the opportunity to regulate certain key aspects of private or non-governmental body standards while not imposing them on the WTO Membership as a whole, but allowing WTO Members to voluntarily adopt such additional commitments. Again, the practical feasibility of such approach appears somewhat remote.

4. Dispute settlement

Dispute settlement at the WTO could also be imagined as a possible legal avenue through which to address the matter of private standards. Although not very likely, a developing country could initiate dispute settlement proceedings against another WTO Member in relation to a private standard which is presumably not based on science, which is widely used by a number of retailers, and which is *de facto* required for accessing that WTO Member's market.

This legal avenue does not appear to be an easy and effective solution. WTO dispute settlement is expensive, politically sensitive, and often incapable of delivering the expected results. In any event, one of interesting questions that would face a possible complainant is how a WTO panel would interpret the obligation to base measures on science *in the light of* Article 13 of the SPS Agreement.

In *Australia – Salmon*, the Panel made reference to Article 13 in support of the finding that the Tasmanian measure was subject to the SPS Agreement and fell under the responsibility of Australia.[117] Although this report of the Panel did not concern non-governmental bodies, it permits to draw some indications on how a Panel would analyse a possible violation of the SPS Agreement by a non-governmental body.

First, it would look at Article 13 of the SPS Agreement to determine whether there is "responsibility" of a WTO Member; then, "reading in the light of Article 1.1 of the SPS Agreement," it would decide whether the measure at stake is an SPS measure; finally, it would rule on whether there is a specific violation of the SPS Agreement, for example of the obligation to base measures on science. For the reasons described in Reports 1 and 2, this legal process appears to be a very complex and difficult path that a complainant would struggle to take in relation to the issue of private or non-governmental body standards and their relation to trade.

5. Creation of an *ad hoc* Committee

To address the issue of standards of non-governmental bodies (and other issues relating to NGOs), a specific Committee could be established within the WTO system.

Article V (Relations with Other Organizations), paragraph 2 of the Agreement Establishing the World Trade Organization ("WTO Charter") suggests certain relationships for NGOs:

> *"The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."*

[117] WT/DS18/RW of 18 February 2000, paragraph 7.162.

The idea of creation of a "Steering group" or an "Advisory Economic and Social Committee"[118] has also been suggested in the literature:

> *"The WTO is believed to be an organisation that is "government to government". This implies that NGOs have no role here: "A steering group, some kind of small group in the organisation, which may help the Director-General. The WTO is far behind to most of the international organisations with regard to how it handles NGOs. Others have very elaborate methodologies of accreditation of NGOs, such as the UN or the ILO and the WIPO".*[119]

In relation to this avenue, it appears difficult to imagine that an NGO could be identified and organized to capture the discontent of developing countries' traders in relation to the issue of private or non-governmental body standards. In addition, the lobbies that have opposite interests and agendas would likely be operating to set-up similar NGOs in order to have their contrasting voices heard in the debate.

6. Formal amendment of Agreements

A formal amendment of one or more of the covered Agreements (SPS, TBT Agreement) could be another way forward to address the issue of private standards and the position of non-governmental bodies' standards within the WTO system.

Article X of the Agreement Establishing the World Trade Organization ("WTO Charter") concerns the procedure for amendments of, for example, the SPS and TBT Agreements, contained in Annex 1A to the Agreement Establishing the WTO:

> *"1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.*

[118] Julio A. Lacarte, Transparency, Public Debate and Participation by NGOs in the WTO, Journal of International Economic Law 7(3), 683-686 [2003].

[119] John H. Jackson, The WTO "Constitution" and Proposed Reforms, Journal of international economic law 2001,67 (75-77).

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

(…)

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

(…)

In essence, a proposal to amend WTO agreements such as the SPS or the TBT Agreement would need to be submitted to the WTO Ministerial Conference, which would then submit the proposed amendment to the WTO Membership for discussion and possible acceptance. Article X of the WTO Charter describes which majorities are needed for a formal amendment. In practice, the procedure to follow and the majorities to be reached clearly indicate that amendments to the WTO Agreements would be particularly difficult to achieve.