



**Trade Law**

C H A M B E R S

**Briefing Document on the relationship between  
the WTO SPS Agreement and Private Standards**

Prepared for

**The ComMark Trust**

**Regional Standards Programme**



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## 1 Introduction

Governments have the sovereign duty to protect human, animal and plant life. Recognising this important principle, the World Trade Organization (“WTO”) Members agreed on the regulatory framework which governments may impose for the protection of human, animal and plant life. These measures can focus on human or animal life or health (sanitary measures) or on plant life or health (phytosanitary measures). Together, they are termed sanitary and phytosanitary (“SPS”) measures. Sanitary and phytosanitary measures can create significant problems for developing country exports of food and agricultural products. According to a recent survey, SPS measures are considered by developing countries as being the most important barrier their agricultural exports face when entering the European Union<sup>1</sup>. There are various reasons why these SPS measures act as barriers to entry some of which include the lack of resources, both technical and financial, in many developing countries to address sanitary and phytosanitary risks. In addition, there are vast differences between the SPS measures in developed and developing countries as developed countries prioritise these measures to protect health and life whereas developing countries do not. Proliferation of different SPS measures therefore makes it difficult for developing countries to comply with these measures.

A new potential barrier has reared its head in the context of the SPS measures. This potential barrier comes in the form of private standards which are being imposed by private companies or institutions. Thus these private standards are often called private voluntary standards as they are not measures imposed by governments, but by private buyers. Thus these private standards are not measures which an exporter has to comply with in order to have its product cross a border of a country. Instead it is a measure which the exporter has to comply with in order to sell its product to a specific private buyer (such as a supermarket chain). The buyer therefore voluntarily chooses whether to sell to this private buyer. Due to the fact that for example retailers (buyers) dominate the market, *de facto* exporters will have to comply with these private standards in the event

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<sup>1</sup> Spencer Henson *et al.*, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports,' in *Agriculture and the New Trade Agenda: Creating a New Global Trading Environment for Development*, eds. M.D. Ingco and L.A. Winters (Cambridge: Cambridge University Press, 2004), 359-375: 361-362.

that they want to sell their product in a particular market where private standards may be applicable.

Given the importance of agriculture to poverty reduction in the Southern African region and in order to give meaning to the 'voice' of Southern Africa in this debate (especially since Southern African countries have not yet added their voice to the debate), there is a need for the matter of private standards to be discussed at the national and regional level from an informed position. To support the process of arriving at an informed position on private standards for SADC member states, the ComMark Trust's Regional Standards Programme, together with SADC, will be hosting a workshop. The objective of this workshop is to delineate the nature of debate on private standards within the WTO SPS Agreement, encourage SADC member states to consider the impact of private standards on their producers as well as to assist them to consider their individual country positions on the matter.

The purpose of this briefing document is therefore to provide an overview of private standards in the context of the WTO SPS Agreement as well as to highlight the specific sections of the SPS Agreement which could be used to resolve the problem of the introduction of private standards. This briefing document also provides an overview of the discussions on private standards held in the WTO SPS Committee as well as the three international standard setting bodies the Codex Alimentarius Commission ("Codex"), the International Office of Epizootics (OIE) and the International Plant Protection Convention ("IPPC").

## **2 The WTO SPS Agreement and Private Standards**

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") entered into force with the establishment of the WTO in 1995. The SPS Agreement sets out the basic rules for food safety and animal and plant health standards, as such all Members maintain measures to ensure that food is safe for consumers and to prevent the spread of disease among animals and plants. These SPS measures may take many forms, such as requiring that products come from disease-free areas, inspection of products, specific treatment or processing of products, setting of allowable levels of pesticide residues or

permitted use of only certain additives in food to name but a few of these measures.

The SPS Agreement allows a Member to set its own standards in order to protect food safety and animal and plant health, but these standards have to be based on science. This means that the standards must be scientifically applied to protect human, animal and plant health or life. The SPS measures may therefore not be disguised barriers to trade as they have to have a scientific basis for protecting either the health or life of humans, animals and plants. Furthermore, the standards may not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail. The SPS Agreement therefore recognises the need for these standards but does not allow these standards to become restrictions to trade or become unnecessary barriers to trade.

Even though Members are encouraged to make use of international standards, guidelines and recommendations, they are free to use stricter standards where there is scientific justification to do so or if the higher standards are based on an appropriate assessment of the risks as long as the approach is consistent and not arbitrary. The SPS Agreement therefore still allows Members to use different standards and different methods of inspecting products if this is based on scientific reason to protect the health and life of humans, animals or plants. Members may also discriminate against different Members, thus a Member has the option to apply a different standard to some countries. This may be done as it is recognised that is not always appropriate in impose the same sanitary and phytosanitary requirements on food, animals and plants originating from different countries. As an example hereof, it might be that certain parts of the world might be prone to disease and therefore a different standard may apply to products originating from Members located in these disease prone parts of the world. Again the SPS Agreement checks unjustified or arbitrary discrimination in these instances.

Often an acceptable risk level can be achieved by alternative ways. Members must therefore choose alternative ways to meet their health objectives which are less trade restrictive provided of course that these alternative methods are technically and economically feasible and provide the same level of food safety or animal and plant health. Furthermore if a Member can show that the measures taken by that

Member provides the same level of health protection, then these measures should be recognised as equivalent.

In terms of the SPS Agreement, we find that private standards fall into a grey area and it is not clear, from a legal perspective, whether the SPS Agreement is applicable to private standards. When the SPS Agreement was negotiated, private standards relating to safety were not contemplated and as a consequence adequate provision therefore has not been made, and in fact private standard setting bodies are not mentioned in the SPS Agreement. It is therefore also no surprise that there was never mention of private standards in the WTO SPS Committee or other standard setting fora until St Vincent and the Grenadines highlighted the issue in 2005.

Article 13 of the SPS Agreement arguably provides the only real avenue to pursue an argument the SPS Agreement is applicable to private standards. This argument can only be postulated due to the fact that Members of the WTO committed in the SPS Agreement 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 SPS Agreement. There are legal questions about the scope of the term "reasonable measures", and as to whether "non-governmental entities" include the various private standard-setting bodies and standard-implementing bodies.

The WTO Secretariat discussed the uncertainty surrounding these concepts during a SPS Committee Meeting. The United Kingdom in a response to the discussion by the WTO Secretariat submitted its own discussion document on these concepts. Both discussions make it abundantly clear that there is legal uncertainty on the question of whether the SPS Agreement is indeed applicable to private standards. There is however a strong possibility that the private standards could indeed fall within the ambit of the SPS Agreement. However a full legal opinion in response to the WTO Secretariat analysis and the United Kingdom submission is not discussed to its full extent in this briefing document. There is also scope within these two opinions for further legal analysis which falls outside the scope of this briefing document and may be pursued at a later stage.

### **3 WTO SPS Committee and Private Standards**

#### **3.1 Introduction**

A special committee (the "SPS Committee") has been established within the WTO as a forum for the exchange of information among Member governments on all aspects related to the implementation of the SPS Agreement. The SPS Committee reviews compliance with the Agreement, discusses matters with potential trade impacts, and maintains close co-operation with the appropriate technical organizations (such as the three international standard setting bodies). In a trade dispute regarding a sanitary or phytosanitary measure, the normal WTO dispute settlement procedures are used, and advice from appropriate scientific experts can be sought.

The first time that private standards in the context of the SPS Agreement were raised in the SPS Committee was during the SPS Committee meeting held during 29-30 June 2005. St. Vincent and the Grenadines pointed out that the EurepGAP certification (now known as "GlobalGAP") has been made a condition for continued trade between St. Vincent and the Grenadines and the United Kingdom supermarkets. In St. Vincent and the Grenadines' view, SPS measures were to be introduced by governments and not private entities or non-governmental organizations. Some of the measures dealt with in the EurepGAP certification programme were clearly within the scope of the SPS Agreement. St. Vincent and the Grenadines therefore enquired if these measures were part of the European Community ("EC") general food law or if they were private entity requirements or private standards.

Jamaica also indicated that it was experiencing similar problems with the EurepGAP requirements on its exports of fresh fruit and vegetables to the EC. Since a reading of the EC food and feed regulations indicated that the EurepGAP requirements were private sector requirements, Jamaica asked what recourse was available to exporting countries.

The EC stated that EurepGAP was neither an EC body nor that of one of its member States. It was a private sector consortium representing the interests of major retailers. In no case could EurepGAP 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. It was therefore confirmed to be a set of private standards.

An information session was subsequently organised and was held on 11 to 12 October 2006, and in addition the issue was placed on the agenda of the SPS Committee for the meeting to be held on 28 February to 1 March 2007. These and other meetings will be discussed below and will be referenced by referring to the Member or organisation which initiated the discussion. In advance of this we first look at what the WTO Secretariat had to say on the SPS Agreement and private standards.

### **3.2 The WTO Secretariat on the SPS Agreement and Private Standards<sup>2</sup>**

The WTO Secretariat issued a note on the SPS Agreement and private standards on 24 January 2007. The purpose of the note is to provide background information on the topic of private and commercial standards ("private standards") which was supposed to stimulate discussion at the SPS Committee.

At the time that the note was written, there was no determination made as to whether private standards are seen as SPS measures within the scope of the SPS Agreement. According to the Secretariat, Article 1.1 states that the SPS Agreement applies to "all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade". Thus the SPS Agreement does not explicitly limit the application of the SPS Agreement to SPS measures taken by governmental authorities. Likewise, the definition of an SPS measure in Annex A(1) of the SPS Agreement and the accompanying illustrative list of SPS measures does not explicitly limit these to governmental measures. On the one hand therefore it appears as if private standards which are concerned with food safety and animal and plant health standards, may be seen as SPS Measures which fall within the ambit of the SPS Agreement and could therefore be evaluated according to the legal rules contained in the SPS Agreement.

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<sup>2</sup> WTO document: G/SPS/GEN/746.

On the other hand, other provisions of the SPS Agreement, including the basic rights and obligations contained in Article 2, explicitly refer to the rights and obligations of "Members". The argument is therefore that, due to the fact reference is made throughout the SPS Agreement to "Members" of the WTO, the private standards must originate from the government or the power to impose these private standards must at least be delegated to private institutions before they will be recognised as SPS measures falling within the scope of the SPS Agreement. The WTO Secretariat is also unclear whether the certification requirements necessary to demonstrate compliance with private standards would be within the scope of Article 8 and Annex C of the Agreement (which deals with the steps Members must take to ensure compliance with control, inspection and approval procedures). Again the argument seems to be that governments should have this authority and not private institutions, unless it could be argued that governments delegated their powers to these private institutions.

The WTO Secretariat does recognise that Article 13 may be relevant to resolve the question at least to some extent. Article 13 reads:

"Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. *Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement.* In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement". (emphasis added).

It therefore seems as if the SPS Agreement does indeed provide that SPS measures imposed by non-governmental entities (thus private standards) may fall

within the ambit of the SPS Agreement. However Article 13 does pose the following questions according to the WTO Secretariat:

- What positive measures and mechanisms are open to Members to support observance of the SPS Agreement by other than Central Government Bodies?
- What would be a reasonable measure to ensure compliance by a non-governmental entity?

The SPS Agreement is silent as to what the reasonable measures are which Members can take to ensure compliance by non-governmental entities with the SPS Agreement, and there is no jurisprudence on this matter. It is thus left open to the SPS Committee to discuss this further and to consider whether the Committee would like to take action on this matter.

According to the WTO Secretariat, a further question is whether or not the standard is really a private or an official standard. As an example hereof, a governmental standardizing body might, for example, develop a national standard based on ISO 22000: Food safety management systems, blurring the distinction between official SPS measures and private standards. Or, a Member might decide to permit the entry of imports that are certified to comply with a private standard that incorporates and exceeds the official requirements. Could the Member be construed as relying on the services of a non-governmental entity to implement sanitary or phytosanitary measures?

Other WTO Agreements may also be of relevance. As an example, an examination of the then EurepGAP standard suggests that some elements of private standards address matters outside the scope of the SPS Agreement. For example, EurepGAP standards contain chapters dealing with, amongst other topics, worker health, safety and welfare and waste and pollution management. These are issues which fall outside the scope of the SPS Agreement. As such, some private standards schemes could fall within the scope of the Agreement on Technical Barriers to Trade ("TBT Agreement"). The legal definitions given for standards, conformity assessment procedures and non-governmental bodies within Annex 1 to the TBT Agreement would appear of particular relevance in this regard and could arguably make these private standards subject to the TBT Agreement.

Were a particular private standard to fall within the definition of a standard under the TBT Agreement, then Article 4 would apply. This Article requires Members to take reasonable measures to ensure that non-governmental bodies accept and comply with Annex 3 to the TBT Agreement (the Code of Good Practice for the Preparation, Adoption and Application of Standards). Amongst the provisions of the Code are notification obligations both with respect to acceptance of the Code and the publication of work programmes. Notification of the existence of work programmes is to the ISO/IEC (the International Organisation for Standardisation and the International Electrotechnical Commission) Information Centre, not the WTO Secretariat. With regard to conformity assessment, the provisions of Article 5 (dealing with the conformity of standards originating from central governmental bodies) and Article 8 (dealing with the conformity of standards originating from non-governmental bodies) of the TBT Agreement would appear of particular relevance.

Both the TBT and SPS Agreements contain similar language with respect to implementation in relation to the activities of non-governmental bodies (as referred to in the TBT Agreement) and non-governmental entities (as referred to in the SPS Agreement). One difference to note with respect to the "reasonable measures to ensure compliance" required of Members is the reference under the TBT Agreement to Members ensuring acceptance and compliance with the Code of Good Practice by non-governmental bodies. No such "reasonable measure" exists under the SPS Agreement.

In addition to the TBT Agreement, other WTO Agreements may also be relevant. For example, the Agreement on Preshipment Inspection may relate to the actions of certification bodies which have been mandated by Members to provide expert inspection services.

Another element to consider is the relationship between private standards and international standard-setting bodies such as Codex and the IEC. Often the private standards are based on the standards, guidelines and recommendations made by these international standard-setting bodies. It is therefore important to look at these rules in addition to the rules contained in the WTO legal texts.

The WTO Secretariat also prompts the SPS Committee to consider the fact that many private standards are often benchmarked against one another, but that such benchmarking does not lead to the different private standards being treated as

equivalent and as such exporters have to comply with a myriad of different private standards. To this extent the WTO Secretariat refers the SPS Committee to its Decision on the Implementation of Article 4 which deals with the manner in which standards may be recognised as equivalent.

The WTO SPS Committee also circulated a number of questions to Members on the 5<sup>th</sup> of July 2008 to solicit proposals regarding what the SPS Committee can and should do to reduce the negative effects that private SPS standards have on international trade, especially for developing countries, and to enhance the potential benefits arising from private SPS standards for developing countries. In summary the following could be learned from Member's responses:

Firstly the majority of the Members felt that the SPS Committee should work on collective international and domestic schemes as well as individual firm schemes as they could all have a detrimental effect on international trade. It was strongly supported that private standard setting bodies should periodically be invited to inform the SPS Committee on their specific standards and recent development. Members were divided, at least for the initial stages, on whether the SPS and TBT Committees should jointly tackle the problem of private standards. Most Members also felt that the TBT Code of Good Practice does not address the concerns relating to private standards. It seemed clear that the Members wanted a unified approach to resolving the issue of private standard and therefore did not want a whole host of other organisations to commence work as it was perceived that the SPS Committee should be the body which will address the problem. However it was felt that Codex, the OiE and the IPPC must be invited to participate in any work undertaken by the SPS Committee. There was some support for the view that private standards could be used to facilitate compliance with international standards (of the Codex, OiE and IPPC).

Following on the responses received, it was recommended that the SPS Committee address the issue of private standards through a multi-track approach where most of the work would be undertaken by interested Members. The proposed actions include, encouraging Members and organisations to provide information on any studies

regarding private standards, organising periodical information sessions on various private standards and undertaking a three phase study<sup>3</sup>.

### **3.3 Summation of discussion by WTO SPS Committee on Private Standards**

As stated above the issue of private standards was only raised in 2005 in the SPS Committee and subsequently the WTO Secretariat has given background information on the SPS Agreement and private standards. However private standards were discussed at various meetings of the SPS Committee and this particular section provides a summation of such discussions.

#### **3.3.1 Submission by the ISO<sup>4</sup>**

The ISO submitted an information document to the SPS Committee for the meeting held on 28 February to 1 March 2007. The essence of the submitted document was to inform the SPS Committee that the ISO works closely with the Codex Alimentarius Commission and essentially the ISO assists stakeholders along the food chain to meet the existing statutory and regulatory requirement by preparing standards on test methods and nomenclature which will be used to comply with these statutory and regulatory requirements. The document then contains a list of new standards which the ISO has either already approved or that are in the process of being approved (with or without Codex's endorsement). It therefore does not contribute much to the current discussion on private standards.

#### **3.3.2 Submission by UNCTAD<sup>5</sup>**

The United Nations Conference on Trade and Development ("UNCTAD") submitted two information documents to the SPS Committee for the meeting held on 28 February to 1 March 2007. The first document aims to reduce the complexity and

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<sup>3</sup> Please refer to Annex 1 for the details of this study.

<sup>4</sup> WTO DOCUMENT: G/SPS/GEN/750.

<sup>5</sup> WTO document: G/SPS/GEN/760 and G/SPS/GEN/761 & Corr.1.

confusion surrounding how these standards are being set and by whom. The document then examines certain standards (both private and otherwise) and identifies the actors involved setting the standards, monitoring the standards, assisting with compliance of the standards and sanctions for non-compliance. The document concludes that some private standards are becoming the entry conditions for certain markets and that small-scale producers have limited access to the standard setting process and that these private standards can have a negative impact on equity and livelihoods if they are not designed carefully to integrate the views and concerns of these small producers.

The second document contains an analysis by UNCTAD's Consultative Task Force on Environmental Requirements and Market Access for Developing Countries ("CTF") on the EurepGAP standard as an example of a private standard and its possible implications for developing country exports. The analysis does not focus on the interface between private standards and the WTO disciplines. Instead it highlights that high costs, lack of awareness about the benefits of good agricultural practices, low levels of education, difficulties in keeping records and undertaking regular self-inspection, poor access to unadulterated inputs (e.g. seeds), and lack of trained personnel are some of the obstacles to GAP (good agricultural practices) implementation for small scale producers. In addition there remains uncertainty whether the imposers of these private standards (like supermarkets) will insist on compliance as there is evidence to suggest that they do not always insist on these standards and thus this acts as a further disincentive to compliance. There is further a great need to harmonise these private standards with global standards to reduce the need for multiple compliance and audits.

### **3.3.3 OECD Submission<sup>6</sup>**

On 23 February 2007 the Organisation for Economic Development and Co-operation submitted an informative paper on voluntary private standards and market access for developing countries (the small-scale producer in particular). The paper highlights the influence that private standards are having on developing

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<sup>6</sup> G/SPS/GEN/763.

countries access to global value chains in the fruit and vegetable sector. Private standards are often more stringent than the national standards and have become a *de facto* requirement if one wants to do business as the major retailers expect this standard. Most of these standards relate to good agricultural practices (“GAP”) schemes of which EurepGAP was most frequently encountered when looking at the sample countries. It is pointed out that for large farms it may be possible to comply with various private standards as they have economies of scale, but the small scale producer is prohibited from complying due to the costs associated with compliance. It was further confirmed that good infrastructure and services for the development of a competitive fresh produce export sector is important especially in light of the requirement of private standards.

The following were identified as the most difficult requirements or challenges cited by *exporters*, namely recordkeeping by producers/out-growers; chemical use verification; management of different standards systems and their compliance; certification, in particular for attesting to good manufacturing practices; transforming the mindset of producers, particularly small and medium producers and meeting diverse country regulations.

For producers the main constraints voiced in the interviews were more related to changes required at the producer level, for instance in agronomic practices. These included: meeting food quality and safety standards, chemical use; worker hygiene; harvest and post harvest operations and accessing the cold chain. Both exporters and producers found that requirements related to maximum residue levels (MRLs); micro-biological contaminant prevention; pesticide selection, application and post harvest testing; record keeping and traceability at the field level were frequently costly and difficult to satisfy. For many of these requirements skilled labour is needed and it is often costly due to its scarcity. Investments required in buildings and equipment: chemical storage, hygiene facilities; as well as information on foreign market regulations and private standards compliance, can exclude certain producers that are the small scale growers without access to finance and skilled labour.

But there are also benefits from complying with private standards and these include: (1) access to the global value chain, which is essential for commercial

exports to developed countries, and the possibility to develop longer term trading relationships; (2) improved efficiency in operations: reduced costs through better use of chemicals, organization of tasks, increased information on proper use and storage of pesticides to improve worker safety; (3) increased information on proper use and storage of chemicals decreased negative effects and (4) improved worker safety through proper attire for chemical use as well as through changes in storage procedures and separation of different tasks.

### **3.3.4 Report by the Bahamas<sup>7</sup>**

In a report submitted by the Republic of the Bahamas they detail their experience with private standards, although they caution that it has not been extensive. What they can however contribute is that private standards can be a valuable tool in promoting exports. However it may also be abused and in such an event it seems as if there is no recourse to settle disputes as to the scientific necessity of such private standards.

### **3.3.5 Concerns of St Vincent and the Grenadines<sup>8</sup>**

On 27 February 2007 St Vincent and the Grenadines communicated their concerns about private standards. According to St Vincent and the Grenadines, the SPS Agreement recognizes the role of the International Standard Setting Bodies (OIE, Codex and the IPPC) as the only authorities for establishing SPS standards. However, the proliferation of standards developed by private interest groups without any reference to the SPS Agreement or consultation with national authorities is a matter of concern and presents numerous challenges to small vulnerable economies. These standards are perceived as being in conflict with the letter and spirit of the SPS Agreement, veritable barriers to trade (which the very SPS Agreement discourages) and having the potential to cause confusion, inequity and lack of transparency. Therefore in the opinion of St Vincent and the Grenadines some of these private standards do not conform to the provisions of the SPS Agreement.

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<sup>7</sup> WTO document: G/SPS/GEN/764.

<sup>8</sup> WTO document: G/SPS/GEN/766.

### **3.3.6 Concerns of Ecuador<sup>9</sup>**

On 2 July 2007 Ecuador made a statement on private and commercial standards. Rather than take a position or share their experiences, Ecuador asked the following questions:

“Do we not already have adequate health and food safety standards provided by the three reference organizations that are associated with and recognized by the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, i.e. the Codex Alimentarius, the IPPC and the OIE? Is there perhaps no recognition of the fact that some of our countries still have serious problems of a technical and economic nature and difficulties arising from the lack of specialized staff in applying and monitoring such official standards? What added value would the developing countries obtain from the existence and application of private or commercial standards if some of these private standards become prerequisites for the facilitation of trade? Furthermore, we have observed that private standards are not harmonized with the official standards laid down in the international agreements, but on the contrary, in some cases, exceed the official standards, for example in the case of tolerances. Will this not, therefore, be a way of imposing restrictions on trade?”<sup>10</sup>

### **3.3.7 DFID Legal Analysis<sup>11</sup>**

United Kingdom’s Department for International Development submitted a report, which is largely based on a legal opinion, to clarify the position of private standard-setters within the SPS Agreement. It is a very lengthy report and only the essence is highlighted.

It is reported that there seems to be no legal impediment to prevent buyers at the national level from defining and applying private standards. These private standards could in some instances provide a stimulus to improved production practices and performance; however these private standards may act as significant barriers to some industries in some countries, especially the developing countries and small-scale producers.

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<sup>9</sup> WTO document: G/SPS/GEN/792.

<sup>10</sup> WTO document: G/SPS/GEN/792.

<sup>11</sup> WTO document: G/SPS/GEN/802.

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 is heavier on exporters where the private standards were developed without consulting the exporters, where different private standards have to be met for different markets, where third party certification can only be obtained at developed world prices and where purchasers do not offer long term contract in an attempt to clear up any uncertainty for suppliers who might be willing to invest in becoming compliant with private standards. Often this is associated by grievances if there is no objective justification for the stricter private standards.

The possible application of the SPS Agreement to the development of private standards was never contemplated when the SPS Agreement was negotiated and is a phenomenon which post-dates both negotiation of the SPS and TBT Agreement. As we have noted earlier the SPS Agreement does not adequately provide the role of non-governmental bodies in standard setting. 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 assessments. The General Agreement on Tariffs and Trade ("GATT") does not define a role for non-government bodies.

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.

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. 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. 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. 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. Another possible approach would be for the SPS and TBT Committees to ask their Members to submit country specific experiences of private standards and continue to have useful discussion on this issue which could involve the private standard setters.

### **3.3.8 OiE Concerns<sup>12</sup>**

On 14 February 2008 the OiE submitted a communication on consideration relevant to private standards in the field of animal health, food safety and animal welfare. In their view, unlike the OiE standards private standards tend to be an unscientific, zero-risk marketing approach that is inconsistent with the disciplines of the SPS Agreement. Due to the difference between OiE standards and private standards a lot of the work done in market access arrangements following the negotiation of the SPS Agreement has been undermined. There is reason to believe that private standards are unjustified barriers to trade as de facto stricter standards are imposed than what was agreed on multilaterally (though the Codex, OiE and IPPC). These private standards as unjustified barriers to trade also have a disproportionate effect on developing countries for the same reasons listed by DFID above. The SPS Committee was urged to determine whether and to what extent private standards are undermining the SPS Agreement and to make recommendations on future action in order to remedy the perceived problem.

### **3.3.9 Uruguay<sup>13</sup>**

Uruguay made two submissions to the SPS Committee on private standard on the 21<sup>st</sup> of May and the 18<sup>th</sup> of June 2008. In its first submission Uruguay raises concerns it has about private standards. Essentially the submission echoes the concerns many others have raised, namely that developing countries are detrimentally affected by the fact that their products have to comply with official and private standards. The additional private standard hinders trade severely for developing countries. In

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<sup>12</sup> WTO document: G/SPS/GEN/822.

<sup>13</sup> WTO document:G/SPS/GEN/843 and G/SPS/W/225.

Uruguay's second submission it proposes the terms of reference for a working group on private standards which should be introduced in the SPS Committee.

#### **4 The Codex Alimentarius and Private Standards**

During the 60<sup>th</sup> session of the Executive Committee of CODEX held from 4 – 8 December 2007 the Committee recognised that the issue of private standards had been discussed in the WTO SPS Committee and some other international fora and in particular acknowledged the in depth submission of DFID on private standards. At the 60<sup>th</sup> session the Committee agreed not to make any decision or recommendation on private standards at present and requested the Secretariat to monitor the discussions at the WTO and other fora.

During the 61<sup>st</sup> session of the Executive Committee meeting held from 24 – 27 June 2008, some members also mentioned that the impact of private standards was being discussed as an important issue in OIE, IPPC and the WTO SPS Committee and that in their opinion the objectives of Codex were most affected by these standards, and therefore it was indispensable that the Commission should define a position in this respect as, in view of its competence, it was the undisputed reference as regards food standards in the framework of the WTO. It was recalled that during the 60<sup>th</sup> session it was decided not to take any action, save for monitoring the discussion in other fora such at the WTO SPS Committee and the IPPC and the OIE. It was pointed out that the WTO held an informative session on private standards and that the FAO has studied the effect of private standards on small scale producers.

One member raised the issue of "fair trade" and how Codex could deal with it. The Secretariat clarified that areas of work affected would be food labeling, traceability and food import and export inspection and certification. Codex work on organic produce was an example that Codex was equipped in principle to deal with issues that go beyond food safety which were relevant under the TBT Agreement. It was indicated that the concerns raised by WTO Members were related to 1) effects of private standards on market access; 2) development concerns; and 3) legal issues in relation to the WTO Agreements. While some WTO members had underlined the positive aspects of private standards on quality and access to high quality markets, many other members had expressed the following concerns: the application of private standards at the import stage resulted in *de facto* barriers to trade, and

created difficulties especially for developing countries; complying with these standards required multiple certification by private bodies, with a high cost for small producers; in many cases private standards were more restrictive and prescriptive than government standards and Codex standards and often had no scientific basis; the process by which private standards were set lacked transparency and inclusiveness; and in some cases such standards did not meet the requirements of the SPS Agreement. Questions about the relationship between private standards and the standards set by OIE, Codex and IPPC had also been raised. As regards legal issues, different views existed on the interpretation of the reference to "non-governmental entities" in Article 13 of the SPS Agreement. The Committee agreed and invited the FAO and the WHO to present papers on private standards at its next session.

The Representative of FAO said that it is important that the Executive Committee define priorities. The representative said further that quality and identity of food were of high importance with an impact on the nutritional status of populations especially at present when rising food prices caused a bigger amount of bad quality food entering the food chain than usual. The Committee agreed with this recommendation.

## **5 The OIE and Private Standards**

As noted above, the OIE has already expressed its concerns on private standards at the WTO SPS Committee. However, as a recognised reference organisation under the WTO SPS Agreement, the OIE is responsible for establishing international standards relating to animal diseases, including zoonotic diseases having in mind its objective of providing a scientific basis for safe international trade in animals and animal products and improving animal health and welfare worldwide.

The OIE, at its 76th General Session of the International Committee held from 25 to 30 May 2008, had an information session on private standards as part of the Technical Items of general interest that is presented annually. Based on this information session the International Committee adopted a resolution on the implication of private standards in international trade of animals and animal products. The International Committee decided:

- To reaffirm the standards published by the OIE in the field of animal health including zoonoses, as the global official sanitary guarantees for preventing the risks associated with international trade in animals and animal products, while avoiding unjustified sanitary barriers to trade, and promoting the prevention and control of animal diseases worldwide.
- To reaffirm the standards published by the OIE in the field of animal welfare as the global reference standard for OIE Members.
- To ask the Director General to work with relevant public and private international organisations with the objective that concerns of Members are taken into consideration and that private standards, where used, are consistent with and do not conflict with those of the OIE.
- To ask the Director General to support Members in taking whatever steps are available to them to ensure that private animal health and animal welfare standards, where used, are consistent with and do not conflict with those of the OIE.
- To ask the Director General to continue with the relevant activities to further strengthen the OIE's work in standard setting for animal health, including zoonotic diseases, and animal welfare and to continue to implement and reinforce capacity building programmes to assist Members in implementing OIE standards. Capacity building includes communication for Veterinary Services in order to convince consumers on the efficiency of OIE standards to protect health and animal welfare.

## **6 The IPPC**

We have reviewed the minutes and reports of the meetings of the Interim Standards Committee, the Standards Committee, the Committee of Experts on Phytosanitary Measures, the Technical Consultation amongst RPPOs, the Technical Panels, the Working Group on Strategic Planning and Technical Assistance and various other reports on the workings of the IPPC.

We have found no reference that would indicate that the IPPC are currently discussing or have plans to discuss the proliferation of private standards within the SPS measure context. We have also contacted a Standards Committee Member of South Africa to find out if the IPPC perhaps have discussed the issue of private

standard which may for some reason not be included in the reports or minute, and received confirmation that the matter has not been dealt with by the IPPC.

## **7 Recommendations**

It seems clear that the issue of private standards goes beyond mere SPS measures and crosses into the realm of the TBT Agreement. Having said that the TBT Agreement provides more legal certainty surrounding these private standards than what is currently contained in the SPS Agreement. It is therefore recommended that the SPS Committee, with the help of its Members and the three international standard setting bodies, continues to lead the work on private standards as they relate to SPS measures. Private standard setting bodies and other organisations which have an interest may be invited to participate in the work of the SPS Committee. Where overlaps do occur between the realms of SPS and TBT measures, the TBT Committee may be approached in such cases. Given that the multilateral trading system and the SPS Agreement was negotiated to provide the rules on SPS measures, the fact that Members are actively involved in the SPS Committee and the fact that the SPS Committee is the authority on any SPS measures, the SPS Committee seems to be the most appropriate forum where private standards should be discussed. The three phase plan recommended by the SPS Committee is a good point of departure for the official establishment of the SPS Committee's work plan on private standards. However it is recommended that a formal work plan or terms of reference be established which will guide the SPS Committee's work on private standards.

Included in this work plan should be provision for various studies on private standards among them a study which will look at the harmonisation of private standards both with other private standards and with international and national standards. Private standard setting bodies should also be included in the dialogue on the setting of these standards. Private standard setting bodies should be included to a certain extent in the discussions and work of the SPS Committee and should periodically be invited to inform the SPS Committee on the workings and developments of their private standards, but the SPS Committee should also periodically inform the private standard setting bodies of the work undertaken by the SPS Committee. Should the above recommendations be followed, national,

international and private standards will more likely move closer to each other (i.e. will move closer to harmonisation) in a shorter time period.

Even though DFID, with the help of a prominent firm of international trade lawyers, did provide a comprehensive legal opinion on private standards and the SPS Agreement, further work can be undertaken on the implementation of Article 13 of the SPS Agreement. In particular further guidance could be given by Members on their interpretation of “non-governmental entities” and “reasonable measures” as well as the various other avenues that could be pursued in order to implement Article 13 in such a manner that private standards will be brought within the ambit of Article 13. Particular attention should be given to the suggestions contained in DFID’s submission with regards to these alternative avenues which may be pursued. It is recommended that these avenues be pursued within a given time period before resort is had to the Dispute Settlement procedure. Only on the expiration of such a reasonable time period should Members consider reverting to dispute settlement mechanisms that are available.

Southern African countries should be encouraged to participate in these discussions and should table the specific problems that they may face. To this end it may be pertinent to make use of trade specialists to conduct a private standards audit to assist Southern African countries to identify specific issues that they may be experiencing with private standards.

In summary the following is recommended:

- The SPS Committee and the three international standard setting bodies should continue to lead the discussions on private standards.
- Where private standards do overlap between the SPS and TBT Agreements, the TBT Committee should be approached in these circumstances.
- It is important to involve private standard setting bodies in the discussions of private standards at the SPS Committee.
- The three-phased workplan contained in Annex 1 does provide a good point of departure, but a more formal workplan must be agreed upon.

- Southern African countries should table their concerns regarding private standards officially, noting that these countries have been relatively low key in the discussions to date.
- Trade specialists may be used to assist Southern African countries in identifying and articulating problems they may be experiencing with private standards.
- A review of the legal interests of Southern African countries should be conducted of the DFID opinion by local experts with a view to determining whether the developing country perspective is adequately catered to.
- Further work is needed on the legal relationship between private standards and the SPS Agreement. This legal analysis should be completed in a given timeframe and only after having obtained the legal opinion should Southern African countries consider the possible use of the WTO's Dispute Settlement procedure.
- Southern African countries compile a work strategy to ensure that they meet the WTO Members' invitation to submit information as requested in Phase I of the proposed WTO methodology, noting that the currently scoped deadline is for the SPS Committee's meeting of 24-26 February 2009.

**The 3-phase WTO Secretariat Recommendation**

Phase 1:

Each interested Member would be invited to identify one or two products of export interest whose trade is affected by private standards. For this product the Member should provide:

- (i) a description of the relevant private standard(s) which are applied in each of its export markets;
- (ii) the relevant Codex, IPPC or OIE standards) for that same product;
- (iii) information on the positive and/or negative effects of the private standard(s), including, to the extent possible:
  - data on trade,
  - costs of compliance with the standard(s),
  - information on recognition of compliance with the standard(s);
  - identification/categorization of businesses that meet the private standard(s) (e.g., small, medium or large, national, foreign or multi-national);
  - any technical or financial assistance received to assist compliance with the private standard(s); and
  - benefits obtained from compliance with the private standard(s).
- (iv) identification, to the extent possible, of any provisions of the SPS Agreement that are relevant with regard to the difficulties arising from the requirements established by the private standard(s).

The Secretariat could develop a format for the use of Members in providing the above information, to ensure some consistency and comparability of the information provided and to facilitate its consideration by the Committee.

### Phase 2:

The Secretariat, with the assistance of interested Members, would compile the information provided by Members into a descriptive matrix. This should permit the group of interested Members to prepare a descriptive report, which would include:

- (i) the identification of the products whose trade is most affected by private standards;
- (ii) identification of the markets where trade is most affected by private standards;
- (iii) the private standards most frequently identified;
- (iv) the costs of compliance with private standards;
- (v) the benefits of compliance with private standards;
- (vi) technical / financial assistance provided;
- (vii) differences and similarities between the private standards and the international standards;
- (viii) whether the private standards facilitate implementation of the relevant international standards; and
- (ix) the provisions of the SPS Agreement most frequently identified....

### Phase 3:

On the basis of the descriptive report, and other relevant input, the group of interested Members could prepare an analytical report for consideration by the SPS Committee. The report would address, inter alia, to what extent private standards create trade difficulties; the nature of any such difficulties; the most relevant SPS disciplines; the role of Codex, IPPC and OIE; etc. This report should also propose concrete actions for consideration by the SPS Committee based on the above study and the comments of Members.

With regard to timing, it is recommended that the various phases identified above be scheduled to correspond with meetings of the SPS Committee. That is, if the Committee were to agree to this recommendation at its meeting in October 2008,

Members would be invited to submit information as requested in Phase I by the time of the Committee's meeting of 24-26 February 2009. The descriptive report would be prepared for presentation to the Committee at its meeting of 23-25 June 2009, and the analytical report with recommendations could be presented for consideration by the Committee at its meeting of 13-15 October 2009.

