

**Private Standards & the SPS Agreement**

Rian Geldenhuys

Director  
Trade Law Chambers  
Cape Town South Africa


The ComMark Trust  
Regional Standards Programme  
Pretoria South Africa  
November 2008



[www.tradelawchambers.co.za](http://www.tradelawchambers.co.za)

**Background**


- SPS Agreement does give right to Members to protect human, animal and plant life
- SPS measures in itself are difficult barriers for developing countries
- New barrier: private standards
- Private standards are not imposed by governments, but private buyers (e.g. a supermarket chain)
- Mix of private standards and especially agriculture is of vital importance for Southern Africa



2

**Background**


- Although some discussion on private standards in the WTO and other institutions, no Southern African country has participated
- Purpose of this meeting:
  - to inform SADC member states of the status quo;
  - encourage members to consider the impact of private standards on their producers;
  - assist in considering individual country positions
- Highlighting what has been discussed at:
  - WTO SPS Committee
  - Three international standard setting bodies



3

**SPS Agreement and Private Standards**

- Governments are allowed to make use of SPS measures if based on science to protect human, animal and plant life
- May take many forms:
  - Product must come from disease-free area
  - Inspection of products
  - Specific treatment or processing of products
  - Permitted use of additives, etc
- May not use SPS measures to be an arbitrary barrier to trade, but recognised that the same SPS measures cannot apply across the board



4

### SPS Agreement and Private Standards

- Private standards fall within grey area in context of SPS Agreement
- Private standards were not contemplated at the time of negotiating the SPS Agreement
- Art 13 of SPS Agreement provides only real legal argument for bringing private standards within the ambit of the SPS Agreement
  - Due to fact that Members must ensure compliance by non-governmental entities
  - But legal questions surrounding what constitutes:
    - "reasonable measures"
    - "non-governmental entities"
- WTO Secretariat has discussed this and UK gave discussion document - outcome: still legal uncertainty



5

### SPS Committee & Private Standards

- SPS Committee within WTO looks after all SPS matters
- Private standards first raised by St. Vincent and the Grenadines at end of June 2005
- They pointed out that EurepGAP (now GlobalGAP) is now a condition for trade between them and the UK supermarkets
- In their opinion, as the GlobalGAP measures dealt with SPS measures, government must implement and not private buyers or non-governmental entities
- They thus wanted clarity on whether these measures were imposed by government – EC stated that it was not EC institution – but that of private individuals
- This led to PS being tabled for discussion for the first time



6

### SPS Committee & Private Standards

- In late January 2007 the WTO SPS Committee issued background paper on private standards
- At time of writing – and still today – there has been not WTO determination made on whether private standards fall within ambit of SPS Agreement
- SPS Committee gives two possibilities:
  - Art 1.1 could indicate that private standards fall within ambit of SPS Agreement
  - Art 2 read with Art 13 – could possibly be that private standards do fall within ambit of SPS Agreement – legally more sound interpretation
- Outcome – thus still uncertain



7

### SPS Committee & Private Standards

- But could look at other WTO Agreements for guidance
- GlobalGAP has elements of TBT measures
- However TBT Agreement contains similar wording to SPS Agreement
- Thus question still revolves around interpretation of "reasonable measures" and "non-governmental entities" – possible further legal analysis needed
- Need to further consider relationship between the three international standard setting bodies and private standards – especially their rules – this has not been done as yet
- Another avenue to pursue is that of equivalence of different private standards



8

### SPS Committee & Private Standards

- WTO SPS Committee circulated questionnaire amongst Members on 5 July 2008 to solicit proposal to deal with private standards
- Outcomes:
  - SPS Com should drive the discussion on private standards – although individual Members will bear workload
  - Private standard setting bodies should be invited periodically to inform Committee on recent developments
  - Only look at TBT Com when there are overlaps
  - Codex, IPPC, OIE must form part of discussions



9

### Other contributions at SPS Committee

- No SADC has made any contributions – Members must undertake studies to determine effect of private standards on their producers and the like
- ISO – stated that it worked closely with Codex and sets standard which will help countries comply with Codex standards
- UNCTAD – 1<sup>st</sup> paper confirms that private standards are becoming the entry condition for goods and has a detrimental effect on especially small-scale producers
- UNCTAD – 2<sup>nd</sup> paper 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.



10

### Other contributions at SPS Committee

- OECD – confirms that private standards are often more stringent than national standards and has become the de facto requirement if you want to export
  - Also – has had a detrimental effect on market access for developing countries
  - Following identified as being challenges:
    - recordkeeping by producers/out-growers
    - chemical use verification
    - management of different standards systems and their compliance; certification
    - transforming the mindset of producers
- Bahamas – compliance with private standards can contribute to exports



11

### Other contributions at SPS Committee

- DFID – private standards do affect trade – especially for developing countries
  - Essentially – agree broadly with background of SPS Committee – but there is more scope for legal analysis especially looking at other WTO Agreements (TBT) and the rules of the three ISSB
  - Does suggest that SPS Agreement could be amended to specifically include private standards – unlikely!
  - Better idea- develop guideline for the implementation of Art 13 – thus looking at curbing implementation of PS – also unlikely
  - Better yet – for a group of countries to enter into second agreement to behave in a certain manner with respect to PS (such as the GATS Standards Code) – but unlikely as these negotiated at plurilateral rounds
  - Best to look at further legal alternatives as mentioned and to discuss it at SPS Com



12

### Other contributions at SPS Committee

- OIE – private standards are unscientific and has a zero-risk approach (which is not necessary) which is inconsistent with SPS Agreement
- Uruguay – concerned about private standards – want terms of reference for a working group on PS to be drafted



13

### Codex on Private Standards

- During the meetings held in 2007 – Codex decided that it will not discuss PS, as SPS Com is appropriate forum
- During 2008 some members mentioned that PS are being discussed at SPS Com, OIE and IPPC – most importantly PS is impacting on objectives of the Codex
- As such SPS Com should define a position on PS as it is the undisputed reference with regards to food standards on a multilateral level
- Summarised major concerns of WTO Members about PS as:
  - Effect of PS on Market Access
  - Developmental concerns
  - Legal issues in relation to WTO Agreements
- FAO & WHO to be invited to next meeting to present papers on PS



14

### OIE on Private Standards

- OIE as pointed out did raise concerns regarding PS
- During May 2008 General Meeting – had an information session as part of the Technical Items of general interest
- Based thereon, the International Committee took the following decisions:
  - To reaffirm the standards they publish relating to animal health & welfare as *the* international standard (i.e. no need to extra standards)
  - To work with relevant public and private organisations on private standards to ensure that PS *do not* conflict with its standards
  - To support Members so that they may take steps to ensure that private animal health & wealth standards are consistent with the OIE's



15

### IPPC on Private Standards

- A review of all publicly available information revealed that the IPPC has not discussed or taken any steps on PS
- This was confirmed by a Standards Committee Member



16

## Recommendations

- WTO SPS Committee, with the help of the Codex, OIE and IPPC and input from private standard setting bodies should be the body who leads work on PS
- Where PS overlaps with SPS and TBT Agreement, the TBT Committee should be approached
- A three-phased workplan was proposed which is an excellent starting point, but workplan should be formalised
- Southern African countries must table their concerns on private standards – to this end trade specialists should assist countries to identify needs
- A comprehensive legal review of SADC's interests should be undertaken
- Southern African countries should compile a workplan in order to ensure that they meet the WTO's invitation for submissions in terms of phase 1 of the workplan –deadline : 24 February 2009

