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## Engaging with private sector standards: a case study of GLOBALG.A.P.

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*There is now a fairly substantial literature on private global business regulation which focuses on the rise of non-governmental and private regulatory systems alongside traditional state-based systems. These private systems cross national borders and impact on international trade which, in the intergovernmental realm, is governed by the rules of the World Trade Organization (WTO). In this article, the authors argue that while in principle private global regulatory trade regimes do not fall under WTO jurisdiction, in practice they are difficult to keep separate. They therefore have the potential to become a concern within the WTO, not only in legal terms, but also from a political perspective because private global regulatory schemes may (re)introduce the distortions into international trade that WTO rules sought to remove. In some cases, a hybridisation of standards occurs as private standards are recognised by public regulatory structures. National governments may find themselves squeezed between their international obligations and the pressures of their citizens, either to respond to consumer concerns themselves and risk being in conflict with their international obligations or to respond to producers seeking action against 'private red tape' which is nominally beyond the scope of the WTO. The article takes as its case study an international business-to-business agri-food standards body, GLOBALG.A.P., and explores the issues that arise for global trade governance from the growth in private regulation.*

**Keywords:** food regulation; private standards; WTO

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The relationship between domestic policy making and international agreements has been the subject of a large amount literature which has explored the implications for national governments of globalisation.<sup>1</sup> As Skogstad (2000: 822) notes, disciplinary divides between public policy and international relations have 'tended to act as a brake on sophisticated inquiry into the policy implications of the enhanced rule-making and rule-enforcement authority of international institutions'. Globalisation, and its impact on domestic economies, goes well beyond formal rules emanating from international organisations and agreements. In recent years, informal international regulatory structures have arisen alongside intergovernmental structures, and these can also have a profound impact on the operation of domestic economies.

During the recent decade, international relations scholars have increasingly become interested in global private governance arrangements. In an excellent review article, Vogel (2007) identifies the issues covered in the literature on private global business regulation and its shortcomings, and suggests a research agenda. One of the key questions in need of more research is the responses of governments to private global standards schemes and how such schemes interact with domestic and intergovernmental regulatory policies.

The linkages between global agreements and domestic implementation are not always clear-cut and the relationship flows in two directions. The first is 'downwards' in the sense that the international agreement is applied within the domestic policy arena and constrains national policy choice (Skogstad 2000: 822). This situation is evident in the guidelines for agencies such as Food Standards Australia New Zealand, Biosecurity Australia or the Australian Quarantine and Inspection Service, which are required to operate in accordance with Australia's obligations under the Sanitary and Phytosanitary Agreement of the World Trade Organization (WTO). In these cases, the national government has clearly ceded an element of sovereignty to the international organisations and, arguably, into the hands of largely unaccountable, but technically expert, bureaucratic organisations. The connection between international obligation and domestic implementation is not always this straightforward as governments do not always initiate strong domestic policy linkages between their international commitments and the domestic sphere. A common failure in this respect is in the area of economic sanctions (for an example, see Botterill and McNaughton 2008).

The second source of pressure is from 'below', and upwards, and can arise from two directions. First, governments can be subject to pressure from their citizens to address issues such as the use of child labour, which are beyond the coverage of the WTO, or to prevent the import of a product perceived to be risky but which does not meet the WTO criteria for exclusion. Second, they may face calls from firms or individuals to respond to issues arising from international private regulatory structures which can increasingly be characterised as 'private red tape', as they impose detailed standards on suppliers into the agri-food chain. The focus of this article is on this latter form of upward

pressure, as the means for addressing problems arising from private regulation are more problematic and the WTO status of these schemes is unclear.

Because they are private arrangements, some argue that private regulatory arrangements sit outside the WTO agreements and therefore cannot legally be challenged as non-tariff trade barriers (for example, Vogel 2007: 264–5). However, the political reality of government in modern, advanced democracies suggests that concerned citizens will turn to government to ‘do something’ irrespective of whether the problem arises from formal or informal regulatory arrangements. Thus, governments may find themselves being drawn into a two-level game in which they will have to negotiate at both the domestic and the international level to address the issue (Putnam 1988). Our case study raises the question of what that ‘something’ might be. There is ambiguity within international agreements about their coverage of private action—so there is a legal dimension to the question. However, there is also a political dimension, as governments seek to respond to the issues raised by their nationals. This may mean raising internationally issues that do not strictly fall within the purview of existing international legal instruments. A further dimension arises when national governments seek to rely on private regulatory structures in the implementation of governmental programs, and the risks they run when the private regulation includes elements that are incompatible with international agreements.

We address these various pressures through our case study: the private business-to-business regulation of the agri-food trade through GLOBALG.A.P.<sup>2</sup> The article begins with a brief history of GLOBALG.A.P. as a regulatory structure and then discusses its impact on producers in both developed and developing countries. This is then followed by a section which discusses the interaction between private regulatory arrangements and the provisions of the WTO, specifically the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) Agreements. We then explore the options available to national governments who are squeezed between their obligations to comply with these agreements and the concerns of their producers that schemes like GLOBALG.A.P. are imposing unacceptable levels of ‘private red tape’ on their operations and, in some cases, acting as barriers to trade. Some parts of the article draw on eight interviews conducted in Australia in 2009 and in Europe in 2010 with representatives of farm groups in the UK and Europe, Assured Food Standards in the UK, WTO officials, and with industry representatives in the horticulture industry. Some of our interviewees preferred not to be identified directly and we have respected this in the reporting of their comments.

### **A brief history of GLOBALG.A.P.**

GLOBALG.A.P. was formed in 2007 as an extension of an earlier scheme—EUREPG.A.P.—which was set up by European retailers in 1997. EUREPG.A.P.

arose from the coincidence of two quite unrelated sets of circumstances—a raft of food safety scares in the 1990s and the rapid rise of high-end home branding among major supermarket chains.

During the 1990s, there was a series of food safety scares in Europe. The highest-profile scandal was probably the outbreak of ‘mad cow disease’ (bovine spongiform encephalopathy or BSE) and the consequent slaughter of large numbers of animals. Others included salmonella in eggs in the UK and the presence of diesel fuel and sewage in animal feed (Campbell 2005: 72). In the UK, a number of these scares followed the passage of the Food Safety Act 1990 which had ‘brought about a major change in the distribution of legal liability for food product safety along the supply chain’ (Henson and Northen 1998: 118). Freidberg (2007: 323) describes this as providing the supermarkets with ‘greater autonomy in matters of safety and quality’.

The food safety panics and the shift in responsibility for food safety from the state to the retailers coincided with an important trend in supermarket food retailing—the rise of the high-end home brand. Home-branding originally emerged in the 1970s in the form of plain-packaged generic foods which competed at the low price end of the market for basic foodstuffs, such as flour, butter, etc. In the 1990s, a new form of own-branding emerged. In a highly competitive environment in which profit margins were very thin, supermarkets turned their attention to meeting the demands of wealthier consumers for fresh, novel and convenient foods, such as ready-to-eat gourmet meals (Burch and Lawrence 2005). Extending home-branding to the premium, high-value end of the consumer food market exposed supermarkets to a new level of risk. While a food scare associated with a third brand was undesirable, one associated with a single item in the supermarket’s own premium line placed the whole brand at reputational risk, including for quite unrelated products. Given that, by 1998, own-branded products accounted for ‘around 62% of new product launches’ by UK supermarkets (Henson and Northen 1998: 114), there was a strong incentive for supermarkets to institute tight quality-control measures along the value chain.

Supermarkets initially moved to set up their own sets of production protocols to meet both the requirements of the UK’s Food Safety Act 1990 and the risk management imperatives of brand protection (Freidberg 2007; Havinga 2006: 522). In Europe, the supermarket chain Carrefour created its own label for beef which ‘really took off with the 1996 BSE crisis’ (Ménard and Valceschini 2005: 429). In 1997, a group of supermarkets, food retailers, non-governmental organisations (NGOs), consumer groups and others formed the Euro Retailer Produce Working Group (EUREP). EUREP established a system of good agricultural practice (GAP) which went beyond simple food safety concerns to include protocols for sustainable food production. This scheme became GLOBALG.A.P. in 2007 and now boasts an impressive global membership of businesses including food producers, suppliers, supermarkets and fast food

outlets, as well as associate members including standards bodies and chemical companies.<sup>3</sup>

An important feature of GLOBALG.A.P. is that the coverage of its standards goes beyond issues strictly related to food safety allowable under the SPS Agreement of the WTO. The rise of premium home-branding made retailers susceptible to campaigns by NGOs which might link their products to child labour, environmental damage or other poor production practices. EUREPG.A.P. therefore included standards that extended beyond product safety in order to meet concerns about corporate social responsibility. As well as serving to fend off potential embarrassment from association with undesirable production practices, EUREPG.A.P., and later GLOBALG.A.P., served to 'add value in the mind of the consumer. At the heart of its mission is the production of a virtual image; an imagined countryside' (Campbell 2005: 6).

### **The impact on producers**

GLOBALG.A.P. is only one of a number of standards with which agricultural producers wishing to sell into the increasingly concentrated global supply chain are being required to comply (Tallontire 2007: 775). In practical terms, the success of standards such as GLOBALG.A.P. rests on the monitoring and control of agri-food production at every stage in the value chain. This control has been achieved in large part through third-party certification (Hatanaka *et al.* 2005; Henson and Northen 1998). Hatanaka and Busch (2008: 73) define third-party certification as 'a product safety and quality verification mechanism in which third parties assess, evaluate and certify safety and quality claims against a particular set of standards and compliance procedures'. The costs of these audit systems are borne by the producers who wish to sell to the supermarket chains (Bain *et al.* 2005: 75; Henson and Northen 1998: 113)<sup>4</sup> and are not passed on to the consumer, in effect ensuring that the standards sought by the retailer are delivered free of charge.

It is worth noting that the incorporation of "'rich country" consumer sensitivity' (Josling *et al.* 2004: 183) into the standards has resulted in something of a paradox. NGOs have used their influence effectively in gaining corporate responsibility standards and third-party certification as a means to 'improve social and environmental conditions throughout the commodity chain' (Hatanaka *et al.* 2005: 363). However, the consequences of schemes like GLOBALG.A.P. have in many instances been to exclude small producers in developing countries from the global agri-food market. As Vogel (2007: 267) notes: 'although western-based NGOs claim to speak in the name of the underrepresented citizens in developing countries, those citizens remain largely silent'. He suggests that, in some cases, Western-imposed standards 'may actually undermine the welfare of developing country workers', pointing out,

for example, that in some countries, child labour 'is critical to family incomes' (Vogel 2007: 274).

While there is discussion within the academic literature of the impact of GLOBALG.A.P. on producers in developing countries, there is only sparse consideration given to the impact on producers in *developed* countries. However, concerns are also evident among these producers about the nature of the standards GLOBALG.A.P. is promoting. In the UK, for example, producers are covered by the Red Tractor scheme which was developed by Assured Food Standards, a company limited by guarantee and governed by representatives of the whole food chain. Red Tractor is currently a member of GLOBALG.A.P., but it became clear during the course of this research that Assured Food Standards was 'considering its relationship' with GLOBALG.A.P. (interview). Issues such as child labour were regarded as not being of particular interest to UK retailers, and producer groups confirmed that farmers found some of the GLOBALG.A.P. standards 'difficult to grasp' and considered some of the non-quality-related attributes in the standards to be 'bolted on' to benchmark assurance schemes (interview). European farm groups are also concerned about the proliferation of private standards, although they concede that such schemes can facilitate as well as hinder the sale of farm produce. They expressed concern that private standards can be used against farmers and that they served as the 'entry door' to shops (interview).

In the case of New Zealand, GLOBALG.A.P. was adopted early on by Zespri, the monopoly exporter of kiwi fruit. Zespri adopted EUREPG.A.P. as part of its marketing strategy in the 1990s when the industry was responding to declining market conditions by rebranding and repositioning its product globally. Campbell (2005: 13) reports that the industry 'implemented significant levels of audit around organic production, integrated systems production, taste, appearance, size and storageability'. By 2003, this audit system had been converted 'to comply with EurepGAP' (Campbell 2005: 14). Zespri's former chief executive officer explained that EUREPG.A.P. was adopted because its emergence coincided with a major shift in Zespri's own marketing strategy towards a focus on image and quality. He conceded that there was 'some grizzling' about the level of paperwork, audits and sampling regimes associated with the adoption of the scheme, but it was an important part of Zespri's corporate marketing strategy (interview).

Australian producers have been somewhat less enthusiastic about EUREPG.A.P./GLOBALG.A.P. This could reflect the composition of Australian horticultural trade, which is much more focused on the Asian market (Campbell *et al.* 2006: 82). Australian producers are well accustomed to meeting exacting export standards through their involvement in the Japanese market, and anecdotal information suggests that there is a growing frustration with the proliferation of incompatible audit/quality systems, which is generating a degree of what could be described as 'private red tape'. At an official level, the Australian government appears somewhat ambivalent about the standards. The

Department of Innovation, Industry, Science and Research is represented on the board of the Joint Accreditation System of Australia and New Zealand, which is responsible in Australia for overseeing the accreditation of bodies which audit compliance with GLOBALG.A.P. In 2004, the Department of Agriculture, Fisheries and Forestry issued the *Guidelines for Implementing EUREPGAP<sup>®</sup> for Australian Fresh Fruit and Vegetable Producers*, which arose from the recommendations of a working group set up to look at the impact of EUREPG.A.P. on Australian producers. The government's view of the standards is implicit in the introduction to the guidelines:

The *normative* document for certification 'EUREPGAP<sup>®</sup> Fruits and Vegetables' commenced as a proposal from European retailers in 1997 and was developed from a group of representatives from all stages of the supply chain in the fruit and vegetable sector in Europe. It has since developed into a privately managed on-farm accreditation scheme which seeks to provide a global verification framework for fruits and vegetables based upon the implementation of good agricultural practices.

As a European retailer-founded proposal the development of EUREPGAP<sup>®</sup> has been an issue of concern for Australian horticultural exporters and producers since 1999. This concern has been due to the conflicting messages being reported about the impact EUREPGAP<sup>®</sup> may have upon export markets (Foodlink Management Services 2004: ii; our emphasis).

The document goes on to recommend that 'Australian producers may be better served by benchmarking existing Australian based assurance schemes against EUREPGAP<sup>®</sup> before choosing to independently adopt this standard' (Foodlink Management Services 2004: 1). The document then makes it clear that the 'Australian Government Department of Agriculture, Fisheries and Forestry does not recommend or endorse this standard but recommends producers should be aware of the standard and similar commercial standards' (Foodlink Management Services 2004: 2).

### **Interaction with the WTO**

The SPS Agreement of the WTO is clear about the nature of measures that may be set by governments to protect plant, animal and human health. Article 2 of the Agreement states that: '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' (WTO 1998: 29).

The Article goes on to make an exception, by reference to Article 5, to cover circumstances in which relevant scientific evidence is insufficient. However, in these circumstances it places the onus on members to seek to obtain additional

information ‘within a reasonable period of time’ (WTO 1998: 33). Private standards do not necessarily meet the exacting evidentiary requirements set by the SPS Agreement—for example, some retailers reportedly arbitrarily reduce statutory maximum residue levels for marketing purposes (interview). The simplistic response to the apparent conflict between the WTO rules for formal regulation and the standards being applied through informal regulation is that the latter is a creature of the free market and therefore of no interest to governments. It could be argued that if producers choose to comply with GLOBALG.A.P. in order to sell their produce to particular customers, that is their choice and they are equally free to choose not to apply these standards. Research has shown, however, that the reach of GLOBALG.A.P. is such that the ‘voluntary’ nature of compliance is increasingly illusory (Hatanaka *et al.* 2005: 359–60). Henson and Reardon (2005: 244) refer to ‘an array of inter-related public and private standards, both of which are becoming an a priori mandatory part of doing business in supply chains for agricultural and food products’. This interrelatedness confuses the issue if governments themselves blur the boundaries between public regulations and private standards. An example of such a blurring has occurred in the UK in the area of feed hygiene standards, where farmers assured under the private Red Tractor scheme are considered ‘lower risk’ and therefore are less likely to receive an inspection by Trading Standards. The WTO’s SPS committee recently undertook a survey of members about private standards in the agri-food chain and it was clear from some responses to that questionnaire that there is also confusion among producers about which standards are government requirements and which are private (WTO 2009a: 24).

Although GLOBALG.A.P. is a private food standards scheme, it does not necessarily mean that it falls outside the purview of the WTO food regulation regime. The purpose of the WTO food regulation regime is to set rules which define the parameters for domestic regulation of food safety, animal and plant health, and various environmental concerns. Three agreements of the WTO may have significance for the operation of GLOBALG.A.P.: the General Agreement on Tariffs and Trade (GATT), and the SPS and TBT Agreements. The SPS Agreement clearly states that it also applies to non-governmental bodies setting food standards:

[WTO] 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 (WTO 1998: 38; Article 13).

The TBT Agreement contains a similar clause (Articles 3 and 4). This implies that the fact that GLOBALG.A.P. is a private standard-setting body does not necessarily mean that it is outside the reach of the WTO, but exactly how these

provisions of the two agreements are to be legally interpreted remains unclear (WTO 2010a: 7–8).

In order to establish how GLOBALG.A.P. might be affected by the three WTO agreements, it is important to distinguish between two types of regulations: those covering process and production methods (PPMs) and those for non-product-related process and production methods (npr-PPMs). PPM regulation is concerned with PPMs which leave a physical trace on the final food product or impact on the health of plants or animals. For instance, a PPM regulation would state that a particular pesticide cannot be applied because it would leave residues in the end product, threatening public health. Domestic regulations should be based on internationally agreed science-based standards, where they exist. If governments want to introduce stricter regulations, these must be based on sound scientific evidence that such regulations are necessary to protect human, animal or plant health. The SPS Agreement only covers policy measures relating to PPMs.

A broader set of consumer concerns are included in npr-PPM regulation.<sup>5</sup> It refers to regulation aimed at *the way in which* the food is produced, processed and distributed, with a focus on processes which do not have an impact on the physical content of the final product or animal and plant health, but nevertheless are of concern to the consumer. Such consumer concerns could, for example, relate to some environmental or animal welfare concerns or farm labour working conditions. An example of a npr-PPM regulation is organic farming rules which prohibit the use of pesticides regardless of whether or not their use would have any physical impact on the final end product. The TBT Agreement covers PPMs not related to food safety, animal and plant health, and presumably also npr-PPM regulations and standards (see below).

Prior to the establishment of the WTO in 1995, Article XX of GATT 1947 allowed GATT member states to implement food regulation to ‘protect human, animal or plant life or health’ (Article XX [b]: 27) and policy measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’ (Article XX [g]: 28). Although Article XX also stated that the application of such measures was ‘subject to the requirement that [they] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’ (27), Article XX did not provide enforceable disciplines on such measures, and thus did not prevent countries from using food safety and animal, plant and environmental regulations as technical barriers to trade. In the Uruguay Round, Article XX of GATT 1947 was not renegotiated and therefore it still applies—now as GATT 1994 (which is similar in content but legally distinct). However, enforceable disciplines were negotiated as part of the SPS and TBT Agreements.

The SPS and TBT Agreements were an integral part of the package negotiated as a single undertaking in the Uruguay Round. Food-exporting countries feared

that domestic food safety and animal and plant health regulations could become a potential loophole for escaping increased market access for agricultural produce, which was envisaged as the outcome of the negotiations on the Agreement on Agriculture (Bredahl and Forsythe 1989: 190; Daugbjerg and Swinbank 2009). The SPS Agreement exclusively focused on policy measures to protect human, animal or plant life or health, while the TBT Agreement applied to '[a]ll products, including ... agricultural products' (WTO 2010b: 117; Article 1.3), with the exception of the sanitary and phytosanitary measures covered by the SPS Agreement. The objective of the TBT Agreement is 'to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade' (WTO 2010b: 117).

The SPS Agreement forms the core of the WTO food regulation regime. The basic idea behind the SPS Agreement is to create a level playing field for trade in food by preventing WTO member states from using domestic food regulations as barriers to trade. The basic provisions of the Agreement are harmonisation of regulations, science-based risk management and equivalence in relation to PPMs. As to harmonisation, the Agreement urges (but does not require) countries to apply international standards in their domestic food safety legislation where they exist, and the Agreement relies explicitly on three international standardisation bodies, the Food and Agriculture Organization of the United Nations' Codex Alimentarius Commission, the World Organisation for Animal Health (OIE), and the relevant international and regional organisations operating within the framework of the International Plant Protection Convention, to set the international standards for PPMs for food safety, animal health and plant health, respectively. If domestic regulations comply with the international standards of these bodies, they are WTO-compatible. Countries are allowed to introduce higher domestic standards if they can be scientifically justified. Equivalence means that importers must accept the measures of the exporting countries if the latter can demonstrate that they are equivalent to the importer's standard (WTO 1998: 29–33; Articles 2–5).

Other technical regulations (mandatory measures) and standards (voluntary measures) related to food production, processing, and marketing and distribution—for instance, environmental regulations—are covered by the TBT Agreement. In accordance with Article XX of GATT 1947, the TBT Agreement stipulates that technical regulations

shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment (WTO 2010b: 118; Article 2.2).

The ‘Code of Good Practice’ of the TBT Agreement (WTO 2010b: 135; Annex 3) states that standards must not create ‘unnecessary obstacles to international trade’, but has no limitations on the objectives which they can be applied to achieve. Similarly to the SPS Agreement, the TBT Agreement states that domestic technical regulations and standards must be based on international standards, where they exist. The increasing use of eco-labelling has triggered a debate both among WTO member states and among trade lawyers as to whether or not the TBT Agreement covers npr-PPM regulation (Josling *et al.* 2004: 51–6). While the Agreement clearly covers PPMs, it is not clear whether npr-PPMs are covered. In particular, discussions on voluntary, government-sanctioned eco-labelling in the WTO Committee on Trade and Environment have revealed significant disagreement over whether or not the TBT Agreement covers npr-PPM-based labelling and the implications of non-coverage. Switzerland and, in particular, the European Union (EU), and initially also Canada, have argued that the TBT Agreement covers npr-PPM-based labelling, whereas a number of developing countries have argued that it is not covered and therefore not permitted (Joshi 2004: 81–5; Vranes 2010: 7). This dispute can also be found in the academic literature. For instance, analysing negotiating history, the TBT Agreement and GATT, and WTO case law, Joshi (2004) concludes that npr-PPM-based standards and technical regulations are neither covered nor recognised by the WTO agreements or by jurisprudence. On the basis of a more thorough analysis of the likeness (like product) concept applied by the WTO agreements, Vranes reaches the contrary conclusion, rejecting the argument that even if the TBT Agreement does not cover npr-PPM-based standards and regulations, it does not *per se* prohibit npr-PPM regulations and standards. As he argues:

The core of this possible misunderstanding seems to be rooted in the misconception that the TBT Agreement *permits* measures that otherwise would be prohibited. However, the TBT Agreement does not introduce permissions; rather, it lays down new obligations, i.e. disciplines that apply in addition to those of the GATT, in particular. Hence, its purported non-applicability would not imply that NPR PPM-based requirements would be *per se* prohibited (Vranes 2010: 7).

### **The squeeze between national and international pressures**

We began this article by arguing that national governments potentially find themselves caught between their commitments to international organisations with respect to their food regulations and pressure from suppliers into the international agri-food market who are facing increasing levels of ‘private red tape’. The puzzle raised by this squeeze is: What options are available to pursue the latter’s concerns while acting within the rules of international trade?

It remains to be seen how a WTO panel would deal with disputes originating in the application of private agri-food standards, as none have been initiated to date. The first issue to be untangled by a potential complainant would be the relevant agreement under which to bring a case. Here we need to return to the distinction between the measures which relate to PPMs and those which relate to npr-PPMs. Although GLOBALG.A.P. relies on the SPS Agreement to set the baseline for food safety standards, the scheme uses higher standards in a number of instances to meet consumer preferences as they are perceived by retailers. The use of standards set higher than those prescribed by the standardisation bodies authorised by the SPS Agreement to set international standards, and the lack of scientific evidence to legitimise such standards, may conflict with the SPS Agreement.

As noted above, the SPS Agreement does not cover npr-PPMs and it is not clear that the TBT Agreement does either. If the TBT Agreement does cover npr-PPMs, international standards should be applied where they exist. However, while for some GLOBALG.A.P. npr-PPM standards, an international standard may exist (for example, labour standards under the International Labour Organization), other areas may not have an international standard or do not have a comprehensive set of standards. For instance, while some standards exist for animal welfare under the OIE, there is no standard for livestock production systems (OIE 2010). Furthermore, since many international standardisation organisations relevant to food regulations are intergovernmental and based on consensual decision making, there is a risk that such standards would be the lowest common denominator, and thus unlikely to meet the expectations of retailers, or their customers.

As voluntary standards, with which producers have no obligation to comply unless they sign contracts with retailers applying GLOBALG.A.P. standards, GLOBALG.A.P. is not per se in conflict with WTO rules (WTO 2007: 4–5). This would also make it difficult for governments to take a case before a WTO panel. However, if GLOBALG.A.P. standards become the de facto standards for exports to a particular market because they are universally applied by all retailers in a market, there may be a case to be made that the standards are restricting market access for producers who do not produce under the GLOBALG.A.P. standards, but comply with the WTO rules. For situations in which governments adopt private standards or accept adherence to private standards as prima facie evidence that statutory standards are being met, the SPS Agreement seems clear, stating that: ‘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’ (WTO 1998: 38; Article 13). Arguably, this could form the basis for a complaint.

While there has been no legal challenge to private food standards, there is an emerging political challenge. The issue of private standards is mainly discussed in the SPS committee and, interestingly, only to a very limited extent in the TBT

committee (WTO 2010a: 5), under which npr-PPM standards may fall. Thus, so far, the political attention has attempted to focus on the private PPM standards related to the issues covered by the SPS Agreement (WTO 2007, 2009a, b), but the discussions have moved beyond these to include npr-PPM-based standards, which has worried some member states (WTO 2010a: 2, 4). The issue of private standards was first raised in the SPS committee in June 2005 by the two small states of Saint Vincent and the Grenadines, which were concerned about their banana trade with UK supermarkets. The issue was discussed again in October 2006 and in February/March 2007. A note produced by the SPS Secretariat in January 2007 highlighted some problems of private standards faced by exporters. One problem raised was the sheer number of private schemes—at that time, it was estimated at 400 and rising. Another issue raised by the SPS Secretariat was the blurred distinction between mandatory government standards and voluntary private standards, which might result in a situation in which the voluntary private 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’ (WTO 2007: 3).

Particularly the developing countries’ concerns about the growth in private food standards triggered discussions in an SPS committee meeting in February 2009. They argued that private standards in food trade led to higher production costs as a result of certification costs and the fact that producers often had to comply with multiple standards when they supplied a number of retailers. Furthermore, they complained about the lack of transparency and the undermining of international standards (WTO 2009b: 24–8). The Brazilian representative summarised the problems clearly when saying that ‘private standards represented higher costs for trade, a divergence from international standards, and confusion for exporters’ (WTO 2009b: 26). This led some of them to call for action by the SPS committee to discipline private standard setting. Ecuador, speaking on behalf of the Group of Latin America and Caribbean Countries (GRULAC),<sup>6</sup> suggested that the SPS Agreement be strengthened to address ‘the threat posed by SPS-related private standards’ (WTO 2009b: 27). Uruguay wanted the establishment of a permanent monitoring mechanism for private standards and the harmonisation of private standards, and called for rules, stating that ‘all private standards which went beyond international standards should be based on scientific evidence’ (*ibid.*). The OIE, which participated in the meeting, also expressed concern about private standards, noting that:

private standards could cause confusion and potentially undermine the key disciplines of the SPS Agreement of transparency and scientific justification of standards. Furthermore, while the SPS Agreement was trying to establish a more level playing field for all Members, private standards had disproportionate negative effects on developing countries (WTO 2009b: 27).

Interestingly, the work of the Organisation for Economic Co-operation and Development on the impact of private standards on producers is less clear, suggesting that other factors, such as infrastructure and institutional constraints in developing countries, may be more important in keeping smallholders out of global agri-food chains (OECD 2007: 27).

It is the Latin American countries, in particular, grouped in GRULAC, which have raised the issue of private trade standards in the WTO. The major importers from these countries—the United States, the EU and Japan—have been remarkably silent on the issue, but this does not mean that the issue is not a significant political issue. Brazil is a large agricultural exporter and the leading country of the Group of 20 coalition in the WTO, as well as a leading member of the Cairns Group. Argentina and Chile are also important members of these coalitions.

## **Conclusion**

This article has set out to demonstrate that the rise of private standards in international agri-food trade raises some important questions for the international food regulation regime. The standards generate pressure on national governments, which are squeezed between their international obligations on the one hand and the demands of their citizens on the other—in the latter case, from both consumers keen to see standards introduced that address concerns not explicitly covered by WTO agreements and from producers who are increasingly being required to meet such standards set by private retailer organisations in order to remain in key markets. We have focused on the latter group and concerns that are emerging about the costs of complying with private regulation which, while nominally voluntary, is becoming more pervasive in international agri-food markets. We have set out to untangle the puzzle of how national governments faced with pressure to act on such issues of concern to their producers could act, and what legal challenges they are likely to confront.

The threshold question is whether the private regulatory structures are covered by the agreements of the WTO—specifically the SPS and TBT Agreements. The literature on this question is divided. The division between WTO coverage of different types of standards (PPMs or npr-PPMs) is unclear, although it is clear that npr-PPMs are not covered by the SPS Agreement. Whether they are covered by the TBT Agreement is not resolved. This uncertainty has, however, not prevented the SPS committee from considering private standards and their impact, particularly on developing-country producers. The picture is complicated by the reliance by some governmental agencies on private regulation as evidence of compliance with statutory requirements. If the private regulation contains non-WTO consistent elements, there is potential for a breach of the SPS Agreement.

The WTO is both a legal instrument and a political forum for addressing issues in international trade. Members are already raising concerns about private regulation and the potential impact on trade. Dealing with the concerns they raise is both a legal and a political challenge to the WTO. GLOBALG.A.P. includes standards which are either not covered by the SPS or TBT Agreements, or which are not consistent with those agreements because they do not meet the requisite scientific evidentiary standards. Whether or not the issue of private regulation can be resolved legally by reference to the WTO has yet to be tested through the dispute settlement mechanism. Until this question can be resolved, national governments will continue to be squeezed between their international obligations and the concerns of their citizens to act in cases of unwanted private red tape.

## Notes

1. For a good overview of the debates around globalisation and its implications for domestic policy making, see Skogstad (2000).
2. The Global Good Agricultural Practices Program is represented by a variety of acronyms in the literature. The form chosen here—GLOBALG.A.P.—is the style adopted by the organisation itself. See <[www.globalgap.org/cms/front\\_content.php](http://www.globalgap.org/cms/front_content.php)>.
3. For details of GLOBALG.A.P. membership, see <[www.globalgap.org/cms/front\\_content.php?idcat=4](http://www.globalgap.org/cms/front_content.php?idcat=4)>.
4. On average, the annual certification costs for a private standard vary between US\$2000 and US\$8000 (WTO 2009a: 5).
5. Josling *et al.* (2004: 18–20) distinguish between ‘content attributes’ (PPMs) and ‘process attributes’ (mainly npr-PPMs), but since the concept of PPMs also includes production processes, the two terms may easily cause confusion. In the absence of better conceptual terms, we shall stick to the highly technical, but nevertheless precise and agreed, concepts of PPMs and npr-PPMs.
6. GRULAC is a 33-member United Nations body whose members include: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and the Bolivarian Republic of Venezuela.

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