

# Public-Private Regime Interactions in Global Food Safety Governance

—PRELIMINARY DRAFT—

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## Abstract

*The exponential increase in food safety incidents across the globe in the past decades have resulted in mushrooming regulatory initiatives, including new standards and requirements from national governments, international organizations, and private actors. The regulatory lacuna in public regulatory space has left room for the proliferating private ordering initiatives at different levels with different designs, which have given rise not only to concerns but also many interesting theoretical and practical questions, for their important public health, international trade, and development implications. As regulatory regimes in global administrative space do not operate in isolation, it is crucial to understand how global food safety governance is configured and reconfigured through complex regime interactions. This paper therefore endeavors to explore the structure and processes of private food safety governance and their interactions with the traditional public governance regimes so as to shed light on such inquiries.*

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## 1. Introduction

The exponential increase in food safety incidents across the globe in the past decades have resulted in mushrooming regulatory initiatives, including new standards and requirements from national governments, international organizations, and private actors. Such regulatory initiatives, public as well as private, have emerged primarily to address the rapidly decaying public trust in the modern global food chains, complicated by many factors including the globalization of economic activities, advancements in food science and transportation technology, the multinationalization of the food industry, and the advent of the World Trade Organization (WTO) in 1995. Given the significantly transformed production, transportation, and consumption of food,<sup>1</sup> recent food safety incidents, with their intensified scope, severity, frequency, and impact, have become extremely challenging for to cope with.

A World Health Organization (WHO) report indicates that food safety problems contribute to 1.5 billion cases of diarrhea in children and over three million premature deaths annually, both in developed and developing countries.<sup>2</sup> For example, approximately 1.8 million children die in developing countries yearly of foodborne diseases caused by contaminated food and water.<sup>3</sup> The United States Centers for Disease Control and Prevention (CDC) estimates that 48 million illnesses, 128,000 hospitalizations, and 3,000 deaths result from foodborne diseases each year in the United States.<sup>4</sup> Despite the unprecedented numbers of food safety incidents, no multilateral treaty exists to monitor or regulate global food safety, other than the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),<sup>5</sup> which lightly touches upon the side issues of harmonization and scientification from an international-trade-law (facilitation of food trade) perspective. In addition, as contaminated food outbreaks respect no national boundaries, unilateral measures adopted by national governments, even with a certain level of extraterritorial effects, fail to provide an

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<sup>1</sup> See WORLD ECONOMIC FORUM, GLOBAL RISK 2008: A GLOBAL RISK NETWORK REPORT, <http://www.weforum.org/pdf/globalrisk/report2008.pdf>. Yasmine Motarjemi et al., *Future Challenges in Global Harmonization of Food Safety Legislation*, 12(6) FOOD CONTROL 339, 340-41 (2001). Fritz K. Käferstein et al., *Foodborne Disease Control: A Transnational Challenge*, 3(4) EMERGING INFECTIOUS DISEASES 503, 503-10 (1997), at <http://www.cdc.gov/ncidod/eid/vol3no4/kaferste.htm>. Fritz K. Käferstein & Mohammed Abdussalam, *Food Safety in the 21st Century*, 77(4) BULL. WORLD HEALTH ORG. 347, 347-351 (1999).

<sup>2</sup> World Health Organization [hereinafter WHO], *Food Safety Programme, Food Safety: An Essential Public Health Issue for the New Millennium*, 9, WHO/SDE/PHE/FOS/99.4 (1999).

<sup>3</sup> Office for the South East Asia Region, WHO, *Health Situation in the South East Asia Region 1994-1997*, SEA/HS/209 (1999), at 213-14, available at [http://www.searo.who.int/LinkFiles/Health\\_Situation\\_health\\_situation-94\\_97.pdf](http://www.searo.who.int/LinkFiles/Health_Situation_health_situation-94_97.pdf).

<sup>4</sup> See CDC Estimates of Foodborne Illness in the United States, at <http://cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

<sup>5</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 59 (2000), 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement].

effective or efficient approach to addressing the global food safety problem.

In light of the regulatory lacuna in public regulatory space, private actors, especially multinational food companies, supermarket chains and non-governmental organizations (NGOs), are increasingly filling the gaps by employing private standards, certification protocols, third-party auditing, and transnational contracting practices.<sup>6</sup> The emergence of private governance in food safety arena has been alongside the gradual decline of states' traditional command-and-control regulation, which is increasingly being replaced by more flexible, market-oriented mechanisms.<sup>7</sup> Examples include Global Good Agricultural Practices (GlobalGAP) and the British Retail Consortium (BRC) Global Standards, and Tesco's Nature's Choice. Although private standards are, in theory, not mandatory for suppliers, many have a *de facto* mandatory status, as a large part of buyers in global agri-food markets now require their suppliers to meet such private requirements, which are usually stricter than their public counterparts. In particular, reinforced by the participation of players with enormous market power such as WalMart, Carrefour, and McDonald's, private ordering initiatives are able to "filter[] all the way back through processors, traders, and down to the level of agricultural production."<sup>8</sup> These initiatives are a testament to the increasing importance of private governance tools in the global regulatory space of food safety.

Nevertheless, the proliferating private ordering initiatives at different levels with different designs have given rise not only to concerns but also many interesting theoretical and practical questions, for their important public health, international trade, and development implications. As regulatory regimes in global

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<sup>6</sup> See e.g. JENNIFER CLAPP & DORIC FUCHS eds., *CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE* (2009). Denise Prévost, *Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities*, 33 S. AFR. Y.B. INT'L L. 1 (2008); Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54(4) UCLA L. REV. 913 (2007); Tetty Havinga, *Private Regulation of Food Safety by Supermarkets*, 28(4) LAW & POL'Y 515 (2006); Linda Fulponi, *Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries*, 31(1) FOOD POL'Y 1 (2006); Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets* (IATRC Summer Symposium: Food Regulation and Trade: Institutional Framework, Concepts of Analysis and Empirical Evidence, Bonn, Germany, May 28-30, 2006 Working Paper).

<sup>7</sup> See generally BRIDGET M. HUTTER, *REGULATION AND RISK: OCCUPATIONAL HEALTH AND SAFETY ON THE RAILWAYS* 9-10 (2001); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy mixes for Environmental Protection*, 21(1) LAW & POL'Y 49 (1999); Franco Furger, *Accountability and Systems of Self-Governance: The Case of the Maritime Industry*, 19(4) LAW & POL'Y 445 (1997); Philip Eijlander, *Possibilities and Constraints in the Use of Self-Regulation and Co-Regulation in Legislative Policy: Experience in the Netherlands – Lessons to Be Learned for the EU?*, 9(1) ELECTRONIC J. COMP. LAW (2005); Philipp Pattberg, *Private Governance and the South: Lessons from Global Forest Politics*, 27(4) THIRD WORLD Q. 579 (2006); David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks*, 71(3) J. BUS.ETHICS 321(2007); John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80(7) MICH. L. REV. 1466, 1466-83 (1982).

<sup>8</sup> CLAPP & FUCHS, *supra* note 6, at 14.

administrative space do not operate in isolation, it is crucial to understand how global food safety governance is configured and reconfigured through complex regime interactions. What strengths and weaknesses are associated with the private approach to food safety regulation? Are public and private forms of governance in competition or do they complement each other? What problems and opportunities are associated with public-private or other forms of regulatory collaboration? Whose values, interests or preferences tend to prevail when private-public institutions interact? What guiding principles, if any, should inform such public-private collaboration? This paper therefore endeavors to explore the structure and processes of private food safety governance and their interactions with the traditional public governance regimes so as to shed light on such inquiries. Part 2 offers a brief account of the public approach to food safety at the national and international level, pointing out its ineffectiveness and inefficiency in face with this global problem. Part 3 describes the emergence of private governance of food safety, its features and driving forces, as well as its merits and problems. This paper focuses on GlobalGAP as the primary example. In Part 4, I assess the regime interface between public and private governance sites. Part 5 concludes by emphasizing the importance of constructive regime interaction instead of institutional boundary building to global food safety governance. Private ordering should not be categorically seen as destructive market barriers or regulatory competition, but rather an integral part of a larger, dynamic and evolving *governance complex*, which facilitates active, mutually reinforcing spheres of orchestrated global food safety governance.

## 2. National and International Public Governance of Food Safety

With ever-increasing food safety crises and heightened public criticism of government failure, it is however remarkable that no multilateral legal instrument addresses these global food safety issues in a comprehensive manner.<sup>9</sup> Indeed, at the international level, relevant public institutions such as the WTO, WHO, and Codex Alimentarius Commission (Codex), face numerous difficulties and problems that undermine their effectiveness and efficiency in addressing global food safety crises.

First, the WTO multilateral trading system, which arguably wields the most significant influence on food safety issues, has never made food safety a core concern throughout its history.<sup>10</sup> The WTO has no provisions regarding the effective promotion of food safety beyond its set of trade agreements.<sup>11</sup> Its most relevant legal instrument, the SPS Agreement, does not require governments to take positive steps to ensure food safety, but stands as a means for WTO members

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<sup>9</sup> See Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51(3) VIRGINIA JOURNAL OF INTERNATIONAL LAW 637, 665 (2011).

<sup>10</sup> Huei-chih Niu, *A Comparative Perspective on the International Health Regulations and the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 513, 515 (2006).

<sup>11</sup> Lin, *supra* note 9, at 665-69.

to create exceptions to each another's food safety rules and standards, in effect, to facilitate food trade.<sup>12</sup> Some scholars argue that many SPS Agreement provisions are designed in an unbalanced manner at the expense of public health, and may further create unnecessary barriers to WTO members whose measures genuinely aim at food safety rather than protectionism.<sup>13</sup>

Second, the Codex, established by the Food and Agriculture Organization (FAO) and WHO in 1963, currently serves as the international body setting public food standards, but the scientific basis of its standards has faced serious challenges, as has the legitimacy of its substantive and procedural rules, the accountability of its structure and operations, and the transparency of its decision-making process.<sup>14</sup> Due to the SPS Agreement's reference to its standards as *the* international standards in the food safety arena, Codex holds a legal status as a quasi-legislator whose standards are *de facto* mandatory for WTO members.<sup>15</sup> Most importantly, the Codex has become increasingly politicized especially in contentious food safety issues, because Codex member states have been incentivized by the backing of WTO dispute settlement system to use Codex platform as a means to pursue their trade interests instead of food safety.<sup>16</sup> As demonstrated by the controversial disputes over beef growth hormones (BGH), genetically modified organisms (GMOs), and ractopamine meat leaner, the Codex has numerous problems such as its frequent use of majority vote rather than consensual decision, poor developing-country member participation, and potential conflicts of interest over scientific authority.<sup>17</sup> All of these problems have rendered Codex unbalanced between public health and fair food trade practices, and its current institutional design inadequate in producing good governance of global food safety.

Thirdly, the WHO, the United Nation's special agency mandated with global health issues, including that of food safety, has so far failed to play a leading role

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<sup>12</sup> See Bruce A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 FOOD & DRUG L.J. 517, 517-20 (2000).

<sup>13</sup> See e.g. Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 CHI. J. INT'L L. 353, 354, 368 (2002).

<sup>14</sup> See e.g. Elizabeth Smythe, *In Whose Interests? Transparency and Accountability in the Global Governance of Food: Agribusiness, the Codex Alimentarius, and the World Trade Organization*, in CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE 93 (Jennifer Clapp & Doris Fuchs eds.); Ching-Fu Lin, *Scientification of Politics and Politicization of Science: Reassessing the Limits of Codex Alimentarius Commission* (working paper, an earlier version of which was presented at the Conference on the Future of Transnational Law: The EU, USA, China, and the BRICS, organized by European Law Journal, Peking University School of Transnational Law, and College of Europe, 29 Nov-1 Dec 2012, Shenzhen, China).

<sup>15</sup> Joel P. Trachtman, *The World Trading System, the International Legal System and Multilevel Choice*, 12 EUR. L.J. 469, 480 (2006).

<sup>16</sup> ALBERTO ALEMANNI, *TRADE IN FOOD: REGULATORY AND JUDICIAL APPROACHES IN THE EC AND THE WTO* 262-63 (2007).

<sup>17</sup> See generally Lin, *supra* note 14.

in creating or coordinating governance initiatives.<sup>18</sup> In addition, as argued by many international health law scholars, the WHO has failed to fully employ its normative authority delegated in WHO Constitution Articles 19, 21 and 23,<sup>19</sup> and in fact, it has refrained from adopting any binding legal instruments on food safety for over 65 years.<sup>20</sup> It remains unclear whether the WHO is politically and practically capable of undertaking international food safety governance and facilitating or coordinating regulatory efforts and future deliberations or cooperation on food safety issues. Again, as collective international actions are needed to address food safety issues at the global level, a comprehensive inter-governmental initiative has not yet found a place on the agendas of the WTO, Codex, or WHO.

At the national level, however, many countries have addressed food safety concerns by revamping food laws and restructuring their regulatory systems, such as enhancing border inspection, and implementing import restrictions and integrated food chain controls. Most such reforms are based on multiple public norms and institutions, including legislation and regulation, international health standards or advisory guidelines, and international trade treaty rules.

However, national food law regimes, especially those in developing countries, often face numerous problems, such as insufficient infrastructure, inefficient jurisdictional overlaps, ineffective law enforcement and inter-agency or central-local cooperation, regulatory fragmentation, and lack of financial or technical capacity.<sup>21</sup> Moreover, both developing and developed countries share such problems. Many industrialized countries such as the United States and in Europe suffer from regulatory system limitations, which further undermine public institutions' ability to provide efficient and effective food safety governance.<sup>22</sup>

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<sup>18</sup> Lin, *supra* note 9, at 673-84.

<sup>19</sup> See Allyn L. Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301 (1992); Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework of Global Health*, 96 GEO. L.J. 331, 334 (2008).375; and David P. Fidler et al., *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, 31 INT'L LAWYER 773 (1997).

<sup>20</sup> In January 2010, the WHO Executive Board recommended that the World Health Assembly (WHA) adopt a resolution "[r]ecognizing the importance of international agreement on global management of food safety." However, in May 2010, the Sixty-Third WHA simply repeated the existing but ineffective International Food Safety Authorities Network (INFOSAN) mechanism. WHO, *Advancing Food Safety Initiatives*, at 2, EB126.R7 (Jan. 21, 2010); Lin, *supra* note 9, at 678-81

<sup>21</sup> See also Bernd van der Meulen, *Development of Food Legislation Around the World: Concluding Observations*, in ENSURING GLOBAL GOOD SAFETY: EXPLORING GLOBAL HARMONIZATION 63, 65-66 (Christine E. Boisrobert et al. eds., 2010).

<sup>22</sup> Lin, *supra* note 9, at 649-61. "In the United States, overlapping competencies among FDA, the USDA, and other federal agencies have undermined the efficiency of the government in handling routine food safety surveillance tasks and in responding to crises of foodborne hazards. Insufficient and ineffective border inspection of imported food remains a node of weakness for both the United States and the EU. In the EU, many inadequately outfitted new member states, although developing their scientific and regulatory capacities, undermine the effectiveness of the

Against the background of globalized food production and consumption, problems caused by the regulatory failure of one country can spill over to others and considerably disturb their public health. A weak national or regional public food safety governance institution can have wide-reaching implications. Yet again, as “[c]ontemporary food safety issues are of a globalized nature and pose global challenges that transcend the competencies of individual states,”<sup>23</sup> unilateral national laws and regulations alone are insufficient to effectively cope with food safety problems in a highly interdependent world.<sup>24</sup>

### 3. The Emergence of Private Food Safety Governance

In light of the regulatory gaps left by the governments and inter-governmental organizations, different forms of private governance have emerged and engage in the regulation of global food market place. The most prominent example among various private governance institutions is GlobalGAP, a (European-based) retailer-led organization that sets Good Agricultural Practice (GAP) standards for agricultural products beyond the traditional state-centric, command-and-control sanitary regulations. First established as EurepGAP by retailers of the Euro-Retailer Produce Working Group in 1997, GlobalGAP made its name reflecting its global reach in 2007.<sup>25</sup> GlobalGAP is now the largest private standard-setter of food safety and sustainability in the world, with over 112,600 producers in more than 100 countries under its certification, deeply rooted in the setup of international food trade.<sup>26</sup>

Many factors have stimulated and facilitated the development and institutionalization of GlobalGAP and private food safety governance models as such.<sup>27</sup> First, the significantly industrialized and globalized patterns of food production and consumption have rendered food safety problems a regulatory issue beyond the scope of traditional state-centric mentality. The intense economic globalization of the past several decades has made national boundaries permeable to the flow of goods, services, humans, investment, and information.<sup>28</sup> The rapid advancement of food science and transportation technology, the advent of the WTO and its agreements aimed at trade liberalization, and the growth of transnational agri-food corporations have made global sourcing of food ingredients feasible and consequently have extended the global food supply chains. The rise of private food safety governance schemes (*e.g.*, GlobalGAP)

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high-standard European General Food Law.”

<sup>23</sup> Lin, *supra* note 9, at 661.

<sup>24</sup> *Id.*, at 650.

<sup>25</sup> GlobalGAP History, at [http://www.globalgap.org/uk\\_en/who-we-are/history/](http://www.globalgap.org/uk_en/who-we-are/history/).

<sup>26</sup> *Id.*

<sup>27</sup> See *e.g.* Tetty Havinga, *Transitions in Food Governance in Europe from National Towards EU and Global Regulation and from Public Towards Hybrid and Private Forms of Governance*, Nijmegen Sociology of Law Working Papers Series 2012/02, 6-9, available at <http://ssrn.com/abstract=2189478>.

<sup>28</sup> Motarjemi et al., *supra* note 1, at 340-41; Käferstein et al., *supra* note 1, at 503-10.

can be, to a degree, attributed to the globalization of food production and consumption. Global sourcing has also raised efficiency drivers (e.g., the reduction of transaction costs) of multinational food companies to effectively manage and control their upstream suppliers in different countries via standardization, certification, and third-party auditing methods.

Second, globalized food supply chains have intensified the seriousness, scale, frequency, and impact of food scares in the past decades, which in turn have not only heightened consumer concerns over food safety and distrust of government oversight, but also forced governments as well as the industry to respond to public criticisms by reviewing and reforming existing regulatory mechanisms. In the 2008 poisonous milk powder case, melamine-contaminated dairy products from China—from infant formula to crackers—affected 46 countries and caused more than 50,000 cases of infant hospitalization and six reported deaths.<sup>29</sup> This case triggered the recent reform of food-safety regulations in China, including the new Food Safety Law of 2009 that replaced China's Food Hygiene Act.<sup>30</sup> Another event of crucial importance in this direction is the Bovine Spongiform Encephalopathy (BSE, commonly known as mad cow disease) outbreak, thought to have originated in the United Kingdom (UK) in the 1970s. Approximately 190,000 bovine cases of BSE were confirmed in 21 countries, and more than 200 human cases were reported in 11 countries from 1986 to 2008.<sup>31</sup>

On the one hand, the BSE crisis (and of course, dreadful food safety scares in general) has raised considerable waves of consumer concerns about food safety, which has further amplified associated reputational costs (risks) on branded food suppliers, especially those in the retail sector.<sup>32</sup> This heightened consumer awareness prompted by the BSE crisis spread from Europe across the globe, along with other food safety issues (of varied risks) such as pesticides, and hormones and chemicals as animal food additives, and GMOs. This transformed mindset of consumers in Europe incentivized private governance mechanisms like BRC and EurepGAP (GlobalGAP's predecessor at the European level) to fill the regulatory gaps left by their public counterparts.<sup>33</sup> Apart from reputational costs concerns, private actors along food supply chains have increasingly engaged in games of product differentiation and marketing strategies. More specifically, driven by a variety of consumer expectations and preferences, private governance mechanisms now reach beyond safety and food quality, to environmental

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<sup>29</sup> See Lin, *supra* note 9, at 645-49 (2011).

<sup>30</sup> Winston & Strawn, *PRC Food Safety Law and Its Impacts on Chinese Food Industry*, GREATER CHINA LAW UPDATE (Dec., 2009), 1-2 (2009).

<sup>31</sup> WHO *Bovine Spongiform Encephalopathy, Fact Sheet No. 113*, WHO (Nov. 2002); *Fact Sheet: Variant Creutzfeldt-Jakob Disease*, Center for Disease Control & Prevention [CDC] (Aug. 23, 2010).

<sup>32</sup> See Havinga, *supra* note 27, at 6-7.

<sup>33</sup> Donal Casey, *Three Puzzles of Private Governance: GlobalGAP and the Regulation of Food Safety and Quality*, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 22/2009, at 10 (2009).

protection, fair trade, labor rights, or animal welfare, etc.<sup>34</sup>

On the other hand, the BSE crisis has led to a public perception of the ineffectiveness of state-centric regulatory systems and has triggered various regulatory reforms, including the UK Food Safety Act 1990.<sup>35</sup> Recognizing the limits of the traditional command-and-control approach in global food supply chain era, a few reform projects adopted by governments (especially in Europe) have gradually shifted the responsibility for ensuring food safety from national governments to the food industry. The UK Food Safety Act 1990 appears to be the benchmark legislation of “devolved responsibility.”<sup>36</sup> Section 21 of the Act imposes “due diligence” requirements on the ultimate suppliers of branded food products, namely the retailers. Food suppliers bear full responsibility for food safety incidents unless they can prove that they have taken all reasonable precautions and have exercised all due diligence to prevent such incidents.<sup>37</sup> This shift of responsibility from the public to private domain has prompted in part the emergence and development of private governance vehicles aimed at managing legal risks via private standards, certification protocols, and transnational contracting practices.

Although regulatory reforms in the food safety domain are usually incident driven,<sup>38</sup> the emergence of GlobalGAP and private governance mechanisms in general have not been driven by a single incident or factor. Rather, a mixture of factors—from economic globalization, frequent food scares, consumer demands, to regulatory reforms characterized by responsibility shifts, has stimulated the development and institutionalization of private modes of food safety governance.

#### 4. Increased Interactions at the Public-Private Interfaces

The development and recent institutionalization of private regulatory mechanisms illustrate “governance beyond the state,”<sup>39</sup> which describes new modes of governance designed and implemented by various non-state (private) actors. Food safety control measures traditionally have been regarded as a regulatory space exclusively filled by states,<sup>40</sup> with indirect participation by (the regulated) food companies. Now these companies are setting and implementing private rules and standards, and overseeing inspection and certification, which, individually and combined, may erode the centrality enjoyed by state authorities. Many observers argue that this rapid evolvement reflects a paradigm shift from state-

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<sup>34</sup> See generally Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARVARD LAW REVIEW 525 (2004).

<sup>35</sup> See generally Colin Scott, “Continuity and Change in British Food Law” 56 *Modern Law Review* 785, 792-94 (1990).

<sup>36</sup> See Casey, *supra* note 33, at 7-10.

<sup>37</sup> Section 21, UK Food Safety Act 1990.

<sup>38</sup> Lin, *supra* note 9, at 683 (2011).

<sup>39</sup> See generally Colin Scott, *Spontaneous Accountability*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 174 (Cambridge University Press, 2006).

<sup>40</sup>

centric approach to a broader focus of governance,<sup>41</sup> as private governance is increasingly gaining influence in the global market, and their authority and sanctions do not need to derive from national governments.

Given the enormous market and economic power (*e.g.*, through procurement decisions) of multinational food companies involved in the private regulation, private rules and standards, although not required by national or international law, have arguably become *de facto* mandatory.<sup>42</sup> Theoretically, private rules and standards are not legally binding to suppliers—they are required to merely comply with the public laws and regulations of their respective jurisdictions or export destinations. However, as a practical matter, some private rules and standards have become the industry norm along global food supply chains, which in effect present as “binding requirements” when economic power asymmetry exists between the procurer and supplier. Because retail markets in most industrialized countries are highly integrated, the economic power enjoyed by giant multinational corporations leaves little room for developing country suppliers: they usually must either comply with the industry standards or exit the market.<sup>43</sup> It is therefore understandable why many producers and exporters in developing countries fail to distinguish between private and governmental requirements, as they only know that to sell their product in a developed country market, they are *required* to comply with and inspected against certain rules and standards.<sup>44</sup>

Public and private governance mechanisms, as a result, overlap as potentially competing regulatory spheres at the transnational level. Such potential regulatory competition is further amplified by the fact that the public-private interface is increasingly blurred especially in the cross-border context, as exporting-country suppliers are generally unaware of the nature, source or process of “law” in an importing country as well as the so-called public-private divide. Such overlap and blurred boundaries have raised concerns in interactions between public and private sites of governance in the global food regulatory space, which is of crucial importance but under-analyzed.<sup>45</sup> There are some studies on private food standards, such as those on GlobalGAP’s impacts or the WTO SPS Agreement’s provide possible responses to private standards.<sup>46</sup> However, such studies tend to

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<sup>41</sup> See *e.g.* Casey, *supra* note 33, at 10 (2009); *more generally*, see Gerry Stoker, *Governance as Theory: Five Propositions*, 50 JOURNAL OF SOCIAL SCIENCES 17 (1998).

<sup>42</sup> See Gretchen H. Stanton, *Food Safety-related Private Standards: The WTO Perspective*, in PRIVATE STANDARDS AND GLOBAL GOVERNANCE: ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES 235, at 246 (2012).

<sup>43</sup> Difficulty especially for small suppliers in developing countries (*cite*)

<sup>44</sup> (WTO, 10 December 2009) This is also why many developing WTO members are greatly concerned with the trade effect projected by private standards, especially when they are usually stricter than their public counterparts. *Id.*

<sup>45</sup> The term “global food regulatory space” here falls in the concept of “global administrative space,” as developed by Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

<sup>46</sup> See *e.g.* Stanton, *supra* note 42; Denise Prevost, *Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities*, 33 SOUTH AFRICAN YEARBOOK OF INT’L LAW 1 (2008).

observe private institutions (e.g., GlobalGAP) as well as public institutions (e.g., WTO) in isolation, and overlook the theoretical and practical implications of studying how interactions take place between the two. To fill this gap, this paper examines two important dimensions of interaction between public and private regulatory mechanisms in global food safety governance: (1) interactions between private ordering and national authorities (see Figs. 1 and 2, the *double arrows A*); and (2) interactions between private ordering and relevant international organizations (see Figs. 1 and 2, the *double arrows B*).

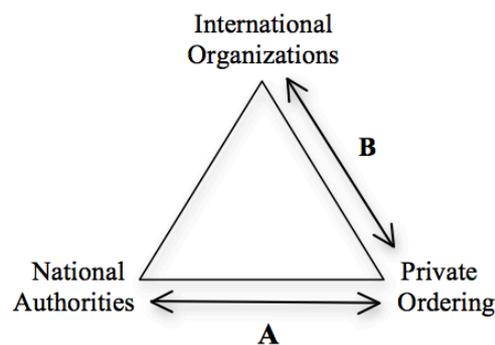


Figure 1: Public-Private Regime Interaction Triangle

While conventional wisdom gives the term “institution” broad definition that includes both formal intergovernmental organizations and government agencies, and also private actors and other hybrid bodies, it tends to focus more on the “public” side of inter-institutional interactions. For example, when approaching the “inter-institutional relations” rubric, conventional wisdom captures as many as five dimensions of institutional interaction that seem oriented to states and inter-governmental organizations: (1) Horizontal interactions between international actors; (2) vertical interactions between an international organization and its member state(s); (3) diagonal interactions between an international organization and non-member state(s); (4) horizontal interactions between different agencies in various national governments; and (5) horizontal relationships between government agencies in the same country.<sup>47</sup>

However, a state-oriented perspective, which centers on the role of public administrative institutions at national and international levels and their interactions, seems incomplete, especially in the area of food safety governance. To be sure, public institutions enjoy considerable power and resources and

<sup>47</sup> See Institute for International Law and Justice, *Analyzing and Shaping Inter-Institutional Relations in Global Governance* (the report of a workshop held on April 16, 2012, at New York University School of Law), at 1-2, available at <http://www.iilj.org/newsandevents/documents/Aprilreport.pdf>. See also Sebastian Oberthür and Thomas Gehring, *Conceptualising Interaction between International and EU Environmental Institutions* (No. D1 of the Project “Institutional Interaction: How to Prevent Conflicts and Enhance Synergies Between International and European Environmental Institutions”), at 9, at [http://www.ecologic.eu/download/projekte/850-899/890/interaction\\_concept\\_final.pdf](http://www.ecologic.eu/download/projekte/850-899/890/interaction_concept_final.pdf).

therefore cannot be ignored in mapping the regulatory complex as demonstrated in Figure 2. Yet today, private *regulators* are actively changing the landscape originally controlled by public institutions due to their economic stakes, expertise, resources, roles in global supply chains, economic influence, and strategic business networking capacity. For that reason, leaving out the “private” aspect of inter-institutional interactions in the analysis of global food safety governance would result in an incomplete analysis.

Therefore, two dimensions of interaction between public and private institutions in global food safety governance are of particular significance for two reasons. First, the two dimensions here do not fall squarely into any of the five institutional-interaction dimensions captured above; that is, they are not vertical, horizontal, or diagonal in a strict sense.<sup>48</sup> Rather, because private ordering is transnational in nature, and does not fit directly into a fixed institutional level,<sup>49</sup> the inter-institutional relationships between private and public regimes are in a contextual, informal, and crisscross manner (*see* Figure 2). Secondly, the “interaction” between public and private spheres has so far been mainly driven (initiated) by the concerns raised in the public spheres. In some circumstances, as a result, the patterns of such interaction are inherently “one-way” or “hierarchical.”

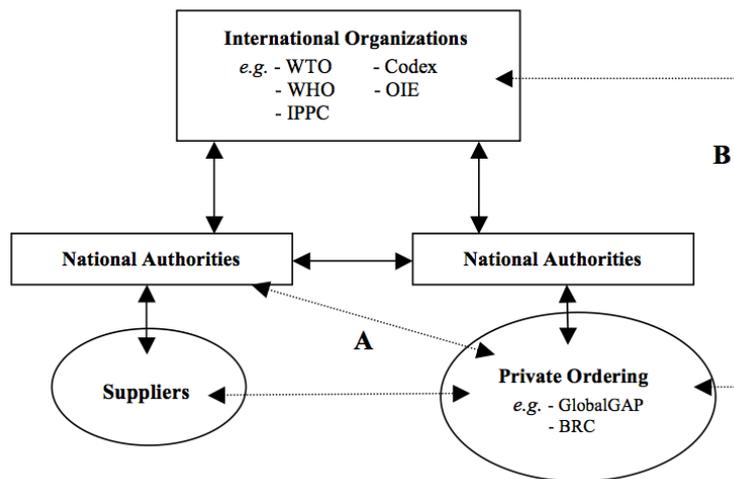


Figure 2: Public-Private Regime Interaction in Global Food Safety Governance<sup>50</sup>

<sup>48</sup> It should be noted that there can be a vertical relationship between the private actor and the country of its legal residence. However, this relationship is rather traditional and relatively well-studied in a way that corporations are, as a matter of course, subject to national laws and regulations of a state that has jurisdiction over them. Therefore, this paper does not focus on such aspect at present.

<sup>49</sup> *See generally* Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change*, 30(4) ENVIRONMENT AND PLANNING C: GOVERNMENT AND POLICY 571 (2012); Kenneth W. Abbott and Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 501 (2009).

<sup>50</sup> Interactions between national authority and international organizations are mostly discussed in the WTO and Codex platforms. *See e.g.* Lin, *supra* note 14.

#### 4.1. Interactions between Private Ordering and National Authorities

Given the (perceived) ineffectiveness of public institutions in ensuring the safety of food products along global supply chains, the private mode of governance stands out for its adaptability, effectiveness, and transnational nature. This case illustrates this point. In the absence of a multilateral or bilateral treaty on food safety regulation, country A, the importing country, generally cannot extend its law enforcement (*e.g.*, factory inspections or microbiological tests) to producers located in country B, the exporting country. Country A thus bears the cost of ensuring the safety of food products from country B because the responsibility for spotting unsafe products normally rests on border inspections of importing countries.<sup>51</sup> Before food products actually arrive at country A's border inspection posts, country B is not required by law (international, or country A's or B's laws) to inform country A of the exported products' sanitary condition.<sup>52</sup> For example, in 2007, the Chinese authorities deliberately delayed the visa-issuing process for officials of the U.S. Food and Drug Administration's (FDA) who planned to inspect the factories that produced melamine-tainted pet food, so when the FDA inspectors were at last permitted to visit the suspect factories, "one had been bulldozed and the other chained, with its equipment removed."<sup>53</sup> "In both cases, requests to view the shipment records of the firms in order to determine if other melamine laced vegetable proteins had been exported to the US were denied on the grounds that the records were in the possession of the local police and those files were confidential."<sup>54</sup>

In contrast, private modes of food safety governance possess important advantages in regulating cross-border food safety practices. First of all, private actors (located in country A or not) with considerable market power are able to *proactively* regulate the behavior of suppliers in country B or other jurisdictions, across the entire supply chain. Moreover, such private governance beyond national boundaries is further reinforced by the concerned industry actors' superior position in possessing scientific and technical expertise in food and supply chain control, high stakes in preserving brand names, and overall resources at their disposal.<sup>55</sup> Similarly, given their enormous market power, private actors are usually able to create more effective and efficient (at lower transaction costs) management, implementation, monitoring, certification, and sanctions in a transnational context so as to structure how upstream suppliers manufacture food

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<sup>51</sup> See Ching-Fu Lin, *SPS-Plus and Bilateral Treaty Network: A "Global" Solution to the Global Food-Safety Problem?* 29 WIS. INT'L L.J. 694, at 716 (2012).

<sup>52</sup> Even so, the United States inspects less than 2% of its total food imports. For example, as the United States imports 80% of its annual seafood consumption from 13,000 foreign suppliers in about 160 nations, its health authorities inspect less than 2% of the imports. U.S. GENERAL ACCOUNTING OFFICE (GAO), GAO-04-246, *FOOD SAFETY: FDA'S IMPORTED SEAFOOD PROGRAM SHOWS SOME PROGRESS, BUT FURTHER IMPROVEMENTS ARE NEEDED* (2004).

<sup>53</sup> See SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, *FOOD FROM CHINA: CAN WE IMPORT SAFELY?* 7, n.10 (Oct. 4, 2007)

<sup>54</sup> *Id.*

<sup>55</sup> See generally Vandenberg, *supra* note 6.

products.<sup>56</sup> Finally, as opposed to the difficult problems with collective actions reflected in the negotiation, adoption, and modification of multilateral international agreements,<sup>57</sup> private governance has an important strength in that it possesses flexibility, which enables its regulatory mechanisms to adapt to the rapidly evolving area of food technology.<sup>58</sup>

It is against such a background that an increasing number of states have encouraged the involvement of private actors in food safety regulatory processes (albeit in a hierarchical way). For example, the U.S. Food Safety Modernization Act (FSMA)<sup>59</sup> signed into law in 2011 emphasizes the need for the FDA to revamp its food safety regulatory mechanism by partnering with private entities. Of particular significance is the requirement that importers mandate their overseas suppliers to meet U.S. food safety rules and standards.<sup>60</sup> Title III of FSMA, rather than focusing on a small number of border inspections, FSMA requires the FDA to rely on *third-party* resources to regulate food imports, including “third-party (usually private) auditors” who inspect and certify that certain foreign suppliers have met U.S. food safety requirements (the “Foreign Supplier Verification Programs”).<sup>61</sup> The FSMA-mandated Foreign Supplier Verification Programs may seem innovative to the public institution (FDA), but they basically embrace the regulatory approach that GlobalGAP and other private institutions have utilized for over a decade. The FSMA can also be seen as a public-private regime interaction initiated by the government, where the public institution views private modes of governance as a complementation. Such design is also evidenced in the design of EU General Food Law.<sup>62</sup> The general principles of the EU General Food Law declare that the primary responsibility for ensuring food safety rests with the food industry.<sup>63</sup> European retailers and supermarkets have in turn required private food certifications of their suppliers in non-EU countries to ensure food safety. Such regulatory designs in some ways regards private modes of governance as complementary, and shift at least part if not the majority of the responsibility for ensuring food safety from public institutions (national agencies) to private institutions (the food industry). This complementary public-private

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<sup>56</sup> See generally Detomasi, *supra* note 7.

<sup>57</sup> See Lin, *supra* note 9, at 730-31.

<sup>58</sup> For example, genetically modified crops, cloned meat products, and many other novel foods are usually beyond the traditional expertise of the government agencies, even those with health and safety mandates. Transnational food corporations and industry associations, on the other hand, usually possess their own laboratories, teams of expert scientists, and specialized knowledge and information in food technology, which public institutions may lack.

<sup>59</sup> Food Safety Modernization Act [hereinafter FSMA], Pub. L. No. 111-353, 124 Stat. 3885 (2011).

<sup>60</sup> See FSMA Title III.

<sup>61</sup> FSMA Title III, Sec. 301. The FSMA also requires that importers verify that their foreign suppliers have implemented proper preventive mechanisms. *Id.*

<sup>62</sup> Regulation (EC) No. 178/2002 of 29 Jan. 2002, 2002 O.J. (L 31/1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0024:EN:PDF> [hereinafter EU General Food Law].

<sup>63</sup> *Id.*

interaction has again reinforced the development and institutionalization of private governance instruments.<sup>64</sup>

However, for many developing countries, private ordering has caused unnecessary problems for it *competes* with public rules and standards in many ways. First, due to the technical and administrative complexity associated with private regulatory schemes, which provide detailed and prescriptive requirements for every stage of the production and processing chain (“down to the level of each individual producer or processing plant”),<sup>65</sup> the costs of compliance may be high and consequently, some developing country suppliers (especially small farmers) may be unable to afford them.<sup>66</sup> Secondly, developing countries often complain that many private standards seem to exceed relevant government requirements, such as maximal levels of pesticide residues of 50% or even 33% of public standards established by the importing countries, or much more stringent and complicated animal disease control steps.<sup>67</sup> Thirdly, the proliferation of private food safety schemes has translated into possibly overlapping and even conflicting public and private requirements,<sup>68</sup> which unnecessarily increase the costs of compliance, especially for small producers. Conflict of laws methodologies that have been developed to resolve inconsistent rules shed little light on this issue, because the situation does not concern a horizontal inter-institutional relationship. Even when a vertical inter-institutional relationship exists, the impacts of private ordering do not appear to readily trigger public intervention, as they are normal commercial practices, namely, business agreements among voluntary parties in a free market space.

As a result, since such demanding private food safety standards have emerged from developed countries and have considerably affected developing countries’ exports, some developing countries have criticized private food safety standards as new sanitary and phytosanitary (SPS) market barriers that undermine their trade (export opportunities) and rights to development.<sup>69</sup> On the one hand, a few developing countries have come to recognize the dominance of private ordering in global food supply chains as a market reality and have responded by cooperating with private regulatory schemes. For example, Kenya, Chile, India, Malaysia, and

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<sup>64</sup> This however makes some (consumer) NGOs raise concerns that private modes of governance will undermine efforts to induce governments to regulate, or detract from the credibility and reliability of having a “public” inspection or process to ensure compliance.

<sup>65</sup> Stanton, *supra* note 42, at 242.

<sup>66</sup> See Grace Chia-Hui Lee, *Private Food Standards and Their Impacts on Developing Countries*, European Commission DG Trade Unit G2 (2006), available at [http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc\\_127969.pdf](http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf).

<sup>67</sup> Stanton, *supra* note 42, at 246.

<sup>68</sup> “At the time, the United Nations Conference on Trade and Development (UNCTAD) estimated the number of private schemes at 400 and increasing.” *Id.*, at 239.

<sup>69</sup> Miet Maertens & Johan Swinnen, *Private Standards, Global Food Supply Chains and the Implications for Developing Countries*, in *PRIVATE STANDARDS AND GLOBAL GOVERNANCE: ECONOMIC, LEGAL AND POLITICAL PERSPECTIVES* 153, at 153-54 (2012).

Mexico<sup>70</sup> have developed government-led Good Agricultural Practices (GAP) and certification services at very low or no cost to assist small suppliers, and they have *benchmarked* such public certification services against private standards so as to be recognized as equivalent to GlobalGAP or other schemes(not hierarchical).

On the other hand, some developing countries have brought the issue of private standards up to the inter-governmental international level. Developing countries have used such international platforms to challenge private ordering and have requested that food regulation stay within public control or, at the very least, that private ordering be disciplined by principles set by public institutions (hierarchical). For example, in 2005, a delegate of St. Vincent and the Grenadines brought a complaint in the WTO SPS Committee about GlobalGAP requirements that restricted the country's ability to export bananas to the EU.<sup>71</sup> By raising its concern about GlobalGAP and other private entities in general at the WTO, Saint Vincent and the Grenadines triggered heated debate at the international level with countries divided on the issue.<sup>72</sup> Similar contested discussions also took place in other inter-governmental international organizations, including *inter alia* the Codex, the World Organization for Animal Health (OIE), and the Organisation for Economic Co-operation and Development (OECD).

#### 4.2. Interactions between Private Ordering and International Organizations

As noted, private standards were first brought to the WTO SPS Committee in 2005 by St Vincent and the Grenadines, which complained that the rules and standards of EurepGAP are more stringent than international standards and government requirements, and argued that public rules should apply.<sup>73</sup> The position of St Vincent and the Grenadines was supported by Jamaica, Peru, Ecuador, and Argentina. Because the issue of private standards has since then been raised frequently as a specific trade concern at the SPS Committee, the SPS Committee jointly established a workshop on private and commercial standards with the UN Conference on Trade and Development (UNCTAD) Trade & Sustainable Development, International Trade Division in June 2007. The joint workshop reviewed different private standards schemes, conducted case studies on many developing countries, and discussed the implications of private standards in terms of market access, development issues, and WTO rules.<sup>74</sup>

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<sup>70</sup> Olga van der Valk & Joop van der Roest, *National Benchmarking Against GlobalGAP: Case Studies of Good Agricultural Practices in Kenya, Malaysia, Mexico and Chile* (LEI Report, 2009), available at <http://edepot.wur.nl/11453>.

<sup>71</sup> WTO SPS Committee, *Private Sector Standards Discussed as SPS Committee Adopts Two Reports*, WTO: News Items (June 29-30, 2005), at [http://www.wto.org/english/news\\_e/news05\\_e/sps\\_june05\\_e.htm](http://www.wto.org/english/news_e/news05_e/sps_june05_e.htm).

<sup>72</sup> Stanton, *supra* note 42, at 235.

<sup>73</sup> WTO SPS Committee, *supra* note 71.

<sup>74</sup> Joint UNCTAD/WTO Informal Information Session on Private Standards (June 25, 2007), at [http://www.wto.org/english/tratop\\_e/sps\\_e/private\\_standards\\_june07\\_e/private\\_standards\\_june2007\\_e.doc](http://www.wto.org/english/tratop_e/sps_e/private_standards_june07_e/private_standards_june2007_e.doc).

In the SPS Committee meeting on April 2–3, 2008, WTO members and the OIE focused largely on the interface between private and public standards. First, the Director-General of OIE warned that standards set by GlobalGAP or other private actors may undermine the science-based and democratically adopted standards of public international organizations and may therefore pose difficulties for developing countries.<sup>75</sup> Moreover, OIE’s submission to the SPS Committee, emphasized that private ordering has not been examined against the SPS Agreement, and “there is reason to believe that many private standards are not consistent with SPS obligations.”<sup>76</sup> As the OIE was seriously concerned about the potential trade-restricting and -distorting effects of private standards, it proposed that the SPS Committee act as a forum for countries to identify and discuss specific problems with private ordering.<sup>77</sup>

In the SPS Committee, Uruguay and Egypt headed a group comprised of developing countries which argued that private rules and standards are “arbitrary and can be difficult for developing countries to meet.” WTO Members are obliged under the SPS Agreement to discipline their non-governmental bodies to respect SPS rules.<sup>78</sup> They in particular based the arguments upon Article 13 of the SPS Agreement, which reads, in part:

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.<sup>79</sup>

Others rebutted this argument claiming that the “non-governmental entities” in Article 13 cannot be interpreted to include GlobalGAP and private-sector standard-setters alike, as at the time of the Uruguay Round negotiations, there was no such phenomenon of private ordering and the drafters of the SPS Agreement were not aware of this dramatic development and the institutionalization of private governance. It is therefore argued that governments have no obligation to

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<sup>75</sup> The public international organizations which play the role as international standard-setters in the WTO SPS contexts are the Codex, the OIE, and the International Plant Protection Convention (IPPC).

<sup>76</sup> Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety and Animal Welfare (Submission by the OIE, February 25, 2008, SPS Committee G/SPS/GEN/822).

<sup>77</sup> *Id.*

<sup>78</sup> WTO, *Sanitary and Phytosanitary Measures: Members Set to Agree on Regionalization, Improved SPS Transparency*, WTO: News Items (April 2-3, 2008), at [http://www.wto.org/english/news\\_e/news08\\_e/sps\\_apr08\\_e.htm](http://www.wto.org/english/news_e/news08_e/sps_apr08_e.htm).

<sup>79</sup> Article 13, SPS Agreement.

ensure the compliance of private actors and their contractual commercial terms and conditions with the SPS Agreement.<sup>80</sup>

On May 29, 2009, the 76<sup>th</sup> General Session of OIE International Committee adopted a resolution on the implications of private standards in international trade of animals and animal products.<sup>81</sup> The resolution asked the Director General of the OIE “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* [emphasis added].”<sup>82</sup> In the same year, the 32<sup>nd</sup> session of the Codex meeting discussed a report on private food standards prepared by Food and Agriculture Organization (FAO) consultants, which systematically compared different types of private standards against the presumption that they pose challenges to the Codex.<sup>83</sup> The 2009 Codex Report suggested that Codex include private standard bodies as observers to Codex meetings, and reform Codex procedures to better respond to the various challenges of private standards. However, many developing countries rejected the 2009 Codex Report findings and insisted that Codex stand as “the sole international reference organization for food safety.”<sup>84</sup> During the 33<sup>rd</sup> session of the 2010 Codex meeting, another report was considered that highlighted many developing countries’ concerns, one being that private standards may undermine the Codex’s authority and other official requirements, that third-party certification is technically and financially difficult, that private standard-setting process generally lacks a sound scientific basis and transparency, and that private standards have negative impacts on market access and development.<sup>85</sup> The 2010 Report nevertheless favored the stance that Codex standards, given they are scientifically backed and democratically adopted, should be the “benchmarks” for their private counterparts.

In the same year, the OIE organized a meeting with global private standard-setting bodies, including GlobalGAP and Global Food Safety Initiative (GFSI). OIE meeting attendees agreed that “the basis for private standards on sanitary safety are the existing international standards of OIE and Codex Alimentarius, as well as national and regional legislation,” and that future collaboration between OIE,

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<sup>80</sup> WTO, *supra* note 78.

<sup>81</sup> *Implications of Private Standards in International Trade of Animals and Animal Products*, OIE Resolution No. XXXII adopted by the 76<sup>th</sup> General Session of OIE International Committee, at [http://www.oie.int/fileadmin/Home/eng/Internationa\\_Standard\\_Setting/docs/pdf/en\\_resolution\\_20\\_N\\_C2\\_B0\\_20XXXII.pdf](http://www.oie.int/fileadmin/Home/eng/Internationa_Standard_Setting/docs/pdf/en_resolution_20_N_C2_B0_20XXXII.pdf).

<sup>82</sup> *Id.*, para. 3.

<sup>83</sup> Spencer Henson and John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, report prepared for the Joint FAO/WHO Food Standards Programme, Codex Alimentarius commission 32<sup>nd</sup> Session (June 29-July 4, 2009).

<sup>84</sup> See Stanton, *supra* note 42, at 248.

<sup>85</sup> *Consideration of the Impact of Private Standards*, Agenda Item 13 (CX/CAC 10/33/13) for the Joint FAO/WHO Food Standards Programme, Codex Alimentarius commission 33<sup>rd</sup> Session (July 5-9, 2010).

GlobalGAP, and GFSI should be encouraged.<sup>86</sup> Subsequently, in May 2010 the 78<sup>th</sup> General Session of the OIE International Committee passed another resolution that requested the OIE “maintain and strengthen appropriate links and dialogue with relevant global private standard setting bodies and global private industry organisations with the aim to allow *compatibility* of private standards with OIE standards.”<sup>87</sup> Most importantly, toward this objective, in another meeting, the OIE followed up with selected private ordering bodies with a global reach and explored the possibility of *signing official agreements* with GlobalGAP and GFSI. The OIE concluded an official agreement with GFSI, as it is more of a benchmarking institution than a standard-setting institution.<sup>88</sup> However, because GlobalGAP is a standard-setting body and potentially competes with the OIE, the OIE decided not to enter into any official agreement with GlobalGAP at that time, but rather to merely continue to share information under an exchange-of-letters mechanism.<sup>89</sup>

## 5. Global Food Safety Governance through Constructive Regime Interactions

As a matter of fact, GlobalGAP and other private ordering schemes will continue to expand the range of influence to more countries and suppliers as well as variety of rules and standards to cover not only food safety standards, but also standards for sustainability, labor rights, and animal welfare.<sup>90</sup> However, the interactions between public and private institutions to date have been limited. Reactions at the national level have been polarized based upon nation states’ respective interests and concerns—from trade and development to health protection. In the WTO context, although Article 13 of the SPS Agreement leaves some (albeit little) room for the argument of disciplining private standards against international trade rules,<sup>91</sup> it remains unclear if and if so, to what extent should WTO Members be required to “take such reasonable measures as may be available” to manage the dynamics of public-private interactions in the food safety arena. Indeed, as the inter-institutional relationship between private ordering represented by

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<sup>86</sup> OIE, *Implications of Private Standards in International Trade of Animals and Animal Products*, at <http://www.oie.int/international-standard-setting/implications-of-private-standards/>.

<sup>87</sup> OIE, *Roles of Public and Private Standards in Animal Health and Animal Welfare*, OIE Resolution No. 26 adopted by the 78<sup>th</sup> General Session of OIE International Committee, at [http://www.oie.int/fileadmin/Home/eng/International\\_Standard\\_Setting/docs/pdf/A\\_RESO\\_2010\\_PS.pdf](http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_RESO_2010_PS.pdf).

<sup>88</sup> OIE, *Report of the Meeting of the OIE Animal Production Food Safety Working Group*, (November 15–17, 2011), [http://www.oie.int/fileadmin/Home/eng/Food\\_Safety/docs/pdf/A\\_Final\\_Working\\_Group\\_Report\\_November\\_2011.pdf](http://www.oie.int/fileadmin/Home/eng/Food_Safety/docs/pdf/A_Final_Working_Group_Report_November_2011.pdf).

<sup>89</sup> It is further noted that “there are fundamentally different approaches to animal welfare standards of the OIE and GlobalGAP (the latter’s standards being largely based on European Union legislation, which is overly prescriptive compared with the approach accepted by OIE Members).” *Id.*

<sup>90</sup> WTO, *supra* note 78.

<sup>91</sup> This paper does not intend to offer a thorough review of arguments in favor of or against the applicability of Article 13 of the SPS Agreement to private food safety standard-setters. For a comprehensive analysis, see generally Prevost, *supra* note 46.

GlobalGAP and international public institutions is neither horizontal nor vertical in the traditional sense, then public institutions' use of legal interpretation as a means to claim supremacy over or eliminate overlaps with private institutions seems to be of very limited utility. Furthermore, as in the Codex and OIE contexts, attempts to create and define boundaries between public and private institutions based on the concepts of competence, expertise, or legal mandate, may not work in such unconventional inter-institutional relationships.

The perspective of the public institutions discussed here is rather one-way, hierarchical, and state-centric, as we can clearly see in the Codex 2010 Report as well as the OIE Resolutions, which underlines the "benchmark" superiority of public institutions rather than of cooperation. As it seems unrealistic to try to contain and isolate private food safety governance sites or ignore their influence in the global market, a constructive framework for public-private regime interactions is desirable. Therefore, after showing the dynamic development and shifts of public-private institutional interplay over time, this paper concludes by presenting some preliminary ideas for further discourse toward a shared vision of the respective roles of private and public institutions in the broader architecture of global food safety governance.

First, given the interactive nature of global food safety governance, institutions may become less important as regulators executing their mandates and exercising their authority, but more important as platforms for inter-institutional interactions. Although the legitimacy, transparency, and accountability of private ordering institutions remain problems of much debate, the current approaches adopted by relevant public institutions seem to ignore the interactive nature of global governance. Public institutions such as the WTO, Codex, and OIE, and many state governments aim to reinforce boundaries among individual institutions and protect the supremacy of public rules and standards despite the regulatory advantages of private ordering.

Second, the current discourse excessively centers upon the trade and development (negative) implications of private ordering, while overlooking its potential contribution to food safety regulation and public health in general. Observing the issue merely from a trade and development perspective may lead to an incomplete conclusion on the costs and benefits of the various models of governance. While high costs of compliance and barriers to export market have been cited as developing countries' main concerns, some research shows that meeting private standards does not necessarily harm developing countries but in some cases benefits them economically.<sup>92</sup> For example, private rules and standards may reduce transaction cost, enhance quality and price premiums, increase

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<sup>92</sup> WTO, *supra* note 78. There are currently two sides of valid arguments over the effects, both positive and negative, of private food safety standards. See Liesbeth Colen, Miet Maertens and Johan Swinnen, *Private Standards, Trade and Poverty: GlobalGAP and Horticultural Employment in Senegal*, 35(8) THE WORLD ECONOMY 1073 (2012).

competitiveness and enhance market access.<sup>93</sup> Private ordering also potentially strengthens food safety regulatory systems in developing countries in the long term. While the empirical evidence on how private rules and standards affect developing countries is limited and the debates remain,<sup>94</sup> and although the public health benefits of private ordering has not been well considered, it is too early for relevant public institutions to “eliminate potential competitors” before seeking inter-institutional conversation and collaboration.

Third, public-private inter-institutional interactions are usually constructive to global food safety governance. As no meta-framework exists or appears to be emerging that dictates, coordinates, or pioneers the development of such diverse norms, the public as well as private institutions together constitute an evolving governance complex being formed and transformed, configured and reconfigured by different actors at different levels with different experimental approaches.<sup>95</sup> Public-private inter-institutional interactions in the process can serve as a vehicle for constructivist learning, mimesis, experimentation, and innovation, projecting normative effects on participating governance sites. The fact that GlobalGAP spurs regulatory reforms (or revisions of existing law) in many countries (both developing and developed), that the OIE takes a step toward legal innovation by signing an official cooperation agreement with a NGO,<sup>96</sup> and that the Codex reassess its decision-making process against the arguably more effective private standard-setters<sup>97</sup> all well demonstrate constructive regime interactions. Dynamic inter-institutional interactions in the food safety area can also help build scientific networks, activity coordination, information exchange, joint projects, and expert collaboration, which are mutually reinforcing in strengthening global food safety governance.

Finally, polycentric governance may call for a new understanding of legitimacy. Some may argue that private governance models suffer from a legitimacy deficit,

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<sup>93</sup> Steven M. Jaffee and Spencer Henson, *Agro-food Exports from Developing Countries: The Challenges Posed by Standards*, in GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES (A.M. AKSOY AND J.C. BEGHIN EDS.) 91 (2005).

<sup>94</sup> Thomas Herzfeld, Larissa S. Drescher, and Carola Grebitus, *Cross-National Adoption of Private Food Quality Standards*, 36(3) FOOD POLICY 401 (2011).

<sup>95</sup> Ching-Fu Lin, *Reassessing the Codex Alimentarius Commission: An Analysis of the Ractopamine Hydrochloride Dispute*, Paper to the Future of Transnational Law: The EU, USA, China, and the BRICS (2012 WISH Conference), Shenzhen, China (2012).

<sup>96</sup> IGO’s signing official agreements with NGOs in the food safety arena is a legal innovation through inter-institutional relations, although in some other areas (such as essential medicine development) there have been a couple of “public-private partnership” projects between the WHO and pharmaceutical companies.

<sup>97</sup> Steven Bernstein and Erin Hannah, *Non-State Global Standard-Setting and the WTO, Legitimacy and the Need for Regulatory Space*, 11(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW 575, at 594 (2008). “[T]he rising uptake in the marketplace of GLOBALGAP... could put even further pressure on the already recognized standard setters listed in SPS Annex A paragraph 3 to adhere to evolving good practices for standard setting bodies, including openness and transparency, especially if they are perceived as slow to respond to evolving consumer and citizen concerns about food safety risks.”

primarily due to private regulators' narrow pursuit of corporate profits rather than public goods,<sup>98</sup> and their lack of electoral mandate or democratic representativeness as enjoyed by public institutions.<sup>99</sup> Such a myriad of legitimacy deficit limits the roles of private governance and therefore, as noted by the World Bank, public standards and approaches would seem to remain indispensable.<sup>100</sup> Yet in many aspects such as supply chain expertise, participation, accountability, responsiveness, adaptability, and transparency, private institutions often perform better than the multi-level, bureaucratic public institutions—so whether Codex enjoys more legitimacy over GlobalGAP is a point of debate.<sup>101</sup> While the idea of global food safety governance confers no supremacy to either public or private institutions, their legitimacy derives from the extent to which their institutional design embeds social (economic, public health, and other) norms in the global marketplace, norms “that derive authority directly from interested audiences, including those they seek to regulate, not from sovereign states.”<sup>102</sup> As the new models of global food safety governance increasingly “derive their legitimacy from the voluntary and conditional participation of individuals who can revoke their consent at any time,”<sup>103</sup> the understanding of legitimacy of global governance may need to be reconceptualized.

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<sup>98</sup> Donna J. Wood, *Corporate Social Performance Revisited*, 16(4) THE ACAD. MGMT. REV. 691, 691-718 (1991).

<sup>99</sup> David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks*, 71(3) J. BUS. ETHICS 321, at 325 (2007).

<sup>100</sup> See e.g. World Bank, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, Report No. 31207 (Jan. 10, 2005).

<sup>101</sup> GlobalGAP, in responding to the need and criticism from developing country suppliers, have adopted several reform projects to its governance structure so as to allow more stakeholder participation (e.g. equal representation of retailers and suppliers), created a mechanism of “group certification” and technical assistance to minimize the adverse impact on small suppliers, and made all meeting documents publicly available—which all seem ahead of the Codex’s current practice in terms of accountability (responsiveness), transparency, and participation.

<sup>102</sup> Steven Bernstein and Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 GOVERNANCE AND REGULATION 347, 348 (2007).

<sup>103</sup> JAMES ROSENAU, *DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALISATION* 308 (Princeton University Press, Princeton 2003).