

Private-regulation in global value chain – a trade barrier or an opportunity for public-private co-operation?

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Abstract

The aim of this paper is to address and analyze the use of different self-regulation systems in the global value chains by asking why companies voluntarily co-operate by self-regulating, even though they compete, also with each other, in the market. Secondly, it is argued that the lawmaker should take private-regulation more seriously as a regulatory strategy because of its benefits and feasibility in the dynamic, global business environment. First, the use of self-regulation in value chain is analysed based on empirical evidence as presented in international and Finnish research papers. Secondly, the results are reflected on with more theoretical arguments.

1. Introductions

The self-regulation and broadly speaking private regulation¹ has emerged recently to certify corporate social and environmental performance in global business environment. The evolving structures of global production - multinational enterprises and global value chains - pose major challenges for conventional “regulation”. Legal infrastructure - by which I mean the legal resources available to individuals, organizations, and regulators to help govern relationships - is critical to the support and regulation of the transformations of the new economy². *Action by the state* or, at the international level, *by groups of states*, acting primarily through treaty-based intergovernmental organizations (IGOs) to control the conduct of economic actors through mandatory legal rules with monitoring and coercive enforcement is outdated and ill-suited for the needs of the new economy. Private regulation increases with high speed and forces states and public sector actors to decide their relationship to this phenomenon.³

The introduction shall be devoted to a description of the emergence of private standards focusing on the *reasons for private regulation based on the research conducted by the author in 2009-2010*⁴. The second part *aims at to reflect the findings with a broader institutional context of international private standards*. The third part of the paper shall address the issue of *the interactions of private regulation (e.g. food safety standards) with the multilateral trading system*.

¹ Vogel uses the notion civil business regulation, Vogel 2009, 2. The term civil regulation comes from Simon Zadek, *The Civil Corporation* London; Earthscan, 2001.

² Hadfield 2010, 4.

³ Abbot & Snidal 2009, 505.

⁴ Sorsa 2009: Self-regulation and co-regulation in value chain – Reviewing retail, food and chemical industry examples. National Research Institute of Legal policy. research Communications no. 100 and Sorsa 2010: Self-regulation and corporate social responsibility. Publications of Ministry of Employment and Trade.

Private regulation employ private, non-state, or market-based regulatory frameworks to govern multinational firms and global supply networks. Unlike traditional inter-state treaties and IGOs, and unlike trans-governmental networks of state officials, most of these arrangements are governed by (1) firms and industry groups whose own practices or those of supplier firms are the targets of regulation; (2) NGOs and other civil society groups, including labor unions and socially responsible investors; and (3) combinations of actors from these two categories⁵. In food value chain co-regulation has grown both domestically and transnationally via an increased role of public regulation and the regulation has moved towards a value chain approach⁶.

The number and scope of global private regulation (civil regulations and self-regulations) began to expand significantly during the 1990s. One can find private regulation especially on the field of responsible business. Private regulation that define standards for ‘responsible’ business practices now exist for virtually every global industry and internationally traded commodity, including forestry, fisheries, chemicals, electronic equipment, apparel, rugs, food stuffs (coffee, cocoa, palm oil, fruits, vegetables), toys, minerals and mining, energy and financial services – though most formally govern only a portion of these products or sectors⁷. These initiatives aim to implement standards, *i.e.* directives suggested or imposed by a rule-setting actor to a rule-abiding actor on how to act in a given context, in production processes. An area in which standards play an increasingly pervasive role these last decades is that of *technical, quality, safety, environmental and social specifications for products*. These standards guide producers on how to produce their goods, and provide information and assurance to consumers and business partners on what they purchase.⁸

These standards mostly relate to *process and production methods (PPM)*, in the broadest sense, *they refer to any activity that is undertaken in the process of bringing a good to market*. Under this definition, a PPM can refer to activities related to the actual production of a good (such as the chemicals used to treat widgets) to the extraction of natural resources for eventual incorporation into goods (harvesting methods applied to timber used in widgets), to trading practices used in bringing goods to market (long-term contracts with timber suppliers in the production of widgets). PPMs, which are used in the manufacture of goods, can be described as either *product-related* or *non-product related* depending on whether a particular set of PPMs affect the *physical* characteristics of the product which they produce.⁹

1.1. Terminology

I have used self-regulation in the meaning of private regulation in my earlier research. The *self-regulation* was understood as regulation of the conduct of individual organisations, or groups of organisations by themselves. Regulatory rules are self-specified, conduct is self-monitored and the rules are self-enforced. There is also a sanction system¹⁰. It was soon found out during the research project that self-

⁵ Abbot & Snidal 2009, 506.

⁶ Cafaggi 2010, 1 and Sorsa 2009d; Sorsa 2008a and 2008b.

⁷ Sorsa 2010.

⁸ Wouters et al. 2009, 5.

⁹ Potts 2007, 3.

¹⁰ Tala 2007a, 9.

regulation is a collaborative effort. Unlike individual responses from companies, self-regulatory tools such as codes of conduct, standardised contract terms, standards or certification imply collaboration between industry partners at various (sectoral, national, regional. etc.) levels and collaboration with other stakeholders like NGOs¹¹. When the public law is backing the self-regulation the better concept would be co-regulation.

Pure self-regulation implies no external (the state or other stakeholders) involvement or control in the regulatory process and the conduct of regulated organisations¹². It differs from the condition of no regulation in that *there is an explicit attempt to regulate conduct*. Self-regulation is a tool of the private sector. Much of it has nothing to do with public policy because businesses are doing something voluntarily for their own ends and there is not necessarily any overlap with regulation. However, Prosser has correctly pointed out that “there is no such thing in the real world as self-regulation; nor is there any such thing as its perceived opposite, command, and control”. As a result it is clear that there is a continuum between different regulatory regimes with varying degrees of public and private input; what is apparent in practice is a cocktail of different techniques dependent on context.¹³ Sometimes regulation and self-regulation co-exist in the same area¹⁴. Any regulatory regime is not characterised by a single model but will be a cocktail of various techniques with interventions by both private and public actors.¹⁵ In this paper I will use the notion private regulation instead of here described definition of self-regulation because the self-regulation schemes I have studied include both pure self-regulation systems and systems with broader stakeholder involvement.

Vogel uses the notion of *civil regulation* to describe the schemes in which civil society actors have been active in creating the rules, monitoring and enforcing them. The organizational or institutional sources of civil regulations vary widely.¹⁶ They include NGOs such as the World Wildlife Fund, Greenpeace, the Clean Clothes Campaign, and Amnesty International. According to Vogel, civil regulations are distinctive from most traditional forms of industry self-regulation in three important respects. First, civil regulations require firms to make expenditures that they would not otherwise make. This is contrary to the aim of the technical standards whose primary purpose is to lower the transactions costs of market transactions. Second, compared to pure self-regulation, civil regulations are more likely to be politicized: they have typically emerged in response to political and social pressures on business, often spearheaded by national and trans-national activists who have embarrassed global firms by publicizing the shortcomings of their social and environmental practices. Third, compared to pure self-regulation, the governance of civil regulations is more likely to be transparent, contested, and to either formally or informally involve non-business constituencies.¹⁷

¹¹ Cotter & Fabregas 2001, 7-8.

¹² Bartle & Vass 2005, 19.

¹³ Prosser 2008, 100-101.

¹⁴ Cotter & Fabregas 2001, 7.

¹⁵ Prosser 2008, 102.

¹⁶ See Bartley 2007.

¹⁷ Vogel 2009, 8.

Abbott and Snidal (2009) use the notion of *regulatory standard-setting* (RSS) instead of the private regulation as the promulgation and implementation of nonbinding, voluntary standards of business conduct. Private regulation (RSS for Abbott and Snidal) potentially involves all of the functions of administrative regulation in domestic legal systems: *rule making, rule promotion and implementation, monitoring, adjudication of compliance, and the imposition of sanctions*. The rapid multiplication of RSS schemes is creating a new kind of transnational regulatory system, one that demands a broader view of regulation and a more nuanced view of the state as regulator.¹⁸ On the other hand, Abbott and Snidal also correctly point out that international relations are legalized to an impressive extent, yet international legalization displays great variety. A few international institutions and issue areas approach the theoretical ideal of hard legalization, but most international law is “soft” in distinctive ways. *Hard law* refers here to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.¹⁹

1.2. Governance triangle

Abbot and Snidal have created a Governance Triangle to demonstrate the different roles of the actors. The GT depicts the multiplicity and diversity of private regulation schemes in terms of participation by three main actor groups: States, Firms and NGOs. The GT model is borrowed from Abbott & Snidal and used here (Figure 1) in order to present the diverse almost twenty schemes which were included in the research conducted by the author of this article²⁰. The schemes shown on the Triangle are identified in Table 1, with the dates of their first significant regulatory standard-setting activities. Points on the Triangle locate individual mostly private regulation schemes according to their most salient and innovative feature: the relative “shares” that Firms, NGOs, and States exercise in scheme governance²¹. These three actor groups—the potential participants in regulatory governance—also define the Triangle as a whole; its surface thus represents the potential “regulatory space²².”

Much research on regulation has been concerned with "mapping" the interpenetration of, and competition between, different regulatory influences, including law, in different social spaces. According to Parker no one regulator, including law, has any monopoly or final authority across a whole regulatory "space." Nor do different regulatory influences necessarily fall into any obvious hierarchy. To the extent that law attempts to create and enforce rules, the creation, interpretation and application of those rules is always mediated by other actors. Parker also argues that law itself is pluralist in the sense that state law means different things according to how it interacts with other actors and regulatory orderings.²³

¹⁸ Abbot & Snidal 2009, 507.

¹⁹ Abbott & Snidal 2000, 421. Sorsa 2010, 7-11. See also discussion related to regulatory spectrum from no regulation to classic command-and-control regulation in Sorsa

²⁰ Sorsa 2009 and Sorsa 2010.

²¹ See also Cafaggi 2010, 18-20.

²² Christine Parker’s metaphor about the regulatory space highlights the importance of other systems of rules with which the legal rules must always compete against. Parker 2003, 391.

²³ Parker 2008, 351.

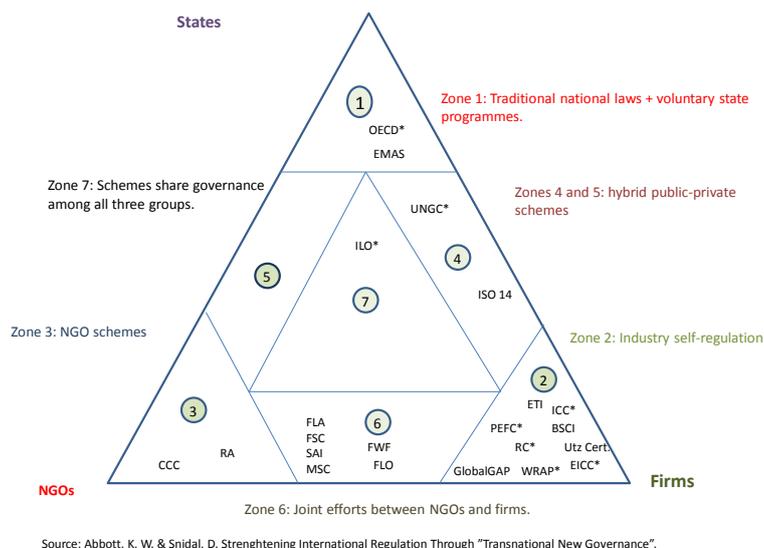


Figure 1. Comparison of different private regulation schemes using governance triangle.

Zone 1	OECD OECD Guidelines for Multinational Enterprises 1976 EMAS EU Eco-Management and Audit Scheme 2009
Zone 2	ETI Ethical Trading Initiative 1994 ICC Int'l Chamber of Commerce Charter for Sustainable Development 1991 BSCI Business Social Compliance Initiative 2003 UTZ CERTIFIED 1997 EICC The Electronic Industry Code of Conduct 2004 RC Responsible Care, chemical industry environmental scheme 1987 GLOBAL.GAP Global Good Agricultural Practices 1997 WRAP Worldwide Responsible Apparel Production, industry labor code 2000 PEFC Programme for the Endorsement of Forest Certification 1999
Zone 3	CCC Clean Clothes Campaign Code of Labor Practices for apparel 1998 RA Rainforest Alliance 1989
Zone 4	ISO14 International Organization for Standardization 14001 environmental management standard 1996 UNGC United Nations Global Compact 2000
Zone 5	---
Zone 6	FLA Fair Labor Association; apparel industry scheme 1999 FSC Forest Stewardship Council certification, labeling scheme 1993 SAI Social Accountability Int'l standard for supplier labor practices 1997 MSC Marine Stewardship Council 1997 FWF Fair Wear Foundation 1999 FLO Fairtrade Labeling Organization "fair trade" umbrella scheme 1997
Zone 7	ILO International Labor Org. Declaration on Multinational Enterprises 1977

Table 1. List of private regulation schemes used in this research.

2. Why companies cooperate by constraining themselves?

2.1. Theoretical insights

In the vocabulary of the business people the value chain is a notion used to express the core idea of business. Value chain can be defined as the full range of activities (primary and supportive activities) that are required to bring a product from its conception to its end use. These include design, production, marketing, distribution, and support to deliver the product to the final user. Value chains are one of the most important elements of the networks or production systems. The activities that comprise a value chain may be contained within a single firm or may embrace many firms, NGOs and civil society organisations. They can be limited to a single country or stretch across national boundaries²⁴. Contracts play a pivotal role in value chain management. Contracts for exchanges within the value chain (and in particular terms concerning quality and safety) are meant to complement State and international public regulation, but also to ensure enforceability of international soft law.²⁵

Hadfield argues that the economy today is fast-paced, global, niche-driven, and increasingly network. According to him this “new economy” *is poorly served by legal markets and institutions* developed to meet the demands generated by an economy based on standardized mass-market manufacturing, predominantly domestic, markets, and production organized within rather than across firm boundaries. I endorse with Hadfield’s argument that today’s legal infrastructure is too slow, cumbersome, and complicated (and hence too costly) to manage the explosion in the number and heterogeneity of legal relationships and regulatory settings that characterize today’s global business, facing shorter product (and strategy) lifecycles and fluid business models.²⁶ According to Vogel the growth of global civil regulation in part represents *a political response* to the recent expansion of economic globalization and the firms and industries that have fostered and benefited from it²⁷.

The reasons why companies cooperate by constraining themselves was analyzed using 22 private regulation schemes as a research object²⁸. Understanding how and why, when and under which conditions trade associations and other networks see self-regulation relevant and reasonable to them provides insights into the role of private regulation and legislation in business. The explanations have so far applied both the theory of new institutional economics and transaction cost theory, but less the theories known in the field of strategic management.

The Value Chain²⁹ framework of Michael Porter - a model that helps to analyze specific activities through which firms can create value and competitive advantage - was used as a contextual framework. Porter strongly underpins the argument that competitiveness at the firm’s level decisively depends on its local embeddedness. While management sciences have always dealt with firm strategy and inter-firm

²⁴ Porter 2004, 33-35; Altenburg 2007, 6.

²⁵ See Cafaggi about the governance by contract in international food value chain 2010, 20-25.

²⁶ Hadfield 2010, 5.

²⁷ Vogel 2009.

²⁸ These self-regulation schemes are discussed more deeply in Sorsa 2009d and in forthcoming Sorsa 2010b.

²⁹ In some of the EU official documents the chain perspective is also taken into account, see the “agricultural product quality policy: impact assessment”.

linkages, it is Porter's merit to have attracted attention to additional location-specific factors as local demand and rivalry.

The traditional way of explaining the reasons and motives of self-regulation assumes the following order: avoidance of regulation³⁰, response to global social activism³¹, protection of self-interests and protection of the company's reputation and brands³². These explanations seem to be based on an analysis of a single or a couple of self-regulation schemes or focused only on one industry sector. These explanations are based on sort of market-based approach ("naming and shaming") or explanations in different theoretical conceptions of institutional emergence. Bartley argues that private regulation is not reducible to corporate strategies but rather reflect the negotiated settlements and institution-building projects that arise out of conflicts involving states, NGOs, and other nonmarket actors, as well as firms.³³ This argument need to be further analysed.

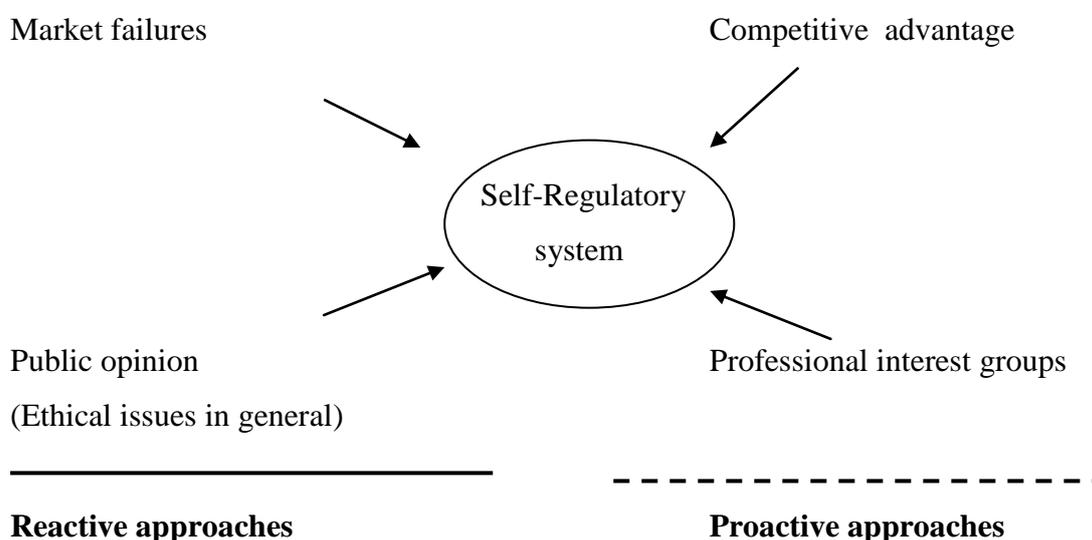


Figure 2: Forces which influence the self-regulatory system (Bartle & Vass 2005).

The theoretical analysis model was developed (Figure 2) combining the earlier research results. Four dimensions were used as hypothetical explanations for the drivers of self-regulatory regimes: market failure -dimension, opinion -responsive -dimension (ethical issues), interest-driven -dimension and competitive advantage -dimension³⁴. The potential sources of competitive advantages on the company level can be: 1) product differentiation in the market place, 2) quality signals, 3) reduced insurance premiums, and 4) maintenance of standards along the supply chain³⁵. These sources are here taken as a starting point for the development of self-regulation

³⁰ Hérítier & Eckert 2008, 116; King & Toffel 2007; Kytä & Tala 2008, 88.

³¹ Vogel 2006, 8; Giovannucci & Potts 2009; Nadgrodkiewicz 2009, 2-5; Kytä & Tala 2008, 94 and Hérítier & Eckert 2008, 116-117.

³² Vogel 2006, 7.

³³ Bartley 2007, 298.

³⁴ Sorsa 2009d, 6.

³⁵ Bondy et al. 2004.

schemes in industry level. Opinion responsive dimension represents the idea that the self-regulation initiative is created in order to promote ethical values. Market failure describes conditions under which market outcomes are not guaranteed to serve the public interest. Market failure often generates regulation.

This model was challenged and reflected in sector specific value chain analysis. Examples from retail business, food industry, clothing industry, electronic industry and chemical industry were under a more detailed analysis. From the policy maker's viewpoint the idea of a value chain becomes useful for analytical and policy purposes, once three features are included: first, the activities are often carried out in different parts of the world; second, some activities add more value and are more lucrative than others (the policy maker's concern is to help local enterprises move into the lucrative activities); third, some actors in the chain have power over the others³⁶.

Reacting to market failures or to the public opinion is argued to be the main reason for self-regulation. They both represent the reactive way of action. On the other hand, creation or promotion of competitive advantage³⁷ or the interests of one interest group like trade association, are more proactive ways of action.³⁸

Usually the research related to self-regulation is focused on one single self-regulation system analysing its strengths and weaknesses. There are however rare exceptions³⁹. This research started from a different viewpoint: the aim was to capture the reality of the business context where the different self-regulation rules are embedded, where they compete with each other or with the legal rules or supplement them. The retail business, food industry, clothing industry, fish industry, electronic industry and agriculture were in focus.

2.2. Methodology

It was based on a literature review and the materials of different self-regulation schemes. The self-regulation schemes were selected based on their global or broad local coverage and the fact that most of them are relevant also from the Finnish companies' viewpoint and in the Finnish markets. The research data included books, articles and studies related to self- and co-regulation. This secondary data used in the research covered approximately 200 scientific research reports and articles published during 2000 – 2009. Important criteria selecting from the materials was the use of the empirical research methods. The material covered research based on quantitative, qualitative or case methods in order to capture the diversity and reality of the phenomenon in business. The preliminary explanations were reflected during the analysis of industry related examples.⁴⁰

³⁶ Schmitz 2005, 4.

³⁷ See e.g. the different private-regulation systems for e.g. coffee value chain. There are Utz Certified, Rainforest Alliance, Fair Trade, Organic and 4G private regulation schemes which focus on different dimensions of sustainability.

³⁸ Sorsa 2009d, 2009b and 2008c.

³⁹ Dankers 2003; Kirk-Wilson 2008.

⁴⁰ Sorsa 2009d, 34-85 and 101-119.

2.3. Findings

The preliminary theoretical analysis model was extended by the theoretical ideas related to the relevance of stakeholder relationships in the value creation of business. Looking at stakeholder relations either from an ethical point of view or from a business point of view is not enough; these issues are inextricably linked. *Stakeholders* other than customers and owners are also *important in the value creation process*, which has usually been defined through the lenses of customer-firm relationships or from the viewpoint of creating value to owners⁴¹. Globalisation of production has accelerated demand for greater control over quality assurance in production processes. This is especially significant where suppliers are located at a great distance from their customers. According to several scholars origins of private regulatory systems is in the interests of market actors themselves, especially consumer-oriented and image-conscious firms find themselves in the “spotlight”.⁴² In stakeholder theory these other stakeholders than customers and owners are needed in value creation. This is very true with the private regulation because the rules of the game that create order, facilitate exchange, and provide collective benefits are *unattainable through individual action* and they are created in co-operation with the broader network of stakeholders. Bartley has seen connections with this kind of argumentation with the “cooperation-for-collective-benefits” conception of institutions, common among institutional economists and rational choice theorists. Private regulations create the rules of the game.⁴³

One key finding during the research process was that *the motives for self-regulation may differ depending of the relationship*. Motives may be different, e.g. if the self-regulation scheme is mostly used in business to business relationship where the motive is to use self-regulation as a method to prevent the risks (GlobalGAP). Self-regulation may be motivated as a method to promote the business and create new opportunities. In the last case the scheme is marketed to the final customers using the label (Utz Certified, Rainforest Alliance, Fair Trade). According to Kaplinsky (2004) collaborative efforts between firms at the same node in the value chain constitute a form of rent⁴⁴ when they help produce economies of scale. Sexsmiths (2008) has found out that although groups not participating in certification are excluded from such benefits, the small-scale producer groups that get involved are generally brought together in ways that enhance their competitive position. Moreover, certification has acted as a catalyst for communities to gather and work toward their social goals (e.g. in the cases of Rainforest Alliance and Fair Trade). Thus, vertical relational rents created by standards may stimulate horizontal collaboration that creates further economic benefits.

In business to business relationship the motive for many of the self-regulation schemes seemed to be *prevention and minimisation of the own risks*. (ISO 14000,

⁴¹ Myllykangas 2009.

⁴² e.g. Martin 2003.

⁴³ Bartley 2007, 306-309. Bartley also develops his own, more political approach which is named asn “The political construction of market institutions”, see Bartley 2007, 309-312.

⁴⁴ The concept rent is used to describe a world where the parties who control a particular set of resources are able to insulate themselves from competition by taking advantage of, or by crating barriers to the entry of competitors. Kaplinsky 2004, 5.

SA8000, BSCI⁴⁵, ETI, GlobalGAP)⁴⁶. In several industries and especially in food industry, the broader demographic and social trends have altered the expectations and demands of consumers with respect to the safety and quality of food. These attributes encompass the manner in which products are produced (for example organic versus conventional agricultural production methods) and the existence of substances in food that are perceived to be unsafe, including those purposefully used in food production (for example pesticides and hormones) and contaminants (for example PCBs and dioxins). Thus, food safety is no longer defined simply as 'fit for human consumption', but rather in terms of a wide array of safety attributes that range from search, through experience to credence attributes. A wide range of 'quality' attributes encompassing impacts on the environment, animal welfare, welfare of workers, and so on, have also been added to consumers concerns. Such attributes are almost universally credence in nature. As a result, consumers are looking for greater and more reliable (or at least what is perceived to be more reliable) information and assurance about the nature of the foods they are eating and the social environmental conditions under which it is produced.⁴⁷ E.g. GlobalGAP's mission is "[t]o respond to consumer concerns on food safety, environmental protection, worker health, safety and welfare and animal welfare"⁴⁸.

In retail business the BSCI standard aims to avoid multiple and redundant auditing systems. There are several platforms where supplier social audits can be shared by buyers and brands in order to minimise "audit fatigue"⁴⁹. These include Sedex⁵⁰ and the Fair factories Clearing House⁵¹. According to OECD report the most important reasons for the spread of private-sector standards are *the stiff competition between retailers* (leading to very slim margins); the intention of retailers *to reduce in-house monitoring and inspection costs* and transfer them to exporters/producers; and the global sourcing of products. Estimates suggest that retailers currently obtain about a

⁴⁵ The Business Social Compliance Initiative (BSCI) is an industry-led platform, an initiative of European retail companies initiated by the Brussels based Foreign Trade Association (FTA). In 2002 a common platform was established for the various different European Codes of Conduct and monitoring systems and to lay the groundwork for a common European monitoring system for social compliance. In 2002 and 2003, retail companies and associations held several workshops to determine the framework for such a system. In March 2003 the FTA formally founded the Business Social Compliance Initiative (BSCI). Audited suppliers are registered in the BSCI Database so that there is no need for other BSCI members to assess the same supplier. This decreases the costs for the supplier and enhances the efficiency of the improvement process.

⁴⁶ Sorsa 2009d, 127- 137.

⁴⁷ Henson & Humphrey 2009, 13.

⁴⁸ GLOBALG.A.P., "General Regulations – Integrated Farm Assurance, Part I – General Information", September 2007.

⁴⁹ Sorsa 2009d, 41-43.

⁵⁰ Sedex is a not-for-profit organisation based in London, UK, open for membership to any company anywhere in the world. Sedex will be the knowledge management provider of choice for measuring and improving ethical and responsible business practices in global supply chains. Sedex focuses on four pillars: Labour Standards, Health & Safety, Environment and Business Integrity. www.sedex.org

⁵¹ Reebok International Ltd., the National Retail Federation, Retail Council of Canada and World Monitors joined forces and created a not-for-profit organisation, the Fair Factories Clearinghouse in late 2004. The FFC was established to use technology to lower the cost of entry for those seeking to manage compliance programs and to improve the availability, comprehensiveness, and standardization of compliance standards and audits through the use of a global management system to track workplace conditions. www.fairfactories.org

quarter of all fresh fruit and vegetables sold in developing countries⁵². Sexsmiths and Potts (2009) have also found out that standards development and implementation can lead to more coordinated action among players downstream on the supply chain, such as traders, manufacturers and retailers. E.g. Utz Certified provides a natural meeting ground for retail chains to coordinate their sustainability strategies. However, it is worth noting that newer mainstream initiatives have typically taken special care to avoid any direct collaboration or pricessetting to ensure consistency with competition policy requirements in North America and Europe.⁵³

In *business to consumer relationship* the motive behind the ICC Code for Advertising and Marketing Communication Practice (CAMCP) seems to be congruent with a common reason for self-regulation, which is the *desire to raise industry standards*. Self-regulation is often used as a means to exceed minimum legal requirements and also as a means to enhance understanding and compliance with regulations.⁵⁴ This is mentioned also in CAMCP. In a competitive environment there is a strong incentive for businesses to continually improve standards and exceed the benchmark service levels in order to gain market share⁵⁵. Many self-regulation systems use the ethical issues as *a source of product differentiation* and aim to distinguish certified products from others by highlighting certain product or process attributes (e.g., Utz Certified, RA, FLO, PEFC, FSC, MSC)⁵⁶. In the first case (CAMCP) the motive seemed to belong to the “professional interest group” category and in the second example to the “competitive advantage” category.

The most important motive for self-regulation seemed to be *the desire to promote or to create competitive advantage both in business-to-business relations and in business to consumer relationships*. The sources of competitive advantage were in most cases pursuit of *cost efficiency* or *differentiation* based on corporate social responsibility issues and the motivation of self-regulation seemed to rise from this foundation especially in the schemes which are mainly govern by firms (PEFC, EICC, WRAP, Utz Certified)⁵⁷. Especially the agro-food production system has drastically transformed *to attain economic efficiency* through applying uniform criteria for product to take advantage on integration of production system *across the borders* while *accommodating diverse market preferences through differentiations*. It was shown also that sustainable development has framed the development of different self-regulation schemes. This seems to serve a public regulatory function in the global environmental arena. Self-regulation networks fill the regulatory gaps⁵⁸ that are created when global trade increases the exploitation of global commons resources and shifts production to exporting countries with lax environmental or social standards.

⁵² OECD, 2006.

⁵³ Sexsmiths & Potts 2009, 29.

⁵⁴ This finding is supported also in the WTO report G/SPS/GEN/932, 3.

⁵⁵ The UK consumer authority Office of Fair Trading (OFT) *encourages businesses to higher standards* when using tools other than enforcement, such as *guidance and training*, and in particular through *Consumer Codes Approval Scheme (CCAS)*. The CCAS rewards those who adopt best practice, giving them a competitive edge in attracting and retaining customers. What is exceptional when providing advice and guidance, OFT distinguishes between *what is necessary to meet statutory obligations* and *what is desirable for the purposes of achieving improvements above the minimum required by law*. (OFT964). See more in Sorsa 2010.

⁵⁶ Sorsa 2009d, 58 -65; Henson & Humphrey 2009, 13.

⁵⁷ Sorsa 2009d, 127-137.

⁵⁸ Caffaggi 2009, 9.

Public responses are often inadequate to address the attendant environmental harms, especially since most of them are regionally restricted. According to Cafaggi public and private regulation (e.g. self-regulation) *complement* rather than substitute one another, although in many contexts, private law-making has anticipated public regulation (e.g. HACCP) or, in de-regulatory ages, has substituted public legislation.

The reason why companies try to tackle problems related to social and environmental aspects is because these are seen on the one hand as opportunities for growth and competitive advantage⁵⁹ or in other cases ethical issues are an integral part of the business without emphasis to competitiveness. That is reflected as a growing number of self-regulation schemes focusing on social or environmental issues. Bartley has analysed the birth of forest certification systems. In my own research I have analyzed the PEFC and FSC developments in Finland⁶⁰. The Forest Stewardship Council and Woodworkers Alliance for Rainforest Protection (WARP) were born by firms looking for a solution to collective action problems in the market. Wood certification allowed environmentally conscious firms to distinguish themselves from the bulk of the forest products industry, therefore providing competitive advantages for some firms and addressing reputational issues while excluding free riders and opportunists. However, environmental NGOs, with support from governments and foundations, has become key institutional players of the first forest certification association (FSC) which highlights also the ethical issues alongside the competitiveness.⁶¹ Bartley also develops his political-institutional approach model for forest certification. He summarizes that *in part* out of a series of institutionally embedded conflicts over the legitimacy of different strategies which governments used (boycotts, government bans, intergovernmental regulation) for regulating the timber trade, they turned to private sector and soon came to see private certification systems as useful policy tools.⁶² I can agree with Bartley that partly the motives to private regulation can be explained by the market failure dimension – especially in the case of FSC.

This research on self-regulatory mechanisms breaks down the classical orthodoxy that regulation only occurs through a mechanism of deterrence that works via commands against misconduct spelled out in legal rules, monitoring of compliance by a state regulatory agency, and application of punitive sanctions for breach. In self-regulation informal sanctions (negative publicity, public criticism, shame) have a greater motivating impact than formal legal sanctions.

3. Private regulation - a trade barrier or an opportunity for public-private co-operation?

3.1. Trade barriers in the context of WTO and EU legislation

Private standards may represent barriers to the trading of a number of products and may therefore run counter to international trade rules. This is why the WTO has developed principles and rules to control and reduce the trade-restrictive effects of for example food safety measures. These rules are laid down in the WTO Agreements which establish

⁵⁹ e.g. Nadgrodkiewicz 2009, 2-3.

⁶⁰ Sorsa 2010b, 67-74.

⁶¹ Bartley 2007, 317-318.

⁶² Bartley 2007, 321-322.

rules of trade *between nations*, their basic goal being to facilitate free trade.⁶³ WTO was established in 1994 after Uruguay round of GATT. The GATT agreement (General Agreement on Tariffs and Trade 1947) was incorporated into the WTO. Article 20 of GATT contains general exceptions to free trade and allows governments to act on trade in order to protect human life or health (and a series of other values), provided they do not discriminate or use this as disguised protectionism. Has to be kept in mind that WTO handles issues between states but private standards are set and implemented by private actors.⁶⁴

In the European Union the Technical Barriers Regulation (TBR) is a *legal instrument* that gives the *right* to EU enterprises, industries or their Associations as well as the EU Member States to lodge a complaint with the European Commission who then investigate and determine whether there is evidence of *a violation of international trade rules* resulting in either adverse trade effects or injury. The TBR is an instrument aimed at opening third country markets by eliminating *obstacles to trade* for the benefit of EU exporters. *Obstacles to trade* is defined in the Regulation as “any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action”. In this context, *international trade rules* are primarily those *established under the World Trade Organisation (WTO)* or, since February 2008, those contained in *bilateral Free Trade Agreements*. The TBR is designed to ensure that the rights of the EU under international trade agreements can be enforced in cases where non-EU (i.e. “third”) countries “adopt or maintain” barriers to trade.⁶⁵

TBT and SPS Agreements

Technical regulations and industrial standards vary from country to country. Producers and exporters have to adjust to different regulations and standards in order to market their products. If the standards are set arbitrarily, they can become obstacles to trade. The TBT Agreement recommends the recourse to international standards (e.g. ISO/IEC) wherever possible while drafting technical regulations. EU industries and companies can rely on the Agreement on Technical Barriers to Trade (TBT) to ensure that regulations, standards, testing and certification procedures in third countries do not create unnecessary obstacles. The TBT agreement applies to a broad range of measures: composition of goods, design requirements, packaging and labelling requirements etc. *It applies both to mandatory regulations laying down product characteristics, and to voluntary standards*. Not only technical measures adopted by central governments are subject to trade disciplines: the TBT agreement also includes provisions describing how local government and non-governmental bodies should apply their own regulations.

In order to balance food safety with free trade the WTO has laid down principles and rules which attempt to control and reduce the trade-restrictive effects of food safety measures. The main rules as to this are laid down in the Agreement on the Application

⁶³ Wouters et al. 2009, 4.

⁶⁴ Lähteenmäki-Uutela 2009, 15.

⁶⁵ TBR brochure 2008, 4.

of Sanitary and Phytosanitary measures (SPS Agreement and partly the Agreement on Technical Barriers to Trade (TBT) which cover also food issues. The other international instruments and organizations are Codex Alimentarius of FAO (Food and Agriculture Organization of the United Nations) and WHO (World Health Organization). Global standards setting bodies such as Codex are a central part of the complex multi-layered structure of public and private standards that currently governs global production and trade, especially in the agri-food sector.⁶⁶

The SPS Agreement deals with food safety and plant and animal health. *It does not impose any quantitative and legally-binding schedules of concessions*, but is rather a set of rules and principles to ensure, among other things, that sanitary and phytosanitary trade measures and food safety are scientifically justified and do not constitute disguised restrictions on international trade. The SPS Agreement allows countries to set their own standards and states that regulations must be based on scientific risk analysis⁶⁷. The SPS Agreement complements *the TBT Agreement which seeks to ensure that technical regulations and standards, including packaging, marking and labeling requirements*, as well as analytical procedures for assessing conformity with technical regulations and standards do not create unnecessary obstacles to trade. Before the SPS Agreement was negotiated, many food safety regulations came under the TBT Agreement.

The Committee on Sanitary and Phytosanitary Measures (SPS Committee) deals with *government regulations* in the areas of food safety, animal and plant health. At these meetings, WTO member countries have the opportunity of raising specific trade concerns, e.g. if they believe that another country's sanitary and phytosanitary (SPS) measures are more trade-restrictive than necessary for health protection.

SPS measures adopted by WTO Members may only be introduced in situations pertaining to human, animal or plant health or life, and *may not be more trade restrictive than necessary*. What is more, such measures must be based on scientific evidence, and may not be maintained in the absence of such scientific evidence (Art. 2.2.) This provision seeks to ban SPS measures which, under the appearance of food safety measures, *de facto* pursue protectionist purposes. Second, SPS measures have to abide by the fundamental WTO principles of *national treatment and most favored nation*, that is, they *may not discriminate foreign products against domestic products*, or against other *like foreign products* (Art. 2.3.). Third, the SPS Agreement intends to 'harmonize' SPS measures across Members, so as to reduce the market access problems caused by the proliferation of national food safety regulations, which often require that products comply with many different conditions in order to access different national markets. In order to achieve this objective, Members are requested to base their SPS measures on 'international standards, guidelines and recommendations' where they exist. Codex Alimentarius for example is this kind of international standard. SPS may also encompass other standards developed by any other relevant international organization which is open for membership to all WTO

⁶⁶ Henson & Humphrey 2009, 3. Lähteenmäki-Uutela 2009, 15-16 and 18-20.

⁶⁷ SPS Agreement recognizes the right of Members to adopt 'SPS measures' as a recognition of the legitimate need to regulate food products to ensure that they are safe to consume (Preamble and Art. 2.1.). SPS measures are, in short, measures to protect human, animal or plant health, or a country, against risks which could arise from, as far as food products are concerned, additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs (Art. 1.1 and Annex A).

Members. If an SPS measure is compliant with such international standards, it is also deemed to comply with the SPS Agreement (Art. 3). This ‘positive integration’ of food safety rules by way of ‘quasi-legislation’ can be seen as an expression of the tendency of WTO to facilitate international trade in encroaching to other regulatory fields.⁶⁸ These transnational standards are often complemented by stricter private standards introduced in agreements and contracts concluded by retailers and suppliers. In certain circumstances they constitute co-regulatory regimes⁶⁹, while in others they tend to have a purely private self-regulatory function.⁷⁰

Codex Alimentarius

The Codex Alimentarius Commission was created to develop food standards, guidelines and related texts (e.g. codes of practice) under the joint FAO/WHO Food Standards Program. The main purposes of this program are to protect consumer health and to ensure fair food trade practices, as well as to promote coordination of work on food standards by international organizations.

The SPS Agreement and TBT are treaties and therefore they have international legal status. In that sense, they only bind States and organizations (like the European Community) which have agreed to it. As is clear from the wording of the SPS Agreement itself, it is first and foremost *addressed to Members* and, insofar as it applies to ‘all SPS measures’, the SPS Agreement was essentially *designed to deal with public measures*. These agreements do not explicitly exclude private standards from their scope, and it is therefore not inconceivable that the disciplines of the e.g. the SPS Agreement – as well as those of the TBT Agreement – could also be applied to private standards. However, such application would have to take place through the mediation of WTO Members. As SPS Agreement is a trade agreement, it seeks to apply the WTO trade rules to the trade in food products, and to harmonize food safety regulations in order to lower trade barriers on food products resulting from those regulations.⁷¹

The WTO does not decide on any substantive food safety issues. It is only concerned with the scientific justification and ‘harmonization’ of food safety measures in order to reduce barriers to trade. In order to pursue those goals, the SPS Agreement designates the Codex Alimentarius Commission as the relevant standard-setter in the field of food safety, without intervening in its work. Therefore, any food safety regulation which complies with an applicable Codex Alimentarius Standard is deemed compliant with the SPS Agreement. Only when a food safety regulation sets a more stringent level of protection, is the SPS Agreement liable of being breached (except when scientifically justified). Any food safety regulation which is more lenient than a Codex Alimentarius Standard does not violate the SPS Agreement.⁷²

⁶⁸ Wouters et al. 2009, 12-13 and Lähteenmäki-Uutela 2009, 19-20.

⁶⁹ E.g. from Finnish food industry, Sorsa 2009d, 51-76.

⁷⁰ Cafaggi 2010, 16.

⁷¹ Wouters et al. 2009, 14.

⁷² Wouters et al. 2009, 15.

3.2. Private regulation in conflict with international soft law?

3.2.1. International public law framework

In June 2005, St. Vincent and the Grenadines raised concerns about GlobalGAP (formally EurepGAP) pesticide requirements for banana importation, and the relationship between GlobalGAP and official EU requirements. Other developing countries shared this concern, wondering what alternatives were available to affected developing countries⁷³. The EU's response was that GlobalGAP *standards were not official EU requirements* and even if they went beyond official EU regulations, they were not in conflict with EU legislation.

Since then, the debate has continued within the framework of SPS–WTO, in other multilateral organizations (OECD, World Bank, UNCTAD) and within the EC. All of these organisations have published reports which deal with the issue of private standards. Their findings have generally been rather supportive including the positive role they can play in creating trade opportunities for developing countries. The WTO recognizes itself: ‘a stable and mutually supportive relationship between standards regimes and international trade rules is central to the effective functioning of the trading system. [...] Standards are essential for addressing market failures. [...] But the design and operation of standards must [...] avoid [...] unwarranted obstacles to competition and trade.’⁷⁴

In the context of global sourcing, European retailers and supermarkets require private food certification of their suppliers to ensure that the products they import to the EU are safe. This requirement is part of a commercial agreement between two voluntary parties in a free market, and as such is not subject to regulatory intervention. However, since costs of compliance with these private standards may be high, many suppliers in Developing Countries met problems in satisfying these requirements.

A defining feature of *private regulation* is that *its legitimacy, governance and implementation is not rooted in public authority*. There are important structural similarities between private regulations and a sub-set of government regulations. The market-based regulatory mechanisms typically employed by private regulations, namely producer certification, product labeling, third-party auditing, and information disclosure are also often used by governments, especially in the area of environmental policy⁷⁵. *Many governments employ voluntary agreements as a vehicle of business regulation*. However, many ‘voluntary’ agreements between firms and governments are voluntary in name only, as the state retains final legal authority. This is not the case for private regulations for which there is typically no state ‘back-up:’ the labeling, disclosure, auditing, and certification components of civil regulations are not subject to state scrutiny, nor are there any state penalties for non-compliance.

⁷³ Stanton & Wolff 2008.

⁷⁴ World Trade Report 2005, 35 ff and pp. iii-iv.

⁷⁵ See for example *Voluntary Approaches for Environmental Policy* OECD, 2003.

3.2.2. Case food safety

The private standards have repeatedly been discussed in the WTO, especially in the SPS Committee. The discussions have focused on three themes⁷⁶: 1) market access; 2) development; and 3) WTO law. The governance of food is taken as an example to explore these issues further since private standards in food governance directly relate to the key issues of sustainability (like biodiversity) and the governance of food, via the SPS Agreement, which directly links private standards to the multilateral trading system. In other words, an analysis of food governance links the issues of international trade, food safety and biodiversity and private standards.

In order to answer the question whether private standards create trade barriers it is necessary to understand what private standards require are and how private actors set these requirements.

Market access

Some say that standards set by the private sector can help suppliers improve the quality of their products and gain access to high-quality markets. Developing countries face increasingly strict sanitary and phytosanitary standards in their export markets and they can maintain and improve market access – and improve domestic food safety and agricultural productivity – by adopting a strategic approach to food safety, agricultural health and trade. High-income countries should increase development flows to help developing countries to build the capacity to plan and execute the necessary strategies⁷⁷.

Others argue that private standards can be more restrictive (e.g. requiring lower levels of pesticide residues) and more prescriptive (e.g. accepting only one way of achieving a desired food safety outcome) than official import requirements, thus *acting as additional barriers* to market access. If a WTO Member state uses an SPS measure which sets a degree of food safety protection higher than that of *the relevant international standard*, such deviation must be scientifically justified, or be justified by a decision as to the appropriate level of risk that the Member is willing to apply following a scientific assessment of the risk posed by certain products, activities or events (Art. 3.3.). That is not the case with private standards which are not scientifically justified or in which scientific assessment of the risk is not applied.

Existing exporters may see their competitiveness diminished in the face of *significant costs* of compliance with private food safety standards, benefitting industrialized countries over developing countries and/or one developing region/country over another.⁷⁸

However, private standards are generally *much more specific* than public standards about how to achieve certain goals and how to operationalise process standards. In many cases public mandatory standards lay down the basic parameters of a food

⁷⁶ Wouters et al. 2009; Potts 2008; Cafaggi 2010; Stanton & Wolff 2008.

⁷⁷ Simeon 2006, 701.

⁷⁸ Henson & Humphrey 2009, 13.

safety system, while private standards elaborate on what this system should 'look like' in order to be effective⁷⁹.

It is also increasingly being recognised that private standards, alongside the regulatory requirements of export markets, can act as catalysts to processes of capacity-building and competitive positioning in global agri-food value chains⁸⁰. According to the EU Commission trade liberalization can offer opportunities for economic growth and sustainable development. Development and the integration of developing countries into the global economy, especially the least developed, are key objectives of the WTO and of EU trade policy⁸¹.

Jaffee (2003) highlights how rising private and public standards have posed challenges to the Kenyan fresh produce industry, yet at the same time they have also thrown a 'life line' to the industry in the face of stiff international competition. Jaffee and Henson (2004) show how Peru has positioned itself as a globally competitive exporter of fresh and processed asparagus through concerted efforts to upgrade food safety capacity in line with GlobalGAP. Finally, UNCTAD (2007b) shows how Thailand, Malaysia and Vietnam, that were proactive in introducing national GAP standards and were historically less reliant on EU markets than some of their international competitors, have found it relatively easy to comply with private standards such as GlobalGAP.

Other market access problems triggered by private standards emerge from the fact that several standardization schemes may coexist, compete and contradict each other. This would result in situations where, on a same local market, the same product would have to comply with (and possibly be certified under) several different and potentially conflicting standards in order to be sold in different supermarket chains, involving a multiplication of compliance costs.⁸²

Development

The costs of complying with private standards, and the additional cost of certification, sometimes for multiple sets of standards for different buyers, can be a problem especially for small-scale producers in developing countries. Similarly, concern has been expressed that, due to the existence of a multitude of private-sector standards, technical cooperation programmes aimed at assisting producers in developing countries to comply with Government regulations in developed countries may be insufficient to effectively facilitate market access if the implications of private-sector standards are not addressed. The evidence that does exist, however, suggests that the challenges and costs of compliance can induce processes of rationalisation that tend to expel smaller and/or more marginal processors/exporters, despite the fact that the level of transformation of many export products is actually rather small. This reflects economies of scale in processes of compliance (see for example OECD, 2006). For example, in the Kenyan context, Jaffee (2003) suggests that many of the original exporters of fresh vegetables have left the sector, which has been progressively dominated by a handful of large firms.

⁷⁹ Henson & Humphrey 2009, 13.

⁸⁰ World Bank, 2005; Henson and Jaffee, 2008.

⁸¹ COM (2009) 215, 8.

⁸² Wouters et al. 2009, 15.

WTO law

While some are of the view that setting standards for the products they purchase is a legitimate private sector activity and not a governmental one, others insist that the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) makes governments in importing countries responsible for the standards set by their private sectors. The latter are concerned that *these standards do not meet* WTO requirements such as *transparency and scientific justification*⁸³ of food safety measures and are more trade-restrictive than necessary to protect health. It has been argued also that private-sector standards *may be more stringent* than public-sector regulations.

However, some have argued that the regulatory and standard-setting activities of governments and the private sector may be mutually supportive in important respects⁸⁴. Each focuses on a separate aspect of risk management. Government regulations aim at *outcomes*: the characteristics of the finished product are specified, and producers and importers are responsible for ensuring, by whatever means, that these requirements are met. Private-sector standards, by contrast, focus on *processes*: requirements are set for the entire system of production and supply, with specific instructions on production methodologies and testing procedures.⁸⁵

GlobalGAP, for example, is an example which improves compliance of public standards by increasing control over suppliers locating in countries where enforcement is weak. *GlobalGAP* is a set of normative documents suitable to be accredited to internationally recognized certification criteria such as *ISO*. It consists of a set of general regulations, protocol for *GAP*, and an auditing system with a checklist. The protocol is broken down into 214 control points which are organised into 14 chapters. The scheme covers *the whole agricultural production process* of the certified product, from before when the plant is in the ground (seed and nursery control points) to non-processed end product (produce handling control points).

According to its representative, *GlobalGAP* does not set out in its standard-setting to intentionally exceed EU requirements. Rather, it aims to raise the awareness of and complement regulatory requirements, including intra and extra EU legislation. Second, some Member States can set more rigorous requirements than the EU. Where this is the case, *GlobalGAP* requires and assists farmers in achieving compliance with Member States' requirements.⁸⁶ This separation of objectives may bring benefits to both government legislators and private sector standard. Third, *GlobalGAP* also requires compliance with legislation in the country of production. In practice, some major exporting countries, e.g. South Africa, Chile, operate to the most stringent member state requirements ensuring that they will meet all the legal requirements.

⁸³ See e.g. Potts 2008, 5.

⁸⁴ See e.g. Cafaggi 2010, 16.

⁸⁵ See discussion related to different regulatory strategies which can easily be embedded into existing business practices Sorsa 2009c, 55-59.

⁸⁶ Chi-Hua Lee 2006, 20.

As a result, legislation in these countries might be more stringent than EU requirements. The certifiers auditing *GlobalGAP* will normally check compliance with national legislation of country of origin as well. Taken together, *GlobalGAP* could be regarded as providing a service to implement compliance with relevant regulations, which should ensure successful imports into the EU. It is believed that if a producer has *GlobalGAP* certification, he should meet all food safety requirements of the EU.⁸⁷

GlobalGAP applies three guiding principles in its standard-setting. First, where there are explicit EU regulations, *GlobalGAP* would normally refer to them; where EU requirements are broadly stated, *GlobalGAP* may have specific guidance. Obviously, these 214 control points are specific steps set to meet EU requirements.

However, the EU does not require a *HACCP*-based approach for primary production. The EU requires “equivalence of risk outcome” as required by SPS and TBT. Only samples of the final imported products are officially controlled in Member States, such as phytocertificate, MRLs, additives, contaminants etc. With regards to the process of production, Regulation EC/852/2004 sets out general hygiene provisions for primary production⁸⁸. And competent authority should carry out regular official controls on food of non-animal origin imported into the EU⁸⁹. However, no official certification is required to verify compliance with these hygiene provisions. For food of non-animal origin, no positive lists of countries or establishments allowed to export to the EU are required. In other words, as long as the final imported products (outcome) pass the official controls in Member States, the EU does not look into the process in which fruits and vegetables are produced in third countries.⁹⁰

4. The coordination of private regulation in global business

Analyzing the benefits and costs of different types of legalization in different circumstances contributes to the understanding of the circumstances that lead actors to select specific forms – hard law or soft law.⁹¹ Food scares – including BSE in Europe and the US, dioxins in Belgium, Sudan red dye in curries, and salmonella in spinach – have contributed to a loss of consumer confidence in government regulation and control of food safety. One *response of governments* has been to shift food safety controls *from the testing of final retail products to the much lauded, more holistic farm-to-fork or stable-to-table approach*. This new approach requires the food

⁸⁷ Chi-Hua Lee 2006, 20-21.

⁸⁸ Including infrastructure, equipment, water quality, pest control, personal hygiene, pre-operational and operational hygiene. EU legislation on biological safety of foods has been revised as of 2006 by the so called “hygiene package”. This legislative package includes: Regulation 852/2004/EC on the hygiene of foodstuffs; Regulation 853/2004/EC on specific hygiene rules for food of animal origin, and Regulation 854/2004/EC laying down specific rules for the organization of official controls on product of animal origin. All of these were enacted on April 2004, and came into force in the beginning of 2006. See Lähteenmäki-Uutela 2009, 111-112; about chemical safety of food *ibid* 112-114 and about safety of food supplements *ibid* 118-119.

⁸⁹ Regulation EC/882/2004, Article 15.

⁹⁰ Chi-Hua Lee 2006, 20-21.

⁹¹ Abbot & Snidal 2000, 421.

industry to put in place risk management systems that ensure food safety at all stages of the chain – from the farm level to final retail sale⁹².

Another major event was the introduction of the "due diligence" clause in the United Kingdom 1990 Food Safety Act. This requires all players along the supply chain to be able to prove that they have undertaken all possible steps to ensure that their product is safe and will not cause harm. This liability clause has had far-reaching repercussions, first in the United Kingdom, and later throughout Europe and other parts of the world. To be able to provide this proof of due diligence, *the food industry developed systems of self-regulation*. These started with codes of practice, or "private voluntary standards".⁹³

In the EU, the Commission has conveyed that *voluntary and regulatory instruments are not sufficiently connected* and potential synergies between the different instruments are not exploited in the context of sustainable industrial policy. Food safety is an elementary part of this discussion. *Implementation is not sufficiently dynamic and forward-looking to drive the performance of products upwards*. Divergent national and regional approaches send conflicting signals to producers, and as a result the full potential of the Internal Market is not realized.⁹⁴

Private regulation which has promulgated in different sectors receives continuously plenty of criticism because of the lack of transparency, legitimacy and the challenges they produce to developing countries producers etc. On the other hand, the old governance system also receives plenty of criticism as well⁹⁵. One could look at the situation from another angle as well. What would happen in the absence of private regulation, e.g. private food schemes? Would we see more or less trade from DCs to the EU? It is reasonable to argue that without *GlobalGAP*, farmers and exporters in DCs would have to come to grips themselves with complicated EU regulations on food safety and those of the member states as well. In this sense, private food schemes help to reduce the transaction costs by making information about European regulations on food safety systematically available and practically achievable.⁹⁶

The SPS agreement's international role is still unclear, which makes the situation in transnational trade vague. Article 13 of the SPS Agreement indicates that

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

⁹² Stanton 2007; Cafaggi 2010, 10.

⁹³ Kirk-Wilson 2008.

⁹⁴ COM (2008) 397, 4.

⁹⁵ E.g. Abbott & Snidal 2009.

⁹⁶ Chi-Hua Lee 2006.

The provision's scope is indeed unclear since the SPS Agreement was drafted in a time when private standards had not yet invaded the market. The disconnection between the underlying assumptions of the SPS Agreement, and today's realities of the food markets are evident. The vagueness of Articles 1.1. and 13 of the SPS Agreement and their public international law nature has led some authors to consider that the SPS Agreement is not applicable to private standards and as such should not be used as a lever to discipline them. To date, no WTO Member has decided not to use the 'hard way' of trying to enforce, by way of WTO dispute settlement, the SPS Agreement against private standards directly, or against another member which would be harboring private standard-setters.⁹⁷

To date, there has been no WTO jurisprudence that would help in determining what are the "reasonable measures" available to ensure that non-governmental entities comply with the SPS Agreement. SPS Committee has been pondering the possible outcomes. Also State regulation in the area of food safety increasingly shows its intrinsic weaknesses in relation to the safety issues concerning globally traded foodstuffs.⁹⁸

On the other hand, the discussions on the relationship between product- and process related measures (PPMs) (which are the core of the private regulations schemes) and WTO policy is quite a confusing area. Any effort to provide an overview of the state of the law with respect to the legality of PPMs under the WTO is fraught with difficulty. Potts (2009) has tried to answer to this deficit in his analysis. The discussions between PPMs and WTO policy are usually framed either in terms of environmental PPMs or in terms of social PPMs, but not both together. Both social and environmental goods raise identical issues with respect to WTO policy. Potts has tried to analyse WTO law based on the different cases which have been in the WTO dispute-settlement process. WTO have displayed a persistent and intentional reluctance in making broad assertions with respect to non-product-related PPMs.⁹⁹

Several researchers have identified some possible corrective actions which could improve the situation and overcome the "orchestration" deficit.

Perhaps *mutual education and exchange* will lead governmental officials to recognize the potential benefits from some private standards and the private standard-setters to modify their procedures to take into account the legitimate concerns of developing countries¹⁰⁰. On the other hand, public authorities can support the *awareness raising by funding* e.g. NGOs' work in the field of private sustainability standards like the EU has done.

The Commission has provided financial support for Fair Trade and other sustainable trade related activities essentially through its development cooperation instruments (budget chapter 19), through co-financing actions with NGO's. Between 2007 and 2008, € 19.466 million were allocated for various NGO implemented and co-financed actions. The majority of these actions were in the field of awareness raising within the EU.¹⁰¹

⁹⁷ Wouters et al. 2009, 20.

⁹⁸ Cafaggi 2010, 5-8.

⁹⁹ Potts 2009.

¹⁰⁰ Stanton 2007.

¹⁰¹ COM (2009) 215, 8-9.

Perhaps the *SPS Committee will identify some actions that governments can take to reduce the negative effects of private standards*. These could, for example, focus on the developmental aspects, such as projects to assist small holders meet certification requirements and maintain compliance with the private standards. Or on *the transparency aspects, by creating a database of information regarding private standards, the products they affect and the markets involved*¹⁰².

EU Commission has already taken quite supportive actions. It recalls that transparency and adequacy of information to consumers about standards of private sustainability schemes are key, and that there could be benefit from arriving at a common understanding of what basic process requirements, such as independent monitoring, are reasonable to expect. It also recalls that further assessment of the impact of private sustainability schemes could be a key step forward.

*EU Commission also intends to explore the scope for further dialogue, co-operation and, where appropriate, convergence between different private labelling schemes to promote possible synergies and enhance clarity for the consumer.*¹⁰³

Perhaps one government or another will decide to bring a formal, legal challenge to the WTO with respect to private standards that are particularly damaging to its export interests. Or the SPS Committee could recommend *revision of the SPS Agreement, to clarify the extent to which its provisions do, or do not apply, to private standards*. Perhaps the Committee will decide to refer the issue to some other forum that it considers a more appropriate place to address this issue, such as the WTO Committee on Technical Barriers to Trade, or the UNCTAD. One thing is clear: the trade implications of private standards are too great for this issue to quickly disappear from the agenda of the SPS Committee.¹⁰⁴

Abbott and Snidal (2009) suggest better orchestration for transnational trade. They call it Transnational New Governance which would mean limited state orchestration, which will be highly decentralized, and utilize dispersed expertise and voluntary codes. According to them Transnational New Governance would provide the most viable route to improving the international regulatory system.¹⁰⁵ Sexsmiths and Potts (2009) suggest demand improvement of availability of market information, building developing country access to sustainable markets and encouraging widespread take-up of chain-of-custody certification.¹⁰⁶ Cafaggi (2010) proposes a larger role for contractual networks to improve effectiveness of food safety regulation. Contractual networks have worked well at least in the Finnish food industry in the co-regulation context at national level¹⁰⁷.

The good examples and good practices which can be found related to the different successful private regulation schemes should be taken into better use. Private regulation schemes are dynamic regulation laboratories which evolve faster than public regimes. The confrontation of private and public regulation should be forgotten and the regulatory tasks should be seen more as a cooperative effort of public and private actors.

¹⁰² Stanton 2007.

¹⁰³ COM (2009) 215, 11.

¹⁰⁴ Stanton 2007.

¹⁰⁵ See more Abbot & Snidal 2009.

¹⁰⁶ Sexsmiths & Potts 2009, 44-46.

¹⁰⁷ Sorsa 2009d, 103-109.

References

- Abbot, Kenneth W. & Snidal, Duncan (2009). Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit. *Vanderbilt Journal of Transnational Law*. Vol. 42, 501-578.
- Abbott, Kenneth W. & Snidal, Duncan (2000). Hard and Soft Law in international governance. *International Organization* 54, 3, Summer 2000, 421–456.
- Bartle, Ian & Vass, Peter. (2005). Self-Regulation and the Regulatory State. A Survey of Policy and Practice. <http://www.bath.ac.uk/cri/>
- Bartley, Tim (2007). Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions. *American Journal of Sociology*, Volume 113. 2, 297-351.
- Cafaggi, Fabrizio (2010). Private regulation, supply chain and contractual networks: The case of food safety. EUI Working papers, RSCAS 2010/10.
- Chia-Hui Lee G (2006). Private food standards and their impacts on developing countries. European Commission DG Trade Unit G2. http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf
- Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. Contributing to Sustainable Development: The role of Fair Trade and nongovernmental trade-related sustainability assurance schemes. Brussels, 5.5.2009 COM(2009) 215 final.
- Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan. Brussels 16.7.2008, COM(2008) 397 final.
- Effects of SPS-related private standards – Descriptive report. WTO. Committee on Sanitary and Phytosanitary Measures. G/SPS/GEN/932 15 June 2009.
- Henson, Spencer & Humphrey, John (2009). The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes. Codex Alimentarius Commission. FAO.
- Kaplinsky, Raphael (1998). Globalisation, industrialization, and sustainable growth: the search for the nth rent. IDS Discussion paper No. 365, Brighton.
- Kaplinsky, Raphael (2004). Sustaining income growth in a globalizing world: the search for the nth rent. Brighton: Centre for Research in Innovation Management, IDS.
- Kirk-Wilson, Ruth (2008) Review of Uptake of FSA Food Assurance Scheme Guidance by UK Scheme Operators for the Food Standards Agency.
- Lähteenmäki-Uutela, Anu (2009). Foodstuffs and Medicines as Legal Categories in the EU and China. Functional Foods as a borderline case. Faculty of Law. University of Turku.
- Parker, Christine. (2008). The Pluralization of Regulation. *Theoretical Inquiries in Law*, Vol. 9, Number 2, July 2008, 349-369.
- Parker, Christine. (2007). Meta regulation: legal accountability for corporate social responsibility. In: Doreen McBarnet & Aurora Voiculescu & Tom Cambell (eds.). *The New Corporate Accountability. Corporate Social Responsibility and the Law*. Cambridge: Cambridge University Press.

- Parker, Christine (2003). Reinventing Regulation within the Corporation. Compliance-Oriented Regulatory Innovation. Teoksessa Colin Scott (toim.): Regulation. Aldershot: 2003, 389-425.
- Potts, Jason (2008). The Legality of PPMs under the GATT. Challenges and Opportunities for Sustainable Trade Policy. http://www.iisd.org/pdf/2007/ppms_gatt.pdf
- Prosser, Tony (2008). Self-regulation, Co-regulation and the Audio-Visual Media Services Directiv. J Consum Policy (2008) 31:99–113.
- Senden, Linda (2005). Soft-Law, Self-regulation and Co-regulation in European Law; Where do they meet? Electronic Journal of Comparative Law , Vol. 9.1. January 2005. www.ejcl.org.
- Sexsmith, Kathleen (2008). power Relations in the Fair Trade Coffee Global Value Chain. Queen Elizabeth House MPhil Thesis. University of Oxford.
- Sexsmith, Kathleen & Potts, Jason (2009). Voluntary Sustainability Standards and Economic Rents. The economic impacts of voluntary sustainability standards along the coffee, fisheries and forestry value chain. <http://www.iisd.org>
- Siméon, M. (2006). Sanitary and phytosanitary measures and food safety: challenges and opportunities for developing countries. Rev. sci. tech. Off. int. Epiz., 2006, 25 (2), 701-712.
- Sorsa, Kaisa (2005). Lainsäädännön proaktiivisuus. Uusia eväitä EU:n sopimusoikeuden yhtenäistämiskeskusteluun? Teoksessa "Ex ante - Ennakoiva oikeus" (toim.) Soile Pohjonen, Talentum 2005, 203-225. (Sorsa 2005).
- Sorsa, Kaisa (2006). Kansainvälinen kauppa ja EU:n sopimusoikeuden yhtenäistäminen, Defensor Legis 1/2006, 16-42. (Sorsa 2006).
- Sorsa, Kaisa (2008a; 2008b) a) Responsible Business – How to Commit the Supply Chain to it? , 139 – 150. (Sorsa 2008a)
b) Responsible Business; Integrating the Legal Environment to Company Strategy by Proactive Approach, Proceedings of the IACCM International Academic Symposiums on Contract & Commercial Management held at The Savoy Hotel, London, UK on November 9th, 2007 and at the Radisson Fort McDowell, Arizona, USA on April 7th, 2008. In: Lowe, D. (ed.), USA 2008, 151 - 162. (Sorsa 2008b).
- Sorsa, Kaisa (2008c). Ennakoivan oikeuden näkökulmia sopimustoiminnan itsesääntelyyn EU:ssa. Oikeus 2008 (37):1: 45 -66. (2008c).
- Sorsa, Kaisa (2009a). Elinkeinoelämä tarvitsee ennakoivaa sopimusosaamista. Defensor Legis 1/2009, 128 – 147. (Sorsa 2009a).
- Sorsa, Kaisa (2009b). Towards a Contracting Capabilities Maturity Model for Projects, 187-212, teoksessa Martinsuo, Miia (ed.) Recipes for success in project-based management. Project Management Association Finland. Espoo. (Sorsa 2009b).
- Sorsa, Kaisa (2009c). The Proactive Law Approach: A Further Step towards Better Regulation. In: Tala, J. & Pakarinen A. (eds.) 2009. Changing Forms of Legal and Non-Legal Institutions and New Challenges for the Legislator - International Conference on Legislative Studies in Helsinki. National Research Institute of Legal Policy. Research Communications 97, 35- 70. (Sorsa 2009c).
- Sorsa, Kaisa (2009d). Itsesääntely- ja yhteissääntely arvoketjussa. Toimialakohtaista tarkastelua. Oikeuspoliittisen tutkimuslaitoksen julkaisuja 100. Helsinki. (Sorsa 2009e).

- Sorsa, Kaisa (2010a). Proactive Law Approach and Consumer Protection – Comparing UK and Finnish Consumer Authorities Systems. *Forthcoming* in Tidskrift, utgiven av Juridiska Föreningen i Finland 2/2010. (Sorsa 2010a).
- Sorsa, Kaisa (2010b). Itsesääntely ja yhteiskuntavastuu. Työ- ja elinkeinoministeriön julkaisu 2010. (Sorsa 2010b).
- Stanton, Gretchen H. & Wolff, Christine (2008). Private voluntary standards and the World Trade organization (WTO) Committee on Sanitary and Phytosanitary Measures. www.agrifoodstandards.net
- Stanton, Gretchen (2007). Private Commercial Standards and the SPS Agreement. Remarks at the Round Table on The Role of Standards in international Food Trade.
- Tala, Jyrki (2009) Itsesääntely ja yhteissääntely lainsäädännön tukena tai korvaajana. Teoksessa Lasola, Marjukka (toim.) Oikeusolot 2009. Katsaus oikeudellisten instituutioiden toimintaan ja oikeuden saatavuuteen. Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 244.
- Tala, Jyrki (2005). Lakien laadinta ja vaikutukset. Edita Publishing Oy.
- TBR brochure 'Opening Markets for EU Exporters' (2008). European Commission. Directorate General Trade.
- Treib, Oliver & Bähr, Holger & Falkner, Gerda (2005). Modes of Governace: A Note Towards Conceptual Clarification. European Governance Papers. No. N-05-02.
- UNCTAD (2007a). Private-sector-set Standards and Developing Counties' Exports of Fresh Fruit and Vegetables: Synthesis of Country-case Studies in Africa (Ghana, Kenya, Uganda), Asia (Malaysia, Thailand, Vietnam), and Latin America (Argentina, Brazil, Costa Rica). http://www.unctad.org/trade_env/test1/meetings/nairobi2/UNCTAD%20background%20note.pdf.
- UNCTAD (2007b) Challenges and Opportunities Arising from private Standards on Food safety and Environment for Exporters of Fresh Fruit and Vegetables in Asia Experiences of Malaysia, Thailand and Vietnam, Geneva: United Nations Conference on Trade and Development.
- Wigell, Mikael (2008). Multi-Stakeholder Cooperation in Global Governance. The Finnish Institute of International Affairs. June 2008.
- Vogel, David (2008). Private Global Business Regulation. Annual Review of Political Science 2008. 11:261-282. <http://polisci.annualreviews.org>
- Wouters, Jan & Marx, Axel & Hachez, Nicolas (2009). Private Standards, Global Governance and Transatlantic Cooperation. The Case of Global Food Safety Governance. Leuven Centre for Global Governance Studies.
- WTO, *Exploring the Links between Trade, Standards and the WTO*, World Trade Report, 2005, available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf. pp. ("World Trade Report 2005"),