

THREE PUZZLES OF PRIVATE GOVERNANCE: GLOBALGAP AND THE REGULATION OF FOOD SAFETY AND QUALITY

Donal Casey*

Abstract

The private governance of food safety and quality is neglected in contemporary discussions relating to governance beyond the state. This sphere presents an interesting case for analysis given the current multiple occupation of steering space which was traditionally perceived to be the exclusive property of the state. This paper addresses a triad of puzzles traced by the empirical case of GlobalGAP and etched in the extant literature concerning novel forms of non-state governance. These puzzles pose the following questions: How and why do sites of non-state governance emerge (the puzzle of emergence)? How should such sites be viewed (the puzzle of conceptualisation)? How can such sites be legitimate and what effect does legitimisation have on their development (the puzzle of legitimation)? This paper concludes that GlobalGAP offers a critical case for the future research of governance beyond the state which has proliferated in the wake of neoliberalism.

I. Introduction

The past twenty years have seen a proliferation and increased array of private actors engaged in ‘steering tasks that were classically in the sphere of states’.¹ Non-state actors, both profit and non-profit, have gained steering capacity through the formation, dissemination, monitoring and enforcement of norms, rules and standards. These phenomena may be conceptualised, for the present purposes, as sites of private governance. I adopt Burris, Drahos and Shearing’s broad brush definition of governance as ‘the management of a course of events in a social system’.² Although not entirely novel, the recent emergence of private governance, particularly at the global level, has broken the classical state-centric frame in fields of governance, regulation and law which grew up subsequent to the 1648 Treaty of Westphalia and the constitution of modern nation states.³

The prying open and reconfiguration of governance space over the past two decades reveals four shifts which have occurred in the management of specific policy areas on the national, regional and global level. Firstly, a decentring of the state may

¹* Ph.D Candidate, University College Dublin, School of Law, Ad Astra Scholar. This research was funded by the UCD Ad Astra Research Scholarship programme.

Susanne Schaller, ‘The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative’ (2007) Duisburg: The Institute for Development and Peace, University of Duisburg-Essen INEF Report 91/2007

<<http://inef.uni-due.de/page/documents/Report91.pdf>> accessed 7 May 2008.

² Scott Burris, Peter Drahos and Clifford Shearing, ‘Nodal Governance’ (2005) 30 Australian Journal of Legal Philosophy 30, 30.

³ Colin Scott, ‘Regulating Private Legislation’ (2007) Comparative Research in Law and Political Economy Research Paper 22/2007

< <http://comparativeresearch.net/servlet/DownloadPDF?paperid=100000008>> accessed 7 May 2008 2008.

be observed.⁴ While states, their sub-systems and their supra-systems are still active nodes of governance, they are no longer the sole nodes of authority.⁵ Secondly, there has been an upward trend in strategic arrangements between private actors with a previous tradition of antagonistic and competitive relations.⁶ Thirdly, the rise of private governance has uncloaked the growing institutionalisation of this collaboration and cooperation.⁷ Fourthly and finally, these sites of private governance have become extensively legalised.⁸ Concomitantly, a large body of academic literature cutting across the disciplines of, *inter alia*, political science, law and sociology has emerged to analyse the functional, systemic, democratic and normative challenges posed by the (re)-emergence of sites of private governance.⁹

Despite the intensity and breadth of this cross-disciplinary inquiry, the governance of food safety and quality is neglected in contemporary discussions relating to governance beyond the state. This policy sphere represents a fascinating case for analysis given the *current* multiple occupation of governance space which was traditionally perceived to be the exclusive property of the state.¹⁰ It is interesting to note that during the medieval period (eleventh to thirteenth century), European private actors in the form of guilds mobilised to govern and regulate the safety and quality of food and agricultural products.¹¹ Indeed, public oversight of this policy sphere ‘blossomed late’.¹² Nevertheless, despite nearly two centuries of state monopolisation of governance in this issue area, the period known by historians of food regulation as ‘the legislative period’ has now been interrupted by the (re)-emergence of private actors engaged in the governance of food safety and quality.¹³ The shift in the location, mechanisms and forms of governance in the food system is expressed succinctly by Fulponi who notes that, ‘[w]hile national institutional frameworks remain important, the private sector, enterprise and civil society associations, as well

⁴ Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post – Regulatory’ World’ (2001) 54 *Current Legal Problems* 103; Scott Burris, Michael Kempa and Clifford Shearing, ‘Changes in Governance: A Cross Disciplinary Review of Current Scholarship’ (2008) 41 *Akron Law Review* 1.

⁵ Steve Bernstein and Erin Hannah, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’ CSGR/GARNET Conference, ‘Pathways to Legitimacy? The Future of Global and Regional Governance’ (2007) University of Warwick September 17-19 <<http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/conference2007/papers/Bernstein.pdf>> accessed 7 May 2008.

⁶ Phillip Pattberg, ‘The Institutionalization of Private Governance: How Business and Nonprofit Organisations Agree on Transnational Rules’ (2005) 18 *Governance: An International Journal of Policy, Administration and Institutions* 589, 591-592.

⁷ *ibid.*

⁸ Errol Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’ (2006) 17 *European Journal of International Law* 47.

⁹ Julia Black, ‘Contesting Accountability and Legitimacy in Non-State Regulatory Regimes’ Basel Institute of Governance Conference, ‘Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide’ (2007) Hilton Hotel Basel February 8-9, 1. <<http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Abstract-Black.pdf>> accessed 7 May 2008.

¹⁰ Tetty Havinga, ‘Private Regulation of Food Safety by Supermarkets’ (2006) 28 *Law and Policy* 515, 516.

¹¹ F. Leslie Hart, ‘A History of Food Adulteration of Food Before 1906’ (1952) 7 *Food Drug Cosmetic Law Journal* 5, 8.

¹² John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge 2000) 399.

¹³ Robert J. Scheuplein, ‘History of Food Regulation’ in Kees van Heijden and others, *International Food Safety Handbook: Science, International Regulation and Control* (Marcel Dekker Ltd, New York and Basel 1999) 648. Hart (n 11).

as international associations, are increasingly taking the lead in shaping global standards for food safety, quality and ethics.’¹⁴

GlobalGAP, a retailer-led private sector body which sets Good Agricultural Practice (G.A.P.) standards for agricultural products, is the most prominent example of the private governance of food safety and quality and represents a critical case in the study of governance beyond the state. This paper addresses a triad of puzzles etched by the empirical case of GlobalGAP and animated in the extant literature concerning non-state governance. Section III explores the first of these puzzles which asks: How and why do sites of non-state governance emerge? – *The puzzle of emergence*. Following this, Section IV tackles the issue of how such phenomena should be viewed and, furthermore, what they are an empirical manifestation of – *the puzzle of conceptualisation*. Finally, Section V examines the thorny issues relating to the legitimacy of sites of non-state governance – *the puzzle of legitimation*. Before these puzzles are addressed, however, Section II presents GlobalGAP as a critical case in the study of governance beyond the state – a site of private governance which lucidly illustrates the four shifts that have occurred in the governance of specific issue areas on the national, regional and global level.

II. GlobalGAP: A Critical Case

The seeds of GlobalGAP were sown over a decade ago when, in 1996, 13 large European retailers conceived the Euro-Retailers Produce Working Group (Eurep).¹⁵ The overarching logic of Eurep was to respond to growing consumer concerns about how their food was produced. Consensus formed that the creation of a single harmonised and integrated G.A.P. standard would most effectively address consumers concerns relating to food safety and quality, environmental protection, occupational health and safety, and animal welfare issues.¹⁶ In 1999, following two years of negotiations, EurepGAP was launched under the rubric ‘The Global Partnership for Safe and Sustainable Agriculture’. At the time EurepGAP consisted of only 17 European retailers.¹⁷ The next two years were spent developing the EurepGAP standard, establishing a system of verification and extending stakeholder participation within EurepGAP. In 2001, the first version of the EurepGAP Fruit and Vegetable Standard was introduced. By 2002, 3,892 producers in 18 countries worldwide had been certified EurepGAP compliant and the organisation’s retail membership had expanded to 22 European retailers.¹⁸ EurepGAP rapidly developed both the scope and reach of the EurepGAP Integrated Farm Assurance (IFA) Standard throughout the next five years.

¹⁴ Linda Fulponi, ‘Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries’ (2006) 31 Food Policy 1, 4.

¹⁵ Nicolien van der Grijp, ‘The Retailer-Led Initiative EurepGAP from the Perspective of Global Legal Pluralism’ BRASS and CARR Workshop Risk and Regulation in the Food System 7-8 October 2004, 8 <www.lse.ac.uk/.../CARR/events/previousConferencesWorkshops/brass/Brass%20PresentationsPapers/vanDerGrijp.pdf> accessed 7 May 2008.

¹⁶ EurepGAP, ‘EUREPGAP Global Report 2005’ (Cologne 2005) 4 <<http://www.eurepgap.org/documents/webdocs/E-book-Globalreport.pdf>> accessed 7 May 2008.

¹⁷ *ibid.*

¹⁸ van der Grijp (n 15) 9.

In September 2007, EurepGAP re-branded itself 'GlobalGAP' to more accurately reflect the organisation's increasingly global aspect and application.¹⁹ Indeed, most recent figures show that there are now 81,163 GlobalGAP certified producers in 90 countries with the figure expected to rise to over 100,000 by the end of 2008.²⁰ GlobalGAP's membership has also grown substantially and diversified geographically. GlobalGAP's retail membership now totals 39 European, Japanese and North American retailers and its producer/supplier membership has risen massively to 129 and now represents all continents.²¹ Furthermore, GlobalGAP's IFA Standard has evolved greatly. The third version of the Integrated Farm Assurance Standard which was published in September 2007 covers crops (fruit and vegetables, combinable crops, coffee, tea, flowers and ornamentals), livestock (cattle, sheep, pigs, dairy, poultry and livestock transport) and aquaculture (shrimp, salmon and trout).²² In little over a decade since its inception, GlobalGAP has developed into the 'most widely implemented farm certification scheme worldwide.'²³

A. Decentring of the State

The emergence and rapid development of GlobalGAP over the past decade spotlights the decentring of states, their sub-systems and their supra-systems in the governance of food safety and quality. As Busch and Bain observe, 'a focus on nation-states is no longer adequate in light of the growing influence of the private sector and new forms of private institutions in shaping the global agrifood system.'²⁴ As presently constituted, GlobalGAP is a wholly private site of governance. Nevertheless, GlobalGAP exerts the enormous influence and control over the European food market as over 85% of all Western European retailers require GlobalGAP certification.²⁵ Thus, although not legally binding in the traditional sense, GlobalGAP's IFA Standard has become de facto mandatory for market participation.²⁶ This influence is also diffusing geographically with GlobalGAP's recent expansion into the North American and Japanese markets. This reconfiguration of governance space in the area of food safety and quality is evidenced in the recent discussions within the Committee on Sanitary and Phytosanitary Measures (SPS) of the World Trade Organisation

¹⁹ GlobalGAP, 'EurepGAP now GlobalGAP' (Cologne 7 September 2007) <http://www.globalgap.org/cms/upload/Documents/070907_press_release_GLOBALGAP_ENG-KM.pdf> accessed 7 May 2008.

²⁰ GlobalGAP, 'Facts and Figures' (Cologne 2008) <http://www.globalgap.org/cms/upload/Resources/Publications/Facts_and_Figures/100108_FactsFigures.pdf> accessed 7 May 2008; John W. Miller, 'European Food Standards Gain Favour in US' *The Wall Street Journal* (Brussels 11 March 2008).

²¹ GlobalGAP, 'Retailer and Food Service Members' (Cologne 2008) <<http://www2.globalgap.org/members.html?memtype=retail>> accessed 7 May 2008; GlobalGAP, 'Producer/Supplier Members' (Cologne 2008)

<<http://www2.globalgap.org/members.html?memtype=supplier>> accessed 7 May 2008.

²² GlobalGAP, 'Integrated Farm Assurance Standard Version 3.2' (Cologne 2007) <http://www.globalgap.org/cms/front_content.php?idcat=48> accessed 7 May 2007.

²³ News Focus, 'GlobalGAP' *Eurofruit Magazine* (January 2008). <http://www.globalgap.org/cms/front_content.php?idart=316&idcat=46&lang=1&client=1> accessed 7 May 2008.

²⁴ Lawrence Busch and Carmen Bain, 'New! Improved? The Transformation of the Global Agrifood System' (2004) 69 *Rural Sociology* 321, 340.

²⁵ Grace Chia-Hui Lee, 'Private Food Standards and their Impacts on Developing Countries' (European Commission DG Trade Unit G2 Brussels 2006), 27.

²⁶ Jim Bingen and Lawrence Busch, 'Introduction: A New World of Standards' in Jim Bingen and Lawrence Busch (eds), *Agricultural Standards: The Shape of the Global Food and Fibre System* (The International Library of Environmental, Agricultural and Food Ethics, Kluwer Academic Publishers, Dordrecht 2005) 11.

(WTO) and the United Nations Conference on Trade and Development (UNCTAD) as GlobalGAP and other private food safety and quality standards organisations become the primary market gatekeepers.²⁷ However, it is important to emphasise that although GlobalGAP illustrates a decentring of the state in relation to food safety and quality, it has not rendered state systems of governance in this field obsolete.²⁸ Indeed, public regulation remains the foundation of GlobalGAP's protocols and compliance with state regulations in both the country of origin and country of destination is a necessary requirement of GlobalGAP certification.

B. Emergence of Coalitions

One must remember that prior to 1997, retailers responded individually to consumer concerns over food production.²⁹ GlobalGAP demonstrates the recent proliferation of collaboration between private actors with 'competing interests and preferences' in the governance of food safety and quality.³⁰ Indeed, GlobalGAP is constituted by a plurality of actors including retailers, producers, suppliers, certification bodies, NGOs, consumer organisations, the crop protection industry, the fertiliser industry and the scientific community. This collaborative shift is manifest further in GlobalGAP's intensive benchmarking and harmonisation activities. To date, GlobalGAP has successfully benchmarked twelve standards with specific sub-scopes of the GlobalGAP IFA Standard. In addition, five standards have been provisionally benchmarked and five more standards are in the process of gaining GlobalGAP recognition. One such standard is the national ChinaGAP standard. This active collaboration reflects the current trend in governance more generally, towards the organisation of specific policy areas by coalitions of private actors who, traditionally at least, would not have had cooperative relationships.

C. Institutionalisation of Cooperation

The past decade has also witnessed an increased institutionalisation of the collaborative relationships on which GlobalGAP is founded and, the development of an organisational structure. As Scott notes, '[t]he concept of institutions and institutionalization has been defined in diverse ways, with substantial variation among approaches.'³¹ In order to avoid the theoretical thicket, it is sufficient for present purposes to state that institutions are constituted by regulative, normative and/or

²⁷ See WTO, 'Private Standards and the SPS Agreement: Note from SPS Secretariat' (24 January 2007) G/SPS/GEN/746; 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, 4; Donal Casey, 'Private Food Safety and Quality Standards and the WTO' (2007) 7 *University College Dublin Law Review* 65.

²⁸ Busch and Bain (n24) 335.

²⁹ Hugh Campbell, Geoffrey Lawrence and Kiah Smith, 'Audit Culture and the Antipodes: The Implications of EurepGAP for New Zealand and Australian Agri-Food Industries' in Terry Marsden and Jonathan Murdoch (eds), *Between the Local and the Global: Confronting Complexity in the Contemporary Agri-food Sector* (Research in Rural Sociology and Development, Elsevier JAI Press, Oxford, Amsterdam and San Diego 2006) 75.

³⁰ Benz and Papadopoulos (n 18) 2.

³¹ W. Richard Scott, 'The Adolescence of Institutional Theory' (1987) 32 *Administrative Science Quarterly* 493, 493.

cognitive pillars.³² The regulative and normative are the most pertinent pillars with regard to GlobalGAP.

Firstly, the regulative dimension of institutions connotes the existence of rules, be they formal or informal, which constrain the behaviour of relevant actors. In this regard, the process of institutionalisation is indicated by the development of procedures and mechanisms for rule setting, monitoring and compliance – the classic regulatory triangle. Such a regulatory system is formalised within the GlobalGAP structure and is primarily applicable to producers/suppliers and certifiers. GlobalGAP standards are developed and revised by Sector Committees (Crops, Livestock and Aquaculture) and finally adopted by the GlobalGAP Board. The GlobalGAP secretariat bears responsibility for implementation of GlobalGAP standards (and all other GlobalGAP policies).³³ Monitoring and compliance is by way of independent third party certification. Third party certifiers are also subject to formalised ‘Certification Body Rules’ contained in the General Regulations document of the IFA Standard.³⁴ Monitoring and compliance of the ‘Certification Body Rules’ is ensured through accreditation and a system of surveillance carried out by GlobalGAP commissioned experts under the newly devised ‘Integrity Programme’.³⁵

Secondly, the normative constituent of institutions refers to the existence of a shared system of values and norms which both guide and govern the behaviour of members.³⁶ Normative systems define the overarching goals and objectives of the institution.³⁷ Moreover, they are prescriptive in nature.³⁸ They constrain the behaviour of the system’s members by prescribing what is perceived by the institution to be the most *appropriate* means of achieving the defined goals and objectives.³⁹ GlobalGAP’s normative system is explicitly outlined in the organisation’s ‘Terms of Reference’ to which all members are committed. Members commit ‘to respond to consumer concerns on food safety, environmental protection, worker health, safety and welfare and animal welfare’ primarily through effective partnership, open consultation with consumers and stakeholders, and the establishment of an independently verified framework for Good Agricultural Practice which may be benchmarked against existing G.A.P. practices.⁴⁰

D. Increased Legalisation of Sites of Governance

³² *ibid*, 33-45.

³³ The secretariat functions are discharged by FoodPLUS GmbH, a Cologne based non-profit company.

³⁴ GlobalGAP, ‘Integrated Farm Assurance Standard General Regulations: Part II Certification Body Rules Version 3.2’ (Cologne 2007) <http://www.globalgap.org/cms/upload/The_Standard/IFA/English/GRs/PartII/GG_EG_IFA_GR_Part_II_ENG_V3_0_2_Sep07.pdf> accessed 7 May 2008.

³⁵ GlobalGAP, ‘Introduction to the GlobalGAP Integrity Programme’ (Cologne 2008) <<http://www.globalgap.org/cms/upload/Resources/Publications/FAQs/080229-FAQ-IPRO.pdf>> accessed 7 May 2008.

³⁶ B. Guy Peters, *Institutional Theory in Political Science: The ‘New Institutionalism’* (2 edn Continuum

³⁷ Scott (n 31) 37.

³⁸ *ibid*, 38.

³⁹ *ibid*, 38.

⁴⁰ GlobalGAP, ‘Membership Package: Application Form for GlobalGAP Membership’ <<http://www.globalgap.org/cms/upload/Membership/GLOBALGAP-Membership-Package-lo.pdf>> accessed 7 May 2008.

Legalisation is related to concepts of institutions and institutionalisation. More specifically, legalisation refers to the formalisation of an institution's regulatory and normative systems.⁴¹ I adopt, and modify to some extent, the framework developed by Abbott, et al, in their study of the legalisation of international political institutions.⁴² This schema assesses legalisation along three independent indexes, namely, obligation, precision and delegation. Firstly, 'obligation' expresses the degree to which the behaviour of the institutional actors are constrained or bound by the institution's regulative and normative rules. Against the backdrop of international law, Abbott, et al, articulate this index to mean the extent to which the behaviour of states 'is subject to scrutiny under the general rules, procedures and discourse of international law.'⁴³ However, I modify this approach slightly given the private nature of GlobalGAP. Instead, drawing from the framework proposed by Meidinger in his study of the Forest Stewardship Council,⁴⁴ I emphasise the degree to which the behaviour of participants in the GlobalGAP system are subject to the scrutiny of GlobalGAP's own formal rules and procedures. In this respect, GlobalGAP can be seen to rely heavily upon formalised rule based standard setting and revision procedures, certification procedures, sanctioning and dispute settlement procedures, labelling procedures, benchmarking procedures and accreditation procedures. All participants in GlobalGAP contractually bind themselves to abide by these rules and procedures. Secondly, 'precision' emphasises the extent to which the rules and norms 'unambiguously define the conduct they require, authorize and prescribe.'⁴⁵ With the exception of the normative 'Terms of Reference', GlobalGAP's standards, rules and procedures are intricately detailed and outlined in documentation. Indeed, the sphere in which GlobalGAP operates – food safety and quality – necessitates such precision. Finally, 'delegation' refers to the extent of third party engagement in, *inter alia*, the implementation, interpretation or application of rules and the resolution of disputes.⁴⁶ A high degree of delegation is exhibited in the GlobalGAP structure through the use of independent third party certification bodies to monitor and enforce the GlobalGAP IFA Standard. Furthermore, GlobalGAP's new 'Integrity Programme' employs independent third parties to monitor the activities of certification bodies. The puzzle of emergence will now be addressed

III. The Puzzle of Emergence

⁴¹ Phillip H. Pattberg, *Private Institutions and Global Governance: The New Politics of Environmental Sustainability* (Edward Elgar, Cheltenham and Northampton 2007) 8.

⁴² Kenneth W. Abbott and others, 'The Concept of Legalisation' (2000) 54 *International Organisation* 401.

⁴³ *ibid*, 401.

⁴⁴ Errol Meidinger, 'Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems' in Christian Brütch and Dirk Lehmkuhl (eds) *Hard, Soft and Private Legalities: The Increase Variation and Differentiation of Law-Like Arrangements in International Relations* (Forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917952> accessed 7 May 2008.

⁴⁵ Abbot and others (n 42) 401.

⁴⁶ *ibid*.

One of the most prominent puzzles posed by the recent shift in the location and nature of governance is the ‘puzzle of emergence’.⁴⁷ The answer to this lies in the identification of factors which facilitated and encouraged the development of sites of private governance in specific issues areas. The puzzle of emergence posed by GlobalGAP can be addressed along four lines of argumentation, namely, the shift in regulatory responsibility for food safety and quality to industry, the increased international sourcing of products, heightened consumer concerns over the safety of their food and changing consumer attitudes in relation to the effect of food consumption. These factors created a concurrent demand by both retailers and consumers for new sites which would govern the safety and quality of food in ways which responded to their specific needs.

A. Devolved Responsibility

Firstly, the emergence of GlobalGAP can be seen as an instance of ‘audit culture’ and a direct retailer response to the ‘neoliberal devolution of governance away from the nation/state.’⁴⁸ This devolution of governance refers to the shifting of responsibility for food safety away from national governments, to the food industry through the use of both ‘direct regulation’ such as food laws and ‘indirect regulation’ such as product liability laws.⁴⁹ An oft cited example of such ‘direct regulation’ is the United Kingdom’s Food Safety Act 1990.⁵⁰ Under this ‘benchmark piece of devolutionist legislation’, primary responsibility for ensuring the safety of all branded food products and fresh unpacked (unbranded) products rested on the ultimate supplier of food.⁵¹ This devolutionist approach was eventually adopted by the EU.⁵² First, Directive 1999/34/EC amended the Product Liability Directive 85/374 EEC to bring primary agricultural products within the ambit of the strict liability regime which the Product Liability Directive established.⁵³ Second, the general principles of European Food Law introduced by Regulation 178/2002 set out that the primary responsibility for ensuring compliance with food law, particularly in relation to food safety, rests with the food business.⁵⁴ This devolution of responsibility necessitated the

⁴⁷ Phillip Pattberg, ‘The Institutionalisation of Private Governance: Conceptualising an Emerging Trend in Global Environmental Politics’ 25 *Global Governance Working Paper No. 9* <<http://glogov.org/images/doc/WP9.pdf>> accessed 7 May 2008.

⁴⁸ Hugh Campbell, ‘Consultation, Commerce and Contemporary Agri-Food Systems: Ethical Engagement of New Systems of Governance under Reflexive Modernity’ (2006) 6 *The Integrated Assessment Journal* 117, 118.

⁴⁹ Havinga (n 10) 518.

⁵⁰ See generally Colin Scott, ‘Continuity and Change in British Food Law’ (1990) 56 *The Modern Law Review* 785, 792-794.

⁵¹ Campbell (n 29) 71. Section 21 of the 1990 Act provided a defence of ‘due diligence’ where the defendant could prove that they ‘took all reasonable precautions and exercised all due diligence to avoid committing that offence’.

⁵² Campbell (n 29) 71.

⁵³ European Parliament and Council Directive (EC) 1999/34/ of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1999] OJ L 141/20; Council Directive (EEC) 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29.

⁵⁴ European Parliament and Council Regulation (EC) 178/2002 of the European of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31, 1.2.2002/1.

development of alternative governance instruments by the private sector ‘to manage regulatory and liability risks’ associated with these new forms of regulation.⁵⁵ The emergence of GlobalGAP can be partially explained as an unforeseen retailer reaction to the shifting of risk and responsibility from governments to industry in the sphere of food safety. Such a view is supported by a recent *OECD* survey where liability and reputational concerns were identified by retailers as the major stimulus for introducing private food safety and quality standards.⁵⁶

B. Global Sourcing of Products

Secondly, the rise of GlobalGAP, and private food safety and quality standard schemes more generally, has been attributed to transformations which occurred as a result of the processes of globalisation. Like many other issue areas and systems of production, the past twenty years have witnessed the rapid ‘globalization of the agri-food system’⁵⁷. These shifts have hugely influenced the way retailers operate. While traditionally food retailers were essentially domestic creatures, they are now global actors operating in global markets. This global expansion of the agri-food industry and the increased international sourcing of products created a demand for instruments which would effectively rationalise retailers’ supply chains. Private food safety and quality standard schemes harmonise product attributes and production processes and, in so doing, reduce transaction costs associated with organising global supply chains.⁵⁸ The emergence of GlobalGAP can be explained, at least in part, as a response to retailers’ demands for mechanisms which would allow them to coordinate their global supply chains through the standardisation of both product and process requirements on an international level.⁵⁹

C. Growing Consumer Concerns of Food Safety

Thirdly, an answer to the puzzle of GlobalGAP’s emergence can be found in the 20 March 1996 statement by the then Conservative British government that there was a probable link between Bovine Spongiform Encephalopathy (BSE) and variant Creutzfeldt-Jakob (vCJD) disease.⁶⁰ This statement created unprecedented widespread concern among consumers about the safety of their food and a new heightened awareness of food safety issues. This acute consumer concern permeated through Europe and has continued to do so in light of new manufactured risks such as genetically modified food stuffs and pesticide residues. This transformation in the mindset of European consumers has been linked by agricultural sociologist Hugh Campbell to the broader shift in Western societies ‘from politics of class (which

⁵⁵ Spencer Henson, Oliver Masakure and David Boselie, ‘Private Food Safety and Quality Standards for Fresh Produce Exporters: The Case of Hortico Agrisystems, Zimbabwe’ (2005) 30 *Food Policy* 371, 372.

⁵⁶ Linda Fulponi, ‘Working Party on Agricultural Policies and Markets; Final Report on Private Standards and the Shaping of the Agro-Food System’ (AGR/CA/APM(2006)9/Final). (OECD, 2006) 23.

⁵⁷ Maki Hatanaka, Carmen Bain and Lawrence Busch, ‘Third Party Certification in the Global Agrifood System’ (2005) 20 *Food Policy* 354, 356.

⁵⁸ *ibid* 245.

⁵⁹ Spencer Henson and Thomas Reardon, ‘Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System’ (2005) 30 *Food Policy* 241, 244.

⁶⁰ BBC, ‘BSE and CJD: Crisis Chronology’

<http://news.bbc.co.uk/1/hi/english/static/in_depth/health/2000/bse/1996.stm> accessed 7 May 2008.

dominated modernity since the Industrial Revolution) to politics of risk⁶¹ – a manifestation of Beck’s ‘risk society’.⁶² As Moran notes, “‘risk society’ in turn produces a regulatory society.”⁶³ Moreover, the BSE crisis and subsequent food scares have led to a decline in the perceived ability of state governance systems to effectively regulate and guarantee the safety of food.⁶⁴ Against this backdrop, GlobalGAP was established to fill the newly created ‘governance gap’ which was opened up by growing consumer concerns about the safety of their food and the concomitant reduction of consumer confidence in the effectiveness of public modes of food safety regulation. This logic continues to drive GlobalGAP. Furthermore, it is embedded as a norm in the institution through its ‘Terms of Reference’ which espouses the overarching objective of GlobalGAP is to respond to consumer concerns relating, *inter alia*, to the safety of food.

D. Changing Consumer Expectation, Preferences and Attitudes

Finally, the emergence of GlobalGAP can be explained by reference to the changing consumer expectations, preferences and attitudes in relation to food quality and increased recognition of the external effects of their consumption. Here, I refer to the increased emphasis and importance consumers now attach to non-traditional quality attributes of food. These attributes do not relate to the organoleptic or physical characteristics of products such as taste, smell and shape. Rather, they are associated with the environmental, social and animal welfare dimensions of food production processes (non-product related production and process methods – NPR-PPMs) and the corollary effects consumption can have on these issues.⁶⁵ The changing attitudes in the sphere of food are entirely consistent with the rise of an era of ‘reflexive modernisation’.⁶⁶ In this social climate, society is increasingly aware and critical of the external effects of modernisation and ‘the negative consequences of rapid economic expansion.’⁶⁷ As with the rise in consumer concerns over food safety in the wake of the BSE crisis, the recent emphasis and significance which consumers have placed on non-traditional food quality attributes have translated into a demand for a food governance system which addressed not only safety, but also the environmental, social and animal welfare dimensions of food production. While states are constrained in going beyond food safety issues by the multilateral framework of the WTO, private sites of governance such as GlobalGAP responded to the emergent consumer demand for regulation of NPR-PPMs and occupied this policy void left by states.

The puzzle of emergence posed by GlobalGAP cannot be answered by reference to one singular factor or causal event. Rather, I have argued that the answer to this specific puzzle lies in the combination of four discrete factors – the shift in regulatory responsibility for food safety and quality to industry; the increased international sourcing of products by retailers; heightened consumer concerns over the

⁶¹ Campbell (n 48) 126.

⁶² Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications, London 1992).

⁶³ Michael Moran, ‘Review Article: Understanding the Regulatory State’ (2002) 32 *British Journal of Political Science* 391, 407.

⁶⁴ See generally Linda Caduff and Thomas Bernauer, ‘Managing Risk and Regulation in European Food Safety Governance’ (2006) 23(1) *Review of Policy Research*.

⁶⁵ Douglas A. Kysar, ‘Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice’ (2004) 118 *Harvard Law Review* 525.

⁶⁶ Ulrich Beck, Anthony Giddens and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in Modern Social Order* (Polity Press, Cambridge 1994).

⁶⁷ Campbell (n 48) 126.

safety of their food and; changing consumer attitudes in relation to the effect of food consumption. These micro factors in turn reflect wider macro transformations – neo-liberal forms of governance; globalisation; risk society and; reflexive modernisation – and created both consumer and retailer demand for new modes of governance in the sphere of food safety and quality.

IV. The Puzzle of Conceptualisation

Of what is GlobalGAP an empirical manifestation – a governance institution; a regulatory institution or; a law making institution? The second puzzle which the emergence of GlobalGAP poses – the puzzle of conceptualisation – revolves around the resolution of this question. This section takes the preliminary steps in addressing this puzzle by exploring the most analytically useful and germane conceptual lenses available to view GlobalGAP. All the frameworks discussed stand in strong opposition to jaded state-centric narratives of governance, regulation and law. Section IV begins by considering governance and two alternative accounts of governance institutions – non-state market-driven governance and nodal governance. Following this, private regulation is explored. Thirdly and finally, the schema of private law making is discussed.

A. The Governance Turn

The governance turn marked a shift in the frame of reference from a focus on states, to a focus on governance. This redirection of attention from ‘governments to governance’ permitted a clearer and more accurate observation of the multiple occupations of steering spaces which were traditionally thought of to be within the sole and exclusive ownership of the state. This shift in focus is described by Stoker who notes that:

[G]overnance refers to the development of governing styles in which the boundaries between and within the public and private sectors have become blurred. The essence of governance is its focus on governing mechanisms which do not rest on recourse to the authority and sanctions of government.⁶⁸

The term governance in its broadest sense means ‘the management of a course of events in a social system’.⁶⁹ This definition, which is used as a benchmark against which alternative narratives of the construct may be contrasted, encompasses all methods of governance within its ambit. Thus, both hierarchical and non-hierarchical methods of steering are included within this definition of governance.

While governance confers no conceptual primacy to either state or non-state actors, the narrowly defined sub-category of non-state market driven (NSMD) governance systems focuses on private governance systems.⁷⁰ NSMD governance

⁶⁸ Gerry Stoker, ‘Governance as Theory: Five Propositions’ (1998) 50 *Journal of Social Sciences* 17, 17.

⁶⁹ Scott Burris, Peter Drahos and Clifford Shearing (n 2).

⁷⁰ Benjamin Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSMD) Governance Systems Gain Rule-Making Authority’ (2002) 15 *Governance: An International Journal of Policy, Administration and Institutions* 503.

systems are defined as ‘deliberative and adaptive governance institutions designed to embed social and environmental norms in the global market place that derive authority directly from interested audiences, including those they seek to regulate, not from sovereign states.’⁷¹ Thus, the key feature of NSMD governance systems is that their authority is not derived from states. Although states may play an ancillary role as external audience, the system’s authority ‘emanates from the market’s supply chain.’⁷² This echoes Rosenau’s espousal that the defining characteristic of new sites of governance is that they ‘derive their legitimacy from the voluntary and conditional participation of individuals who can revoke their consent at any time.’⁷³

As with all these conceptions of governance, the conceptual lens of nodal governance posits that the traditional state-centric notions of governance are insufficient to accurately depict the modernity of governance.⁷⁴ Nodes are sites of governance which exhibit mentalities, technologies and resources and which are constituted within institutions.⁷⁵ In other words, nodes are institutions which have a cognitive dimension coupled with the capacity (methods and resources) to exert influence. Influence is exerted on other nodes primarily, although not exclusively, through networks. Unlike NSMD governance systems, ‘[w]ithin a nodal conception of governance, no set of nodes is given conceptual priority.’⁷⁶ Nevertheless, it is important to remember that not all nodes have equal governance capacity. The capacity of a node to effectively govern depends upon its ability to deploy its technologies, resources and mentalities to manage the course of events in a social system, coupled with an institutional structure which facilitates such a mobilisation. While the narrative of governance encapsulates a plurality of governing methods, the following subsections narrow the focus and examine private actors’ involvement in more discrete mechanisms of governance namely, regulation and law making.

B. Decentred and Polycentric Regulation

While the governance turn allowed us to see private actors as ‘originators and developers of governance beyond the state’,⁷⁷ the concept of private regulation allows a more detailed focus to be placed on a discrete mode of governance employed by non-state actors. Regulation was traditionally seen to be an activity exercised exclusively by states. Nevertheless, the concept of ‘decentred regulation’ and developed by Julia Black attempts to remove the centrality of the state from the concept of regulation. By drawing attention away from states, the decentred understanding of regulation facilitates awareness of sites of ‘polycentric regulation’

⁷¹ Steven Bernstein and Benjamin Cashore, ‘Can Non-State Global Governance be Legitimate? An Analytical Framework’ (2007) 1 *Governance and Regulation* 347, 348.

⁷² *ibid*, 349.

⁷³ James Rosenau, *Distant Proximities: Dynamics Beyond Globalisation* (Princeton University Press, Princeton 2003) 308. Cited in: Steve Bernstein and Benjamin Cahsore, ‘Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?’ in John Kirton and Michael Trebilcock, *Hard Choices, Soft Law: Combining Trade, Environment and Social Cohesion in Global Governance* (Ashgate Press, London 2004) 33.

⁷⁴ Burris, Drahos and Shearing (n 2) 31.

⁷⁵ *ibid*, 37.

⁷⁶ Clifford Shearing and Jennifer Wood, ‘Nodal Governance, Democracy, and the New ‘Denzians’’ (2003) 30 *Journal of Law and Society* 400, 404.

⁷⁷ Colin Scott, ‘Spontaneous Accountability’ in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge Studies in Law and Society, Cambridge University Press, Cambridge 2006).

where a plurality of actors, both state and non-state, participate.⁷⁸ In light of this, Black espouses the view that:

[R]egulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may or may not involve mechanisms of standard setting, information gathering and behaviour modification.⁷⁹

This definition emphasises not only the intentional, but also the inherent problem solving nature of regulation. The decentred definition of regulation, therefore, is analytically useful as it distinguishes regulation from other mechanisms of governance. As with the alternative accounts of governance discussed above, Black's definition of regulation affords no conceptual priority to any actor. States and private actors may be both the regulators and, the subjects of regulation.

Five notions make up the 'conceptual core' of the decentred understanding of regulation.⁸⁰ Firstly, this perspective highlights the complexity of the interactions between actors and the causal factors which lead to problems. Secondly, the fragmentation of knowledge, power and control within social systems is emphasised.⁸¹ The third notion refers to the 'autonomy and ungovernability of actors'.⁸² The fourth notion which underpins the decentred conception of regulation is the complex interactions and interdependences between all actors present in the regulatory space. Regulation is not regarded as a one way process. Rather, regulation is the multi-directional process. Finally, the decentred conception of regulation stresses a complete collapse of the classical public private distinction.⁸³ As Smith notes, the decentred definition of regulation provides 'a working taxonomy of regulation which, though it might contain 'convenient misrepresentations', or as [Julia Black] puts it "indefensibly broad brush", allows us to see certain patterns and tendencies.'⁸⁴ These 'patterns and tendencies' manifest themselves, in part, through the regulatory activities of non-state actors.

C. Legal Pluralism

⁷⁸ Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation and Governance 137, 140

⁷⁹ Julia Black, 'Critical Reflection on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1, 26.

⁸⁰ *ibid*, 3.

⁸¹ See Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] Public Law 329.

⁸² Black (n 79) 6.

⁸³ *ibid*, 8.

⁸⁴ Dimity Kingsford Smith, 'What is Regulation? A Reply to Julia Black' (2002) 27 Australian Journal of Legal Philosophy 37, 46. Footnotes omitted.

Legal pluralism rests on a clear rejection of the ‘ideology of *legal centralism*’.⁸⁵ ‘Legal pluralists are in agreement on a ... proposition, a negative proposition: “not all phenomenon related to law and not all that are law like have their source in government.”’⁸⁶ As such, legal pluralism rethinks the traditional conceptual boundaries of law and the possible sources of law. Nevertheless, despite this consensus, there is general disagreement as to how law can and should be distinguished from other forms of social ordering.⁸⁷ This fundamental analytical quandary has led to both functional and instrumental problems. How can one identify law making if one cannot differentiate ‘law’ from instruments of ordering which are ‘other than law’?

Legal pluralists have taken two broad approaches to the identification of normative systems as ‘law’.⁸⁸ Firstly, the externalist approaches focus on how norms are utilised by society and espouse the position that ‘law consists of and can be found in the regularized conduct or actual patterns of social behaviour in a community, association, or society.’⁸⁹ Therefore, sites of law making may be empirically extracted from a plurality of locations. Adopting an externalist approach, Tamanaha expounds a ‘non-essentialist’ definition that law ‘*is whatever people identify and treat through their social practices as “law”*’.⁹⁰ However, such an approach has been criticised for placing complete responsibility for the identification of law in those who interact with the very rules and norms under analysis.⁹¹

By contrast, the internal perspectives focus on the norm producing system itself and emphasise the institutions and/or the functional output of the governance system. From an institutional perspective, legal pluralists posit that legal rules originate from institutions and see law as essentially ‘institutional norm enforcement’.⁹² The institution from which ‘law’ emanates is not necessarily the state. As such, there may be a plurality of law making institutions, be they in the public or private sphere. Such an approach is adopted by Meidinger in his analysis of private governance institutions including, *inter alia*, the Forest Stewardship Council.⁹³ The functional output perspective, however, draws attention to the inherent legal nature, or not, of the norms produced by a system. As systems ‘are defined by function, the state is not central to the analysis.’⁹⁴ Teubner’s shift in focus to a theory of global legal pluralism is an exemplar of this approach.⁹⁵ Teubner’s thesis rests on the notion that

⁸⁵ John Griffiths, ‘What is Legal Pluralism’ (1986) 24 *Journal of Legal Pluralism* 1, 3. The ideology of legal centralism refers to ‘the exclusive positivist focus on state law, and its systems of lawyers, courts, and prison’. Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) 80 *Southern California Law Review* 1155, 1171.

⁸⁶ Brian Z. Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’ (2000) 27 *Journal of Law and Society* 296, 298.

⁸⁷ *ibid.*

⁸⁸ Errol Meidinger, ‘Forest Certification as Environmental Law Making by Global Civil Society’ in Errol Meidinger, Chris Elliot and Gerhard Oesten (eds) *Social and Political Dimensions of Forest Certification* (Remagen-Oberwinter, 2002) 299.

⁸⁹ Brian Z. Tamanaha, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law’ (1995) 15 *Oxford Journal of Legal Studies* 501, 503.

⁹⁰ *ibid.*, 313.

⁹¹ Simon Roberts, ‘After Government? On Representing Law Without the State’ (2005) 68 *The Modern Law Review* 1, 20-21.

⁹² Tamanaha (n 30) 300.

⁹³ Meidinger (n 44) 12-13.

⁹⁴ Imelda Maher, ‘Community Law in the National Legal Order: A Systems Analysis’ (1998) 36 *Journal of Common Market Studies* 237, 240.

⁹⁵ Gunter Teubner, ‘“Global Bukowina”: Legal Pluralism in World Society’ in Gunter Teubner, *Global Law Without a State* (Studies in Modern Law and Policy, Dartmouth, Hampshire 1997).

today there are systems which, although not tethered to either a national or international legal system, communicate in ‘law’ like rules (in a binary code of legal/illegal).⁹⁶ These systems, according to Teubner, do not see themselves as anchored to traditional legal systems, nor do they wish to be. Rather, they expound ‘global validity’.⁹⁷ Although such an approach is attractive, particularly in light of GlobalGAP, it has been criticised for ignoring the important role played by states, ‘hard law’ and institutional structures in the ‘the game of legal pluralism.’⁹⁸ A more holistic internal approach is adopted by Snyder in his study of the international commodity chain for toys.⁹⁹ Snyder claims that in order to correctly identify sites of law making, one must examine not only the norms, but also ‘the institutional ... and processual components of sites of global legal pluralism.’¹⁰⁰

All these approaches take seriously the idea that non-state actors are capable of governance, regulation and/or law making. Furthermore, while none propose state withdrawal, they all strongly reject state-centric narratives of governance, regulation and law. At this juncture, however, it is necessary to stress that ‘[w]hat is important is not what we call an activity or phenomenon that is the subject matter of inquiry or analysis, but what it is.’¹⁰¹ Resolution of this puzzle is important as correct conceptualisation is necessary for accurate analysis and inquiry of GlobalGAP. Moreover, there is a fundamental nexus between categorisation and the substance of critique and prescription.¹⁰² This is particularly important in light of the final puzzle posed by the emergence of GlobalGAP – the puzzle of legitimation.

V. The Puzzle of Legitimation

GlobalGAP and other private food safety and quality standard regimes have been the subject of much debate and criticism over the last five years. The criticisms are directed at various aspects of these private sites of governance and originate from multiple sources such as states, international organisations such as the WTO and UNCTAD, civil society groups and the academy. Because the regulatory output of such sites tends to be more stringent than the food safety standards of states and international standard setting bodies (Codex Alimentarius), they are criticised for creating unjustified and unnecessary barriers to international trade, particularly for developing countries.¹⁰³ In this respect, the standards are condemned for being based on ‘a non-scientific, zero-risk, marketing approach’ and therefore, in conflict (at least

⁹⁶ *ibid*, 12

⁹⁷ *ibid*.

⁹⁸ *ibid*, 14. Francis Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’ (1999) 5 *European Law Journal* 334.

⁹⁹ *ibid*.

¹⁰⁰ *ibid*, 344.

¹⁰¹ Black (n 79) 21.

¹⁰² *ibid*, 28.

¹⁰³ See WTO, ‘Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement: Communication from the Bahamas’ (28 February 2007) G/SPS/GEN/764; WTO, ‘Private Industry Standards: Communication from Saint Vincent and the Grenadines’ (28 February 2007) G/SPS/GEN/766; UNCTAD, ‘Trade, Environment and Development. Background note by the UNCTAD Secretariat’ (TD/B/Com.1/86). (UNCTAD 2007); UNCTAD, ‘Food Safety and Environmental Requirements in Export Markets - Friend or Foe for Producers of Fruit and Vegetables in Asian Developing Countries?’ (UNCTAD/DITC/TED/2006/8) (UNCTAD 2007).

in spirit) with international trade rules.¹⁰⁴ Furthermore, these sites have been criticised for being unaccountable, undemocratic and for violating notions of fairness. The standard setting procedures have been denounced for lacking transparency, representation and participatory mechanisms.¹⁰⁵ Moreover, the sites are criticised for imposing a European model of agricultural and food production by prescribing production and processing methods (PPMs) which are inappropriate and insensitive to local economic, social, religious and cultural contexts.¹⁰⁶ In particular, the stipulation of NPR-PPMs has been heavily criticised for doing what states have multilaterally agreed not to do.¹⁰⁷ Despite this, such sites have also been criticised by civil society groups and commentators for failing to adequately tackle environmental protection, occupational health and safety, social and animal welfare issues.¹⁰⁸ These are but a few of the many and, often times conflicting criticisms which have been made against GlobalGAP and other sites of private governance in the sphere of food safety and quality.

These critiques emphasise the functional, normative and democratic challenges posed by private sites of governance.¹⁰⁹ These challenges are commonly articulated in terms of the legitimacy and accountability.¹¹⁰ Together, they spotlight the final puzzle posed by the emergence of GlobalGAP – the puzzle of legitimation. The puzzle of legitimation poses the question: How can sites of non-state governance achieve legitimation? There is no clear or obvious answer to this question. Indeed, the answer one proffers depends entirely upon the approach one takes to addressing the puzzle. This section takes the first tentative steps by outlining and unpacking the two approaches which may be taken to resolve this puzzle, namely, the normative prescriptive approach and the descriptive approach.¹¹¹ Firstly, however, I address the issue of why legitimacy is so important for sites of private governance.

A. *Why is Legitimacy so Important?*

I define legitimacy for the present purposes as either being justified as or, perceived as being ‘desirable, proper, or appropriate’ in a specific context.¹¹² Legitimacy is of such great importance to a site of governance because it one of the main drivers which leads to support, be it either active or passive, for that site.¹¹³ However, legitimacy takes on a particular significance in relation to sites of non-state governance. While states are able to garner support and ensure compliance with rules through the

¹⁰⁴ See WTO, ‘Considerations relevant to private standards in the field of animal health, food safety and animal welfare: Submission by the World Organization for Animal Health (OIE)’ (25 February 2008) G/SPS/GEN/822; WTO (n 27).

¹⁰⁵ See Henson (n 27) 25.

¹⁰⁶ Hugh Campbell, ‘The Rise and Rise of EurepGAP: European (Re)Invention of Colonial Food Relations?’ (2005) 13 *International Journal of Sociology of Food and Agriculture* 1; WTO (n 27)

¹⁰⁷ See WTO (n 27); Chia-Hui Lee (n 25).

¹⁰⁸ See Nicolien van der Grijp and others, ‘European Retailers as Agents of Change Towards Sustainability: The Case of Fruit Production in Brazil’ (2005) 2 *Environmental Science* 445, 458.

¹⁰⁹ Black (n 78) 141.

¹¹⁰ *ibid.*

¹¹¹ David Beetham, *The Legitimation of Power* (Issues in Political Theory, Humanities Press International, New Jersey 1991); Michael Zürn, ‘Democratic Governance Beyond the Nation State: The EU and Other International Institutions’ (2000) 6 *European Journal of International Relations* 183; Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (Transformations of the State Series, Palgrave MacMillan, Hampshire and New York 2007) 14.

¹¹² Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571.

¹¹³ *ibid.*, 575.

authority of public law, private sites of governance are generally unable to do so.¹¹⁴ It is for these reasons that legitimacy is paramount to the effectiveness and survival of sites of non-state governance. Let us now turn to the issue of legitimation.

B. Unravelling the Two Approaches?

How can sites of non-state governance such as GlobalGAP achieve legitimation? The first stage in the resolution of this puzzle is the disentanglement of the two competing approaches which may be taken. Firstly, the normative prescriptive approach to the puzzle of legitimation ascribes principled ‘standards and criteria of legitimacy’ which must be met by a site of (non-state) governance in order for that site to be afforded ‘the predicate legitimate.’¹¹⁵ In other words, the normative prescriptive approach speaks of legitimacy in terms of acceptability. By contrast, the descriptive approach to the puzzle of legitimacy attempts to empirically identify if and why a site of governance is *perceived* as legitimate.¹¹⁶ In other words, the descriptive approach to legitimacy speaks of acceptance in reality.

C. Prescriptive Approach to Legitimacy

The normative prescriptive approach, as one would imagine, consists of a multitude of proposals and logics. Black identifies four broad and essentially normative logics of legitimation – constitutional; justice; functional or performance and; democratic.¹¹⁷ It is important to note, however, that the different bases of legitimation are given greater weight than others in light of the perceived role played and activity engaged in by the site of governance. While democratic ideals such as transparency, participation, accountability and deliberativeness are emphasised in discussions relating to governance beyond that state, the functional and performance logics such as expertise, effectiveness and efficiency are stressed in the literature relating to private regulation.¹¹⁸ By contrast, issues such as fairness, due process, consistency, adaptability/reflexivity and coherence which all fall under the rubric of constitutional claims are afforded greater significance where non-state actors are perceived to be

¹¹⁴ Black (n 78) 148.

¹¹⁵ Jens Steffek, ‘The Legitimation of International Governance: A Discourse Approach’ (2003) 9 *European Journal of International Relations* 249, 253; Steve Bernstein, ‘The Elusive Basis of Legitimacy in Global Governance: Three Conceptions’ (2004) *Institute of Globalization and Human Condition Working Paper 04/2*, 4
<<http://globalization.mcmaster.ca/wps/Bernstein.pdf>> accessed 7 May 2008.

¹¹⁶ Steffek (n 115) 253; Black (n 78) 144.

¹¹⁷ Black (n 78) 145-146.

¹¹⁸ Michael Zürn, ‘Democratic Governance Beyond the Nation State: The EU and Other International Institutions’ (2000) 6 *European Journal of International Relations* 183; Schaller (n 1); Klaus Dieter Wolf, ‘Private Actors and the Legitimacy of Governance Beyond the State’ in Arthur Benz and Yannis Papadopoulos (eds), *Governance and Democracy: Comparing National, European and International Experiences* (Routledge/ECPR Studies in European Political Science, Routledge, Oxford and New York 2006); Thomas Risse, ‘Transnational Governance and Legitimacy’ in Arthur Benz and Yannis Papadopoulos (eds), *Governance and Democracy: Comparing National, European and International Experiences* (Routledge/ECPR Studies in European Political Science, Routledge, Oxford and New York 2006); Fritz W. Scharpf, ‘Interdependence and Democratic Legitimation’ (1998) *Max Planck Institute for Study of Societies Working Paper 98/2*
< <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp98-2/wp98-2.html>> accesses 7 May 2008; Nils Brunsson and Bengt Jacobsson (eds), *A World of Standards* (Oxford University Press, Oxford 2000); Dieter Kerwer, ‘Rules That Many Use: Standards and Global Regulation’ (2005) 18 *Governance: An International Journal of Policy Administration and Institutions* 611.

engaged in law making.¹¹⁹ Indeed, as Black notes, these normative logics of legitimation are ‘both contested and contestable, not only between the different groups, but within them.’¹²⁰

D. Descriptive Approach to Legitimacy

Unlike the normative prescriptive approach, the descriptive approach to legitimacy does not aim to make “powering” proposals.¹²¹ Rather, the descriptive approach to legitimacy seeks to identify whether and why a site of private governance is socially accepted and perceived as legitimate. Suchman offers an oft cited, synthesised and comprehensive schema which may be employed in empirically investigating the legitimacy of a site of private governance.¹²² Suchman espouses the view that ‘[l]egitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’¹²³ Suchman identifies three pillars of legitimation. Firstly, a legitimacy community may grant legitimacy to a site of governance because activities of that site are perceived to benefit the audience’s own self interest – pragmatic legitimacy.¹²⁴ Secondly, legitimacy may be granted because there is perceived congruence between a site of governance and a legitimacy community’s normative evaluations – moral legitimacy.¹²⁵ Thus, the descriptive approach to legitimacy is not insulated from normative concerns. Indeed, there may (or may not) be a plurality of normative concerns identified. However, these normative concerns are empirically grounded in a particular legitimacy community, not principled abstractions. Finally, the legitimacy granted to a site of non-state governance may be cognitively based – cognitive legitimacy.¹²⁶ By this, I mean that legitimacy rests on neither a cost-benefit assessment nor a normative evaluation. Rather cognitive legitimacy is based on a deep rooted sense of understanding and inevitability felt by a legitimacy community in relation to the site of governance and its activities. Consequently, legitimacy may be granted to a site of governance for a multiplicity of reasons and by a large assortment of legitimacy communities.

Nevertheless, a corollary of this observation is that a wide array of different legitimacy demands may be made against a site of governance by a multitude of legitimacy communities. Legitimacy demands are not homogenous. While there may be congruence, and indeed a certain degree of compatibility between certain legitimacy demands, it is equally likely these demands will lead to contestation and a ‘legitimacy dilemma’ for the site of governance – ‘what they need to do to be accepted by one part of their environment is contrary to how they need to respond to another.’¹²⁷ Where a legitimacy dilemma develops, a site of governance will have to

¹¹⁹ Meidinger (n 88); Oren Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’ (2003) 10 *Indiana Journal of Global Legal Studies* 25.

¹²⁰ Black (n 78) 146.

¹²¹ Black (n 79) 1.

¹²² Suchman (n 112); See Cashore (n 70); Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, New Haven and London 2004); Bernstein and Cashore (n 71); Black (n 78) 144.

¹²³ *ibid*, 574.

¹²⁴ *ibid*, 578-579.

¹²⁵ *ibid*, 579-580.

¹²⁶ *ibid*, 582-583.

¹²⁷ Black (n 9) 7-8.

make a strategic decision as to how it responds to and manages the competing legitimacy demands.¹²⁸

E. Re-Coupling the Two Approaches

The puzzle of legitimation posed by GlobalGAP essentially calls for a prescription as to how sites of non-state governance can achieve legitimation? However, as Black notes, '[i]t is the empirical questions that we need to ask before we can approach the normative.'¹²⁹ Indeed, they are the logically prior questions which must be asked. The resolution of the puzzle of legitimation necessitates the normative prescriptive approach to be re-coupled with the descriptive approach to legitimacy and to be empirically grounded. In this way, normative prescriptions may be informed by empirical observations. Any prescription made, therefore, may take into account and reflect the plurality of potentially competing legitimacy communities, legitimating logics and legitimacy demands which are identified by empirical research. Furthermore, one must recognise that it may not be possible for a site of non-state governance to have complete legitimacy.¹³⁰ Such a re-coupled approach is particularly important in relation to sites of non-state governance given their relative youth and unconventional nature. One cannot simply superimpose, blindly, functional equivalents of state legitimacy structures. Such a warning is echoed by Fritz Scharpf who notes that:

In order to arrive at these explanations and predictions, we need to identify the legitimating beliefs that are in fact held by the target populations of the regimes studied. If these are ignored in normative analysis the relationship between the normative and positive theorizing could only be one of mutual irrelevance.¹³¹

While these comments were made in light of weak or failed states, developing countries and colonies, they may, by reading across, be applied to the puzzle of legitimation posed by GlobalGAP and other sites of non-state governance.

VI. Conclusion

¹²⁸ Christine Oliver, 'Strategic Responses to Institutional Processes' (1991) 16 *Academy of Management Review* 145, 159; Julia Black (n 78).

¹²⁹ Black (n 78) 144.

¹³⁰ Black (n 9) 8.

¹³¹ Fritz W. Scharpf, 'Legitimacy in Normative and Positive Theory: Comments on Robert Keohane' (Comment on Keynote Speech Held at the Opening Conference of Research Centre (SFB) 700 Berlin 2007) <http://www.sfb-governance.de/publikationen/sfbgov_ls/ls1_en/sfbgov_ls1_en.pdf> accessed May 7 2008.

Guilds were self-organised and self-regulated private mercantilist associations who disseminated, monitored and enforced standards for specific areas of trade and manufacturing.¹³² Between the eleventh and thirteenth century European Guilds operated oversight of food safety and quality in order 'to protect consumers and traders from food products' risks and unsafe commercial practices.'¹³³ By the fourteenth and fifteenth centuries, regulation by guilds died out and was gradually substituted by local ordinances and state laws as the scale and geographies of commerce expanded.¹³⁴ By the end of the eighteenth century, rampant adulteration of food stuffs by the newly constituted food industry which emerged during the industrial revolution and resultant period of increased urbanisation led to deafening consumer demands for increased public oversight. These demands were answered from the nineteenth century onwards in what became known as 'the legislative period'.¹³⁵ This period 'saw the first enactment of general nationwide statutes prohibiting adulteration of food stuffs, directing penalties for violations, and establishing administrative responsibility for enforcement.'¹³⁶ However, the past ten years have witnessed a further reconfiguration of governance space in the sphere of food safety and quality.

GlobalGAP is the exemplar case of the *re*-emergence of highly formalised, institutionalised and cooperative arrangements amongst non-state actors in this policy sphere. Furthermore, as Section II highlighted, GlobalGAP represents a critical case in the study of governance beyond the state. The emergence of GlobalGAP, however, poses three puzzles which occupy the extant literature relating to sites of non-state governance – the puzzle of emergence, the puzzle of conceptualisation and the puzzle of legitimation.

The puzzle of emergence posed by GlobalGAP essentially asks how and why GlobalGAP emerged. Section III spotlighted four lines of argumentation with which to answer this puzzle – the shift in regulatory responsibility for food safety and quality to industry; the increased international sourcing of products by retailers; heightened consumer concerns over the safety of their food and; changing consumer attitudes in relation to the effect of food consumption. The collision of these factors led to demand by both retailers and consumers for a novel site of governance which would be able to effectively tackle these issues. In addition, Section III drew attention to the nexus between these micro factors and broader macro transformations which have occurred, namely, the rise of neo-liberal governance, globalisation, risk society, and reflexive modernity.

¹³² Fernand Braudel, *The Wheels of Commerce* (Harper Colins, London 1982); Frans van Waarden, 'Taste, Traditions and Transactions' in Christopher Ansell and David Vogel (eds), *What's the Beef? The Contested Governance of European Food Safety* (The MIT Press, Massachusetts and London 2006) 46.

¹³³ Reba A. Carruth, 'Socio-Economic Foundations of Food Safety Regulation and the Governance of Global Agri-Food Industries' in Reba A. Carruth, *Global Governance of Food and Agriculture Industries: Transatlantic Regulatory Harmonization and Multilateral Policy Cooperation for Food Safety* (Edward Elgar, Cheltenham and Northampton 2006) 4.

¹³⁴ Scheuplein (n 13) 648.

¹³⁵ *ibid*, 649. Hart (n 11).

¹³⁶ Jesse D. Lyon, 'Coordinated Food Systems and Accountability Mechanisms for Food Safety: A Law and Economics Approach' (1998) 53 *Food and Drug Law Journal* 729, 744. France passed its first general food law in 1851; England passed the Adulteration of Food and Drink Act in 1860 (see Ingeborg Paulus, *The Search for Pure Food: A Sociology of Legislation in Britain* (Law and Society Series, Martin Robertson, London 1974); the German Empire passed its first general food law in 1879 and; the United States passed the Pure Foods and Drugs Act in 1906 (see Peter Barton Hutt, 'A History of Government Regulation and Misbranding of Food' (1984) 39 *Food Drug Cosmetic Law Journal* 2.

Following this, Section IV took the preliminary steps in addressing the puzzle of conceptualisation by outlining the most pertinent conceptual lenses with which to study GlobalGAP – transnational governance; NSMD governance; nodal governance; decentred regulation and; legal pluralism. All these conceptual frameworks vehemently oppose state-centric notions of governance, regulation and/or law. Nevertheless, at no time is state withdrawal proposed. This is particularly important given that state standards, where present, remain the foundation of GlobalGAP’s IFA Standard. However, Section IV stressed that ‘[w]hat is important is not what we call an activity or phenomenon that is the subject matter of inquiry or analysis, but what it is.’¹³⁷ In this respect, the resolution of the puzzle of conceptualisation is necessary for accurate future analysis and critique of GlobalGAP and any subsequent prescriptions made.

Finally, Section V began by outlining a number of claims against the legitimacy of GlobalGAP as a site of non-state governance. Once I disentangled the two approaches to legitimacy – the normative prescriptive approach and the descriptive approach – it was suggested that these two approaches needed to be re-coupled in order to resolve the puzzle of legitimation. In this way, any prescription as to how GlobalGAP can achieve legitimation will be empirically grounded in the pragmatic, moral and cognitive beliefs of its legitimacy communities. In conclusion, it is necessary to stress that while this paper took the tentative first steps in addressing the triad of puzzles posed by the emergence of GlobalGAP, there is much work left to be done. Indeed, GlobalGAP is an exceptionally fertile and, as yet, largely unexplored terrain.

Bibliography

¹³⁷ Black (n 79) 21.

- Abbott, Kenneth W. and others, 'The Concept of Legalisation' (2000) 54 *International Organisation* 401.
- BBC, 'BSE and CJD: Crisis Chronology'
- Beck, Ulrich, Giddens, Anthony and Lash, Scott, *Reflexive Modernization: Politics, Tradition and Aesthetics in Modern Social Order* (Polity Press, Cambridge 1994).
- Beck, Ulrich, *Risk Society: Towards a New Modernity* (Sage Publications, London 1992).
- Beetham, David, *The Legitimation of Power* (Issues in Political Theory, Humanities Press International, New Jersey 1991).
- Berman, Paul Schiff, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155.
- Bernstein, Steve and Cahsore, Benjamin, 'Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?' in John Kirton and Michael Trebilcock, *Hard Choices, Soft Law: Combining Trade, Environment and Social Cohesion in Global Governance* (Ashgate Press, London 2004).
- Bernstein, Steve and Cashore, Benjamin, 'Can Non-State Global Governance be Legitimate? An Analytical Framework' (2007) 1 *Governance and Regulation* 347.
- Bernstein, Steve and Hannah, Erin, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space' CSGR/GARNET Conference, 'Pathways to Legitimacy? The Future of Global and Regional Governance' (2007) University of Warwick September 17-19
- Bernstein, Steve, 'The Elusive Basis of Legitimacy in Global Governance: Three Conceptions' (2004) Institute of Globalization and Human Condition Working Paper 04/2.
- Bingen, Jim and Busch, Lawrence, 'Introduction: A New World of Standards' in Jim Bingen and Lawrence Busch (eds), *Agricultural Standards: The Shape of the Global Food and Fibre System* (The International Library of Environmental, Agricultural and Food Ethics, Kluwer Academic Publishers, Dordrecht 2005).
- Black, Julia 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137.
- Black, Julia, 'Contesting Accountability and Legitimacy in Non-State Regulatory Regimes' Basel Institute of Governance Conference, 'Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide' (2007) Hilton Hotel Basel February 8-9.
- Black, Julia, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post – Regulatory' World' (2001) 54 *Current Legal Problems* 103
- Black, Julia, 'Critical Reflection on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.
- Braithwaite, John and Drahos, Peter, *Global Business Regulation* (Cambridge University Press, Cambridge 2000) 399.
- Braudel, Fernand, *The Wheels of Commerce* (Harper Colins, London 1982).
- Brunsson, Nils and Jacobsson, Bengt (eds), *A World of Standards* (Oxford University Press, Oxford 2000).
- Burris, Scott, Drahos, Peter and Shearing, Clifford, 'Nodal Governance' (2005) 30 *Australian Journal of Legal Philosophy* 30, 30.
- Burris, Scott, Kempa, Michael and Shearing, Clifford, 'Changes in Governance: A Cross Disciplinary Review of Current Scholarship' (2008) 41 *Akron Law Review* 1.
- Busch, Lawrence and Bain, Carmen, 'New! Improved? The Transformation of the Global Agrifood System' (2004) 69 *Rural Sociology* 321.

- Caduff, Linda and Bernauer, Thomas, 'Managing Risk and Regulation in European Food Safety Governance' (2006) 23(1) *Review of Policy Research*.
- Campbell, Hugh, 'The Rise and Rise of EurepGAP: European (Re)Invention of Colonial Food Relations?' (2005) 13 *International Journal of Sociology of Food and Agriculture* 1.
- Campbell, Hugh, 'Consultation, Commerce and Contemporary Agri-Food Systems: Ethical Engagement of New Systems of Governance under Reflexive Modernity' (2006) 6 *The Integrated Assessment Journal* 117.
- Campbell, Hugh, Lawrence, Geoffrey and Smith, Kiah, 'Audit Culture and the Antipodes: The Implications of EurepGAP for New Zealand and Australian Agri-Food Industries' in Terry Marsden and Jonathan Murdoch (eds), *Between the Local and the Global: Confronting Complexity in the Contemporary Agri-food Sector* (Research in Rural Sociology and Development, Elsevier JAI Press, Oxford, Amsterdam and San Diego 2006).
- Carruth, Reba A., 'Socio-Economic Foundations of Food Safety Regulation and the Governance of Global Agri-Food Industries' in Reba A. Carruth, *Global Governance of Food and Agriculture Industries: Transatlantic Regulatory Harmonization and Multilateral Policy Cooperation for Food Safety* (Edward Elgar, Cheltenham and Northampton 2006).
- Casey, Donal, 'Private Food Safety and Quality Standards and the WTO' (2007) 7 *University College Dublin Law Review* 65.
- Cashore, Benjamin, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 15 *Governance: An International Journal of Policy, Administration and Institutions* 503.
- Cashore, Benjamin, Auld, Graeme and Newsom, Deanna, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, New Haven and London 2004).
- Chia-Hui Lee, Grace, 'Private Food Standards and their Impacts on Developing Countries' (European Commission DG Trade Unit G2 Brussels 2006), 27.
- Dingwerth, Klaus, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (Transformations of the State Series, Palgrave MacMillan, Hampshire and New York 2007) .
- EurepGAP, 'EUREPGAP Global Report 2005' (Cologne 2005) 4
- Fulponi, Linda, 'Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries' (2006) 31 *Food Policy* 1.
- Fulponi, Linda, 'Working Party on Agricultural Policies and Markets; Final Report on Private Standards and the Shaping of the Agro-Food System' (AGR/CA/APM(2006)9/Final). (OECD, 2006).
- GlobalGAP, 'EurepGAP now GlobalGAP' (Cologne 7 September 2007).
- GlobalGAP, 'Facts and Figures' (Cologne 2008).
- GlobalGAP, 'Integrated Farm Assurance Standard General Regulations: Part II Certification Body Rules Version 3.2' (Cologne 2007).
- GlobalGAP, 'Integrated Farm Assurance Standard Version 3.2' (Cologne 2007).
- GlobalGAP, 'Introduction to the GlobalGAP Integrity Programme' (Cologne 2008)
- GlobalGAP, 'Membership Package: Application Form for GlobalGAP Membership' (Cologne 2008).
- GlobalGAP, 'Producer/Supplier Members' (Cologne 2008).
- GlobalGAP, 'Retailer and Food Service Members' (Cologne 2008).
- Griffiths, John, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1.

- Hart, F. Leslie, 'A History of Food Adulteration of Food Before 1906' (1952) 7 Food Drug Cosmetic Law Journal 5.
- Hatanaka, Maki, Bain, Carmen and Busch, Lawrence, 'Third Party Certification in the Global Agrifood System' (2005) 20 Food Policy 354.
- Havinga, Tetty, 'Private Regulation of Food Safety by Supermarkets' (2006) 28 Law and Policy 515.
- Henson, Spencer and Reardon, Thomas, 'Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System' (2005) 30 Food Policy 241.
- Henson, Spencer, '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.
- Henson, Spencer, Masakure, Oliver and Boselie, David, 'Private Food Safety and Quality Standards for Fresh Produce Exporters: The Case of Hortico Agrisystems, Zimbabwe' (2005) 30 Food Policy 371.
- Hutt, Peter Barton, 'A History of Government Regulation and Misbranding of Food' (1984) 39 Food Drug Cosmetic Law Journal 2.
- John W. Miller, 'European Food Standards Gain Favour in US' *The Wall Street Journal* (Brussels 11 March 2008).
- Kerwer, Dieter, 'Rules That Many Use: Standards and Global Regulation' (2005) 18 Governance: An International Journal of Policy Administration and Institutions 611.
- Kysar, Douglas A., 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' (2004) 118 Harvard Law Review 525.
- Lyon, Jesse D., 'Coordinated Food Systems and Accountability Mechanisms for Food Safety: A Law and Economics Approach' (1998) 53 Food and Drug Law Journal 729.
- Maher, Imelda, 'Community Law in the National Legal Order: A Systems Analysis' (1998) 36 Journal of Common Market Studies 237.
- Meidinger, Errol, 'Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems' in Christian Brüttsch and Dirk Lehmkuhl (eds) *Hard, Soft and Private Legalities: The Increase Variation and Differentiation of Law-Like Arrangements in International Relations* (Forthcoming).
- Meidinger, Errol, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17 European Journal of International Law 47.
- Meidinger, Errol, 'Forest Certification as Environmental Law Making by Global Civil Society' in Errol Meidinger, Chris Elliot and Gerhard Oesten (eds) *Social and Political Dimensions of Forest Certification* (Remagen-Oberwinter, 2002).
- Moran, Michael, 'Review Article: Understanding the Regulatory State' (2002) 32 British Journal of Political Science 391.
- News Focus, 'GlobalGAP' *Eurofruit Magazine* (January 2008).
- Oliver, Christine, 'Strategic Responses to Institutional Processes' (1991) 16 Academy of Management Review 145.
- Pattberg, Phillip, 'The Institutionalisation of Private Governance: Conceptualising an Emerging Trend in Global Environmental Politics' 25 Global Governance Working Paper No. 9.
- Pattberg, Phillip, 'The Institutionalization of Private Governance: How Business and Nonprofit Organisations Agree on Transnational Rules' (2005) 18 Governance: An International Journal of Policy, Administration and Institutions 589.
- Pattberg, Phillip, *Private Institutions and Global Governance: The New Politics of Environmental Sustainability* (Edward Elgar, Cheltenham and Northampton 2007) .

- Paulus, Ingeborg, *The Search for Pure Food: A Sociology of Legislation in Britain* (Law and Society Series, Martin Robertson, London 1974).
- Perez, Oren, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10 *Indiana Journal of Global Legal Studies* 25.
- Peters, B. Guy, *Institutional Theory in Political Science: The 'New Institutionalism'* (2 edn Continuum, 2005)
- Risse, Thomas, 'Transnational Governance and Legitimacy' in Arthur Benz and Yannis Papadopoulos (eds), *Governance and Democracy: Comparing National, European and International Experiences* (Routledge/ECPR Studies in European Political Science, Routledge, Oxford and New York 2006).
- Roberts, Simon, 'After Government? On Representing Law Without the State' (2005) 68 *The Modern Law Review* 1.
- Rosenau, James, *Distant Proximities: Dynamics Beyond Globalisation* (Princeton University Press, Princeton 2003) 308.
- Schaller, Susanne, 'The Democratic Legitimacy of Private Governance: An Analysis of the Ethical Trading Initiative' (2007) Duisburg: The Institute for Development and Peace, University of Duisburg-Essen INEF Report 91/2007
- Scharpf, Fritz W., 'Legitimacy in Normative and Positive Theory: Comments on Robert Keohane' (Comment on Keynote Speech Held at the Opening Conference of Research Centre (SFB) 700 Berlin 2007).
- Scharpf, Fritz W., 'Interdependence and Democratic Legitimation' (1998) Max Planck Institute for Study of Societies Working Paper 98/2
- Scheuplein, Robert J., 'History of Food Regulation' in Kees van Heijden and others, *International Food Safety Handbook: Science, International Regulation and Control* (Marcel Dekker Ltd, New York and Basel 1999).
- Scott, Colin, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329.
- Scott, Colin, 'Continuity and Change in British Food Law' (1990) 56 *The Modern Law Review* 785.
- Scott, Colin, 'Regulating Private Legislation' (2007) *Comparative Research in Law and Political Economy Research Paper* 22/2007
- Scott, Colin, 'Spontaneous Accountability' in Michael Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge Studies in Law and Society, Cambridge University Press, Cambridge 2006).
- Scott, W. Richard, 'The Adolescence of Institutional Theory' (1987) 32 *Administrative Science Quarterly* 493.
- Shearing, Clifford and Wood, Jennifer, 'Nodal Governance, Democracy, and the New 'Denzians'' (2003) 30 *Journal of Law and Society* 400.
- Smith, Dimity Kingsford, 'What is Regulation? A Reply to Julia Black' (2002) 27 *Australian Journal of Legal Philosophy* 37.
- Snyder, Francis, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) 5 *European Law Journal* 334.
- Steffek, Jens, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 *European Journal of International Relations* 249.
- Stoker, Gerry, 'Governance as Theory: Five Propositions' (1998) 50 *Journal of Social Sciences* 17.
- Suchman, Mark C, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571.

- Tamanaha, Brian Z., 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 *Oxford Journal of Legal Studies* 501.
- Tamanaha, Brian Z., 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296.
- Teubner, Gunter, "'Global Bukowina": Legal Pluralism in World Society' in Gunter Teubner, *Global Law Without a State* (Studies in Modern Law and Policy, Dartmouth, Hampshire 1997).
- UNCTAD, 'Food Safety and Environmental Requirements in Export Markets - Friend or Foe for Producers of Fruit and Vegetables in Asian Developing Countries?' (UNCTAD/DITC/TED/2006/8) (UNCTAD 2007).
- UNCTAD, 'Trade, Environment and Development. Background note by the UNCTAD Secretariat' (TD/B/Com.1/86). (UNCTAD 2007).
- van der Grijp, Nicolien and others, 'European Retailers as Agents of Change Towards Sustainability: The Case of Fruit Production in Brazil' (2005) 2 *Environmental Science* 445.
- van der Grijp, Nicolien, 'The Retailer-Led Initiative EurepGAP from the Perspective of Global Legal Pluralism' BRASS and CARR Workshop Risk and Regulation in the Food System 7-8 October 2004.
- van Waarden, Frans, 'Taste, Traditions and Transactions' in Christopher Ansell and David Vogel (eds), *What's the Beef? The Contested Governance of European Food Safety* (The MIT Press, Massachusetts and London 2006)
- Wolf, Klaus Dieter, 'Private Actors and the Legitimacy of Governance Beyond the State' in Arthur Benz and Yannis Papadopoulos (eds), *Governance and Democracy: Comparing National, European and International Experiences* (Routledge/ECPR Studies in European Political Science, Routledge, Oxford and New York 2006).
- WTO, 'Considerations relevant to private standards in the field of animal health, food safety and animal welfare: Submission by the World Organization for Animal Health (OIE)' (25 February 2008) G/SPS/GEN/822.
- WTO, 'Private Industry Standards: Communication from Saint Vincent and the Grenadines' (28 February 2007) G/SPS/GEN/766;
- WTO, 'Private Standards and the SPS Agreement: Note from SPS Secretariat' (24 January 2007) G/SPS/GEN/746.
- WTO, 'Report by the Commonwealth of the Bahamas to the WTO-SPS Committee on Private Standards and the SPS Agreement: Communication from the Bahamas' (28 February 2007) G/SPS/GEN/764.
- Zürn, Michael, 'Democratic Governance Beyond the Nation State: The EU and Other International Institutions' (2000) 6 *European Journal of International Relations* 183.
- Zürn, Michael, 'Democratic Governance Beyond the Nation State: The EU and Other International Institutions' (2000) 6 *European Journal of International Relations* 183.