Effects of private standards on agri-food trade

Francisco Fabián Sáez[1]

Abstract

Globalization entails new opportunities as well as challenges. Likewise, there is a broad consensus on the importance of legal security, understood as the certainty of standards and, therefore, the predictability of their enforcement. It was the GATT first, and then the WTO, that established a series of guidelines aimed at freeing international trade from obstacles and making it more transparent.

In this context, trade in agri-food products has significantly expanded over the last decades. At the same time, standards on food safety and quality have proliferated and deepened. These standards, which used to be regarded as a responsibility lying almost solely with the government, have been enriched by a number of "volunteer" private schemes whose scope involves environmental, labour, social and animal welfare aspects. This paper briefly presents the reasons for the creation of these schemes and the impact attributed to them.

Finally, on the basis of the relevant WTO Agreements, there is a brief discussion on the scope of governments' responsibility—if any—so as to prevent these standards from hampering market access. On the one hand, case law establishes that, certain conditions having been met, a government might be held responsible for the actions taken by individuals. Nevertheless, on the other hand, there is no unanimous interpretation of the scope of the provisions contained in the Agreements and of the resulting governmental obligations.

1. Introduction

In recent years, there has been a proliferation and strengthening of sanitary and phytosanitary standards (SPS), in the public and private sectors alike, within a context characterized by the constant expansion of agri-food standards (World Bank, 2005). While much of the focus of the economic literature has been on the role of public standards for food safety and quality both as policy instruments and as non-tariff barriers to trade, it is evident that private standards are playing an increasing role in the governance of agricultural and food supply chain (Henson, 2006). Currently, compliance with the importing country regulations does not seem to be enough; products must also satisfy requirements of private voluntary standards schemes, which are often more complex and stringent than those of governments (OECD, 2006c; Henson and Reardon, 2005). In fact, even when food safety has traditionally been seen as the preserve of government regulation (Antle, 1995; Caswell and Johnson, 1991), contemporary agri-food systems are pervaded by a plethora of private standards (WTO, 2007e). Likewise, the complexity of the standards setting for high-value food is likely to increase in the future given the emerging tendency, especially within the private sector, to package together safety, quality, environmental, and social standards (World Bank, 2005).

It could then be said that voluntary standards as well as their associated codes and certification schemes appear as emblematic of globalization. In spite of being voluntary, these private standards are required for doing business, thus *de facto* mandatory (Henson and Northen, 1998; Fulponi, 2006). Consequently, it is private rather than public standards that are becoming the predominant drivers of agri-food systems (Henson and Hooker, 2001). In fact, the increasing use of private standards has raised concerns about market access for developing countries producers, in particular small and medium producers.

Echoing those rightful concerns, and being aware of the fact that the ultimate impact of private standards schemes will depend on each case in particular, this paper will be based on the hypothesis that, on a regular basis, those schemes are by no means a minor obstacle to producers in underdeveloped economies. In view of that, the second hypothesis guiding this work is that in the multilateral sphere, there would be enough legal elements not to, at least *prima facie*, rule out the possibility of blaming governments for the restrictive effects of standards on trade, even when they originate in private institutions.

[1] Coordination of International Affairs at SENASA. The opinions herein do not compromise the institution where the author works.

Bearing both hypotheses in mind, we shall review the material written by those who have focused their attention on this issue and the reports released by international institutions, especially those that make reference to concrete examples. We will then look into the texts of the World Trade Organization (WTO) Agreements so as to identify the provisions that can be of interest to us, without neglecting the case law on the issue.

2. An outlook on private standards

2.1. Emergence and evolution of private standards

Perhaps the most explicit case for the application of public regulatory standards is to reduce the risks to human health associated with food-borne hazards and/or to protect consumers against fraud (Antle, 1995). Indeed, the failure of markets to provide the desired level of protection to consumers has been the *prima facie* case for the promulgation of public mandatory food safety and quality standards (Henson, 2006). Within this scenario, firms have the greatest incentive to implement private standards where there are missing or inadequate public food safety and/or quality standards, or where control systems are inefficient, acting as a substitute for inadequate public institutions (Henson and Reardon, 2005).

Undoubtedly, consumer concerns about food safety are coloured by the degree of confidence they have in government safety assurance programmes. The European Union countries, particularly the United Kingdom, have had to work very hard to begin to regain this confidence after multiple lapses in control in the 1990s (World Bank, 2005). In contrast, the Canadian and US governments enjoy relatively high consumer confidence (Caswell and Joseph, 2006).

However, private standards have also developed within scenarios that are ruled by strict public standards. In said cases, there would be incentives for leading firms to develop private standards to differentiate themselves from competitors that operate on the basis of the requirements laid down by the government (Lutz *et al.,* 2000). As a matter of fact, to some extent, private standards have become the predominant basis for product differentiation in markets increasingly driven by quality-based competition.

The evolution of private standards reflects the preponderance of "soft law" in the governance of economic national and international systems as well as the innovation of regulatory systems, including the possibility of resorting to co-regulation (García Martínez *et al*., 2005). In that respect, some people believe that the government and the private sector mutually support their own standardization activities. While public standards are focused on the end-product, private standards mainly concern production systems and processes (Chia-Hui, 2006). This separation of objectives may bring benefits to both government legislators and private sector standard setters, to the extent that the relationship between the two could be characterized as a "tacit alliance" (UNCTAD, 2007a).[2]

On the other hand, private standards act as instruments for the coordination of supply chains by standardizing product requirements over suppliers, which may cover wide geographical regions (Henson and Reardon, 2005). In this sense, private standards reduce transaction costs and risk exposure (Caswell and Joseph, 2006). The construction of trust and reputation around the visible symbol of a brand arguably acts to enhance the credibility of private standards among consumers (Henson and Northen, 1998).

To sum up, the evolution of private standards is explained by a variety of factors:

- High profile food safety concerns and problems of confidence in regulatory agencies;
- Legal requirements on companies to demonstrate "due diligence" in the prevention of food safety risks;

[2] It is worth pointing out that the development of "soft law" has not been restricted to the agricultural sector; on the contrary, the growing role of standards that are *de facto* imposed affects many sectors of the economy (see, for example, Farrell and Saloner, 1985; Katz and Shapiro, 1985) as part of general trends in industrial organization—concentration, search for scale economies or new ways of doing business, and others (OECD, 2006a).

- Growing attention to "corporate social responsibility" (CSR) and a drive by companies to minimize "reputational risks";[3]

- "Globalization" of supply chains and a trend towards vertical integration through the use of direct contracts between suppliers and retailers;

- Expansion of supermarkets in food retailing both at national and international levels; and

- Global expansion of food service companies.

In short, private standards have evolved in response to regulatory changes, and more directly, to consumers' concerns, and also as instruments to enhance market competitiveness of high-value agri-food products. (World Bank, 2005). The latter leads us to think that private standards will continue to evolve, increasing in scope and stringency (OECD, 2006c); consequently, it is to be expected that as they are gradually adopted, companies should aim at reinforcing them so as to keep certain product differentiation from competitors and consequently, maintain price differentials (Reardon and Farina, 2001).

2.2. Classification of private standards

According to UNCTAD estimates, the number of private systems amounts to 400 and is on the rise. The establishment of private standards has taken place mainly in industrialized countries, particularly in Europe; however, such standards have spread globally, even in middle- and low-income countries (Reardon *et al.,* 2001).

From what could be referred to as a perspective of territorial reach, systems range from those devised for a certain firm to international collective systems, including national collective systems; this being only one of several possible classifications. Generally speaking, firms would apply the systems designed by them, irrespective of the country where they are operating. Besides, in a broad sense, national collective systems are enforced, at least in principle,[4] only within the country, while international collective systems are susceptible of being applied in several countries.

One alternative is to focus on the links of the supply chain they are applied to, in which case we will find standards applied pre-farm gate, that is, in the primary phase of the production process or in the processing/packaging phase. Another differentiation criterion lies on the issue addressed or the particular goal aimed at in the supply chain. These goals can be different and simultaneous (Reardon and Farina, 2001), such as: quality (e.g., appearance, hygiene, taste), safety (pesticide or artificial hormone residue, microbial presence), authenticity (guarantee of geographical origin or use of a traditional process), and goodness of the production process (worker health and safety, animal welfare, environmental contamination).

The systems that appear in Table 1 encompass all the categories. For example, while GlobalGAP is mainly a standard applied pre-farm gate, the global standards established by the British Retail Consortium (BRC) and the International Food Standard (IFS) are intended for food packaging and processing facilities. Finally, the ISO 22005 standard addresses specific issues in the supply chain.

[3] No agreed definition of "corporate social responsibility" (CSR) exists. One definition in use of CSR is "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis". Communication from the European Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, Brussels, 2 July 2002, COM (2002) 347 final.

[4] We say "in principle" because the Global Standard for Food Safety of the British Retail Consortium (BRC), for example, was originally developed by retailers in the United Kingdom to help them bear their responsibilities by virtue of the 1990 Food Safety Act. However, the BRC web site (www.brc.org.uk) mentions that many European retailers demand that suppliers possess the BRC certification and mentions the case of retailers from Norway, Switzerland, Denmark and Finland.

Tabla 1
Examples of private standards

	Stage in the production chain	
	First stage of production	Manufacturing/Packaging
Systems of specific companies	Tesco (Nature's Choice) Marks & Spencer (Field to Fork) Auchan (Filière Agriculture Raisonnée) Carrefour (Filière Qualité)	
National collective systems	QS Qualitat Sicherheit Assured Food Standard	QS Qualitat Sicherheit Assured Food Standard British Retail Consortium Global Standard for Food Safety
International collective systems	GlobalGAP	ISO 22000: Food Safety Management Systems
	ISO 22000: Food Safety Management Systems	HACCP
	Safe Quality Food (SQF) 1000	Global Food Safety Initiative
	Global Food Safety Initiative	Safe Quality Food (SQF) 2000 International Food Standard
	ISO 22005: Traceability in the feed and food chain.	ISO 22005: Traceability in the feed and food chain.

Source: own elaboration based on WTO (2007a) and Chia-Hui (2006).

In any case, at least to date, attempts to classify private standards do not seem to go beyond a mere tendency to schematize them, which reveals the diversity of systems that producers are faced with. In that respect, it is worth mentioning that in July 2008, the Secretariat of the WTO Committee on Sanitary and Phytosanitary Measures circulated a questionnaire—JOB (8)/58—consulting Members whether said Committee should be focused on the analysis of any specific category (collective international schemes, collective national schemes or firm schemes). The nearly thirty countries that gave a response agreed, broadly speaking, on the fact that the three categories can potentially have an impact on trade and that, as a consequence, the only criteria to delimit the Committee's tasks should be: (i) that private standards do or may, either directly or indirectly,[5] affect international trade, and (ii) that they involve sanitary and phytosanitary aspects.

2.3. Harmonizing private standards?

The proliferation of national and international standards systems has fostered comparative assessments, leading, in some cases, to the harmonization of prescriptions.[6] For example, GlobalGAP includes a procedure to assess other systems by comparing them with theirs. Another example is the Global Food Safety Initiative (GFSI). It was established with the aim of assessing national systems internationally, on the basis of a set of key elements that include, among others, food safety management systems, good agricultural practices, good manufacturing practices and HACCP—Hazard Analysis Critical Control Points (Chia-Hui, 2006). In that sense, some analysts predict that, with a diminishing number of leading retailers, there will be a change from national and/or regional institutions towards international private standards organizations (Casella, 2001).

[5] It should be borne in mind that, within the framework of the Agreement on Sanitary and Phytosanitary Measures (and also in the case of the Agreement on Technical Barriers to Trade), the concept of "significant effect on trade" encompasses both an increase and a reduction in imports, as long as the effect is significant (WTO, 2002). The WTO Handbook adds that when assessing whether a sanitary or phytosanitary standard can have a significant effect on trade, countries must consider elements such as: a) value or other aspects of imports that are crucial to the interested importing or exporting countries; b) the potential development of said imports; and c) the difficulties encountered by producers from other countries in complying with sanitary and phytosanitary standards.

[6] The comparative assessment does not necessarily presuppose any equivalence. For example, a comparative assessment of GlobalGAP and QS Qualitat Sicherheit systems has given rise to their being currently taken as equivalent. On the contrary, the BRC and IFS standards are not accepted as equivalent, although both have been assessed against the GFSI.

It is worth adding that the comparative assessment procedure is by no means easy. For example, for GlobalGAP to formally recognize a national standard as an equivalent, the standard must meet all control points and accomplishment criteria set under the GlobalGAP standards. Consequently, the concept of equivalence employed within the context of a comparative assessment against GlobalGAP standards is more stringent than that contemplated in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and in the Agreement on Technical Barriers to Trade (TBT Agreement). In fact, while the WTO agreements use the concept of equivalence of outcomes, GlobalGAP uses the concept of equivalence of processes (UNCTAD, 2007a). Likewise, benchmarking may also imply the need to introduce into existing national protocols new requirements that may not be particularly relevant or appropriate to local conditions, and that may create obstacles to smallgrowers (UNCTAD, 2007a). So far, harmonization seems to be the exception rather than the rule (World Bank, 2005).

2.4. Voluntary compliance?

Private standards are voluntarily in nature. However, as Galperín and Pérez (2004) claim, a voluntary requirement can become a compulsory regulation due to pressure exerted by environmentalists, consumer protection organizations and product-sector organizations as well as consumers themselves in favour of such standard, based on reasons not necessarily supported by solid scientific evidence of likely negative outcomes against health or the environment.

Even though Galperín and Pérez (2004) seem to refer to the approval of a public standard, the arguments are still valid for standards that remain within the private spheres. When private standards prevail in a certain sector, suppliers have limited room for manoeuvre. In fact, when a particular set of products or specifications gains market share such that it acquires authority or influence, the set of specifications is then considered a *de facto* standard (WTO, 2007a; Henson, 2006). In such case, firms have little or no option but to comply if they wish to enter or remain within a particular market (Henson, 2006).

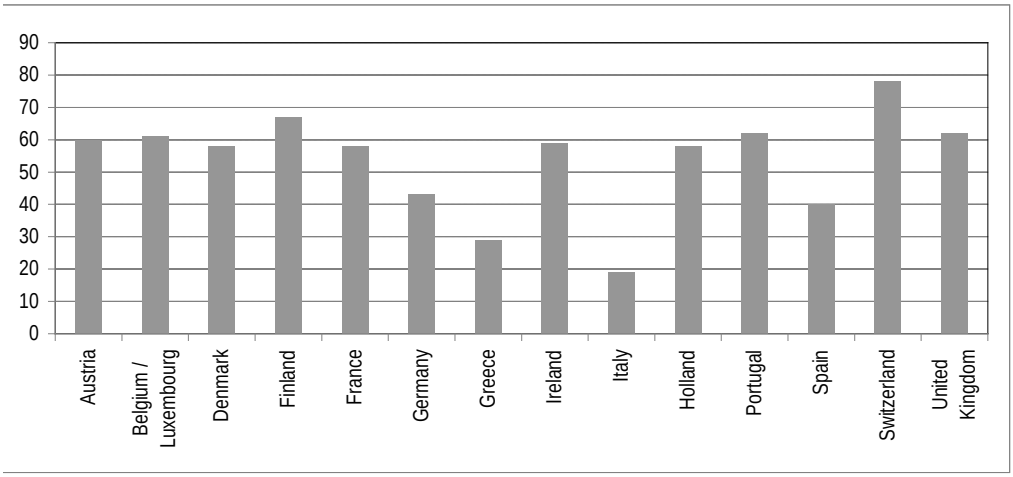
In that respect, it can be crucial to take into account the food market concentration at the retailer level (OECD, 2006a). Where a small number of food retailers account for a high proportion of food sales, the options for suppliers who do not participate in either an individual or collective retailer standard scheme can be considerably reduced (Caswell and Joseph, 2006). In fact, in a report submitted by the United Kingdom to the WTO (2007d), Gascoine and O' Connor state that the taking up of consumer concerns about animal welfare, environmental, occupational health and safety, and consumer safety aspects of foods, for example, in private voluntary standards is a development that parallels the rapid increase of market penetration by very large supermarket chains.

It must be borne in mind that in many industrialized countries, the top five retailers usually account for more than 50% of sales (Henson, 2006), as can be observed in Graph 1. An example of this could be Nature's Choice, the standard scheme of Tesco, the UK chain that commands a market share of over thirty percent. These large retailers have enough oligopoly power so as to provoke changes in the supply chain, making some standards become *de facto* mandatory (WTO, 2007d: 41).

Graph 1

Top-five companies' market share in retail sales in industrialized countries

Year 2003, in %



Source: Dobson (2003)

Nevertheless, the analysis should not be so simplistic. According to the World Bank (World Bank, 2005), compliance or non-compliance with private standards needs to be considered from a wider strategic perspective encompassing many elements, not limited to the level of access to existing or new markets, nor to the associated costs, but which also analyzes long-term competitiveness of a certain industry and its different participants, the structure and operating modes of supply chains and their effects on different groups (social inclusion/exclusion) as well as other likely spillover effects (especially for domestic consumers and producers).

The previous analysis is not exhaustive but it is enough to highlight the diversity of private standards systems currently in use and how their voluntary nature can be blurred when they become a standard in the sector.

3. Trade-related aspects of private standards

3.1. Different experiences and several concerns

Even though there are no conclusive empirical analyses on the trade impact of private standards on quality and safety, some assert that such standards can play an ambiguous role, namely, by both reducing and increasing trade in agri-food products (Reardon and Farina, 2001; Chia-Hui, 2006). These trade effects are likely to vary in relation to the product, destination country and/or origin country, and the firms involved (Jaffee, 2003).

On the one hand, compliance with a private standard can open access to multiple markets if the private standard is used internationally or if a firm operating a scheme is trading internationally (WTO, 2007a). Under such circumstances, suppliers would also benefit from long-term trade relations and from the status of "preferred suppliers" (Nadvi and Waltring, 2003). In that sense, private standards can have trade creation effects.

There are positive experiences in developing countries like Kenya (fresh vegetables); Zimbabwe (also fresh vegetables) and Peru (especially asparagus). In specific sectors, these countries have turned from simple trade mediators to suppliers acting in a highly integrated manner, and even as partners in market development. The benefits have translated into a better reputation of the industry, increased profit margins and enhanced ability to design investment and marketing plans (Jaffee and Masakure, 2005). In the same sense, other examples are the case studies of Thai and Kenyan horticulture, Thai and Nicaraguan shrimp, and Indian spices, in which compliance with private standards contributed to more sustainable trade over the long run (World Bank, 2005).

It is clear that, in some cases, those standards have played a positive role, acting as catalysers and incentives for progressive change in regulatory systems and the adoption of safer, more efficient and sustainable manufacturing and processing practices (World Bank, 2005). From this perspective, it can be said that there are some benefits from complying with private standards: 1) access to the global value chain and the possibility to develop longer term trading relationships; 2) improved efficiency in operations; 3) increased information on proper use and storage of chemicals for decreased negative effects; and 4) improved worker safety (WTO, 2007b).

To sum up, private standards schemes can contribute to improving food system efficiency so as to deliver and ensure specific product and process attributes (OECD, 2006a). It is so much so that Henson and Reardon (2005: 246) point out that communicating to the urban or developed country consumer that private standards exceed the stringency and/or enforcement of public standards encourages consumers to buy products from countries that they may see otherwise as having lax quality and safety regulations.

Without detriment to the latter, nobody is unaware of the fact that compliance with these private standards presupposes an important challenge for producers and exporters from developing countries (see, for example, Vermeulen et al., 2006 and World Bank, 2005). Some studies show that private standards tend to marginalize small farmers (WTO, 2007e; OECD, 2006b), who cannot meet the standards or maintain viable economic and financial structures (OECD; 2006a) since they cannot benefit from economies of scale. Under circumstances when more than 95% of the agricultural community is constituted by small-scale producers, this can negatively affect rural poverty indices (COLEACP, 2007).[7]

For example, St. Vincent and the Grenadines, along with other Caribbean territories within the African, Caribbean and Pacific Group (ACP) are traditional suppliers of a number of agricultural commodities to the European Communities (EC). In recent times, these exports have been subjected to a range of private standards that are affecting small farmers adversely (WTO, 2007c).

In this respect, it is worth wondering whether said systems go further than what is scientifically justified, and who must afford compliance with the standards. To shed more light on this, the difficulties in connection with private standards can be divided into: 1) concerns over the content of private standards and 2) concerns over agents' capacity to comply with them (see Table 2).

Table 2
Examples of concerns related to private standards

Concerns related to the content of private standards	Concerns related to compliance with private standards
Multiplication of private standards systems within and among markets.	Third party certification costs, especially for small- and medium-sized companies and farmers in developing countries.
Blurred boundaries between sanitary and phytosanitary measures and private standards.	Some private systems require resorting only to certain certification bodies.
Relationship between private systems and international standardization institutions mentioned in the WTO Agreement on Sanitary and Phytosanitary Measures (see Box 2).	Lack of equivalence between systems leads to repeated certification auditing.
Scientific justification of some of the requirements in terms of production processes and methods.	Lack of accredited certification bodies in developing countries.

Source: WTO (2007a).

Trade concerns in connection with the content of private standards result from the great number of standards and from the attention paid by private standards to production processes and methods. Private standards cover such

[7] Some of those limitations derive from exploitation or from farmers themselves, like the lack of physical and human capital. Other limitations are external and have to do with infrastructure and services of the economy as a whole, such as the lack of reliable energy supply, low-quality transport facilities and telecommunication systems, a lack of laboratories and cold-storage facilities, and poor technical assistance.

diverse issues as the HACCP,[8] animal welfare, organics, absence of genetically modified organisms, traceability, environmental impact, labour standards, etc. These standards tend to be prescriptive, placing detailed requirements on suppliers which do not always allow alternative, but equivalent, ways of achieving the same food safety (or other) outcome. In fact, in relation to the HACCP, back in 1996 Caswell and Hooker (1996) warned that even though the measure had gained legitimacy, it might impede trade if it ceased to be a performance standard—where no implementation details are specified—to become a process standard, setting elements that can be more difficult to achieve in the exporting country than in the importing country, and which may not contribute to food safety.[9]

The scientific justification of prescriptions is another particularly sensitive aspect. In 2004, Galperín and Pérez (2004) stated that, at an official level, many countries were reducing the maximum residue limits for pesticides accepted for fresh and processed fruit, especially broad-spectrum ones. In spite of this—as the document states—supermarket chains in European countries are demanding fruits with lower levels of residues than those demanded by the countries where they are based (Galperín and Pérez, 2004:11). The same conclusion can be drawn from a report issued by the Organisation for Economic Co-operation and Development (OECD, 2006a: 23) based on interviews with leading food retailers, standards' owners and selected manufacturers, and surveys of farmer associations that point out that "more than 85 percent of retailers had stated that the standards they imposed were more stringent than those imposed by the government, and approximately half of them stated that they were much more stringent". By way of example, it can be mentioned that some of the main supermarket chains demand that pesticide residues do not surpass one third of the level officially prescribed (Chia-Hui, 2006: 27).

In close relation to the latter, it is also worth considering that private standards are not always necessary, for example, to protect consumers' health; neither do they represent the least trade-restrictive option.[10]

Trade concerns related to the agents' ability to comply with private standards refer to both the cost of putting in place the necessary infrastructure in agricultural farms or at the industrial level, and the cost of compliance with private standards.[11] Costs vary significantly among industries, countries and different companies within the same country. In turn, it is worth bearing in mind issues such as: the fact that some private standards demand individual producer certification and do not accept group certifications; the lack of cross-validation of most certifications resulting from the lack of equivalence among different systems (see 2.3); the different interpretations of requirements by those who issue certifications; the lack of accredited certification agencies; and the debatable objectivity of the criteria used by some of these certification agencies.[12] However, the World Bank (World Bank, 2005) states that the available evidence indicates that, in many instances, the costs are not as high as it is assumed, especially relative to the value of exports. Curiously enough, an analysis made in the same year by Development Alternatives Inc. for the United States Agency for International Development warns that the cost of assessing compliance with the standards on production and processing methods can be very high for small producers given their turnover and export benefits (USAID, 2005).

In view of these and other considerations, and taking into account the expected evolution of private standard schemes, the issue should be addressed within the broader context of competitiveness (World Bank, 2005) and market access (OECD, 2006a). As was previously mentioned, in order to gain access to developed country markets, agri-food products must now meet not only the importing country standards, but also those set by major importers and retailers (OECD, 2006b). This is precisely one of the reasons why the focus, which was once on the implications of governmental barriers to trade, is now shifting towards private standards.

[8] The Hazard Analysis and Critical Control Points is a systematic approach to the identification, evaluation and control of food safety hazards (definition taken from the Recommended International Code of Practice – General Principles of Food Hygiene, adopted by the Codex Alimentarius Commission [CAC/RCP 1-1969, Rev 4 (2003)]).

[9] From Galperín and Pérez (2004: 12).

[10] This observation is part of the conclusions jointly drawn by those who attended the Regional Seminar on "Private standards on plant and animal health and food safety," organized by FAO Regional Office, which was held in Santiago de Chile on September 3–5, 2008.

[11] It is worth adding that another concern is that related to the objectivity of the auditing system. For example, in Barlovento Islands, external auditors regard the "sleeves" (plastic bags) used in the production of bananas as pesticides and, as a consequence, they demand that they should be stored under specific conditions. However, in Dominican Republic, these sleeves are not considered pesticides and therefore, there are no specific storage requirements there.

[12] These comments are also present in the document of the Regional Seminar mentioned in footnote number 10.

3.2. The Argentine experience: Fresh fruits and vegetables[13]

In 2004, Argentine fruit and vegetable production added up to 10.7 million tonnes. In 2005, Argentine fresh fruit and vegetable exports surpassed USD 1 billion, showing a significant increase, compared to USD 716 million in 2003. Thus, fruits and vegetables accounted for 5.5% of Argentina's total agricultural exports in value during 2005. Moreover, approximately 45% of Argentine exports in value of fruits and vegetables are destined to the European Union (15). Regarding fruits, pears, citrus fruits (especially lemons) and apples are the main export products, representing 74% of total exports of fresh fruits in 2005.

Generally speaking, fresh fruit production in Argentina has been concentrated in a reduced number of producers with a large capital base. Approximately 20% of producers of pears and apples are absolutely integrated into the value chain; nearly 30% are moderately integrated, and the remaining 50% are small and medium-sized independent producers.[14] Serious problems are faced by these producers when they want to implement good agricultural practices (GAP) and obtain the corresponding certification with their own resources.

Producers who have managed to implement GlobalGAP do not need to certify any other quality system in their primary production. Nevertheless, apart from GlobalGAP standards, they may have to comply with packaging requirements, since certain buyers (for example, the European Union and the United States) require compliance with HACCP or GMP (Good Manufacturing Practices) and/or with standards on environmental management systems (ISO 14001) and/or social responsibility (SR 8000).

The major companies exporting fresh fruit and vegetables are currently certified or at an advanced stage of compliance with the conditions to obtain the certification. However, this situation varies considerably for small producers, some of which are likely to be familiar with the name of the certification systems, though not with their requirements or further details.

Several institutions, such as the Secretary of Agriculture, Livestock, Fisheries and Food and the National Institute for Agricultural Technology, as well as producer associations, have offered training and awareness-raising activities—including workshops, seminars and courses on GAP. While some producers have benefited from those activities, others are still far from getting to know and implementing the requirements. It must also be emphasized that small- and medium-sized producers need assistance for the implementation of GAP programmes.

Even though there is no official information available, preliminary estimates indicate that only 20% of fruit and vegetable exports to the European Union come from GlobalGAP-certified farms. This percentage varies according to crops and regions. Thus, pear and apple producers from the Alto Valle del Rio Negro (Province of Río Negro) are the producers who have progressed the most as regards the implementation of GAP and GlobalGAP certification, while in other producing regions, it is estimated that less than 10% of exports are produced by GlobalGAP-certified farms. Besides, many exporters obtain only part of their supplies from certified producers, which implies that even though the exporter can be certified, only part of the fruit and vegetable exports is in a position to meet GlobalGAP standards. This, in turn, could affect the access of these products to markets that are more demanding in terms of good practices (see Box 1).

At the official level, the National Animal Health and Agri-food Quality Service (SENASA) has developed two sets of guidelines: (i) Guidelines for Good Agricultural and Hygiene Practices in the Primary Production, Packaging, Storage and Transportation of Fresh Vegetables (SAGPyA Resolution 71/99) and; (ii) Guidelines for Good Agricultural and Hygiene Practices in the Primary Production, Packaging, Storage and Transportation of Fresh Fruit (SENASA Resolution 510/02). These Guidelines are more detailed than 1999 Guidelines; they cover similar aspects to those of the GlobalGAP protocol, but they are even more detailed in relation to specific aspects, such as equipment and the application of post-harvest products, and freezing damage prevention.

Among the main limitations for the implementation of GAP schemes, we can mention: (i) insufficient access to credit lines to enable farmers to carry out the necessary investments in machinery and facilities; (ii) lack of sufficient skilled workers; (iii) producers' lack of interest (especially in regions where traditional household production prevails); (iv) GAP implementation does not result in a price premium and the producer is obliged to absorb implementation and

[13] The data on the Argentine experience was taken from UNCTAD (2007b).

[14] The June 2008 report prepared by Engineer Bruzone of the National Directorate of Food of the Secretariat of Agriculture, Fisheries and Food (Bruzone, 2008) published at www.alimentosargentinos.gov.ar corroborates those percentages.

certification costs. Likewise, small producers face particular difficulties regarding some aspects of the GlobalGAP Control Points and Compliance Criteria (CPCC), such as self-assessment (CPCC 2.2), record keeping (CPCC 2.3), site management (CPCC 4.2), and fertilizer (CPCC 6.2) and pesticide use (CPCC 8.3). And the situation is similar in the case of requirements for fertilizer (CPCC 6.4) and pesticide storage (CPCC 8.8) and in harvesting (CPCC 9.1) and handling (CPCC 10.1) hygiene procedures.

As stated in its website, "GlobalGAP has begun to link global implementation activities closer to the needs of producers, while at the same time seeking to gain qualified input from national experts and other stakeholders with respect to the differing legal and structural conditions that exist globally". This goal is pursued mainly by creating the National Technical Working Groups (NTWGs), whose function is to elaborate a set of national interpretation guidelines and face the specific adaptation and implementation challenges identified at the local level. These groups work in close collaboration with the GlobalGAP Secretariat and the Sectoral Committees.

In Argentina there is a NTWG, and ArgenINTA Foundation serves as host organization. The NTWG started operating in 2004, with the aim of elaborating, in coordination with official institutions, an appropriate legislation to ease compliance with certification requirements; setting implementation guidelines for each sector; raising awareness of GlobalGAP standards among fruit and vegetable producers; and adapting GlobalGAP protocols to particular conditions in our country.

In general terms, the main fresh fruit and vegetable producers and exporters have managed to obtain the certification when they were required to do so. Nevertheless, small producers tend to meet considerable difficulties when trying to comply with protocols.

Box 1

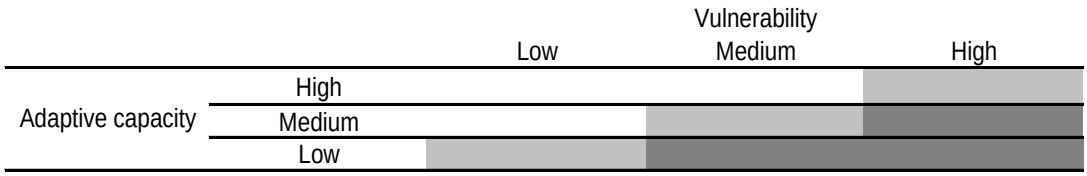
Apple and pear complexes in Argentina

It is worth mentioning the fragility analysis performed by Galperín and Pérez (2004) with respect to apple and pear complexes in Argentina and their health and environmental requirements. These researchers propose that the fragility of an agroindustrial complex is the result of combining the complex's vulnerability and adaptability. This approach makes it possible to consider both the consequences of the decisions made in destination markets and those decisions the export sector is likely to make. Some of the paragraphs deemed relevant to the present paper are transcribed below. The vulnerability reflects whether the complex can be affected by external actions. The degree of vulnerability is high if a complex exports an important percentage of its production and a big share of those exports is destined to markets that are prone to impose barriers to access.

In turn, a complex's adaptive capacity can be defined as the ability to modify its inputs, processes, technology and sale destinations in response to environmental changes. In view of the health and environmental requirements to gain access, three general alternatives can be mentioned: i) to modify inputs, processes and technology according to export market demands; ii) to maintain current production methods, but sell the products to those destinations where there are no access restrictions; iii) to differentiate and sort out production according to the criteria of each destination market, that is, a combination of alternatives i) and ii).

The degree of fragility can be observed in a matrix combining the vulnerability criterion and the adaptability criterion, where the lightest box shows a case of low fragility, and the other two show medium and high fragility respectively.

Fragility assessment matrix of an agroindustrial complex



When analysing vulnerability, it is necessary to bear in mind the role of exports in overall sales, and the importance of the destinations which are prone to be more restrictive as regards health and environmental requirements for products and processes. Galperín and Pérez took into account the most significant countries for pome fruit exports, which, in turn, are highly demanding in terms of the access requirements analysed above: the European Union (EU), Brazil and the United States.

On the basis of 2002 figures and only taking fresh fruit exports as a benchmark, the study points out that 12 per cent of apple production (eight percentage points corresponding to the EU) and 44 per cent of pear production (23 percentage points corresponding to the EU) can be affected by the demands of major destination markets. Said values reached 44 per cent of apple production and 68 per cent of pear production, if juice exports (almost totally destined to the United States) are also considered.

Among other conclusions, the study shows that the fragility in both complexes varies from medium to high, depending on the chain of companies considered.

4. Private standards and the WTO

4.1. Background

As is well known, since 1948 the GATT was the only multilateral instrument by means of which international trade was ruled until the WTO was established in 1995. During the first years, the GATT trade negotiation rounds were centred on the continuation of the tariff reduction process. As a consequence, other measures began to assume a more relevant role, leading to the Tokyo Round held in the 1970s when the first serious attempt to approach non-tariff obstacles and improve the system was made. The Tokyo Round gave birth to the so called "Code of Standards" which, though not specifically aimed at regulating sanitary and phytosanitary measures, covered technical requirements affecting food safety and animal and plant health measures, including pesticide residue limits, inspection requirements and labelling. Later on, as a result of the Uruguay Round and the transition from the GATT to the WTO, the Code of Standards was substituted by the Agreement on Technical Barriers to Trade (TBT). Among the advantages of the TBT Agreement, as compared with the Code of Standards, it is worth noting the fact that it encompasses production processes and methods related to product characteristics; it deals more in depth with the issue of conformity assessment procedures; it sheds more light on the issue of disciplines and develops transparency provisions in a more detailed way. Likewise, food safety, animal health and plant preservation measures started to be contemplated under a specific Agreement: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The SPS Agreement acknowledges Members' sovereign right to determine the level of sanitary/phytosanitary protection that they deem appropriate, and to adopt the measures that they deem necessary for the protection of human and animal health and life, or for plant preservation from certain specific risks. In turn, the TBT Agreement acknowledges Members' right to adopt the necessary measures in order to achieve a "legitimate objective," such as protection of the environment or of human health or safety. At the same time, both Agreements support a series of principles and obligations that are aimed at preventing those rights from being exercised with protectionist purposes, thus becoming unjustified restrictions to international trade.

In essence, pursuant to these Agreements, the measures should be based on risk assessment (though the scientific thoroughness is more noticeable in the SPS Agreement); they should not discriminate between national and imported products (national treatment) or between products imported from different places (most-favoured-nation treatment), nor should they restrict trade more than necessary. Likewise, harmonisation of the measures is promoted by taking relevant international standards as reference standards, particularly those developed by the "Three Sisters": the Codex Alimentarius Commission, the World Organization for Animal Health[15] and the International Plant Protection Convention (see Box 2). Moreover, other of the provisions set forth recognise equivalent measures, which—in spite of being different—can have the same effectiveness against a particular risk. The transparency provisions contained in both Agreements are, by no means, less important. They confer countries the possibility of

[15] It was not until 2003 that the *Office International des Epizooties* (International Epizootic Office) changed its name to World Organization for Animal Health, while keeping the acronym of the original name, namely, OIE.

submitting comments on draft measures or those adopted in emergency situations—the notifying country being compelled to take them into account.

To sum up, the TBT Agreement was introduced with the aim of ensuring that "technical regulations"[16] and "standards"[17] (as well as test and certification procedures) used by countries do not constitute unnecessary obstacles to trade. The SPS Agreement was adopted as a multilateral framework of standards and disciplines that set the pattern for the drafting, adoption and observance of sanitary and phytosanitary measures,[18] so as to reduce to the minimum their negative effects on trade. Consequently, the WTO and international standards-setting bodies have contributed to greater discipline and enhanced transparency in the use of public food safety and quality measures (Roberts, 2004), and they have also established a common vocabulary through which governments can communicate their goals concerning the issue.

Box 2

Private standards and the "Three Sisters"

1. Codex Alimentarius

At its 60th Session, held in December 2007, the Executive Committee of the Codex Alimentarius Commission agreed not to adopt any decision or make any recommendation on the issue of private standards at that moment. At its 61st Session, held in June 2008, some members noticed that the effects of private standards were a relevant point of discussion at the OIE, IPPC and the WTO SPS Committee. They also stated that, in their opinion, those standards were mostly related to Codex goals[19] and it was thus crucial for the Commission to take sides on the issue.

Consequently, the Executive Committee invited the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) to submit a paper on private standards at the next session of the Committee to be held in June 2009. The topic would also be included in the agenda of the next session of the Codex Alimentarius Committee to be held in June 2009.

2. International Plant Protection Convention.

Within the framework of the Third Session of the Commission on Phytosanitary Measures (CPM) held in April 2008, "several members expressed concern that private standards, many of which had no scientific justification, adversely affected export markets and requested that the CPM discuss the implications of these private standards. Some countries were concerned with the approach by private retailers, by which more stringent and scientifically unjustified private standards were imposed on small scale farmers, especially in least developed and developing countries" (paragraph 124 of the report of the session).

[16] The TBT Agreement defines "technical regulation" as a "Document which lays down product characteristics or their related processes and production methods (…), with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method" (Annex 1, paragraph 1).

[17] The TBT Agreement defines "standard" as a "Document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method" (Annex 1, paragraph 2).

[18] According to the SPS Agreement (Annex A, paragraph 1), sanitary or phytosanitary measures comprise measures applied: a. to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; b. to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; c. to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or d. to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

[19] It should be remembered that the Codex is not only aimed at protecting the health of consumers and ensuring fair practices in the food trade, but also at promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations.

It was suggested that this issue should be of concern to the IPPC and should be discussed with relevant international organizations with a view to removing any areas of conflict with the SPS Agreement. Paragraph 25 of the report of the session reads: "This was especially true for the 'GlobalGAP' standard, which included phytosanitary considerations as it was based on a value-chain approach."

3. World Organization for Animal Health

At the 76th General Session held in May 2008, the OIE adopted a resolution (Resolution Nº XXXII) that deals with the consequences of private standards on international trade in animals and animal products. Said resolution emphasizes that the WTO, under the SPS Agreement, formally recognises the OIE as the reference organization responsible for establishing international standards relating to animal diseases, including zoonotic diseases, and it further emphasizes that these standards are scientifically supported.

In that respect, the OIE decided:
- to reaffirm the standards published by the OIE in the field of animal health, including zoonoses, as the global official sanitary guarantees for preventing the risks associated with international trade in animals and animal products, while avoiding unjustified sanitary barriers to trade, and promoting the prevention and control of animal diseases worldwide;
-to reaffirm that the standards published by the OIE in the field of animal welfare are the global reference standard for OIE Members;
- to ask the Director General to work with relevant public and private international organisations with the objective that concerns of Members are taken into consideration and that private standards, where used, are consistent with and do not conflict with those of the OIE.

In June 2008, also in connection with the previously mentioned Resolution, the OIE submitted a document to the WTO (G/SPS/GEN/822) by which it expressed its concerns about the potential for private standards to have trade limiting and distorting effects. The OIE recommended that the SPS Committee analyse the use of those private standards that relate to health and safety in international trade, and ascertain if this practice is increasing globally or within certain regions. The OIE added that, if that were the case, it would be important to analyse whether and how private standards were undermining the operation of the SPS Agreement. The OIE also recommended that the SPS Committee focus on the effects of private standards on developing countries' market access capabilities.

In the same document, the OIE considered it important to prevent the introduction of non-science-based measures, in relation to both animal health and welfare. To that aim, the OIE urged countries, regional organisations and international organisations to strongly support the OIE's standards, including its recommendations on animal welfare, as the appropriate references for international trade.

4.2. Applicability of WTO Agreements

It has always been recognized that government measures are not the only type of measures that can affect, influence, promote or somehow distort international trade. For that reason, under certain circumstances, WTO Agreements contain provisions that hold governments responsible for private acts. The provisions that attribute the conduct of private parties to WTO Members tend to prevent WTO rules from being evaded when governments delegate or enable other bodies to act in ways that would otherwise be inconsistent with WTO principles. It could also be mentioned that even in those cases in which there is no explicit provision in that respect, several WTO rules would, nevertheless, give rise to such responsibility (SIEL, 2008). Bohanes and Sandford (in SIEL, 2008) state that in some cases it would be possible to attribute private acts to governments, while in other cases the WTO Agreements would provide elements to question governments for failing to discipline such conduct.

The issue of private standards was first put forth at the WTO during the SPS Committee meeting held in June 2005 (WTO, 2005), where Saint Vincent and the Grenadines expressed its concern about the operation of the EurepGAP

scheme[20] in relation to trade in bananas with supermarkets in the United Kingdom. At the same meeting, Jamaica stated that, as a result of EurepGAP requirements, they were also facing difficulties for their fresh fruit and vegetables to enter the European market. Likewise, other developing countries expressed their concern about the effects of private standards on their trade (WTO, 2005). The issue was again dealt with at the SPS Committee meeting in October 2005, which was resumed in February 2006 (WTO, 2006a). At the SPS Committee meeting held in October 2006, private standards were also mentioned. On that occasion, Argentina, Belize, Cuba, Dominica, Egypt, Indonesia, Kenya and South Africa claimed to have the same concerns as Saint Vincent and the Grenadines, and suggested that the issue should be included in the agenda of the following Committee meeting (WTO, 2006b). Thus, the issue of private standards has remained in the agenda since then, first as a sub-item within "specific trade concerns" and afterwards as an autonomous item.

To sum up, debates at the SPS Committee focused on three issues:[21]

- Market access: Some Committee members consider that the standards set by the private sector can help suppliers improve the quality of their products and gain and maintain access to high-quality markets. In turn, other members claim that private standards can be more restrictive—if they, for example, set very low levels for pesticide residues—and more preceptive—if, for example, they only authorize a single way of achieving food safety objectives—than government standards applicable to imports, and, as a consequence, constitute one further obstacle to market access.

- Level of development: many Committee members are concerned that the application of private standards—with the additional certification costs thereof implied and the difficulty in meeting the different requirements imposed by each buyer—poses difficulties, especially for small producers and, particularly (though not exclusively) for small producers in developing countries.

- WTO rules: some members consider that setting standards for the products they purchase is a legitimate private sector activity, where the State must not interfere. Others insist that, by virtue of the SPS Agreement, importing countries are responsible for the standards contained in said Agreement and set by their private sectors. The latter are concerned that these standards do not meet WTO requirements, especially those related to transparency and scientific justification of sanitary and phytosanitary measures—mainly for food safety—and are more trade-restrictive than necessary to protect health.

Out of the three axes of debate mentioned, the core issue resides in determining whether private food safety and quality standards exceed the competence of the WTO or not. For some authors, private standards fall outside the purview of the WTO (Jaffee and Henson, 2004), raising challenges for the future role of the SPS and TBT Agreements (Henson, 2006). Considering the tendency of private standards to become the dominant mode of governance in global supply chains for agricultural and food products, Henson (2006) states that the WTO will become irrelevant or, at least, of secondary importance. Nevertheless, some authors claim that private standards on food safety are under the scope of the WTO, and are, in many cases, in conflict with the letter and spirit of the SPS Agreement (WTO, 2007c).

Although it may seem obvious that the TBT Agreement encompasses private standards, the SPS Agreement, on the other hand, is not clear enough in that respect. Gascoine and O'Connor and Company (WTO, 2007d: 25) point out, based on the evidence given by two individuals who were centrally involved in the negotiations[22] that produced the SPS Agreement, that the possibility of applying the SPS Agreement to private voluntary standards was never mentioned either in formal negotiating meetings or in informal discussions. On the contrary, the TBT Agreement deals not only with the development and implementation of mandatory technical regulations by governments but also, explicitly, with private activities to develop and adopt standards and to conduct conformity assessment.

Such analysis must bear in mind that Article 1.1 of the SPS Agreement states that "it applies to all sanitary and phytosanitary measures, which may, directly or indirectly, affect international trade", without explicitly limiting this application to SPS measures taken by governmental authorities. Likewise, the definition of sanitary and phytosanitary

[20] EurepGAP started in 1997 as an initiative of retailers belonging to the EUREP (Euro-Retailer Produce Working Group). The decision to turn EurepGAP into GlobalGAP was announced in September 2007, at the 8th Global Conference held in Bangkok.

[21] See Final Report of the OIE 76th General Session, Paris, 25 to 30 May 2008. Paragraph 144 summarizes the report submitted by Christiane Wolff, counsellor at the WTO's Agriculture and Commodities Division, regarding the debates held at the SPS Committee on private standards.

[22] Gretchen Stanton, who chaired almost all the negotiating meetings, and the principal author of the report, Digby Gascoine, who represented Australia throughout the negotiations.

measures given in the Agreement and the accompanying illustrative list of SPS measures do not explicitly limit these to governmental measures (WTO, 2007a: 5). On the other hand, other provisions of the SPS Agreement explicitly refer to the rights and obligations of "Members". Neither is it clear whether the certification requirements necessary to demonstrate compliance with private standards would be within the scope of the Agreement. The provisions of Article 13 may be relevant in this regard. Article 13 reads as follows:

> "…Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories ...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 ...non-governmental entities... 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".

While some private standards consider risks referred to in the definition of sanitary and phytosanitary measures of the SPS Agreement, some aspects of private standards deal with issues beyond the scope of that Agreement. As a consequence, other WTO Agreements can also be relevant. For example, GlobalGAP standards comprise chapters that deal, among other issues, with occupational health and safety, workers' welfare, waste management and environmental pollution. These aspects might correspond to the scope of the TBT Agreement. In a similar spirit to Article 13 of the SPS Agreement, Article 4 of the TBT Agreement states that:

> "Members …shall take such reasonable measures as may be available to them to ensure that... non-governmental standardizing bodies within their territories…accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice [for the Preparation, Adoption and Application of Standards]…"[23]

As can be observed, both the TBT and the SPS Agreements include similar texts regarding the activities of non-governmental bodies. Nevertheless, contrary to the SPS Agreement, the TBT Agreement contains a definition of "non-governmental body": "Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation". Although this is a broad definition, some analysts think that, in the light of the context and purpose of the SPS and the TBT Agreements, it would be possible to argue that "non-governmental entities" are not individual economic operators (or their associations) but rather private bodies that have been entrusted by government with the performance of certain tasks or that have otherwise a special legal status to develop and implement sanitary and phytosanitary standards as well as technical regulations (Chia-Hui, 2006: 34 and 35). Luff's argument is similar (2004: 269) in that he states that, under Article 13 of the SPS Agreement, the sanitary and phytosanitary measures which are envisaged are those which are adopted by the central governments of the Members and by regional or local institutions or by non-governmental entities which have been entrusted by Members with tasks to put in place an SPS policy, and that the SPS Agreement holds Members responsible for the activities of non-governmental entities to which Members have given specific competences.

In turn, Bohanes and Sandford believe that the current meaning of the term "non-governmental body" does not suggest that only private entities with some special legal status or with government-delegated authority are covered (in SIEL, 2008: 38). Gascoine and O' Connor and Company share that interpretation by stating that, under the SPS Agreement and its Article 13, the meaning of "non-governmental body" is broader and also includes private bodies which have been entrusted by government with certain tasks but which operate within the territories of a WTO Member (WTO, 2007d: 62). By virtue of that, and based on Article 13, Gascoine and O' Connor and Company add that WTO Members are responsible for preventing non-governmental entities from acting in a manner that is inconsistent with the SPS Agreement (WTO, 2007d: 63 and 78). Likewise, they claim that the definition of "non-governmental body" included in the TBT Agreement seems to implicitly recognize the existence of non-governmental bodies that are not legally empowered to enforce any technical regulation, since it is defined as a "body […] including a non-governmental body which has legal power to enforce a technical regulation" (WTO, 2007d: 73). In fact, the same observation is made by Bohanes and Sandford (in SIEL, 2008: 38), who point out that the definition given by the TBT Agreement makes express reference to non-governmental bodies which have the "legal power to enforce a

[23] The Code of Good Practices for the Preparation, Adoption and Application of Standards reproduces several of the principles contained in the SPS and TBT Agreements. For example, standardizing bodies shall not give the products imported from the territory of any Member a less favourable treatment than that given to similar products of national origin and to similar products originating in any other country; they shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade; they shall be based on international standards; etc.

technical regulation", thus suggesting that the entities that do not have the legal power to do so are *a priori* included. For Bohanes and Sandford, this shows that, when drafters envisaged a situation in which WTO Members entrust non-governmental entities with the performance of certain tasks, they described that situation explicitly.

As can be observed, there are different interpretations of the scope of Article 13 of the SPS Agreement and of Article 4 of the TBT Agreement. The analysis by Gascoine and O'Connor and Company (in WTO, 2007d) examines some possible legal options and their supposed feasibility, such as:

- Seeking agreement on the issue of private or non-governmental body standards, between a selected group of WTO Members that would draft, adopt and commit to certain *ad hoc* obligations by means of a "plurilateral instrument".[24] The practical feasibility of this approach appears somewhat remote.

- The WTO dispute settlement mechanism could also be imagined as a possible legal avenue in relation to a private standard which is presumably not based on science, which is widely used by a number of retailers and which is *de facto* required for accessing that WTO Member's market. This is an expensive and politically sensitive option and often incapable of delivering the expected results.

- A formal amendment of one or more of the covered Agreements (SPS, TBT Agreement) could be another way forward to address the issue of private standards within the WTO system. It would be particularly unlikely for such an amendment to be achieved.

At the April 2008 SPS Committee meeting, Argentina proposed to create a small working group to address the issue of the relationship between the SPS Agreement and private standards, particularly with regard to Article 13 (WTO, 2008a). The proposal made by Argentina was reintroduced at the June 2008 meeting when the Committee agreed to the formation of a working group (WTO, 2008b), and also agreed on some points, including:

- the need to define and focus only on the SPS-related aspects of private standards;

- the need for a clear picture of the positive and negative aspects of the implementation of private standards;

- that eventually the Committee should see how it could contribute to reducing the negative aspects of private standards; and

- the need to identify very clearly what specific actions the Committee should pursue, and in what order, to reach practical results as quickly as possible.

Consequently, in July 2008 the Chairman of the SPS Committee circulated a number of questions for the attention of Members[25] to solicit proposals regarding what the SPS Committee can and should do to 1) reduce the negative effects that private sanitary and phytosanitary standards have on international trade, particularly for developing countries, and to 2) enhance the potential benefits arising from private SPS standards for developing countries. As a result, in October 2008 (WTO, 2008c) the SPS Committee agreed to work on the following three stages:

> Stage 1: To invite Members to identify one product of export interest whose trade is affected by private standards. For this product, each Member should provide 1) a description of the relevant private standards which are applied in each of its export markets; 2) the Three Sisters' international standards for the same product; 3) information on the positive and/or negative effects of the private standards; and 4) identification, to the extent possible, of the SPS Agreement provisions that are relevant for the difficulties arising from the prescriptions set by private standards.
>
> Stage 2: The Committee's Secretariat, with the help of the Members concerned, shall compile the information in a descriptive matrix that would provide the input for a descriptive report.
>
> Stage 3: Based on the descriptive report, the group of Members concerned shall prepare an analytical study to be submitted to the SPS Committee for its consideration. The report shall analyse, among other things, to

[24] An example of a plurilateral initiative in the WTO system is the "Reference Paper in basic telecommunications".
[25] Document JOB(08)58, Private standards - Identifying practical actions for the SPS Committee.

what extent private standards create trade difficulties; the nature of those difficulties; the role of Codex, the IPPC and OIE, etc. The report shall also propose concrete actions to the SPS Committee.

As regards timing, it was agreed that the different phases mentioned be scheduled to correspond with meetings of the SPS Committee. Thus, Members were invited to submit information as requested in stage 1 by the time of the Committee's meeting of February 2009. The descriptive report should be presented at the Committee's meeting of June 2009 and the analytical report with recommendations should be ready for consideration by the Committee at its meeting of October 2009.

4.3. WTO jurisprudence

As stated by the Appellate Body (AB), the GATT is not to be read in isolation from the public international law.[26] As a consequence, it could be appropriate to take into account the general public international law principles of state responsibility, contained in the "Draft Articles on the Responsibility of States for Internationally Wrongful Acts".[27] The "Draft Articles" state that conduct by private actors may be attributed to a state, thereby triggering state responsibility if the conduct is internationally wrongful,

- when it is carried out under the direction or control of a state (Article 8), or
- for conduct that would not otherwise be attributable to a state, "if and to the extent that the State acknowledges and adopts the conduct in question as its own" (Article 11).

According to a document published by the Society of International Economic Law (SIEL, 2008), a number of WTO provisions illustrate that in certain cases, conduct by private parties will be attributed to governments, where the government has mandated or directed certain practices.[28] Another category of private actions that may be attributed to governments appears to be related to measures taken within a framework of incentives, disincentives, or special privileges.[29] None of these cases require a direction or mandate from government; rather, all that is necessary is that the government allows the conditions to exist under which private bodies will take certain trade-restrictive measures, and incentivizes the private bodies to act precisely in that way.

The same document (SIEL, 2008: 27) also identifies situations in which the action of a private party cannot be attributed to the government, because it occurs entirely outside that government's sphere of control. The so-called "due diligence" provisions play a role in these situations: (i) provisions that expressly require a WTO Member to take action so as to discipline action by private parties within its jurisdiction, and (ii) provisions that do not contain such express obligation, but could nevertheless be interpreted to require such action. In turn, in the first category, it is possible to make a distinction between obligations of Members to "ensure" (obligation of result) and obligations to "take reasonable/appropriate measures" (obligation of conduct).

Some commentators have referred to positive obligations to act, or "due diligence" obligations, as situations in which private actions may be attributed to the state (see for example, Gandhi, 2005). However, for Bohanes and Sandford, the concept of attribution of conduct is a different element from the allocation of responsibility for violation of obligations. Bohanes and Sandford state that there are situations in which a government may have a responsibility under the WTO Agreement not to tolerate certain conduct, even where that conduct is not attributable to the state (in SIEL, 2008).[30]

---

[26] Report of the Appellate Body, the United States-Gasoline, Dispute WT/DS2 1996:l p. 3 to 16.

[27] Adopted by the International Law Commission at its fifty-third session (A/56/10) and annexed by the General Assembly of the United Nations to its Resolution 56/83, dated 12 December 2001.

[28] In SIEL (2008), Bohanes and Sandford analyse, by way of example, the definition of "financial contribution" under the Agreement on Subsidies and Countervailing Measures, which includes the situation in which "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions...which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments".

[29] In SIEL (2008), Bohanes and Sandford put forth the case of Article XVII of the GATT (State trading enterprises); Article 9 of the Agreement on Agriculture (Export subsidy commitments), and the Japan-Trade in Semiconductors dispute in relation to Article XI of the GATT (General elimination of quantitative restrictions).

[30] These researchers admit that, in the final analysis, there would be little practical difference between a scenario in which the conduct of a private party is attributed to a government, and a scenario in which such conduct is not attributed, but the government nevertheless has the

Bohanes and Sandford interpret that the obligation to take "reasonable measures" under Article 4 of the TBT Agreement—which, as was already analysed, is similar in spirit to Article 13 of the SPS Agreement—involves an "obligation of conduct" rather than one of result. For example, a Member could satisfy the obligation to take "reasonable measures" by mandating a fair and transparent process for the preparation of standards, including rights of participation and right to be heard for all affected stakeholders (SIEL, 2008: 35).

In spite of that, Bohanes and Sandford state that Article 13 of the SPS Agreement entails an "obligation of result". They argue that in WTO parlance, the terms "laws, decrees, regulations, requirements and procedures" (contained in the definition of sanitary and phytosanitary measures of the SPS Agreement) are always associated with governmental action. Consequently, in the view of these researchers, acts by non-governmental entities would be subject to the disciplines of the SPS Agreement, but only to the extent that those bodies operate under special governmental authority. For that reason, they claim that said acts would be attributable to governments.

Apart from what has been expressed, it must be borne in mind that, to date, there is little jurisprudence on the interpretation of Article 13 of the SPS Agreement and no jurisprudence at all on "non-governmental bodies".[31] Neither is there jurisprudence within the framework of the TBT Agreement in relation to non-governmental institutions. Pursuant to Article 3.3 (General Provisions) of the WTO Dispute Settlement Understanding (DSU): "The prompt settlement of situations in which a Member considers that any benefits accruing to it… under the covered agreements are being impaired by measures taken by another Member is essential…" This Article entails that the measures that can be questioned before a Special Group (SG) must have been adopted by a WTO Member. That does not necessarily imply an active role on the part of governments. It must be remembered that in the United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products (Dispute WT/DS244) the AB expressed that:

> "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."

Likewise, the AB left open the possibility of attributing certain actions of private entities to a Member by stating that: "We need not consider, in this appeal, related issues such as the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances." The SG characterized a private action as a governmental "measure" in the Japan-Photographic Film and Paper Panel (Dispute WT/DS44) and pointed out that:

> "As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure*... of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this "truth" may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgements as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."

Based on the analysis of the GATT practice on this matter, the SG defined the "sufficient governmental involvement" as the decisive criterion for determining whether a private party action can be considered a governmental measure:

> "[The] past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."

From this jurisprudence it follows that certain private party actions could be subject to the procedure set forth in the DSU/WTO. Said possibility will be subject to the condition that the existence of "sufficient governmental involvement" can be demonstrated so as to assert that said standards can be attributed to the Member in question.

---

responsibility to ensure in every case that the private party's actions are consistent with the WTO. Yet, they add that, at a conceptual level, there is a crucial difference: the attribution of private party action to a WTO Member can occur on the basis of general principles that are not necessarily expressly stated in the WTO Agreements; in contrast, an obligation for a WTO Member to actively discipline private party action requires a specific obligation in the WTO Agreements, either explicitly or implicitly (SIEL, 2008: 28).

[31] See "WTO Analytical Index," available at www.wto.org.

Sometimes, the link between private conduct and a government may be so tenuous that it cannot be attributed to that government. Furthermore, even having convinced a SG that private action is attributable to the government, Bohanes and Sandford (in SIEL, 2008: 26) believe that this may get a claimant nowhere if there is no provision to "catch" that conduct.

In that respect, it seems worth mentioning that one of the peculiarities of WTO law is the possibility to challenge "measures" even if they do not violate WTO law. Article XXIII of the GATT called "Nullification or Impairment" refers to cases in which:

> "…any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:
>
> b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> c) the existence of any other situation…"

Bohanes and Sandford (in SIEL, 2008) analyse both paragraphs. Regarding paragraph b), it has been addressed only in three cases since the establishment of the WTO, and all three cases were unsuccessful.[32] In the EC-Asbestos case the AB agreed on the fact that the paragraph should remain an exceptional remedy.[33] With reference to paragraph c), Bohanes and Sandford (in SIEL, 2008: 60 and 61), state that the wording "any other situation" is broad enough to capture private party conduct. They point out that said paragraph, as opposed to paragraph b), does not refer to "measures" and, as a consequence, trade restrictive private party action could be captured, regardless of whether a government was obliged to take action against such private party behaviour or not.

5. Conclusions

Private standards are closely related to a developing economic context and to a legal and institutional framework. Private standards are mostly driven by the intention to alleviate the trade and/or reputation risks connected with food safety, turning consumers' concerns into an instrument for product differentiation.

The role of private standards is growing in importance within the global agri-food system. They are shaping the organization of agricultural supply chains and the conditions under which agricultural and food products are produced, processed and distributed. Not only do these standards seem to be here to stay, but they also seem to be gaining in scope and stringency as time goes by. Likewise, even though there is very little empirical evidence, there are enough reasons to claim that private standards are, in a great number of cases, becoming a crucial factor to guarantee market access, especially in certain industrialized countries.

Regarding public standards, there is a process that has proved to be effective when challenging measures that imply a disguised restriction on international trade. However, it is still under debate whether a country is entitled to resort to the WTO and succeed in having a Special Group established at the country's request to assess the compatibility of voluntary private standards with WTO Agreements. Without underestimating that it is difficult to prove the responsibility of the state for actions that, in principle, belong to the private sphere, there are legal instruments and background that confirm that such responsibility exists. Thus, given certain assumptions, it is possible to hold the government responsible for the actions performed by private actors.

In any case, the role of the government is to ensure that private standards do not constitute or conceal anti-competitive practices (World Bank, 2005): 9). The risk posed by the impossibility to put an end to private standards—otherwise driven by the market itself—was clearly summarized by the statement made by the representative of Argentina—duly recorded in the corresponding minutes (WTO, 2005)—when at the SPS Committee meeting that discussed the EurepGAP standards:

[32] Japan-Film, EC-Asbestos, and Korea-Government Procurement.
[33] AB Report, Dispute WT/DS 135, paragraph 186, referring to Panel Report, Japan - Film, paragraph 10.37.

> "…recalled that the international community had generated international agreements to ensure that trade standards were not unnecessarily stringent so as to act as barriers to international trade, and countries had devoted time and financial and human resources to attend all the international meetings where standards were discussed, developed and implemented. If the private sector was going to have unnecessarily restrictive standards affecting trade, and countries had no forum in which to advocate some rationalization of these standards, twenty years of discussions in international fora would have been wasted."

For the time being, it may seem that the best option available for countries that have shown concern about the impact of private standards on international trade is to actively take part in the Working Group constituted by the SPS Committee.

In fact, the actions that are likely to be agreed upon at the SPS Committee will be limited to the sanitary and phytosanitary aspects of private standards, and as a consequence, an important number of issues will remain unsolved (such as standards for animal welfare or environmental protection). Nevertheless, if the work of the SPS Committee were successful, it would constitute a benchmark that could possibly be replicated—with all the necessary changes—in other spheres.

Bibliographical references

Antle, John M. (1995). Choice and Efficiency in Food Safety Policy. Washington D.C.: AEI Press.

Bruzone, Iván (2008). Manzana y Pera: perfiles productivos. Available at www.alimentosargentinos.gov.ar (23/09/08).

Casella, Alessandra (2001). Product Standards and International Trade: Harmonization Through Private Coalitions? *Kyklos* 54 (2/3): 243-264.

Caswell, Julie A. y Neal H. Hooker (1996). HACCP as an international trade standard. American Journal of Agricultural Economics *78 (3): 775-779.*

Caswell, Julie A. y Gordon V. Johnson (1991). Firm Strategic Response to Food Safety and Nutrition Regulation. At Julie A. Caswell (Ed.), Economics of Food Safety. New York: Elsevier Science Publishing Company.

Caswell, Julie A. y Siny Joseph (2006). Consumer's Food Safety, Environmental and Animal Welfare Concerns: Major determinants for agricultural and food trade in the future?, paper prepared for Summer Symposium of the International Agricultural Trade Research Consortium (IATRC). Bonn, Germany, 28-30 March 2006.

Chia-Hui, Lee G. (2006). Private food standards and their impacts on developing countries. European Commission DG Trade Unit G2.

COLEACP (2007). Food Quality Certification Adding value to farm produce. Brussels, 5/6 February 2007. Ppt presentation available at: http://ec.europa.eu/agriculture/events/qualityconference/stinglhamber_en.pdf (15/09/2008).

Dobson, Paul W. (2003). Buyer Power in Food Retailing: The European Experience; paper presented at the conference Changing Dimensions of the Food Economy: Exploring the Policy Issues. The Hague; Netherlands.

Farrell, Joseph y Garth Saloner (1985). Standardization, Compatibility and Innovation. Rand Journal of Economics 16: 70-83.

Fulponi, Linda (2006). Private voluntary standards in the food system: the perspective of major food retailers in OECD countries. *Food Policy* 31:1 1-13.

Galperín, Carlos y Guillermo Perez (2004). Los complejos de manzanas y peras de la Argentina y los requisitos sanitarios y ambientales: un análisis de fragilidad. Documentos de Trabajo Nº 118. Buenos Aires: Universidad de Belgrano.

Gandhi, Samir R. (2005). Regulating the use of voluntary environmental standards within the World Trade Organization legal regime: Making a case for developing countries. Journal of World Trade 39(5): 855-880.

García Martínez, Marian, Andrew Fearne, Julie A. Caswell y Spencer Henson (2005). Co-Regulation of Food Safety: Opportunities for Private-Public Partnerships. Ashford: Imperial College at Wye.

Henson, Spencer (2006). The role of Public and Private Standards in Regulating International Food Markets; paper prepared for Summer Symposium of the International Agricultural Trade Research Consortium (IATRC). Bonn, Germany, 28-30 March 2006.

Henson, Spencer y Neal H. Hooker (2001). Private Sector Management of Food Safety: Public Regulation and the Role of Private Controls. International Food and Agribusiness Management Review 4: 7-17.

Henson, Spencer y James R. Northen (1998). Economic Determinants of Food Safety Controls in the Supply of Retailer Own-Branded Products in the UK. Agribusiness 14 (2): 113-126.

Henson, Spencer y Thomas Reardon (2005). Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System. Food Policy 30 (3): 241-253.

Jaffee, Steve (2003). From Challenge to Opportunity: Transforming Kenya's Fresh Vegetable Trade in the Context of Emerging Food Safety and Other Standards in Europe. Washington D.C.: World Bank.

Jaffee, Steve y Spencer Henson (2004). Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debate. World Bank Policy Research Working Paper 3348.

Jaffee, Steve y Oliver Masakure (2005). Strategic use of private standards to enhance international competitiveness: Vegetable exports from Kenya and elsewhere. Food Policy 30, 316–333.

Katz, Michael L. y Carl Shapiro (1985). Network Externalities, Competition, and Compatibility. American Economic Review 75: 424-440.

Luff, David (2004). Le droit de l'Organisation Mondiale du Commerce – Analyse critique. Brussels: Bruylant.

Lutz, Stefan., Thomas P. Lyon y John MaxwelL (2000). Quality Leadership When Regulatory Standards are Forthcoming. Journal of Industrial Economics 48 (3): 331-348.

Nadvi, Khalid y Frank Waltring (2003). Making Sense of Global Standards. En Schmitz, H. (ed.), Local enterprises in the Global economy: Issues of Governance and Upgrading (53-94). Cheltenham: Edward Elgar.

OMC (2002). Cómo aplicar las disposiciones en materia de transparencia del Acuerdo sobre Medidas Sanitarias y Fitosanitarias. Ginebra: OMC.

OECD (2006a). Final Report on Private Standards and the Shaping of the Agro-food System*;* AGR/CA/ APM(2006)9/FINAL. París: OECD

OECD (2006b). Private standards schemes and developing country access to global value chains: challenges and opportunities emerging from four case studies; AGR/CA/APM(2006)20. París: OECD

OECD (2006c). Private Standards and the Shaping of the Agri-Food System*.* París: OECD

OMC (2003). Entender la OMC. Ginebra: OMC.

OMC (2005). Comité de Medidas Sanitarias y Fitosanitarias. Resumen de la reunión celebrada los días 29 y 30 de junio de 2005 (G/SPS/R/37/Rev.1).

OMC (2006a). Comité de Medidas Sanitarias y Fitosanitarias. Resumen de la reunión del 24 de octubre de 2005, reanudada los días 1º y 2 de febrero de 2006 (G/SPS/R/39).

OMC (2006b). Comité de Medidas Sanitarias y Fitosanitarias. Resumen de la reunión celebrada los días 11 y 12 de octubre de 2006 (G/SPS/R/43).

OMC (2007a). Las Normas Privadas y el Acuerdo MSF*.* Nota de la Secretaría (G/SPS/GEN/746).

OMC (2007b). Las normas privadas voluntarias y el acceso a los mercados para los países en desarrollo: resultados preliminares*.* Comunicación de la OCDE (G/SPS/GEN/763).

OMC (2007c). Normas del Sector Privado*.* Comunicación de San Vicente y Granadinas (G/SPS/GEN/766).

OMC (2007d). Las normas privadas voluntarias en el marco multilateral de la OMC. Comunicación del Reino Unido (G/SPS/GEN/802).

OMC (2007e). Normas del sector privado y exportaciones de países en desarrollo de frutas y hortalizas frescas. Comunicación de la UNCTAD (G/SPS/GEN/761).

OMC (2008a). Comité de Medidas Sanitarias y Fitosanitarias. Resumen de la reunión celebrada los días 2 y 3 de abril de 2008 (G/SPS/R/49).

OMC (2008b). Comité de Medidas Sanitarias y Fitosanitarias. Resumen de la reunión celebrada los días 24 y 25 de junio de 2008 (G/SPS/R/51).

OMC (2008c). Comité de Medidas Sanitarias y Fitosanitarias. Normas Privadas – Identificación de medidas prácticas para el Comité MSF – Resumen de las respuestas recibidas (G/SPS/W/230).

Reardon, Thomas y Elizabeth Farina (2001). The rise of private food quality and safety standards: illustrations from Brazil; Selected paper, presented at the International Food and Agribusiness Association's 2001 Food and Agribusiness Symposium. Sydney, 27 June.

Reardon, Thomas, Jean-Marie Codron, Lawrence Busch, James Bingen y Craig Harris (2001). Global Change in Agri-Food Grades and Standards: Agribusiness Strategic Responses in Developing Countries. International Food and Agribusiness Management Review 2 (3/4):421-435.

Roberts, Donna (2004). The Multilateral Governance Framework for Sanitary and Phytosanitary Regulations: Challenges and Prospects. Washington DC: World Bank.

SIEL – Society of International Economic Law (2008). The (untapped) potential of WTO rules to discipline private trade-restrictive conduct. Working Paper Nº 56/08; Inaugural Conference. Geneva, Julio 15-17, 2008.

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). Background Note by the UNCTAD secretariat for the FAO-UNCTAD Regional Workshop on Good Agricultural Practices in Eastern and Southern Africa: Practices and Policies. Nairobi, Kenya, 6-9 Marzo 2007.

UNCTAD (2007b). The implications of private-sector standards for good agricultural practices – Exploring options to facilitate market access for developing country exporters of fruit and vegetables: Experiences of Argentina, Brazil and Costa Rica; (UNCTAD/DITC/TED/2007/2). New York and Geneva: UNCTAD.

USAID (2005). The relationship of third-party certification to sanitary/phytosanitary measures and the international agri-food trade: Final Report. Raise SPS Global Analytical Report #9.

Vermeulen, Hester, Danie Jordaan, Lise Korsten y Joahnn Kirsten (2006). Private standards, handling and hygiene in fruit export supply chains: a preliminary evaluation of the economic impact of parallel standards; Working paper 2006-01. Faculty of Natural and Agricultural Sciences; University of Pretoria.

WORLD BANK (2005). Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports. Washington D.C.: World Bank.