Private Standards and WTO Law

MBENGUE, Makane Moïse
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By Makane Moïse Mbengue

Proliferating private sector standards - with requirements that often go beyond or differ from those set by public bodies - are generating considerable interest and controversy among WTO members. Among questions being asked is whether private sector standards could be ‘imported’ within the WTO, or whether WTO rules should rather be ‘exported,’ bringing some order to the standard-setting universe. In this context, the international standard-setting organisations with an agreed mandate under the WTO are also seeking to ensure their continued dominance.

Private sector standards in the area of agricultural products/food for human consumption purport to achieve a variety of objectives, ranging from food safety to environmentally sustainable production. Such standards have been actively discussed at the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) over the last few years. Critics stress that private voluntary standards may exclude small producers in developing countries from markets; strong opponents emphasise that such standards are much more rigid than public-sector standards, and without scientific justification. In other words, private standards may not be based on science or risk analysis, and their adoption is neither democratic nor transparent.

Private and commercial standards are proving to be sensitive at the World Trade Organization (WTO), as the organisation’s membership is restricted to states and its agreements are binding on states only. This article aims at briefly depicting and describing the current challenges facing private standards within the WTO framework.

Importing private standards within the WTO?

There are many reasons behind the rise of private standards in the international trade arena. These include a lack of public confidence in regulatory agencies, the legal requirements on companies to demonstrate ‘due diligence’ in the prevention of food safety risks, a growing focus on ‘corporate social responsibility’ and the global expansion of food service companies. Examples of some of the more prominent private voluntary standards schemes in international trade include the ‘Carrefour Filière Qualité’ standard, the ‘British Retail Consortium Global Standard – Food’, the ‘QS Qualität Sicherheit’, the ‘Label Rouge’, the ‘Global Food Safety Initiative’, as well as the International Standards Organization (ISO) standards: ‘ISO 22000: Food safety management systems’ and ‘ISO 22005: Traceability in the feed and food chain’.

One approach to private standards at the WTO would be to allow their ‘import.’ ‘Importing’ such standards would imply, inter alia, the possibility for WTO member states to develop national standards based on private standards or to permit imports certified to comply with a private standard that incorporates and exceeds the official requirements embodied in national standards and/or international standards.1 The debate on the ‘importability’ of private standards in the multilateral trading system arose in June 2005 when Saint Vincent and the Grenadines raised concerns at the SPS Committee about EUREPGAP certification for bananas. Saint Vincent and the Grenadines opposed the importability of private standards, considering that those standards go well beyond international standards.

Since then, there has been a growing perception that private standards need to be scrutinised through a multilateral approach and surveillance. This perception was confirmed at a first WTO Session of Information on private standards in October 2006, at which EUREPGAP (which became GLOBALGAP) and the United Nations Conference on Trade and Development (UNCTAD) participated. Another UNCTAD/WTO Joint Information Session was organised in June 2007, and private and commercial standards were included for the first time as a specific agenda item of the SPS Committee. A lively debate on private standards, including many Member contributions, took place between October 2007 and June 2008.

The multilateral trading system was conceived primarily to deal with ‘public’ standards, i.e. standards formulated by public regulatory agencies and/or elaborated by agreed international standardisation organisations like the Codex Alimentarius. Unless an evolutionary interpretation of some of the core WTO Agreements involved in private standards is fashioned, the import of private standards into the WTO may be limited by legal impediments. For the time being, discussions on a so-called ‘integration’ of private and commercial standards within the WTO framework remain slow and cautious, not to say controversial.

Exporting WTO law into the sphere of private standards?

During a meeting of the WTO Informal Ad Hoc Group on Private Standards in December 2008, the group of Latin American countries presented a statement raising a number of concerns about private standards. The group proposed that the SPS Committee should permanently monitor the development of private standards and identify whether the measures based on those standards “constitute restrictions to trade disguised as replies to the ongoing economic crisis”. This position emphasised the need to ‘export’ WTO law into the sphere of private standards when these standards are being used or authorised by WTO member states within their own jurisdiction. The issue of rationalising private and commercial standards through the lens of WTO law is another tricky element of the ongoing discussions. Some solutions are being suggested for the sake of conforming more legitimacy (legality?) to private standards.

For instance, with regard to the TBT Agreement, most WTO Members do not consider that the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (TBT Code of Good Practice)1 would be useful in this context, as it essentially applies to governmental or quasi-governmental standardisation bodies, not to private bodies. Some have emphasised, nevertheless, that it would be useful “if private standard-setting bodies adhered to the basic principles of the TBT Code of Good Practice, in particular with regard to transparency, participation of developing countries, impartiality and consensus, effectiveness and relevance, coherence, and the

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1 In this article, ‘international standards’ refer to those standards elaborated by international standard-setting organisations of an inter-state character.
2 EUREPGAP is a private sector body that sets voluntary standards for the certification of agricultural products around the globe. The terms of reference define the body as “The Global Partnership for Safe and Sustainable Agriculture”
3 Code of Good Practice for the Preparation, Adoption and Application of Standards, Annex III of the TBT Agreement.
development dimension.”

Therefore, from the point of view of some WTO members, private standards may play a greater role in the multilateral trading system if they abide by well-embedded WTO law principles like the principle of transparency. It is true that the TBT Agreement opens the door for such compliance. If private standardisation bodies are to be given the status of ‘non-governmental bodies’, WTO members states seem definitely to be under an obligation to “take such reasonable measures as may be available to them to ensure that local government and non-governmental standardising bodies within their territories (...) accept and comply with this Code of Good Practice.”

When it comes to the SPS Agreement, things are much more nebulous. It is highly uncertain whether private standards could qualify as SPS measures within the scope of the SPS Agreement. Article 1.1 of the SPS Agreement states that the agreement 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. Along the same lines, the definition of an SPS measure in Annex A(1) and the accompanying indicative list of SPS measures do not explicitly limit these to governmental measures. A number of private standards would appear to address, in particular, the risks to human health identified in Annex A(1)(a). However, other provisions of the SPS Agreement, including the basic rights and obligations in Article 2, explicitly refer to the rights and obligations of “Members,” i.e. member states and not private bodies. Furthermore, doubts remain regarding how and to which extent private standardisation bodies can be subject to the fundamental requirement of the SPS Agreement to base SPS measures on scientific risk assessment.

The only obvious path for ‘exporting’ SPS rules in the context of private standards may be the one rooted in Article 13 of the SPS Agreement, which reads as follows: “Members are fully responsible under this Agreement for the observance of all obligations set forth herein (...) Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement.” Countries like Egypt, Argentina, and a number of other developing countries argue that the SPS Agreement makes governments in importing countries responsible for the standards set by their private sectors. For the time being, the only point on which WTO members have agreed not to disagree relates to the need to conduct a study of the relationship between the SPS Agreement and private standards.

The Empire Strikes Back... Linking private standards and international standards?

The formulation of standards, and in particular of food safety as well as health standards, has long fallen within the province of agreed international standard-setting organisations, also referred to as the “international standardisation community.” More specifically, under the SPS Agreement ‘three sister organisations’ are identified as being the ‘Hercules’ of standardisation in the context of food safety and health: the Codex Alimentarius, the International Plant Protection Convention (IPPC), and the World Organization for Animal Health (OIE). The standards formulated by these organisations now face competition from private standards. Without a doubt, there is an increasing fragmentation in the field of standardisation and thus a potential risk of ‘standards shopping’ in international trade.

Aware of these major developments, the International Committee of the OIE adopted a resolution in 2008, in which it recalled that the “World Trade Organization, under the Agreement on the Application of Sanitary and Phytosanitary Measures, formally recognises the OIE as the reference organisation responsible for establishing international standards relating to animal diseases, including zoonotic diseases.”

The focus by the OIE on its mandate is not fortuitous. The rationale governing the resolution is to delineate clearly the sphere of influence of international standards vis-à-vis private standards. The position of the OIE is strong and does not leave any room for interpretation. Private standards must comply with international standards. They should neither exceed international standards nor conflict with international standards. The WTO is thus confronted with a dilemma when it comes to standards. Should it adopt a ‘legalistic’ approach that would only take into account international standards? Or should it adopt a ‘pragmatic’ approach, which would entail the integrative recognition of private standards in the framework of the multilateral trading system? WTO Members have suggested various ways to promote coherence between private standards and international standards. These mainly involve information exchange and outreach between international organisations and private standardisation bodies to improve coherence in the standard-setting universe, inclusion of private standard-setting bodies as observers in the standard-setting procedures of the three sisters, and harmonisation of the standards of the three sister organisations with private standards, in particular with ISO standards.

Behind these suggestions lies a great concern by several WTO members, who wish to avoid being forced to make a Cornelian choice between private standards and international standards. The concern is all the more understandable when considering the constitutional mandates and competence of the relevant international standardisation organisations. Capitalising on their respective mandates, the ‘empire’ of international standard-setting organisations is watching and is determined to strike back if the development of private standards goes beyond any normative control. It suffices to have a careful look at the conclusions of the Codex Alimentarius Commission at its last session. The relevant passage reads as follows: “The Commission noted that the proliferation of private standards was of significant concern to many members as compliance with and certification to these standards was difficult, especially for developing countries. The Commission also noted that for food safety matters there was no other international standard-setting organisation than Codex developing science-based standards in an open, democratic, inclusive and transparent forum. The Commission acknowledged that private standards existed and there was a need to see how they related to Codex standards. The Commission was of the opinion that Codex standards should be benchmarks for these private standards and that international harmonisation of food safety provisions should be based on Codex standards” (emphasis added). It remains yet for the three public standard setting organisations to formulate a common position on private standards.


Makane Moise Mbengue is Lecturer at the Geneva University Law School and at the Graduate Institute of International and Development Studies in Geneva.