

# Private Food Safety Standards, Obligations of Governments, and Unresolved Questions in Contemporary WTO Law

Moshe Hirsch

## Abstract

The rapid proliferation of private standard schemes has attracted the attention of numerous experts and policy-makers, and proved to be a sensitive issue for developing and developed countries. Though these standards are not legally binding, they occasionally constitute 'industry norms' and significantly constrain retailers and producers, thus influencing trade flows. Such impacts on international trade and the multiplication of schemes led some countries and economic operators (particularly of developing countries and small-medium-sized enterprises) to raise certain concerns. Since 2005, WTO bodies have discussed these and other issues which have proved to be controversial.

This initial paper aims to address several legal questions regarding private standards, particularly those relating to the scope of WTO member states' obligations under the SPS Agreement. International economic legal doctrine has not yet developed a coherent doctrine regarding the duties of states regarding private economic operators and the extent to which relevant rules deriving from the ILC Articles on State Responsibility should be applied. Consequently, this paper briefly reviews the SPS Agreement's provisions (particularly Articles 1 and 13), some GATT/WTO jurisprudence regarding member states' duties relating to acts undertaken by private actors, (prominently Japan -- Film), and the relevant provisions of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (prominently Articles 4, 5, 8, 11).

An analysis of Article 13 of the SPS Agreement indicates that while it does not impose direct obligations on private standard-setting entities, the ordinary meaning of the text suggests that the latter bodies are covered by this provision. Accordingly, WTO members are bound to employ reasonable measures available to them in order to ensure that private-standard setting bodies operating in their territories comply with the relevant provisions of the SPS Agreement. As elaborated below, this interpretation of Article 13 is also consistent with other provisions of the SPS Agreement, the general aims of the WTO as well as with the need to cope with recent trends in the international economic system. Specific obligations imposed on WTO members in this context may be informed by the 'due diligence' principle in international customary law. In light of the elusive nature of this latter principle, the significant question is what kind of measures are to be undertaken by governments in order to satisfy this requirement? WTO members may implement this moderate obligation through a broad range of measures, and in light of the early stage of this research-work, the paper offers only several examples.

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