

# NAVIGATING THE REGULATORY LANDSCAPE OF VOLUNTARY SUSTAINABILITY STANDARDS IN INTERNATIONAL FOOD TRADE: A MULTILATERAL INTERPLAY

## NAVEGANDO PELO CENÁRIO REGULATÓRIO DOS PADRÕES VOLUNTÁRIOS DE SUSTENTABILIDADE NO COMÉRCIO INTERNACIONAL DE ALIMENTOS: UMA INTERAÇÃO MULTILATERAL

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### ABSTRACT

Voluntary sustainability standards (VSSs) are non-mandatory criteria designed to foster sustainable practices throughout the global supply chain. These standards are particularly prevalent in the agri-food sector, where they aim to support wider public policy objectives such as sustainable food production, animal welfare, healthy lifestyle, and labour conditions. Significant challenges arise from the fact that VSSs, despite their voluntary nature, they often impose mandatory effect in the global supply chain. They also often lack easily-identifiable features of the product themselves. These create systematic problems for the global food trade system, where conventional regulation address governmental measures on goods with specific inherent characteristics that can be clearly identified in the final product. This article explored the inter-relationship among private VSSs, national regulations and international treaties within the agri-food industry. It highlights ambiguity surrounding the regulatory framework for VSSs under the WTO law, noting the absence of a consensus on how relevant provisions should be interpreted. Despite the diversity among various VSSs, this article argues for the potential for harmonization and equivalence among VSSs. By aligning various VSSs and with technical regulations, it is possible to strike a balance between trade liberalization and promotion of sustainable practices.

**KEYWORDS:** Voluntary sustainability standards. Food regulation. WTO Law.

### RESUMO

Os padrões voluntários de sustentabilidade (VSSs) são critérios não obrigatórios criados para promover práticas sustentáveis em toda a cadeia de suprimentos global. Esses padrões são particularmente predominantes no setor agroalimentar, onde visam apoiar objetivos mais amplos de políticas públicas, como produção sustentável de alimentos, bem-estar animal, estilo de vida saudável e condições de trabalho. Desafios significativos surgem do fato de que os VSSs, apesar de sua natureza voluntária, geralmente impõem um efeito obrigatório na cadeia de suprimentos global. Além disso, muitas vezes não apresentam características facilmente identificáveis do próprio produto. Isso cria problemas sistêmicos para o sistema global de comércio de alimentos, em que a regulamentação convencional aborda medidas governamentais sobre produtos com características inerentes específicas que podem ser claramente identificadas no produto final. Este artigo explorou a inter-relação entre VSSs privados, regulamentações nacionais e tratados internacionais no setor agroalimentar. Destaca-se a ambiguidade em torno da estrutura regulatória para VSSs de acordo com o direito da Organização Mundial do Comércio (OMC), observando a ausência de um consenso sobre como as disposições relevantes devem ser interpretadas. Apesar da diversidade entre os diversos VSSs, este artigo defende o potencial de harmonização e equivalência entre os VSSs. Ao alinhar vários VSSs e regulamentos técnicos, é possível

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*encontrar um equilíbrio entre a liberalização do comércio e a promoção de práticas sustentáveis.*

**PALAVRAS-CHAVE:** *Padrões voluntários de sustentabilidade. Regulamentação de alimentos. Direito da OMC.*

## I. INTRODUCTION

Voluntary Sustainable Standards (VSSs) are sustainability systems designed to help producers, businesses, and other economic actors achieve sustainable development outcomes in global food supply chains. The food we eat undergoes a systematic domino-like process from farm to tables. In recent years, there has been growing recognition of the complexity of food system and the relevance of food policy to wider public policy goals. These goals encompass not only food safety but also concerns related to sustainable production, food poverty, animal welfare, healthy eating lifestyle and labour condition. VSS are introduced as market-based tools that “prescribe a set of social, economic and/or environmental requirements that economic actors can voluntarily comply with to make their production and processing practices more sustainable”.<sup>1</sup> Consequently, policymakers must account for these policy agendas when engaging in food-related regulations. Extensive evidence indicates that our way of food production and consumption has a significant impact on both our food and our environment.

From a production-based perspective, food production has contributed to soil degradation, competition for farmland productivity, loss of biodiversity, pressure on water availability.<sup>2</sup> All these issues are intertwined with the dynamics of environmental degradation,<sup>3</sup> and climate change.<sup>4</sup> Some common food-borne

1 United Nations Conference on Trade and Development, *Voluntary Sustainability Standards in International Trade* (United Nations 2023) <<https://www.un-ilibrary.org/content/books/9789210022750>>.

2 Agriculture and food are water-intensive industries. It has been estimated that agriculture accounts for 92% of the human water footprint. Food industry also has a large share in the global water flow, for example, cereals 17%, industrial foods 12%, cocoa 8%, beef 7%.

3 The heavy reliance on pesticides and fertilisers and their effects on wildlife soil and water sources and the ecosystem health have been well documented. Carolyn Denton, ‘How Are Food and the Environment Related?’ (26 April 2016) <<https://www.takingcharge.csh.umn.edu/how-are-food-and-environment-related>> accessed 29 September 2024.

4 It has been estimated that the greenhouse gas emissions from agriculture, forestry and other land use account for 24% of anthropogenic emissions. (in 2010). Pete Smith and others, ‘Agriculture, Forestry and Other Land Use (AFOLU)’ in O Edenhofer and others (eds), *Climate Change 2014: Mitigation of Climate Change* (Cambridge Univ Press 2014). The emissions in food processing vary depending on the methods used and the technology adopted. The post-production stage, which is often neglected in literature, also contribute to significant anthropogenic emissions, due to trade globalisation and improvements in logistics and transportation. For example, in the UK, post-production emissions make up 50% of total food system emissions. Tara Garnett, ‘Where Are the Best Opportunities for Reducing Greenhouse Gas Emissions in the Food System (Including the Food Chain)?’ (2011) 36 *Food Policy* S23.

diseases are increasingly linked to environmental exposure; while the rising frequency of floods and droughts has a pronounced impacts on food supply.<sup>5</sup> The mutual impacts of food production and environment have led to serious social concerns. Therefore, one important role of food policy is to promote support for more sustainable, environmental friendly and higher quality food.

From a consumption-based perspective, food policy is gaining increasing attention for population-wide health interventions<sup>6</sup> that encourage sustainable diets and healthy lifestyles for present and future generations. This includes food policies that promote healthy lifestyle consumption behaviours and prevent obesities and other non-communicable diseases (NCDs) in developed and the emerging economies. The interconnected agendas of food safety, sustainable production, biodiversity, lifestyle and wellness, social equality and labour incomes, underscore a more holistic and comprehensive approach to food policy. There is now an urgent need for governance of food trade in order to address the multi-dimensional VSSs present in the food system across its varies supply chains.

In the private sector, there has also been an increasing number of standards and initiatives with qualitative, environmental and social objectives covering issues such as sustainable farming, waste management, emission limits, labour standards, animal welfare. A notable example is the Rainforest Alliance Certification in Brazilian coffee production, which has gained significant attention for its focus on sustainability. This VSS certification aims to address qualitative, environmental, and social objectives, including sustainable farming practices, waste management, labor standards, and animal welfare. The impetus behind this trend is the increasing consumer demand for sustainably produced goods, particularly among wealthier and more educated consumers who are more discerning and critical of their food choices. They seek not only food safety but also transparency regarding production methods at both the farm and processing levels.

VSSs often do not represent easily identifiable and testable features of the product itself, and are typically not recognised by conventional food safety regulations.<sup>7</sup> This raises the concept of “like products”, which is an essential element in the international trade system. Such ambiguity leads to regulatory confusion and increases potential trade distortions. In high-standard countries, some groups fear a “race to the bottom” as governments compete to attract investment by lowering their standards. The lower-standard countries, mostly developing countries, on the other hand, fear being forced to raise their

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5 Tara Garnett and others, ‘What Is a Sustainable Healthy Diet? A Discussion Paper’.

6 World Bank, *World Development Report 2015: Mind, Society, and Behavior* (2015).

7 Tim Josling, Donna Roberts and David Orden, *Food Regulation and Trade: Toward a Safe and Open Global System* (2004) 152.

standards in the early stages of their development and thus lose their competitive advantage in the international trade arena. Private VSSs can further create trade restrictions especially those that aim to increase product differentiation and provide consumers with informed choices. Therefore, both food public policy and private VSSs appear at the centre of trade disputes and are regarded as technical barriers to trade. This article focuses on the nature and interactions of private, national and international VSSs in the food system and their trade implications. It begins with an overview of the current situation regarding agri-food VSSs introduced at different levels of governance and follows with the discussion of potential regulatory space for private VSSs, exploring whether gaps be bridged through harmonisation and equivalence across sectors.

## **II. MULTILATERAL APPROACHES TO VSSS**

### **A. PUBLIC VSSS ENDORSED BY GOVERNMENT AGENCIES**

Public VSSs are standards developed or endorsed by government agencies or international organizations. At national level, emerging food regulatory issues present significant challenges to conventional food safety regulations. One of the most contentious aspects of food public policy revolves around the processes attributed to achieve quality, environmental protection and social goals. As a result, many countries in the world are now facing additional choices in how to regulate these credence characteristics in food and guide industry practices. When countries choose different approaches to regulations, tensions will arise.

#### **1. Public VSSs on Organic Food**

Consumers buy organic food for its higher quality, freshness, health benefits, and also for environmental concerns, local considerations and lifestyle choice.<sup>8</sup> The complexity of these attributes is linked to different aspects of food regulations. The quality attribute is more of a product characteristic whereas the environmental concerns of organic food are substantially in relation to process regulations which examine the life-cycle effect of a product on the environment in which the food is produced. Hence, organic regulations vary from country to country.

The European Union takes a proactive approach to organic food production and labeling and has led the early waves of regulatory activities towards organic food. The EU regulatory activities date back to 1991 when the EU Council Regulation on Organic Foods (EEC No.2092/91) was passed in response to consumer demand for organically-produced agricultural products and foodstuffs. The European Union has established comprehensive regulations

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8 *ibid* 170.

governing organic production and labeling through Regulation (EU) 2018/848, which came into effect in 2022. This regulation replaces the previous framework set by Regulation (EC) No. 834/2007 and aims to enhance the integrity and sustainability of organic farming across the EU. It sets out the overarching sustainability goals, with strict requirements on labeling and traceability, reflecting the EU's commitment to high standards in organic farming and food production that is environmentally friendly and socially responsible.

In China, the Environmental Protection Administration (EPA) was the first governmental authority that worked on organic products in early 1990s. The Chinese National Organic Products Standard (GB/T 19630-2011) was jointly made by the EPA and other related governmental authorities and was revised in 2019 (GB/T 19630-2019), covering mandatory requirements for organic production, processing, labeling, and management. In the same year, the central certification body, Certification and Accreditation Administration (CNCA), released revised certification rules to further streamline certification practices. The Chinese National Organic Product Standard is based on international norms with added emphasis on contamination by pollutants and prohibited materials and quality management systems, especially record keeping and traceability. China's new standard for the application of organic product certification is considered among the strictest in the world for organic agriculture.

Brazil has a robust regulatory system for organic agriculture, with Ministry of Agriculture, Livestock and Food Supply (MAPA) overseeing mandatory certification. Organic Law 10.831/2003 has established the basic requirements for organic production and Decree 6.323/2007 has provided details on the application of the Organic Law, including control mechanisms, technical standards, accreditation, certification, labeling, and permitted inputs.<sup>9</sup> The regulations aim to promote domestic organic production while ensuring consumer confidence. With that being said, Brazil does not recognize organic certifications from other countries. Imported organic products must be certified by a MAPA-approved body.

Until now, there has been no unified definition of organic products. Despite the emergence of organic standards and regulations, there are significant differences among national standards from different countries. The credibility of different standards is another policy issue. This constitutes a trade irritant and the equivalence and mutual recognition among different jurisdictions is seen as unfruitful.

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<sup>9</sup> 'Decree-No-06-323-2007-Guidelines-for-Organic-Agriculture' <<https://www.gov.br/agricultura/pt-br/assuntos/sustentabilidade/organicos/legislacao/ingles/decree-no-06-323-2007-guidelines-for-organic-agriculture.pdf>> accessed 29 September 2024.

## 2. Public VSSs on Animal Welfare

Animal welfare is also a desirable attribute for certain consumers when attached to food. Meat consumers may want to know how animals are treated when alive. The trend of animal welfare regulations starts in the 1970s when animal abuses received public attention. Later in some rich developed countries, animal welfare became a regulatory concern.

The EU has a comprehensive legal framework governing animal welfare, and early regulatory activities started from 1986.<sup>10</sup> Since the 1990s, the EU has been actively involved in animal welfare regulations, and have enacted a number of regulations that set minimum welfare standards for various farm animals. In 1992, a declaration on animal welfare was annexed to the Treaty of the European Union. Examples of EU animal welfare regulations include the European Convention for the Protection of Animal for Slaughter, which specifies the rules for slaughterhouse conditions and the slaughtering processes;<sup>11</sup> the European Convention for the Protection of Animals Kept for Farming Purposes outlines general requirements for confining animals;<sup>12</sup> EU Directive 1999/74/EC lays down minimum standards for the protection of laying hens; and the European Convention for the Protection of Animals During International Transport provides regulations for the treatment of animals during transport, and specifies the intervals during which animals are to be fed and the space in which they can be confined.<sup>13</sup> In 2017 the Commission established the expert group ‘Platform on Animal Welfare’ (Decision 2017/C 31/12), with an aim to support coordinated actions on animal welfare among competent authorities, businesses and civil society. Over the past decade, the EU animal welfare legislation has evolved on the basis of sound scientific knowledge, improving the quality of animals’ lives in accordance with citizen’s expectations and market demands.

In Brazil, a series of Normative Instructions have been introduced to provide recommendations for good animal welfare practices at various stages of production and transportation for animals. A dedicated technical commission (Permanent Technical Commission on Animal Welfare) has been established to promote animal welfare actions across different sectors and to encourage agreement to advance animal welfare. Despite all these efforts, the country is

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10 Council of the European Union, Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages 1986.

11 Council of the European Union, Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing 1993.

12 Council of the European Union, Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes 1998.

13 Council of the European Union, Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC.

still facing challenging in fully aligning with international best practices and standards.

In many countries, animal welfare is not a sensitive issue, and in those countries, there are no such regulations on animal welfare. In China, despite the existence of wildlife protection laws, along with a draft proposal of animal protection law released in 2009,<sup>14</sup> food safety with regard to human health and life is the primary focus of food regulation. So far, there has been no specific nationwide laws against animal mistreatment. Animal welfare issue seems to be an indulgence when food safety problems have yet to be solved.

These emerging issues create systematic problems for the global food trade system. Conventionally, regulation of goods with certain inherent characteristics can be revealed in final content information of the products. Therefore, the control of food products can be done on the product and its content attributes. With the emerging VSSs on process attributes, the concept of “like products” which is an essential element in the trading system brings about the potential for regulatory confusion.

## B. VSSS IN INTERNATIONAL REGIME

### 1. WTO

The international governance of food regulation was strengthened by the revised and new agreements at the Uruguay Round negotiations in 1994. The Standard Code<sup>15</sup> was revised to become the WTO Technical Barriers to Trade Agreement (TBT Agreement), and a new Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was produced that specifically targets animal, plant and human life and health in response to the emerging world-wide food safety scandals. Measures that do not apply to SPS measures identified in the SPS Agreement may be TBT measures.<sup>16</sup> These include measures in relation to quality specification, and measures in protection of environment, consumer interest other than food safety, and animal welfare etc.

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14 The draft proposal has not yet been adopted by the legislature and it must go through legislative process of the National People's Congress.

15 The Standard Code, also called Agreement on Technical Barriers to Trade was produced in GATT Tokyo Round negotiations, which established obligations to ensure mandatory regulations, voluntary standards, and conformity assessment procedures were not applied to create unnecessary obstacles to trade.

16 SPS measures are defined as “measures that are applied to protect human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food; to protect human life from plant- or animal-carried diseases; to protect animal or plant life from pests, diseases, or disease-causing organisms; to prevent or limit other damage to a country from the entry, establishment or spread of pests; and to protect biodiversity”. See United Nations Conference on Trade and Development, ‘International Classification of Non-Tariff Measures’ (UN, 2012) ch A <<http://digitallibrary.un.org/record/789390>>.



The new agreements and the new dispute settlement procedures have spurred a number of requests for international panels to review the food-related measures that restrict trade. Notably, 70% of the complaints citing violations of the TBT Agreement relate to food regulations, with reference to environmental measures and animal welfare alongside food safety measures.<sup>17</sup> This again shows the multi-dimensional objectives in food regulations. In international food trade, the conventional food safety governance is mostly, though not confined to regulations of final food products. When there is a risk to human life and health, a complete ban happens mostly. Unconventional food issues, for example, environmental sustainability of food production, organic farming and animal welfare concerns, focus more on the process attributes of the food system. Regulatory measures in response to these unconventional are mostly measures in the form of bans on exporters that do not live up to some particular process or production methods (PPM) requirements.

Under the WTO General Agreement on Tariffs and Trade, PPM-based trade measures should not be found to be in violation of GATT general provisions. Measures that constitute a quantitative restriction,<sup>18</sup> or treat imported products less favourably than the “like products” from domestic or other foreign sources,<sup>19</sup> should be justified under one of the exceptions of Article XX.

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination of international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of the measures:

- (a) Necessary to protect public morals;
- (b) Necessary to protect human, animal or plant life or health
- ....
- (g) Relating to the conservation of exhaustible natural resources if such measures or consumptions are made effective in conjunction with restrictions on domestic production or consumption.

Paragraph (a) to (g) contains a list of measures with multiple social concerns. Such measures are usually manifested as responses to national public policies. Paragraph (a), (b) and (g) are especially relevant to international food trade, and the related public policies such as animal welfare, consumer health and sustainable production are often applied to food system. Despite its coverage in the list of exceptions, Article XX GATT requires a two-step analysis. A measure needs to fit within one of the exceptions of the Article XX listing, and also needs to be evaluated under the wording of the introductory clause, commonly known

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17 Josling, Roberts and Orden (n 7) 63.

18 General Agreement on Tariffs and Trade 1994 art XI.

19 *ibid* I and III.



as the “chapeau”, which constitutes a final test to ensure that the application of the measures does not amount to “unjustifiable” or “arbitrary discrimination.”<sup>20</sup> Therefore, WTO members are free to implement national regulations to protect the environment under Article XX(g), on condition that these regulations are WTO-consistent.

Above all, the WTO is a trade-oriented institution, and social concerns are relatively new. Members differ in the importance they place on different public policies depending on their income, preferences and cultural history, etc. This inevitably leads to trade disputes in the international food trading system. The Agreement on Technical Barriers to Trade (TBT Agreement) is a more modern agreement rooted in the Tokyo Round in the 1970s, with later updates in the Uruguay Round in the 1990s.<sup>21</sup> This Agreement is a *lex specialis* with respect to more generally-applicable GATT. It sets out rules for technical regulations, voluntary standards, and conformity assessment procedures that are not covered by the SPS Agreement.<sup>22</sup> This new agreement has spurred more requests for international panels to review food-related measures that restrict trade. Therefore, the TBT Agreement is becoming increasingly important as governments promulgate more regulations and standards that specify characteristics of a product or processing methods and compliance is mandatory. In the meantime, private standards applied by entities such as supermarket chains are increasingly prevalent. These private standards and schemes are developed by private institutions such as International Dairy Federation (IDF) and the International Organization for Standardization (ISO) etc. While these international standards themselves are voluntary, compliance is mandatory only for members. Nevertheless, they often serve as reference points in the global food system, imposing *de facto* mandatory requirements in the food supply chain. Like the SPS Agreement, TBT Agreement also encourages members to use international standards;<sup>23</sup> however, it does not explicitly recognise specific international standard organisations. It is up to WTO members to decide which international standards are relevant. The TBT Agreement requires members to ensure their central governmental standardising bodies adhere to Code of Good Practice set out in Annex 3 of the Agreement, and also take reasonable measures to ensure other governmental and nongovernmental standard organisations within their territory comply with the code. However, in practice, the diverse food regulations and standards in the market that have potential to affect trade

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20 Appellate Body Report, ‘United States- Imported Prohibition of Certain Shrimp and Shrimp Products’ (1998) WT/DS58/AB/R para 161,177.

21 Agreement on Technical Barriers to Trade. [hereinafter TBT Agreement]

22 *ibid* Art 1.5.

23 *ibid* 2.4.

significantly have become battlegrounds at the centre of the most prominent disputes.

More significantly, TBT Agreement sets out key principles of “non-discrimination” and “least trade restrictive measures” for members to follow. Article 2.1, the non-discrimination provision, is a combination of national treatment and most favoured nation (MFN) obligations with respect to technical regulations. Article 2.2, the necessity provision, provides that technical regulation “shall not be more trade-restrictive than necessary to fulfil legitimate objectives”. These “legitimate objectives” include, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health; or the environment. Despite the encompassing social concerns in the food system, the necessity test remains challenging, and in most cases, members can always propose a reasonably available alternative to the challenged measure that is less trade restrictive.<sup>24</sup>

## 2. MEAs

Outside the WTO framework, sustainable food has risen up the political agenda and formed a major part of the new UN Sustainable Development Goals and Sustainable Cities and Regions agenda.<sup>25</sup> This challenges governments around the world to think about the multi-dimensional issues and their interlocking features in the food system and revise their food policies. Governments also negotiate food-related issues in multilateral environmental agreements (MEAs). There are currently 250 multilateral environmental agreements (MEAs) in force dealing with various environmental issues. About 15 of these MEAs include provisions to control trade in order to prevent damage to the environment,<sup>26</sup> such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (CBD), that are of most relevance to food system since animal-source foods and plant-derived foods are the two main source of human food consumption. These MEAs contain measures that prohibit trade in certain species or products or that authorise signatory countries to restrict trade in certain circumstances. This is potentially in conflict with the WTO “non-discrimination principle” to the extent that MEAs can authorise trade of a specific product between parties, but

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24 For example, in the US – Tuna II, the Appellate Body found that Mexico had indeed proposed an alternative measure that was less trade restrictive. See Appellate Body Report, ‘US – Tuna II’ WT/DS381/AB/R 330–331.

25 AS Morley, TK Marsden and KJ Morgan, ‘Food Policy as Public Policy: A Review of the Welsh Government’s Food Strategy and Action Plan’.

26 WTO, ‘The Doha Mandate on Multilateral Environmental Agreements (MEAs)’ <[https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_neg\\_mea\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm)> accessed 29 September 2024.; WTO, ‘WTO Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements (MEAs)’ <[https://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_matrix\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm)> accessed 29 September 2024.

ban trade of the same product with countries that are not signatories. In the 1994 Marrakesh Ministerial Decision on Trade and Environment, the Committee on Trade and Environment (CTE) was tasked to identify the relationship between trade measures and environmental measures in order to promote sustainable development.<sup>27</sup>

However, in terms of the environmental protection of animals and plants, the MEAs do not provide an all-round protection of endangered species, and consequently, members may decide to protect these species through trade measures; for example, the United States has measures in place to protect endangered sea turtles. In relation to animal welfare, farming, transportation and slaughter of animals for animal products are significant concern in international food trade. The level of animal protection differs from country to country. So far, despite some few regional animal welfare conventions in force,<sup>28</sup> there are no international agreements on animal welfare. The smaller the number of hard law treaties on animal welfare issues that exist, the more likely it is that governments will resort unilateral trade measures to protect animal rights, and therefore, cause trade tensions.

### C. PRIVATE VSSS IN FOOD SYSTEM

The past decade has witnessed a trend towards private governance of non-safety issues in the food industry. In the early 1980s, corporate responses to social concerns including environmental protection and animal welfare agendas were largely reluctant and even hostile.<sup>29</sup> Since the late 1980s, many corporations have started to incorporate environmental goals as well as animal welfare standards into their corporate strategy, and to promote “win-win” solutions that further both business economic and public social interests in response to government failure and changing consumer attitudes.<sup>30</sup> This new and proactive response was particularly visible during in the Rio Earth Summit 1992, where individual firms and organisations such as the International Chamber of Commerce (ICC) lobbied for more market-oriented and self-regulatory models of environmental governance, and sought to shape and influence global environmental politics.<sup>31</sup>

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27 WTO, 'Items on the CTE's Work Programme' <[https://www.wto.org/english/tratop\\_e/envir\\_e/cte00\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/cte00_e.htm)> accessed 29 September 2024.

28 For example, European Convention for the Protection of Animals During International Transport, Paris, 13 December 1968, European Treaty Series, No 65,103,196; European Convention for the Protection of Animals Kept for Farming Purposes, Strasbourg, 10 March 1976, European Treaty Series, No 87,145; European Convention for the Protection of Animal for Slaughter, Strasbourg, 10 May 1979m European Treaty Series, No 102.

29 Robert Falkner, 'Private Environmental Governance and International Relations: Exploring the Links' (2003) 3 *Global Environmental Politics* 72.

30 Michael E Porter and Claas van der Linde, 'Green and Competitive: Ending the Stalemate' in Emiel FM Wubben (ed), *The Dynamics of the Eco-Efficient Economy* (Edward Elgar Publishing 2000) <[https://ideas.repec.org/h/elg/eechap/2278\\_2.html](https://ideas.repec.org/h/elg/eechap/2278_2.html)>.

31 Stephan Schmidheiny, *Changing Course: A Global Business Perspective on Development and*

The ISO 14000 series represent corporate efforts to lay down principles for environmental self-regulation, and demonstrate the businesses' abilities to regulate themselves. Up to the present day, there are over 2,300 global firms that have endorsed the Business Charter for Sustainable Development developed by the ICC, and more than 46,000 firms have been certified as compliant with ISO 14001. Such private standards and initiatives in relation to the food industry include: GlobalGAP,<sup>32</sup> The Carbon Trust Standard,<sup>33</sup> The Marine Stewardship Council,<sup>34</sup> and The UTZ Certified,<sup>35</sup> among others. Such VSSs are civil regulations that are private, voluntary, and specify the responsibilities of firms for addressing environmental performance and animal welfare issues. They exist in parallel to governmental regulations and are considered soft law rather than legally-enforceable standards.<sup>36</sup> Violators usually face social or market penalties rather than legal sanctions.

Unlike most public food safety initiatives that are essentially incident-driven, the proliferation of private unconventional, non-safety regulations has resulted for a number of interconnected reasons. Firstly, the inadequacy of national and international rules on social policy has prompted NGOs to monitor existing rules and in some cases, create their own codes of conducts and compliance system. Secondly, the acceleration of economic integration and the growth of international food companies and global brands, particularly multinational corporations (MNCs) has heightened the importance of reputation in consumer markets. Any threat to the reputation may lead to grave disaster for the company and brand, making VSSs crucial determinant in international competitiveness.<sup>37</sup>

Corporate social responsibility has become another driving force in the development of private VSSs. Most VSSs stem from citizen campaigns against particular companies, industries, or business practices, on issues such

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*the Environment*, vol 1 (MIT press 1992).

32 GlobalGAP is an “umbrella” standard for in primary food sector. In addition to most important food safety part, GlobalGAP also includes requirements for environment and animal welfare such as animal transport. See <http://www.globalgap.org> .

33 Carbon Trust certifies organisations that have measured, managed and genuinely reduced their carbon foot print and committed to making further reductions year on year. See <https://www.carbontrust.com/home/>

34 The Marine Stewardship Council (MSC) is one of the important organisations that promote sustainable fishing industry. The MSC fishery certification program and seafood ecolabel recognise and reward sustainable fishing. See <http://www.msc.org>

35 The UTZ Certified is to achieve sustainable agricultural supply chain, that meet the growing needs and expectations of farmers, the food industry and consumers. See <http://www.utzcertified.org>

36 Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International organization* 421.

37 Kym Anderson, ‘Environmental and Labor Standards: What Role for the WTO?’ [2001] *The WTO as an International Organization*, Chicago, IL 231.

as unsustainable agriculture and aquaculture practices, business investment that adversely affects environmental quality and animal welfare, etc.<sup>38</sup> The “naming and shaming” of public has visibly affected large international firms, compelling global firms to act more responsibly. As a result, food companies show their commitment to sustainable development by binding themselves to VSSs that elaborate on such interests.<sup>39</sup> Some food MNCs adopted their own company-specific codes of conduct and some adopted industry-wide norms on environmental protection, animal welfare and labour standards etc. For instance, Nestle has started life cycle assessment studies and collaborated on broader industry initiatives to reduce environmental impact of their product packaging.<sup>40</sup> This trend has enabled MNCs to more easily acquire and disseminate information about global environmental sustainability and animal welfare practices, further facilitating the growth of VSSs.

Income growth and the expanding knowledge of consumers have also contributed to private VSSs on environmental sustainability and animal welfare. As people become more affluent, they tend more readily reach social consensus on what are appropriate environmental sustainability initiatives and animal welfare standards, and can afford implement solutions to these concerns. Additionally, “industries seek safety in numbers”,<sup>41</sup> forming a “herd effect”, by subscribing to industry-wide VSSs and partnering with NGOs and industry associations to monitor their supply chain. Corporate sustainable practices have already become a business “norm” with VSSs serving as important components of business risk management.

Lastly, social issues, particularly environmental concerns are often complicated by externalities associated with global problems that transcend national boundaries. The rapid spread of the export-oriented food industry in a numerous countries has significantly depleted natural resources and generated substantive negative externalities, such as waste in the environment. In response, NGOs have actively participated in regulation at both national and international levels to address this free-riding problem, and have challenged global firms to internalise their negative environmental and social externalities. Cross-actor cooperation with the participation of NGOs and MNCs is believed to enhance

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38 Tim Bartley and Curtis Child, ‘Shaming the Corporation: Globalization, Reputation, and the Dynamics of Anti-Corporate Movements’, *annual meeting of the American Sociological Association, New York*. Available at [http://www.allacademic.com/meta/p184737\\_index.html](http://www.allacademic.com/meta/p184737_index.html). (Accessed March 1, 2009.) (2007).

39 Bernd Meulen, ‘The Anatomy of Private Food Law’ (2011).

40 Nestlé, ‘Nestlé’s Life Cycle Approach: Environmental Sustainability’ (12 October 2010) <[https://www.nestle.com.sg/media/newsandfeatures/2010\\_nestle\\_life\\_cycle\\_approach](https://www.nestle.com.sg/media/newsandfeatures/2010_nestle_life_cycle_approach)> accessed 29 September 2024.

41 A Maitland, ‘Industries Seek Safety in Numbers’ (2005) 1 Financial Times, Special Report: Focus on Ethical Supply Chains.

the effectiveness and legitimacy of those social norms while alleviating the burden on states in implementing these norms.

In the unconventional non-safety food governance, where multi-dimensional issues co-exist, national regulations and international agreements are weak, lacking or non-existent. Some environmental and social values are embedded into the marketplace emerging as alternatives to regulate market behaviour,<sup>42</sup> and playing important roles in the global food market.

Private initiatives and standards usually emerge and are seen as filling the void in public regulations and functioned as the “rule of the game” in the global food business. Although these private VSSs are voluntary in nature, once a producer, manufacturer or supplier is signed in, they are subject to the enforcement. This mechanism resembles state regulation and is effectively mandatory, as firms cannot easily abandon a VSSs without consequences due to supply and demand pressures. Moreover, VSSs are forcing domestic and even worldwide standards upwards by combining social, economic and environmental interests in the private policy-making process.<sup>43</sup>

The upward pressure on VSSs can generate direct material incentives along the supply chain and create niche markets for food businesses in order to alter their competitiveness within the industry. Firms develop their own standards to encourage the market uptake to maximise profit, often promoting their VSSs through public and marketing relations. Such VSSs can create product differentiation and lead to a premium price in the marketplace. Certification schemes of these standards formally differentiate products based on the qualities associated with the product, process and the place of production.<sup>44</sup> Business operators may be directly appealed to with the lure of a price premium, and promote food production in ethical, environmentally sustainable and socially just ways through a range of practices including the use of VSSs, third party auditing and product labelling.

Private VSSs also bring together many diverse actors and interests in order to facilitate solutions to global environmental, social and economic problems. They provide forums for discussion and consensus, on both technical and practical aspects of the food industry, offering mechanisms to verify compliance. These forums allow firms to learn from one another, formulate best practice and learn how to respond effectively to improve their performance. Through standard development, certification and accreditation processes, cooperation

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42 John Ruggie, ‘Global Markets and Global Governance: The Prospects for Convergence’, *Global liberalism and political order: Toward a new grand compromise* (2007) 23.

43 Errol E Meidinger, ‘Private Environmental Regulation, Human Rights, and Community’ (1999) 7 *Buff. Envtl. LJ* 123.

44 Brian Ilbery and others, ‘Product, Process and Place: An Examination of Food Marketing and Labelling Schemes in Europe and North America’ (2005) 12 *European Urban and Regional Studies* 116.

among individual stakeholders in the food supply chain is strengthened. A typical example of such is Forest Stewardship Council (FSC), which is regarded as a “solution facilitator” in global environmental politics, bringing together divergent actors to negotiate standards and procedures and build consensus on important issues.<sup>45</sup>

Lastly, private schemes act as knowledge and norm brokers, bringing together a wide range of experts and practitioners to develop and disseminate knowledge on sustainable, ethical, and quality-enhancing practices in the food industry. Information flows include both top-down and bottom-up processes, allowing for the wide dissemination of information on sustainable practices, consumer behaviour, and existing public regulations at both national and international levels.

The development of private VSSs has posed serious challenges for international trade and raised public concerns. Adopting higher environmental, social and animal welfare standards can increase costs for firms. While global companies and food industries have the momentum to create or participate in a VSS for financial and reputational benefits, profit maximisation via private regulations does not always guaranteed. For example, EurepGAP (now GlobalGAP), initiated by European supermarkets for certification of agriculture, gained global significance as more producers and retailers joined.<sup>46</sup> However, as virtually all major global food companies subscribed to its codes of good agriculture practices, the competitive advantage companies sought from these practices diminish. In addition, global sourcing trends in the food industry have led to the dissemination of VSSs through supply chains. International food giants like Walmart and Tesco strive to create value by sourcing low-cost and high-quality food often demanding certification of VSSs. This imposes high compliance costs for upstream suppliers, particularly small farmers and small and medium enterprises.

Moreover, environmental, social, and animal welfare standards are often perceived as potentially discriminatory in international food trade, especially by developing countries. Unlike the traditional state-centric international policy making systems (e.g. UN and WTO) that provide developing countries with formal equality to represent their interests,<sup>47</sup> private VSSs usually have problems of North-South inequality in their standard-setting and implementation processes. Developing countries are often underrepresented in standard setting

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45 Philipp Pattberg, ‘What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)’ (2005) 5 *International Environmental Agreements: Politics, Law and Economics* 175.

46 Meulen (n 39).

47 Robert Falkner, ‘Private Environmental Governance and International Relations: Exploring the Links’, *International Environmental Governance* (Routledge 2017).



agencies, lack information about new standards and face difficulties when pushing for discussions about technology transfer and a phase-in period.<sup>48</sup>

The autonomy of private VSSs from sovereign states has also sparked controversies among academics, and imposes challenges on world politics and international trade systems. The proliferation of private VSSs are gaining widespread support owing to increasing societal value placed on environmental concerns and increasing environmental group membership. Economic actors make free choices about whether to support and operate under certain rules and procedures laid out in VSSs, granting them authority in market transactions along the supply chain.<sup>49</sup> Many of these private VSSs further seek recognition as international standardisation bodies, and actively seek to gain legitimacy in the context of international trade law.<sup>50</sup> However, to what extent the WTO disciplines spill over into private VSSs remains a topic of ongoing discussion.

### III. THE INTERPLAY OF PUBLIC AND PRIVATE REGULATIONS ON VSSs

#### A. INTERPLAY OF PRIVATE AND TRADITIONAL STATE-CENTRIC REGULATIONS

Regulatory failure, in other words “governance deficit”,<sup>51</sup> in the global economy is arguably one of the major drivers resulting in the flourishing of VSSs in the private sector. State usually set bottom-line safety and minimum quality standards and assessment metrics as common grounds for different market players. The rise of transnational supermarket chains, the growth of large food manufacturers, and the increase in the global sourcing of fresh and processed food products, all challenge the existing capacities of national governments to regulate both the structure and the scale of these food chains, where business activities often take place beyond their borders,<sup>52</sup> and regulatory focus moves from the conventional bottom line safety and minimum quality standards. Sadly, national governments have not yet developed effective mechanisms to govern these unconventional and multi-dimensional factors in the global food production chain, nor have they participated in the enforcement of VSSs, which

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48 Jennifer Clapp, ‘The Privatization of Global Environmental Governance: ISO 14000 and the Developing World’ (1998) 4 *Global Governance* 295.

49 Benjamin Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority’, *International environmental governance* (Routledge 2017).

50 Steven Bernstein and Benjamin Cashore, ‘Can Non-State Global Governance Be Legitimate? An Analytical Framework’ (2007) 1 *Regulation & governance* 347.

51 Peter Newell, ‘Managing Multinationals: The Governance of Investment for the Environment’ (2001) 13 *Journal of International Development* 907.

52 Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International organization* 421.

remain voluntary and are bound by contracts. In many cases, private regulation developers also do advocacy campaigns and encourage governments to reference their standards when developing legislation and procurement policies.

Given that many VSSs are consistent with public approaches to business regulation, and the advantages of private regulations being that environmental and social impacts are comparable if not greater than many national regulations in food industry, governments usually regard private regulations as important sources of leverage over food business activities.<sup>53</sup> As such, they serve as facilitators to private regulations in the food industry by bringing companies, NGOs and trade unions together, even in some cases providing them with initial funding to reach common standards in the marketplace.

Some governments have played an important role in promoting and supporting the establishment of VSSs. The Irish government works with the fish farming industry to develop an environmental code of practice for Irish aquaculture companies and traders. This is so as to ensure the sector produces the highest standard of food, and that business activities interact positively with the environment. These environmental and quality efforts have also been assisted by EU funding.<sup>54</sup> Similarly, the UK government have supported their milk industry's code of practice, and engaged in the process to help reach the final agreement on the initiative, in order to improve the competitiveness of British milk products versus imports in the exports market.<sup>55</sup> Several European governments promote companies' sustainable practices by encouraging public pension funds to consider companies' environmental and social performance in investment decisions. They also rely on private sectors to develop and enforce VSSs.<sup>56</sup> Additionally, VSSs also target governments to adopt their standards in public procurement policies leveraging states' market influence through buying power. The European Commission published a handbook advising members on green public procurement to achieve sustainable consumption and production, recognising the importance of public sector spending on goods and services. National governments have the discretion to develop national action plans to support environmental and wider sustainable development objectives based on existing international standards.<sup>57</sup> In a related effort, the OECD has launched a

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53 David Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49 *Business & Society* 68.

54 Irish Sea Fisheries Board BIM, 'Environment Management System for Aquaculture (ECO-PACT)' <<https://bim.ie/aquaculture/sustainability-and-certification/environment-management-system-for-aquaculture-ecopact/>> accessed 30 September 2024.

55 Welsh Affairs Committee House of Commons, 'The Voluntary Code of Practice in the Dairy Sector: Government Response to the Committee's First Report of Session' (2013) 2013–14.

56 Kristina K Hermann, 'Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study' (2004) 11 *Indiana journal of global legal studies* 205.

57 European Commission. Directorate General for the Environment. and ICLEI – Local Govern-

new agenda on best practices for sustainable procurement, aiming to use green public procurement as a smart governance tool to achieve sustainable policy objectives.<sup>58</sup>

## B. NATIONAL REGULATORY AUTONOMY UNDER INTERNATIONAL LAW

In order to achieve public policy objectives, governments often enact technical regulations or product standards in order to achieve public policy goals and they fall under the remit of the WTO-GATT and the TBT Agreement, which aim to balance the often competing objectives of trade liberalisation and the protection of societal values. Articles I and III of the GATT prohibit discriminatory regulations that modify the conditions of competition, both *de jure* and *de facto*, between imports from a WTO member and any other imports (the most-favoured-nations requirement), and between imports from one member and the “like domestic products” (the national treatment requirement). The non-discrimination principle precludes any WTO member from using trade measures to place other members at a disadvantage for having lower standards; for example, lower environmental and social standards. However, Article XX also recognises that members’ regulatory policies and provides exceptions to these general non-discrimination rules in Article XX paragraph (a) to (j) pursuant to certain societal values. Specifically, Article XX allows for trade restrictions “necessary to protect public morals”<sup>59</sup>, “necessary to protect human, animal or plant life or health”<sup>60</sup>, and “relating to the conservation of exhaustible natural resources”<sup>61</sup>. It has also been required by the chapeau of Article XX that such exceptions shall be applied in a way that does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. The interpretation of these exceptions has evolved over time. For instance, in the US-Shrimp dispute, the Appellate Body ruled that “exhaustible natural resources” should be interpreted in light of contemporary environmental concerns.<sup>62</sup> This is a landmark decision in WTO law, in that it recognises the legitimate environmental concerns of its members as justifiable under the WTO regime.

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ments for Sustainability., *Buying Green! :A Handbook on Green Public Procurement : 3rd Edition*. (Publications Office 2016) <<https://data.europa.eu/doi/10.2779/246106>> accessed 30 September 2024.

58 OECD, *Going Green - Best Practices for Sustainable Procurement* (OECD 2015) <[https://www.oecd-ilibrary.org/governance/going-green-best-practices-for-sustainable-procurement\\_3291acbf-en](https://www.oecd-ilibrary.org/governance/going-green-best-practices-for-sustainable-procurement_3291acbf-en)> accessed 30 September 2024.

59 General Agreement on Tariffs and Trade 1994 art XX para(a).

60 *ibid* para(b).

61 *ibid* para(g).

62 Appellate Body Report, ‘United States- Imported Prohibition of Certain Shrimp and Shrimp Products’ (1998) WT/DS58/AB/R para 129.

This decision is in accordance with the Preamble to the Marrakesh Agreement, which explicitly acknowledges the objective of sustainable development.<sup>63</sup>

The non-discrimination principle is also evidenced in the TBT Agreement that specifically deals with product standards. Article 2.1 of the TBT Agreement is similarly formulated to Article III:4 of the GATT,<sup>64</sup> but contains both the national treatment and the most-favoured nation treatment obligations.<sup>65</sup> Unlike the GATT, the TBT Agreement does not contain a general exception provision for public policy regulations,<sup>66</sup> raising concerns that a prohibition on the discriminatory treatments of “like products” is absolute. This creates legal uncertainty on the regulatory autonomy of states on public policy regulations.

In addition to the non-discrimination obligation required by Article 2.1, Article 2.2 provides that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective”.<sup>67</sup> Here, Article 2.2 refers to a “legitimate objective” and uses the term “*inter alia*” in the text of the article to highlight some important social values including protection of human health or safe, animal or plant life or health, and the environment that may be involved in national regulations. While Article 2.2 of the TBT Agreement does not provide an exhaustive list of legitimate objectives, and the exceptional social values in public policies are “inherent rights” of WTO members, the TBT Agreement demands non-discriminatory measures and questions the reasonableness of the regulation itself.<sup>68</sup> These obligations strictly constrain the domestic regulatory space for setting national public policies with social objectives. Therefore, can domestic regulations with legitimate social objectives be excluded from the non-discrimination requirement of Article 2.1?

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63 Amrita Narlikar, Martin James Daunton and Robert Mitchell Stern, *The Oxford Handbook on the World Trade Organization* (Oxford University Press, USA 2012) 522.

64 See Article III.4: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of *national origin* in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

65 See Article 2.1 of the TBT Agreement: Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of *national origin* and to like products *originating in any other country*.

66 Appellate Body Report, ‘United States - Measures Affecting the Production and Sale of Clove Cigarettes’ (1998) WT/DS406/AB/R para 101.

67 See Article 2.2 of the TBT Agreement: Members 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. For this purpose, technical regulations shall *not be more trade-restrictive than necessary* to fulfil a *legitimate objective*, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

68 *Ibid.*

There are no agreed conditions laid down in the TBT Agreement for such regulatory space. The dispute settlement bodies, mindful of their interpretative obligations, rely heavily on the customary international law principle of treaty interpretation as codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) and follow the literal interpretation approach, reading the words in good faith according to the ordinary meaning of the words and in light of the objective and purpose of the agreement.<sup>69</sup> However, as words can have various meanings, the text-first approach is not always feasible and may lead to undesirable outcomes. However, recognizing the limitations of this text-first approach, a more systematic and holistic interpretation of Article 2.1 and Article 2.2 of the TBT Agreement is necessary.

The Preamble of the TBT Agreement clearly provides that “no country should be prevented from taking measures necessary for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate.”<sup>70</sup> Considering this context, the Appellate Body has sought an intended balance between trade liberalisation and the regulatory autonomy of members to achieve societal values. In *US – Clove Cigarettes*, the Appellate Body held that the balance of the Preamble of the TBT Agreement struck between trade liberalisation and members’ rights to regulate was not, in principle, different from that between the national treatment obligations of Article III and the general exceptions under Article XX. It clarified that Article 2.1 of the TBT Agreement allows pursuit of legitimate objectives like preventing youth smoking, provided that domestic “like products” receive equal treatment.<sup>71</sup> In the *US – Tuna II* case, the Appellate Body further confirmed this approach by developing a two-steps analytical framework regarding the interpretation of Article 2.1: (i) whether the measure modifies the conditions of competition in the relevant market to the detriment of imported like products; and (ii) whether such a detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported like products.<sup>72</sup> These rulings have therefore carved out regulatory space for members under Article 2.1 primarily because TBT Agreement does not contain general exceptions as comparable to Article XX. The conditions set out in Article XX for preventing abuse of exceptions lend legitimacy to the WTO adjudicative bodies in their interpretation of Article 2.1.

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69 Vienna Convention on the Law of Treaties art 31.

70 Agreement on Technical Barriers to Trade para 6.

71 Appellate Body Report, ‘United States - Measures Affecting the Production and Sale of Clove Cigarettes’ (n 66).

72 Lukasz Gruszczynski, ‘Re-Tuning Tuna? Appellate Body Report in US–Tuna II’ (2012) 3 European Journal of Risk Regulation 430.

In the WTO case law, the Appellate Body has also carefully established criteria to limit the use of such regulatory autonomy of members, so as to ameliorate the risk of abuse. In the *US – Tuna II* the Appellate Body found that the “dolphin safe” label on tuna products was not even-handed because the United States failed to demonstrate that the detrimental impact of the US measure stemmed exclusively from a *legitimate regulatory distinction*.<sup>73</sup> The Appellate Body also proposed an analytical approach in the interpretation of Article 2.2, requiring (i) the existence of a legitimate objective, (ii) the degree to which a contested measure contributes to such an objective, (iii) the trade-restrictiveness of a contested measure, and (iv) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure.<sup>74</sup> In the *US – COOL*, where Canada respects that the US mandatory Country of Origin Labelling (COOL) requirement for beef and pork unduly burdened Canadian and American livestock supply chains and discriminated against imported beef and pork for feed or immediate slaughter, the Appellate Body found that these measures arbitrary and unjustifiable, noting that their impact did not stem exclusively from a legitimate regulatory distinction, but, instead, reflects discrimination in violation of Article 2.1 of the TBT Agreement.<sup>75</sup>

The question of whether a technical regulation’s detrimental impacts on imports stems exclusively from a legitimate regulatory distinction must be examined case by case. If affirmative, and if measures are not motivated by unrelated factors, no violation of Article 2.1 exists. Although the limitations on regulatory flexibility is *ad hoc* and case-law driven, they close loopholes for protectionism balance members’ regulatory *autonomy* with trade liberalisation. It is therefore concluded that the TBT Agreement does not close the door for legitimate public policy regulations, but rather goes beyond the non-discrimination to ensure reasonableness and legitimacy of technical regulations. This allows sufficient scope for members to achieve their legitimate policy objectives through regulation, and achieve trade liberalisation while preventing potential disguised protectionism.

Another unsettled regulatory scope under the GATT and the TBT Agreement relates to process and production methods (PPMs). PPM based trade measures have become increasingly important instrument in international trade and import restrictions based on PPMs have been used in several MEAs, as well as in national measures to promote the sustainable development and to

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73 Appellate Body Report, ‘United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products’ (2012) WT/DS381/AB/R para 298.

74 *ibid* 322.

75 Appellate Body Report, ‘United States - Certain Country of Origin Labelling (COOL) Requirements’ (2012) WT/DS384/AB/R paras 347–349.

ensure agri-food quality. Whether standards based on PPMs can be used as a legitimate means of distinguishing and thereby discriminating between like products remains a question. The issue of PPMs is largely driven by consumer choice rather than just product availability.<sup>76</sup> This is particularly true in the food industry, where consumers, notably from industrialised countries, are increasingly concerned with how and where products are manufactured or processed, how natural resources extracted or harvested, and other sophisticated qualitative aspects of production.

Using PPMs as a basis for trade policies remains one of the most contentious issues in international trade law. The recent WTO case involving the EU highlights the increasing use of PPM-based trade measures for sustainability purposes. This case established that regulatory distinctions based on PPMs are not a *priori illegal* under WTO law, and that when production methods are taken into consideration, products might be perceived substantially different.<sup>77</sup> However, many PPMs challenged failed to pass certain legal tests in WTO jurisprudence. To maintain a member's international trade commitments, such measures must fulfill specific requirements, including passing the chapeau test of GATT Article XX, being "necessary" to achieve a "legitimate policy objective" and being based on "international standards" where applicable. These criteria ensure that PPM-based measures strike a balance between allowing members to pursue legitimate policy goals and preventing disguised restrictions on international trade.

In summary, the regulatory space for domestic regulation with social objectives, especially public VSSs remains ambiguous to date. This "constructive ambiguity"<sup>78</sup> is not rare in international agreements, resulting from negotiations and compromises. Such ambiguity allows for multiple interpretations and relies heavily on dispute settlement bodies to clarify provisions in line with the objectives and purposes of the agreement. Despite the differing policy priorities and compliance cost in different countries, the TBT Agreement also create strong incentives for members to make domestic technical regulations consistent with relevant international standards.<sup>79</sup>

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76 Robert Reed, 'Process & Production Methods (PPMs) & the Regulation of International Trade', *The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States* (2005).

77 Panel Report, 'European Union and Certain Member States- Certain Measures Concerning Palm Oil and Oil Palm Corp-based Biofuels' (2012) WT/DS600 /R para 7.542

78 Peter Van den Bossche, 'The WTO at 20: A Glass Half Full, Half Empty or Broken?', *Settlement of international trade disputes: achievements and challenges* (Asser 2015).

79 Article 2.4 of the TBT Agreement provides that WTO members are obliged to use relevant existing or imminent international standards as a basis for technical regulation. Article 2.5 further provides that technical regulations adopted in accordance with international standards are afforded the rebuttable presumption of not unnecessary obstacles to international trade.



### C. PRIVATE VSSS IN INTERNATIONAL LAW REGIME

Globalisation practices and their impact on food business actors, particularly multinational corporations (MNCs), have given rise to the notion of corporate social responsibility (CSR). The CSR movement underlines that implementation of sustainable development goals is not solely the responsibility of public regulations but also requires efforts from business and civil society. There has been increasing interest in private sector involvement in global food governance, especially in environmental governance, resulting a proliferation of private VSSs. These VSSs transcend national borders, and their decentralised, flexible and *de facto* mandatory character creates horizontal mechanisms in the market.<sup>80</sup>

While private VSSs are not the initial focus in neither international law nor sustainable development regimes, they have become increasingly significant. Research shows that a broad range of normative materials, mostly voluntary, are being converted into international obligations. Simultaneously, many international standards emanate from VSSs and private-public partnerships in which non-state actors are the driving force.<sup>81</sup> On the other hand, they have raised concerns in the international trade markets. Many private VSSs aimed at PPM-based standards fall outside the scope of international trade regulations. Such standards have imposed high costs on producers and are in effect limited in the participation of small farmers, food SMEs and food producers in developing countries. Do private VSSs fall under the purview of international law?

The WTO's stance against unjustifiable trade distortions by governments raises questions about similar distortions caused by private actors. However, the current legal system only address governmental conduct with limited exception for private entities granted special privileges by governments. Article XVII of the GATT regulates state trading under non-governmental enterprises, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, are subject to the general principles of non-discrimination. The TBT also imposes obligations on voluntary standards enacted by non-governmental bodies. Central government bodies do not require or encourage non-governmental bodies to act in a way inconsistent with the TBTs obligations.<sup>82</sup> These requirements suggest that discrimination not allowed

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80 Robert O Keohane and Joseph S Nye, 'Redefining Accountability for Global Governance' in Miles Kahler and David A Lake (eds), *Governance in a Global Economy* (Princeton University Press 2003) 386 <<http://www.jstor.org/stable/j.ctv1pdr77.19>> accessed 28 September 2024.

81 Robert Howse, 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards"' [2006] *Constitutionalism, multilevel trade governance and social regulation* 383.; Kenneth W Abbott and Duncan Snidal, 'International standards' and International Governance' (2001) 8 *Journal of European Public Policy* 345.

82 Agreement on Technical Barriers to Trade (n 70) art 3,4 and 8.

for government entities should not be adopted by the private sectors.<sup>83</sup> However, the definition of “non-governmental bodies” in the TBT Agreement has been defined as:

“A 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.”

A strict and text-first interpretation suggests that only bodies conferred power by states fall under the TBT Agreement’s purview, excluding NGOs and MNCs without such power. Only international criminal law that makes international legal obligations directly enforceable to private actors including MNCs, NGOs and individuals.<sup>84</sup> International trade rules primarily imposed on members, relying national law to translate the obligations to private actors within their territory. No international instrument disciplines NGO conduct, despite their increasing influence on industry and governmental politics.<sup>85</sup> In essence, while WTO provisions aim to prevent members from circumventing obligations through private actors, the international legal framework remains limited in directly regulating private entities’ conduct in global trade.

Apart from the simple VSSs developed by NGOs and MNCs, some market-driven private VSSs have been fully developed and widely applied across the food industry. They go beyond the simple goals of creating a niche market for a single corporation, and promote socially responsible and qualitative enhancing behaviours in the entire sector through the governing arrangements they have developed.<sup>86</sup> They not only create standards for food products, but also regulate processes of production and their related environmental and social impacts. These private regulations eventually expend efforts to gain recognition as legitimate and relevant international standards. Examples include the Marine Stewardship Council, one of the most important organisations promoting sustainable fishing industry, and GlobalGAP, an umbrella standard of safety, environmental protection and animal welfare. Such standards and initiatives that operate independently of governments may also produce a similar effect to technical regulations in the marketplace.

The TBT Agreement has recognised the importance of international standards, and conformity assessment systems can improve the efficiency of

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83 Tim Josling, ‘Private Standards and Trade’ in Joseph A McMahon and Melaku Geboye Desta (eds), *Research Handbook on the WTO Agriculture Agreement* (Edward Elgar Publishing 2012) <[https://ideas.repec.org/h/elg/eechap/13302\\_8.html](https://ideas.repec.org/h/elg/eechap/13302_8.html)>.

84 Harold Hongju Koh, ‘Separating Myth from Reality about Corporate Responsibility Litigation’ (2004) 7 *Journal of International Economic Law* 263.

85 Joost HB Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO “Missing the Boat”?’

86 Steven Bernstein and Benjamin Cashore, ‘Can Non-State Global Governance Be Legitimate? An Analytical Framework’ (2007) 1 *Regulation & governance* 347.

production and facilitate the conduct of international trade, and thus encourage the development of international standards. The TBT Agreement provides that members shall use *relevant international standards* as a basis for their technical regulations.<sup>87</sup> However, it never explicitly mentions what constitutes a relevant international standard for the purposes of Article 2.4. Furthermore, the TBT Agreement defines standards as:

“document approved by a *recognised 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.”

In this definition, the TBT Agreement once again does not explicitly define criteria for a “recognised body”,<sup>88</sup> nor provided a list of international standardisation bodies whose standards counts as “international standards”. There is no WTO ruling on the meaning of “recognised body”. This ambiguity necessitates case-by-case analysis to determine whether a standard is relevant under the TBT Agreement. The TBT Agreement, although being fully aware of private standards when it was drafted, seems to fail to address the situation whereby a member adopts or refers to a private market standard as a basis for technical regulations, and whether such standard setter would be considered as a recognised body. This contrasts with the SPS Agreement, which explicitly refers to the “three sisters” (Codex, IPPC, and OIE) as competent international organisations for developing food safety, plant, and animal health standards.<sup>89</sup> For entities that do not explicitly identified as international standards may be examined by a panel if they are: (i) recognized by one or more WTO Members as a standardization body, (ii) involved with activities of international standardisation organisations, (iii) open to involvement from other WTO Members, and (iv) has accepted the Code. The panel will also determine (v) whether any WTO Members promulgated by the entity, and (iv) if the aim of its standards further a legitimate objective within TBT Article 2.2.<sup>90</sup>

The TBT Agreement also sets out Code of Good Practice (Annex 3) for standardising bodies, including non-governmental and industry standardising bodies, to prepare, adopt and apply standards. The Code is extensive and includes fundamental obligations to avoid unnecessary trade barriers. The Annex 4 of the TBT Committee’s Second Triennial Review (2000)<sup>91</sup> offers additional guidelines on how standardisation bodies should conduct their work. Despite these, the

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87 Agreement on Technical Barriers to Trade (n 70) art 2.4.

88 TBT Agreement draws from ISO/IEC Guide 2:2004 for guidance. Agreement on Technical Barriers to Trade (n 70) annex 1.2.

89 Agreement On The Application Of Sanitary And Phytosanitary Measures, Annex A para 3.

90 Arthur E Appleton, ‘Supermarket Labels and the TBT Agreement: Mind the Gap’ (2007) 4 Bus Law Brief 10.

91 WTO Committee on Technical Barriers to Trade, ‘Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade’ (2000) G/TBT/9.

TBT Agreement does not contain any direct obligation for non-governmental bodies to comply with these guidelines, nor is there any mechanism for assessing compliance. To date, while the ISO has enjoyed an unchallenged position as an international standardising body under the context of the TBT Agreement, increasing concerns on VSSs, may challenge ISO's dominance in certain areas.

#### **IV. BRIDGING THE PUBLIC AND PRIVATE DIVIDE**

Compared with food safety, environmental sustainability and animal welfare, and qualitative issues targeting niche market in international food trade have received lesser attention, because of their “low politics” nature. VSSs, as a result of social and environmental movements, favour market-enabling regimes over state regulatory regimes, and have challenged private sector behaviours in favour of greater environmental sustainability and food quality. Although they exist outside the confines of the territorially-based state regulatory system, this governance model has created global awareness on sustainable food production and greater food quality. These values penetrated across borders and throughout the supply chain. Do they create challenges to public regulatory authorities?

It is quite clear, in general, regulatory tools available for disciplining VSSs are very limited, both domestically and internationally. However, the growing engagement of NGOs and MNCs with the public sector to create private governance mechanisms on multi-dimensional non-safety issues, particularly on environmental sustainability of the food industry reveals that private governance is rather interdependent with traditional public regulations. This trend blurs the boundary between public and private regimes, leading hybrid governance. Food MNCs usually “wield power with responsibility”<sup>92</sup> to promote global environmental sustainability and social responsibility norms, influencing public policy through lobbying. Moreover, VSSs rely on public regulatory authorities for legitimacy and adequacy. ISO exemplifies this hybrid approach gaining significant influence in the public arena. The “double consensus” mechanism, among stakeholders mainly in industry and across countries,<sup>93</sup> enables the ISO environmental management standards to acquire national and international legal significance. Some countries have adopted ISO 14000 as an official standard, and it serves as a reference point in the TBT Agreement. Similar hybrid governance of VSSs created by transnational policy networks consisting of both industry representatives from the private sector and regulatory officials are emerging. VSSs in the food industry is rather complementary to public authorities instead

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92 Peter Newell, ‘Environmental NGOs and Globalization: The Governance of TNCs’ [2000] *Global social movements* 117.

93 Steven Bernstein and Erin Hannah, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’ (2008) 11 *Journal of International Economic Law* 575.

of supplanting in nature.<sup>94</sup> A simple dichotomous divide of private and public interplay will not help in understanding current dynamic global governance. Ultimately, in the long term, the accountability of VSSs on multi-dimensional social issues depends on the extent to which they are integrated with and reinforced by the state-based and enforced regulatory policies at both national and international levels.<sup>95</sup> Accordingly, public regulations have to consider how to integrate those VSSs into domestic law, and strengthen domestic regulations in those “low politics” areas of environmental sustainability and social responsibility as well as other product quality regimes.

The WTO-related agreements do not militate against the use of private standards; neither did they pull themselves into political games to decide which standards are authoritative. They carved out some regulatory space for national public policy with legitimate objectives, implicitly allowing policy space for non-state private governance including VSSs,<sup>96</sup> which primarily operate directly in the market and outside the purview of WTO discipline. So long as private VSSs are credible and result in positive environmental and social impacts, the competition between various schemes in the marketplace can be deemed beneficial.<sup>97</sup> Some strict NPR-PPM requirements in VSSs, particularly that on environmental externalities, may have positive benefit for sustainable development by removing some hidden costs of environmentally unfriendly practices.

Having realised this high number of technical regulations and standards and their potential effect on international food trade, the TBT Agreement encourages the use relevant international standards to avoid duplication, overlap or even competing standards that may cause trade barriers. It further provides harmonisation, equivalence and mutual recognition to deal with high number of regulations and standards. The TBT Agreement encourages members to participate, within the limits of their resources, in the work of international bodies for the preparation of standards,<sup>98</sup> and provides guidelines or recommendations for conformity assessment procedures<sup>99</sup> with the view of harmonisation. However, reaching consensus on technical regulations and standards can take years, and the result may not necessarily be positive; as such, equivalence has been introduced as a complementary approach to technical

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94 Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment 2013).

95 Halina Ward, *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock* (Citeseer 2004).

96 Kevin Gallagher, *Putting Development First: The Importance of Policy Space in the WTO and IFIs* (Zed Books 2005).

97 Bernstein and Hannah (n 92).

98 Agreement on Technical Barriers to Trade (n 70) art 2.6.

99 *ibid* 5.5.

harmonisation. Members are encouraged to accept technical regulations different from their own if they can fulfil the same policy objectives, even if through different means.<sup>100</sup> Multiple testing and certification may also be required accordingly. Such diversity of standards significantly increases the cost for producers. Therefore, if a product can be tested once and the result can be accepted in all market, costs of compliance will be drastically reduced. The TBT Agreement additionally encourages members to enter into negotiations with other members for the mutual acceptance of conformity assessment results.<sup>101</sup>

Regulatory cooperation is also emphasised in some mega-regional trade agreements (RTAs), such as the Transatlantic Trade and Investment Partnership (TTIP), to resolve conflicting food standards by exploring possible avenues to attain “regulatory compatibility”.<sup>102</sup>

Harmonisation, equivalence and mutual recognition to avoid a “race to the bottom” and alleviate the high cost of multiple compliance and certification can also be applied in the private sector. As a policy approach, harmonisation and mutual recognition of VSSs is desirable and possible. There have been some private schemes that are developing forums for the harmonisation of VSSs from around the world. Indeed, harmonisation, equivalence and mutual recognition can not only exist within a sector, but can happen across sectors. This cross-sector cooperation may enhance coherence in the different standards enacted, and bolster the credibility and effectiveness of these standards. The TTIP also requires multi-stakeholder advisory processes including representatives of citizen, consumer, industry and interest groups to support regulatory cooperation and promote regulatory efficiency and coherence. The ISO industry voluntary standards also move into the public policy arena in many countries, with active involvement from the public sector to create a forum for harmonisation. However, harmonisation for many NPR-PPMs requirements imposed by either public sector or through VSSs seems highly problematic and challenging, especially where private VSSs are to the extent that they mark comparative advantage for example supermarket labelling schemes that target on market segmentation.

## V. CONCLUSION

This article explored the interrelationship among private VSSs, national regulations, and international regulations and discuss how they interplay with one another in the agri-food sector. The regulatory space for domestic regulation and with social objectives and VSSs under the WTO are still ambiguous to date. Analysis of case law decisions suggests that conditioned regulatory space

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100 *ibid* 2.7.

101 *ibid* 6.3.

102 The EU Proposal for a Chapter on Regulatory Cooperation art 10.2.

exists within WTO discipline for national technical regulations with legitimate objectives, such as environmental sustainability and animal welfare. However, significant gaps persist in the international trade law with respect to the treatment of VSSs. The applicability of WTO obligations to private standard-setting activities remains unclear, with no consensus on the interpretation of relevant WTO provisions. Most private VSSs targeting on product differentiation and certain niche market may fall outside the TBT Code of Good Practice, potentially absolving members of responsibility for these private activities. Despite the differences among private VSSs, harmonisation and equivalence in many cases can happen across sectors among technical regulations and VSSs, so as to achieve the equilibrium of international trade liberalisation and the promotion of social and environmental sustainability in the food industry.



