Private Standards or Market Standards:

in search for legitimacy and accountability in the international trading system

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1. Introduction

In the last decades, many have discussed the impacts of globalization and the spread of a new phenomenon that comes with it – global governance, which means multiplication of international actors, proliferation of distinct norms and manifestation of different concerns from such a multiplicity of 'regulators' and 'regulation'.

Multilateral and governmental initiatives have been incapable of addressing these global challenges that have spread with the 'emergence of new non-state market regulatory initiatives', which are aimed at governing 'production, production process and supply chains across the globe according to a set of non-governmental private standards' – rules that regard different and complex issues, such as food safety, environmental protection, labor conditions, human rights protection and others[3].

There are many arguments for and against private standards, but none of them can ignore the fact that private standards have become a reality on global trade. Therefore it is urgent the need to better understand and analyze the institute of private standards from a developing country perspective, in order to maximize their positive points and minimize their negative ones, overcoming policy inertia as well as market failures.

In general, private standards have faced many concerns and have become a big challenge for the multilateral trade system. Some of the challenges that international trade governance has faced with private standards may be listed as such:

i) multiplicity of interoperability of private standards, which implies lack of harmonization and equivalence on similar standards, including compliance costs, since there are multiple standards for a single product;

ii) marginalization of small holders and developing and least developed countries due to complex, rigorous and multi-dimension standards;

iii) concerns that private standards undermine the structure of the WTO Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytossanitary Measures (SPS);

iv) risk that private standards are disguised and arbitrary measures that undermine all the globalized structure of free trade;

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[3] Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters, Private standards and global governance, Leuven Global Governance Series, 2012, at 01.

v) multiplication of private standards that may put at risk their sustainability objectives and create confusion to producers and consumers ('green-washing');

vi) lack of a multi-dimensional approach on addressing risks for the composition of private standards since many of the standards set are not science-based;

vii) effects of many private standards that are part of global supply chains, which generates concerns on national policies and priorities and respect to natural trade intensity of exporting countries[4].

In summary, all the concerns herein expressed are related to three main issues: legitimacy, accountability and trade barriers.

In order to better understand the issue of private standards, this paper aims at pointing out their main features as well as questions related to their terminology, legitimacy and accountability.

Firstly, this paper proposes a new terminology for private standards – 'market standards', with the purpose of differentiating them from other well stablished international private standards.

Secondly, it comes up with the conclusion that, in order to deal with the overall problems associated with the proliferation of private standards, the negotiation of a meta-regulation to deal with their complexity is urgently necessary. It argues that it is imperative to create new regulation to build up a meta-structure for these private standards in order to develop basic principles, rules and instruments for the establishment, compliance, supervision and conflict resolution of such standards.

Thirdly, it defends the creation of an international body on private standards, which will be responsible for the negotiation of basic rules as well as for the representation of their stockholders in international trade fora, such as the WTO – the meta-organization in charge of trade regulation – and its landmark agreements on TBT and SPS measures.

Fourth, it argues that the significant work of some private bodies such as ISO, IEC and UNFSS and the main private standards platforms have to be taken into consideration, as well as the work of several governmental bodies, such as Codex and OIE. The complexity of global trade demands that some basic rules, such as transparency, non-discrimination, accountability, supervision, must be negotiated within these new set of standards.

Fifth, it encourages the creation of national platforms in all interested countries, with the support of private and public bodies, in order to organize the information and offer a focal point to the interested ones, with the objective of increasing transparency and diminishing trade barriers, besides enhancing effectiveness in all considered sectors.

Finally, facing the significant impact of private standards on trade, it is imperative to recognize that they must be seriously discussed in the WTO, in the SPS and TBT Committees, and that the political maneuver not to face the problems they are creating is a huge strategic misconception. At the end, the effects of private standards on the international trade are clearly responsibility of governments and should be treated in the

[4] UNFSS Forum on Sustainability Standards, Geneva, 2013. Documents available at www.unfss.org (Access on 2 February 2015).

WTO. Another political mistake is to spend years discussing the definition of what is a private standard only in the SPS Committee, postponing the discussion in the TBT Committee. A good assessment of the problem clearly shows that private standards include sustainability concerns, that are, par excellence, TBT issues. Private standards should be analyzed in joint meetings of the SPS and TBT Committees, because the separation of the two categories of measures is a false dilemma. They come from the same origin – the Tokyo Standards Code.

Such a political attitude should not endure. Otherwise, private – market – non-governmental – transnational standards, whatever the chosen name, will be transformed in significant threat that can undermine the whole meta-structure of the WTO, created by a huge effort of its members, along the last seventy years.

2. Main features: definition, terminology and interplay between regulation, private standards and international standards

Standard is a document that provides guidelines, characteristics, requirements or specifications in order to ensure that products, processes, services and materials are suitable for their aim[5]. Theoretically, standards should help companies to get access to markets as well as developing countries in levelling the playing field, besides facilitating international trade[6].

Under the WTO, the definition of standard is provided by the Agreement on Technical Barriers to Trade (TBT), in Annex 1, paragraph 1(2), as a document

'Approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which **compliance is not mandatory**. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method' (emphasis added).

Standards may be set by public or private entities. Private standards differ from public ones since they are not prepared by regulatory authorities, but instead by non-governmental entities.

Many publications on private standards have often confused the terms and have employed 'private standards' as synonyms for 'voluntary standards'. Voluntary standards are those that are not mandatory[7]. Often, public authorities produce mandatory standards, but there are some voluntary standards that have been produced by public authorities too[8].

In 2005, a discussion on private standards was raised on the SPS Committee[9]. Another discussion was raised in 2006[10]. In both, the arguments centered on whether the

[5] ISO efinition, ISO/EIC Guide 2, available on: http://www.iso.org/iso/home/standards.htm (Access on 31 October 2014).
[6] Ibid.
[7] Henson, S. e Humphrey, J. (2010), "Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries", Journal of Development Studies, Vol. 46, Nº 9, pp. 1628 -1646.
[8] Liu, P. (2009), "Private Standards in International Trade: Issues and Opportunities", WTO´s Workshop on Environment-related Private Standards, Certification and Labelling Requirements, Geneva;
[9] G/SPS/R/37, 11 August 2005.
[10] G/SPS/R/39, 21 May 2006.

government had backed the private sector's standards (EurepGap/GlobalGAP and Nature Choice's, respectively). In both, once demanded, the EC Commission only confirmed the existence of the standards and that they were indeed private ones, but that they neither conflict with EC legislation nor with WTO law.

In 2008, a Working Group was established on private standards, which handed in, in 2011, a report on 'Possible actions for the SPS Committee regarding SPS-Related Private Standards[11]. From this report, some policies were approved by the Committee, *inter alia*: a need to define private standards and exchange of information on whether private standards could be ever compared to regulation.

In 2012, there was a long debate in the SPS Committee related to a definition of private standards, but divergences between the Members did not allow a final conclusion on it. The definition that was presented in 2012 was not approved. It had been proposed that:

'SPS-related private standards are [voluntary] requirements which are [formulated, applied, certified and controlled] [established and/or adopted and applied] by non-governmental entities [related to] [to fulfill] one of the four objectives[12] stated in Annex A, paragraph 1 of the SPS Agreement and which may [directly or indirectly] affect international trade'[13].

The definition of private standards as voluntary ones is highly questionable. Since the exporter does not conform to the standard, it cannot sell its products on the importing market, which would make the standard *de facto* mandatory. In 5 August 2014, the SPS Committee agreed to pursue its work on a definition of SPS-related private standards, based on the working definition tabled in the document G/SPS/W/276:

'An SPS-related private standard is a written requirement or a set of written requirements of a non-governmental entity which are related to food safety, animal or plant life or health and for common and repeated use'[14].

From this definition, the term 'voluntary' was excluded. This last definition, which is still under scrutiny in the Committee, is much more objective than the earlier one. One should remark that it includes the term 'for common and repeated use', which excludes other kinds of documents for internal uses within the non-governmental entity. Moreover, with such a definition, the excuses that private bodies would not fall under the requirements for a 'non-governmental entity' would come to an end[15].

[11] G/SPS/W/256, 3 March 2011.
[12] SPS Agreement, Annex A, paragraph 1: 1. Sanitary or phytosanitary measure — Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
[13] G/SPS/W/265, Proposed Working Definition on SPS-Related Private Standards. 6, March 2012.
[14] G/SPS/GEN/1334/Rev.1, circulated on 5 August 2014.
[15] See a discussion on non-governmental entities under the topic of Legitimacy.

Pascal Liu presents private standards as standards that are elaborated by non-governmental entities, which belong to them, whether they are profit oriented (private companies) or non-profitable bodies[16].

On matters of terminology, a proposal has been the expression 'transnational standards regulation', referring to the same kind of 'private standards'[17]. The term "transnational' has been adopted under international law pointing, in general, as main actors multinationals, supermarket chains and NGOs. It would also cover the work of ISO, Codex and similar international entities, since they are also framed under the coverage of non-governmental bodies.

Our proposal for terminology would be 'market standards' in order to point to the kind of private standards that are prepared by multinationals, supermarket chains and NGOs, but are out of the scope of formal international standardization such as ISO. 'Market standards' would make a good distinction whenever discussions related to legitimacy and accountability are on the stage.

From the above discussions on definition, we can track some of the main features related to market standards/private standards - their voluntary nature and their non-governmental status.

There are some private voluntary standards that have become mandatory under legislation – some market standards elaborated by some non-governmental organizations and private companies of organic products, such as Soil Association and Demeter, have been adopted under domestic legislation, such as the European Union, or by recognized international bodies, such as the Codex Alimentarius[18].

The International Organization for Standardization (ISO), which is the largest developer of voluntary international standards, is a non-governmental entity and, at the same time, has 165 member countries represented by their national standards bodies, whether they are private or public ones[19]. Despite, in general, ISO standards are voluntary ones, many of the standards prepared by ISO have become mandatory under domestic legislation.

Voluntary market standards prepared by private companies might become *de facto* mandatory, such as in the food sector, supermarket chains, producers and cooperatives[20]. Even though they are not binding on producers, the only option left besides fulfilling the standard requirement is to leave out the market[21]. Since a standard has gained the international market, it also gains international recognition but issues related to legitimacy are still a concern. Therefore, in practice, the difference between a private and a public standard might not be important, at the end, for producers, since

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[16] Liu, P. (2009), "Private Standards in International Trade: Issues and Opportunities", WTO´s Workshop on Environment-related Private Standards, Certification and Labelling Requirements, Geneva, at. 2.

[17] See L. Dobusch, P. Mader and S. Quack, Governance across borders (eds.). Transnational fields and Transversal themes. A Blogbook. Berlin: Epubli, 2013.

[18] Santacoloma, P. (2014), "Nexus Between Public and Private Food Standards: Main Issues and Perspectives", Workshop of the FAO/UNEP Programme on Sustainable Food System – Voluntary Standards for Sustainable Food Systems: Challenges and Opportunities, Roma.

[19] http://www.iso.org/iso/home/about.htm (Access on 31 October 2014).

[20] Wouters, J. e Geraets, D. (2012), "Private Food Standards and the World Trade Organization: Some Legal Considerations", World Trade Review, Vol. 11, Nº 3, at 479.

[21] Ibid., Wouters, J. e Geraets, D. (2012), "Private Food Standards and the World Trade Organization: Some Legal Considerations", World Trade Review, Vol. 11, Nº 3, at 479.

they both create heavy burdens in the production process and overall barriers to international trade[22].

For example, the search for production of renewable energy has led to establishment of private standards on the sector. Most of these standards were established in fulfillment of government directives, such as EC Directive 2008/28/CE, which stablished a goal of 20% for consumption of renewable energy by 2020 (from this total, 10% has to be in the transports sector), and EC Directive 2009/28/CE, that established sustainability goals, such as reduction on emissions of 35%, which must be, at least, of 50% from 2017 onwards and 60% from 2018 onwards[23].

Moreover, despite they do not become mandatory, they are used all along the value chain, which makes suppliers' options very limited[24]. In many circumstances, the private standards become part of the culture of a specific market and they represent increase of power for some retailers and, as such, they have a *de facto* mandatory force[25].

3. Different types, sectors categories and examples of private standards

Market/Private standards can be separated into different types, according, *inter alia*, to sectors, categories and subjects. As remarked by Arcuri, 'within the far-reaching category of transnational private regulation, at least four types of regulatory schemes can be distinguished: i) private food safety standards; ii) 'civil regulation' or private codes and standards to control environmental and social aspects of business operations; iii) technical and quality standards; and iv) private meta-regulatory frameworks'[26].

Spreading of food safety standards was the first concern to inspire questions on whether private standards are barriers to trade within the WTO Committees. Private food safety standards were established as a way to deal with responsibility for food safety to retailers and as a response to some food crises that affected the food sector[27]. Such reasons for the development of private food safety standards are legitimate ones; however, their effects are contested. The problem is that some few large supermarket chains dominate food products markets and retailers require compliance with some private standards; meanwhile, small producers, mainly from developing countries, may not always afford certification costs and, as such, they might be *de facto* excluded from these markets[28].

'Civil regulation' is the term that has been used to define the structure of private regulation that deals with social and environmental impacts of business operations,

[22] Engler, A., Nahuelhual, L., Cofré, G., Barrena, J. (2012), "How Far from Harmonization are Sanitary, Phytosanitary and Quality-related Standards? An Exporter's Perception Approach", Food Policy, Vol. 37, pp. 162 – 170.
[23] Rodrigo C. A. Lima. Padrões Privados e Responsabilidade do Estado na OMC. 2014, at 7. (Forthcoming publication).
[24] Rua, L. R., 2014,, at 14.
[25] Liu, P. (2009), "Private Standards in International Trade: Issues and Opportunities", WTO´s Workshop on Environment-related Private Standards, Certification and Labelling Requirements, Geneva.
[26] Alessandra Arcuri, The TBT Agreement and private standards, In: Tracey Epps and Michael J. Trebilcock, Research Handbook on the WTO and Technical Barriers to Trade, 3013, at 488.
[27] Fabrizio Cafaggi, 'Private Regulation, Supply Chain and Contractual Ne
tworks, The Case of Food Safety', EUI RSCAS, 2010/10 Private Regulation Series n. 03 (2010), at 490.
[28] Arcuri, supra, at 491.

being influenced by citizens-consumers - private codes and standards to control environmental and social aspects of business operations. It can be seen as 'a mechanism that extends the political realm to markets, enabling acts of political consumerism'[29].

On the other hand, technical and quality standards are the primary standards *par excellence*, which were created for trade facilitation. In 1947, the ISO was established with the aim to focus on technical standards thus facilitating trade, since voluntary but worldwide recognized standards were followed by industries all over the world[30]. In the same way, in the field of electronics, the International Electrotechnical Commission (IEC), founded in 1906, helped to spread compatibility of electronic devices worldwide[31]. The work of ISO has been extended also to other fields and, under the auspices of ISO, standards have been created, inter alia, in the fields of human rights (ISO 26000), environmental management (ISO 14000 and its sequence) and food safety (ISO 22000). Moreover ISO has observer status in the TBT Committee and the Codex Alimentarius Commission. Under the TBT Agreement, compliance with ISO standards is compliance with WTO law (TBT, Annex 3).

Many market standards have been pointed out as examples of private standards that have had a large effect on global markets. The tables bellow show some of these standards and their respective 'creators'.

Table 1: Examples of private standards

Created by Individual companies	Created by national chains	Created by international chains
Nature's Choice (TESCO)	Assured Food Standards (UK)	GlobalGAP
Filiéres Qualité (Carrefour)	British Retail Consortium Global Standard	International Food Standard
Field-to-Fork (marks & Spencer)	Freedom Food (UK)	Safe Qaulity Food (SQF) 1000/2000
Filiére Controllée (Auchan)	Qualitat Sicherheit (QS)	Marine Stewardship Council (MSC)
P.Q.C. (Percorso Qualitá Conad)	Assured Combinable Crops Scheme (UK)	Forest Stewardship Council (FSC)
Albert Heijn BV: AH Excellent	Farm Assured British Beef and Lamb	
	Sachsen Ahrenwort	
	QC Emilia Romagna	
	Stichting Streekproduction Vlaams Brabant	

Source: WTO, SPS Committee and M. K. Amaral (2014)

Last, private meta-regulatory frameworks have also been developed on 'how to produce and manage private regulatory schemes'[32]. Meta-regulation has also been produced by ISO. One such example is ISO Guide 65, published in 1996, on the general requirements for bodies operating product certification systems.

[29] Arcuri, supra, at 488.
[30] Information on ISO available at http://www.iso.org/iso/home.html (Access on 9th January 2015).
[31] Information on IEC available at http://www.iec.ch/ (Access on 9th January 2015).
[32] Arcuri, supra, at 495.

3. Legitimacy and accountability for market/private standards

One of the big challenges faced by the proliferation of market standards has been legitimacy on creation and setting of such standards as well as accountability and State responsibility towards the behavior of the bodies that have issued them.

Concerns related to legitimacy intend to answer questions such as: i) 'who is producing the standards?' and ii) 'where such authority comes from?'

Concerns related to accountability are related to: i) are there scientific basis for the creation of such standards?; ii) who responds for the setting of private standards under a market/government failure and a multilateral trade system perspective?

3.1 – Legitimacy

Market standards have been issued by non-governmental bodies based on many different reasons. The Table presented above shows some of the main private standards that have dominated the contemporary market and their respective 'regulators'. Concerns have existed on legitimacy of such standards creators and how the market has accommodated such new 'trustworthiness'.

Under the TBT agreement, standardizing bodies have to comply with a Code of Good Practice (Annex 3) and Members should not take measures which have the effect of, directly or indirectly, require or encourage such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. In this sense, any standard created by a standardization body, 'irrespective of a governmental mandate', fall within the scope of the TBT agreement, and, as such, is also a 'clear case of private regulation' under TBT[33]. As remarked by Arcuri, 'the remaining question concerns which private regulatory bodies fit within the definition of the TBT Agreement. Given the open-ended definition of a non-governmental body provided in Annex I (8) of the TBT Agreement, some doubts may remain as regards bodies that do not set routine standards, and doubts have also been raised as to whether all typologies of standards are covered by Article 3'[34].

From the very definition of standards, under the TBT Agreement (See definition above) one could ask what kind of bodies would fit within such definition. No doubt as for International bodies, regional, local or central government ones. But what to say of non-governmental bodies? Annex 1, paragraph 8 expressly states that a non-governmental body is a :

> Body other than a central government body or a local government body, including a nongovernmental body which has legal power to enforce a technical regulation.

Would it include bodies that are not regulatory ones, but that develop standards occasionally, in a random fashion?

It is important to note that, in the explanatory note to the definition of standard developed in the building up of the TBT Agreement, pending the Tokyo Round, it was settled that the definition does not cover technical rules made by individual companies

[33] Arcuri, supra, at 501.
[34] Arcuri, supra, at 501.

for its own production and consumption requirements[35]. In the final text of the TBT Agreement, such exclusion was not included, which may indicate that the definition of a non-governmental body, pending the Uruguay round, is much broader than what was initially intended in the Tokyo Round[36].

That would also lead to another question related to the acceptance of international standards, within TBT and other WTO Agreements, as a bench for compliance with WTO law. As TBT has no definition of 'international standards', the one that is adopted by scholars and WTO jurisprudence is the definition set in ISO, taking into consideration that ISO standards are pointed up in the introductory clause of TBT, Annex1[37]. Thus, the answer comes in ISO/IEC Guide 2:

Standard that is adopted by an international standardizing/standards organization and made available to the public.

In US-Tuna II, the Appellate Body understood that such definition 'suggests that it is primarily the characteristics of the entity approving a standard that lends the standard its "international" character'[38].

On the other hand, in the TBT Agreement, Annex 1, paragraph 4, an international body is a:

Body or system whose membership is open to the relevant bodies of at least all Members.

What exactly such 'openness' mean? 'Should it be open at the moment a standard is negotiated, or is it sufficient that it is open once the standard has already been adopted?'[39]

The answer came with the 2000 TBT Committee Decision , which interpreted, in section 2, 'openness' as:

Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development, such as the:

a. Proposal and acceptance of new work items;
b. Technical discussion on proposals;
c. Submission of comments on drafts in order that they can be taken into account;
d. Reviewing existing standards;
e. Voting and adoption of standards; and
f. Dissemination of the adopted standards[40].

Besides openness, the 2000 TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement lists also transparency, impartiality and

[35] Arcuri, supra, 505.
[36] Arcuri, supra, 505.
[37] Arcuri, 507.
[38] US – Tuna II, note 45, para. 353.
[39] Arcuri, supra, at 508.
[40] G/TBT/9, 13 November 2000, para. 20 and Annex 4.

consensus, effectiveness and relevance, coherence and development dimension and principles to be observed in the construction of international standards.

In the US Tuna II, the Appellate Body understood that a 'TBT Committee Decision can be considered as a 'subsequent' agreement' within the meaning of Article 31 (3) (a) of the Vienna Convention. The extent to which this Decision will inform the interpretation and application of a term or provision of the TBT Agreement in a specific case, however, will depend on the degree to which it "bears specifically" on the interpretation and application of the respective term or provision'[41].

Arcuri remarks that 'if, on the one hand, the Decision introduces principles that could enhance the transparency and participatory dimensions of international standard bodies, on the other hand, it has been criticized as attempting to 'shape and constrain international standard setting in the light of the norms and priorities of Geneva[42].

From an economics point of view, many certification rules would fit the 2000 Decision terms 'market needs' as 'regulatory needs' , since a need for regulation, whenever read from a neoclassical economics standpoint, happens when there is market failure and many international labelling standards would fit such requirement since they deal with asymmetry issues[43].

Moreover, in *US - Tuna II*, the Appellate Body, in an interpretation of the term 'recognized body', understood that the meaning should be a broad one by linking its interpretation to the ISO/IEC definition: 'the definition in the ISO/IEC Guide 2: 1991 adds to and complements the definition in the TBT Agreement, specifying that a body must be 'recognized' with respect to its activities in standardization'[44]. However, the Appellate Body understood that the broad participation on standards development might constitute evidence that a body has a recognized role on standardization[45]. Nevertheless, at the same time, an organization that has developed a single standard might also have 'recognized activities in standardization'[46].

In the SPS Agreement, the only clause that could accommodate private standards is the definition set in Annex A, paragraph 1, wherein:

Sanitary or phytosanitary measure - Any measure applied:
(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during

[41] US – Tuna II (Appellate Body Report), supra note 45, para. 372.
[42] Arcuri, supra, at 509.
[43] Arcuri, supra, at 509.
[44] US-Tuna II (Appellate Body Report) supra, at 357.
[45] US Tuna II, at 357.
[46] US Tuna II, at 394.

transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

Many scholars have questioned whether or not such definition would include non-governmental measures within the features of private standards. Some would say that 'all relevant laws, decrees, regulations, requirements and procedures' do not include non-governmental measures, within an interpretation of Panel's not specific rulings[47].

Moreover, the Preamble of SPS refers to Members, which would suggest that only Members' measures would fit in the agreement[48].

However, such views would only stand if the SPS Agreement could be seen as a separate agreement, totally dissociated from the rest of WTO law, which is not the case. Marceau and Trachtman well remember that WTO Agreements comprehend a single treaty – under the single undertaking principle[49] and as such, in those matters that are not specificity of the SPS agreement, principles and definitions from other parts of WTO law could be accommodated in SPS measures through a dialogue of complementary. The definition of standards provided in the TBT Agreement could be easily transposed to SPS since it is the only agreement that sets a definition of standard, which does not mean that it would break the specificity exclusion of TBT, Article 1.5, which clearly excludes the application of the 'TBT provisions' to 'SPS measures', but do not exclude definition of terms.

Moreover, the SPS Agreement, Article 13, establishes a rule on implementation of the agreement, which extends Members' measures to non-governmental ones, as such:

(…) Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

Although some scholars have argued that such a clause rules out private standards from SPS[50], we do not understand it in this way; quite the opposite. Such a narrow interpretation of the clause does not go with the ongoing work developed in the SPS Committee on a definition of private standards, as we have remarked earlier. Therefore, private standards do not stand alone under the auspices of the TBT structure, but it is also accommodated within the SPS provisions. Under the single undertaking principle, they should be interpreted together in the name of coherence and harmony within WTO law.

[47] See Arcuri and the mention to umpublished work on this subject, supra, at 517.
[48] Arcuri, supra, 516.
[49] Gabrielle Marceau and Joel P. Trachtman, A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade', Journal of World Trade 48, no. 2 (2014).
[50] See Arcuri, supra, at 520.

Alessandra Arcuri ends up her comments on private standards by raising the question that 'from a normative point of view, it may be complex to draw a line between private standards that could legitimately be subjected to WTO law and standards that may not. These considerations highlight the fact that the binary question (is it desirable/undesirable to bring private standards under the purview of WTO law) may not be easily answerable. Instead, the question could be reformulated as one of the degree: to what extent can the existing WTO legal framework address the trade-related problems created by the emergence and operation of private standards, without losing legitimacy?'[51].

Besides WTO, the market itself has provided legitimacy to the many private standards that have proliferated and been accommodated within global value chains. The problem has been to sustain such legitimacy for a long time, since proliferation of new rules and new certificates have been common ground on distinct sectors and, as such, have created confusion for producers and consumers, delegitimizing them with a certain period of time. Sustainability of legitimacy for most private standards already existent could be found in meta-regulation, as it will be presented later on in this essay. The issue of accountability adds concerns to legitimacy since, under law, security is a matter of certainty.

3.2 – General Accountability and State responsibility

In 2005, the small Caribbean island of St. Vincent, a sovereign State Member of the WTO, raised a Specific Trade Concern, under the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee), complaining about restrictions on the sale of bananas to the European Union. Such concerns were not about the official pesticide residue requirements of the EU, but instead on the requirements of a private, non-profit organization so called GLOBALG.A.P. (in 2005, known as EUREPGAP)[52]. That was the first time that the issue of private standards was raised for discussions in the WTO.

In general, WTO only takes into consideration voluntary standards when they belong to international standardization bodies, such as ISO or Codex, and the WTO agreements refer to them as a means of harmonization (See TBT and SPS Agreements[53]). Whenever countries use these international standards for products entering their territory, there is a 'presumption of conformity'.

As we have remarked earlier, the definition of market/private standards as voluntary ones is highly questionable. Since the exporter does not conform to the standard, it cannot sell its products on the importing market. For example, the search for production of renewable energy has led to establishment of private standards on the sector. Most of these standards were established in fulfillment of government directives, such as EC Directive 2008/28/CE, which stablished a goal of 20% for consumption of renewable energy by 2020 (from this total, 10% has to be in the transports sector), and EC Directive 2009/28/CE, that established sustainability goals, such as reduction on

[51] Arcuri, supra, at 522.
[52] G. H. Stanton, Food safety-related private standards: the WTO perspective, In: A. Marx, M. Maertens, J. Swinnen and J. Wouters, Private Standards and Global Governance. Economic, Legal and Political Perspectives, 2012, at 235.
[53] See TBT, Code of Good Practices (Annex 3) and SPS, Preamble and Article 3(1).

emissions of 35%, which must be, at least, of 50% from 2017 onwards and 60% from 2018 onwards[54].

Moreover, this 2009 Directive also establishes that biofuels and bioliquids cannot be produced from raw materials extracted from land rich in biodiversity, which from January 2008 has the following characteristics: being primary forest or wooded land, indigenous areas protected under law, endangered species protection areas or pastures areas rich in biodiversity, either natural or cultivated[55].

Fulfillment of the Directive requirements is expected from the economic operators that might comply with it through voluntary regimes or bilateral or multilateral agreements, including certification procedures[56]. Nevertheless, the main issue regarding the multilateral trade system, is whether the EC Directives have adopted a trustful scientific model, which would allow impact measurements consistent with the side effects that it has provoked, which makes it open to dispute under the WTO Dispute Settlement System, mainly the TBT Agreement and GATT[57].

Moreover, irrespective of having or not scientific basis, the creation of such standards also raise concerns on accountability under a market/government failure and a multilateral trade system perspective.

International standards are encouraged, in general, under TBT. In order to harmonize regulations on a broad scale, Members should play a full part

2.6. [I] in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

If a regulation is prepared, adopted or applied in accordance with relevant international standards, according to Article 2.5,

2.5 (…) [I]t shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

Besides, the TBT Agreement also provides for circumstances when there is not a relevant international standard or when a regulation is not in accordance with the technical content of relevant international standard and, according to Article 2.9, Members should proceed to notifications at an early appropriate stage, when amendments can still be introduced and comments taken into account, identifying, whenever applicable, the parts which in substance deviate from relevant international standards.

Annex 3 of TBT provides for a Code of Good Practice for Preparation, Adoption and Application of Standards. In the General Provisions of the Code of Good Practice, it is provided that the Code is open to acceptance by any standardizing body – whether a central government body, a local government body or a non-governmental body – within the territory of a WTO Member.

[54] Rodrigo C. A. Lima. Padrões Privados e Responsabilidade do Estado na OMC. 2014, at 7. (Forthcoming publication).
[55] Rodrigo Lima Ibid., at 9.
[56] Rodrigo Lima, Ibid., at 10.
[57] Rodrigo Lima, Ibid., at 11.

TBT, Article 4, demands Members to ensure that their central government standardizing bodies as well as non-governmental bodies within their territories accept and comply with the Code of Good Practice. Moreover, it also provides that the obligation of Members in relation to compliance of standardizing bodies with the commandments of the Code of Good Practice 'shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice'.

In the Code of Good Practice, paragraph E, it is provided that the standardizing body, which might be a non-governmental one (See definition of a non-governmental body above), shall ensure that standards are not prepared, adopted or applied 'with a view to or with the effect of creating unnecessary obstacles to international trade'.

One of the discussions in the SPS Committee was based on the wording of Article 13 of the SPS Agreement and the Member's duty towards the behavior of non-governmental entities within their territories. The requirements for Member are clear-cut in the Agreement: they shall take reasonable measures to ensure that non-governmental bodies comply with the provisions of the SPS Agreement (See full text of Article 13 above).

A parallel requirement is also established in the TBT Agreement. Article 3 of TBT demands that:

With respect to their local government and **non-governmental bodies within their territories**:
3.1 Members shall take such reasonable measures as may be available to them to **ensure compliance by such bodies with the provisions of Article 2**, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2. (…)
3.4 Members **shall not take measures which require or encourage** local government bodies or **non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.**
3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members **shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies**. (emphasis added)

In the TBT Committee, negotiations on private standards have not reached further results[58]. The core of the discussions on the TBT Committee is the adoption of the Code of Good Practices by private bodies[59].

Recently, it has been observed either implicit or explicit government support for market standards and they have become, mainly in matters of certification, a regulatory barrier to trade. Some of them have been mentioned even on State's regulation or public procurement contracts. The grey area between the State's involvement and the private sector's only involvement makes it more difficult to point out a violation issue under the WTO system. Nevertheless, it seems that whenever it is possible to show evidence of State's involvement in the private standard implementation, it might be possible to raise an issue of State's responsibility[60].

The difficulty would be, in any case, to establish what would be the level and deepness of State's involvement in order to establish that a private standard has become a 'private standard backed by government' and, as such, 'mandatory under law'.

[58] Manuela K. Amaral, supra, at 244.
[59] G/TBT13; G/TBT/26; G/TBT/32.
[60] Manuela k. Amaral, supra, at 248.

In the EC Directives above mentioned, the UE has accepted market standards as a way of complying with the requirements of its legislation. It seems reasonable that it could be raised a claim for State's responsibility under the TBT and SPS Agreements, since Members shall ensure compliance to these agreements by non-governmental bodies[61].

Governments can be responsible for actions of private parties. In Japan-Film, it was argued that although it might not be easy to determine 'bright-line rules', whenever there is 'sufficient government involvement' with it, it might be found that such measure is governmental[62]. Such understanding was adopted under the GATT/WTO system but it could also be extended to other matters.

On matters of scientific evidence, for instance, proliferation of market standards have spread sometimes with no scientific basis but instead for pure market preference concerns pointing out to 'holdings' on global value chains. As such, accountability concerns within the WTO system and within other plurilateral or regional arrangements might be detected and might be dealt with under State's responsibility for non-governmental bodies.

4. Meta and Transnational governance on Market/Private Standards

'Social compliance' is for most contemporary businesses on the 'order of the day' due to a spread of private standards initiatives to regulate working conditions in the industries' global supply chains, considering an ongoing quest for best practices. 'From the company perspective, this multiplicity also makes for a "crowded and costly market in social compliance", as factories supplying several brands may have to deal with various codes and certifiers and their sometimes conflicting demands'[63].

In 2003, some key members of civil society and multi-stakeholder entities in the worker's rights field gathered together to create the Joint Initiative on Corporate Accountability and Worker's Rights (JO-IN)[64]. Each one of these entities has been involved in the task of improving working conditions mainly in the apparel global supply chains, by reducing duplication of efforts as well as identifying best practices, improving the implementation and enforcement of codes of conduct and sharing learning experiences[65]. The last efforts on this project were undertaken in 2007, since the joint operations did not manage to come to a consensus on an appropriate system for code implementation and compliance verification[66].

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[61] Rodrigo C. Lima, supra, at 23.
[62] Panel Report, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, adopted 22 April 1998, para. 10.56.
[63] Boudewijn Derkx, Meta-governance in the Realm of Voluntary Sustainability Standards: early experiences and their implications, UNFSS Discussion Papers. N. 1, Geneva, 2013, at 2.
[64] The six private entities are: Clean Clothes Campaign, Ethical Trading Initiative, Fair Labor Association, Fair Wear Foundation, Social Accountability International and Workers Rights Consortium ("the organizations").
[65] See information on JO_IN at http://www.jo-in.org/english/about.html (Access on 5 February 2015).
[66] Derkx, 2013, at 3.

Another sector that joined efforts to have meta-governance on market standards was the sector of organic agriculture[67]. The multiplicity of private labels and certification and assessment procedures had a deep impact on organic producers, mainly on smallholders that were engaged in international trade. The International Task Force on Harmonization and Equivalence in Organic Agriculture (ITF) was launched in 2003, in a joint effort of UNCTAD, FAO and International Foundation for Organic Agriculture (IFOAM)[68]. Between 2003 and 2008, many agreements between public and private sectors individuals were achieved on how to reduce barriers to organic trade. ITF Tools were developed in 2008 – the International Requirements for Organic Certification Bodies IROCB and the Tool for Equivalence of Organic Standards and Technical Regulations (EquiTool)[69]. The ITF work was enhanced by the project Global Organic Market Access (GOMA) that took place from 2009 to 2012, aiming at facilitating and giving support to regional harmonization and equivalence processes on the sector[70].

ITF and GOMA have had their history of success. First, they have indeed enhanced public-private collaboration on the establishment of market standards in the organic sector. Second, they have supported harmonization and equivalence among stakeholders. Third, some high quality tools, i.e. EquiTools, have been developed under their auspices[71]. However, 'on the whole, the uptake of the ITF's tools has remained rather limited so far' and there are 'few indications that the Task Force's various recommendations have already had tangible impacts on the decision making processes of the regulatory arena's major players'[72]. In general, the implementation of the project was successful, having had the development of recommendations and high quality technical tools. Nevertheless, 'as the ITF was an outward-oriented institution, aiming to change the wider regulatory environment rather than merely the practices and standards of its participants, the effective set up and implementation of the process was not by itself enough to bring about the desired amounts of regulatory change'[73].

In 2002, some certification organizations – Forest Stewardship Council (FSC), the International Federation of Organic Agriculture Movements (IFOAM), Fairtrade and Marine Stewardship Council (MSC), the International Organic Accreditation Service, Marine Aquarium Council, Rainforest Alliance and Social Accountability International - created the International Social and Environmental Accreditation and Labelling Alliance (ISEAL Aliance)[74]. In 2010, it was established the ISEAL Stakeholder Council, joining together other representatives from business, government, civil society and academia and, in 2012, ISEAL expanded its programme of work to address sustainability issues in Brazil, India and China.

After an elaborated work on best practices for sustainability standards, ISEAL launched its Codes of Good Practice (2004), the ISEAL Impacts Code (2010) and the ISEAL

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[67] See Diane Bowen and Ulrich Hoffmann, Review of Key Systemic Issues and Findings Resulting from Activities of the International Task Force on Harmonization and Equivalence in Organic Agriculture (ITF) and the Global Organic Market Access (GOMA) Project. UNFSS Discussion Papers, N. 2, 2013.
[68] See information on ITF at http://www.organic-world.net/itf.html (Access on 5 Febraury 2015).
[69] Information available at http://www.organic-world.net/itf.html (Access on 5 February 2015).
[70] See information on the GOMA project at http://goma.tops.net/about/project/ (Access on 5 February 2015).
[71] Derkx, 2013, at 7.
[72] Derkx, 2013, at 7.
[73] Derkx, 2013, at 8.
[74] See information on ISEAL Alliance at http://www.isealalliance.org/about-us/our-history (Access on 6 February 2015).

Assurance Code (2012), which provide procedures on how standards systems may effectively measure and evidence contribution to social and environmental impacts[75].

However, 'ISEAL's other work programs combining conceptual work on the development of good practice guidance with related shared learning and capacity building activities have progressed a lot slower and been less effective. Cooperation within ISEAL has thus far also yielded relatively little in terms of successful tangible collaboration on concrete projects[76].

In general, there has ben an urge for meta-regulation on general market standards, in order to resolve concerns related to legitimacy and accountability, which were a summary of the problems faced by the meta-regulation attempts presented above by sectors. The difficulty is to reach a common ground on which body could play such a role.

4.1 The Role of ISO

ISO is the International Organization for Standardization[77] and it categorizes private standards into distinct ways according to ISO's work on standards: i) PS in the Information and Communication Technologies sector (ICT); ii) PS in the agri-food sector; and iii) PS related to social and environmental aspects[78].

ISO has been pointed out as a possible body to meta-regulate private standards. 'In the environment and related areas, ISO provides international standards addressing such subjects as environmental management (ISO 14001/4) ; environmental labelling (ISO 14020/21/24/25), lifecycle assessment (ISO 14040/44) ; greenhouse gas measurement, verification and validation (ISO 14064/65) ; and drinking water and wastewater services (ISO 24510/11/12)'[79]. Moreover, ISO has recently engaged in the development of new standards – the ISO 26000 – on social responsibility. 'This high profile project, involving more than 400 global experts, from 91 countries and 42 international governmental and non-governmental organizations, also demonstrates how the ISO standards development process can address complex societal and sustainability issues. Other examples under development in ISO include the carbon footprint of products and services; sustainability criteria for biofuels; sustainability in event management, and the water footprint of organizations'[80].

Notwithstanding the acknowledgeable standardizing role developed by ISO, there is a good amount of criticism on the status that ISO has in the WTO. ISO has been 'stigmatized as a club dominated by private industrial groups, where civil society has no real role to play. ISO members are national standards bodies; many of which in turn are private non-profit groups, often dominated by private companies. Not only is civil society excluded from the decision-making process – it may not even exercise a critical role, as proposed standards are difficult to access. Even adopted ISO standards cannot be accessed free of charge but must be purchased. Such legitimacy and accountability

[75] See information at http://www.isealalliance.org/about-us/our-history
[76] Derkx, 2013, at 10.
[77] See information on ISO at http://www.iso.org/iso/home/about.htm (access on 27th January 2015).
[78] See ISO, International Standards and Private Standards, Geneva, 2010, at 6.
[79] ISO, International Standards and Private Standards, Geneva, 2010, at 7.
[80] ISO, International Standards and Private Standards, Geneva, 2010, at 7.

issues may appear irreconcilable with the privileged status that ISO standards seem to have at the WTO'[81].

As above remarked, meta-regulation has also been produced by ISO. However, it is highly questionable, due to the reasons mentioned in the last paragraph, that ISO would be the right standardizing body to deal with meta-regulation on market standards. Since market standards have dealt with changes in global production markets and have highly influenced the way producers work in developed as well as in developing countries, perhaps an institution that would be more concerned with the social and environmental impacts of private standards, mainly in developing countries, would be a better option for meta-regulation on this matter.

4.2 The Role of UNFSS and the building up of domestic VSS platforms

The United Nations Forum on Sustainability Standards is a joint initiative of FAO, ITC, UNCTAD, UNEP and UNIDO, consisting of a platform of International Dialogue on Voluntary Sustainability Standards (VSS), which are related to environmental, social, occupational safety and animal welfare issues[82].

In the UNFSS platform, private standards are included in the VSS structure, which is defined in a broad but straightforward way. Thus, 'voluntary sustainability standards (VSS) are standards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, environmental impacts, community relations, land-use planning and others'[83]. In general, they are VSS whether prepared by governmental or non-governmental bodies.

The UNFSS has become a forum for State actors to dialogue with each other and with some core groups, such as traders, consumers, producers, certification bodies, diplomats, NGOs and scholars. 'The overall goal of UNFSS activities is to make VSS a driver and avoid it being an obstacle to sustainable development in developing countries'[84]. Moreover UNFSS intends to drive attention to the marginalization of smallholders and small and medium-sized enterprises[85]. Such work might be accomplished through analytical procedures and activities, having exchanges of experiences and constructing a network among stakeholders[86].

Although not excluding VSS produced by governmental bodies, the primary focus of the UNFSS activities is on VSS developed by non-governmental organizations and private companies – named in this essay 'market standards', which have been categorized into distinct categories: i) business-to-business standards; ii) consumer-oriented standards; iii) meta standards covering different issues and groups of products; iv) issue and commodity specific standards; and v) company-specific standards.

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[81] Arcuri, supra, at 495.
[82] See information on UNFSS on http://unfss.org/about-us/objectives/ (Access on 18th December 2014).
[83] UNFSS Plataform, available at http://unfss.files.wordpress.com/2012/05/unfss-report-issues-1_draft_lores.pdf (Access on 15th January 2015).
[84] UNFSS, available on http://unfss.org/about-us/objectives/ (Access on 18th December 2014).
[85] UNFSS.
[86] UNFSS.

Under the UNFSS auspices, the main concerns on VSS are related to

'(i) proportionate to the (real) risk they claim to address;
(ii) scientifically-based; and
(iii) that the burden of compliance is distributed fairly'[87].

Such concerns have been dealt with in briefing sessions organized by the UNFSS secretariat. In 2013, several briefing sessions were organized and took place in Geneva (February 18th 2013), China (March 4th 2013); Thailand (March 13th 2013), Kenya (March 2013) Panama (May 9th 2013), Cameron (June 27th 2013) and in the Philipines (October 24th 2013).

In the UNFSS launching conference that took place in Geneva, in 2013, titled 'Policy Making and Sustainability Standards: How can governments and the private sector work together to achieve sustainable development goals?', there was acknowledgment of the importance of a national dialogue between key stakeholder groups VSS policies. Therefore, there was a proposal for the establishment of national multi-stakeholder platforms for policy studies and dialogue, under the supervision of the UNFSS.

India was the first country to have launched its national VSS platform under the auspices of the UNFSS, envisaging the building of technical and institutional capacity (i.e. standards, metrology, testing and quality assessment procedures) as well as policy structuring, taking into account the true social and environmental costs [88].

The primary concern is the conduction of a dialogue with the ASEAN Task Force on Horticultural and Food Product Standards, besides establishing a direct connection with the West African International Cocoa Organization to work on schemes of sustainable cocoa certification[89].

In India, some of the most important VSS already implemented are ECOMark, AgroMark, IndGAP, Fruit Product Order (FPO) and mandatory farming production standards implemented under the National Programme for Organic Production[90]. Differently from other countries, in India, VSS systems and approaches are implemented under integrated government management schemes, even though they seem to be focused on needs and demands of the industry[91].

In general, the main objective of the platform is helping to create a UNFSS focal point in India, in order to coordinate between UN Geneva, UNFSS India platform composed of public/private sector, industry etc. and Indian policymakers, thus establishing a feedback system that would build on a whole scenario for private standards[92].

China also proposed the construction of a VSS platform, under the auspices of the UNFSS. The primary concern, in China, is also the conduction of a dialogue with the

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[87] UNFSS, In: http://unfss.files.wordpress.com/2013/02/unfss-presentation-briefing-18feb2013_as.pdf (Access on 13 February 2015).

[88] See http://unfss.org/2014/08/20/unfss-in-ciiissd-conference-new-delhi-india/ (access on 29 January 2015)

[89] UNFSS, National Platform on Private Sustainability Standards in India, Concept Note, 2014, at 1.

[90] UNFSS, National Platform on Private Sustainability Standards in India, Concept Note, 2014, at 4.

[91] UNFSS, National Platform on Private Sustainability Standards in India, Concept Note, 2014, at 4.

[92] UNFSS, National Platform on Private Sustainability Standards in India, Concept Note, 2014, at 6.

ASEAN Task Force on Horticultural and Food Product Standards[93]. In general, with such a structure, China pretends to harness the benefits of VSS and increase competitiveness as well as to have an overview of the strategically important VSS issues for the country[94]. The focus of China would be private sustainability standards in the fields of food safety and quality as well as their interplay with Chinese standards and Chinese quality control systems in the agricultural area[95].

In China, the institutions involved in the platform are the Ministry of Commerce (WTO Department as the focal point), the Ministry of Agriculture, the Ministry of Environmental Protection, the National Development and Reform Commission, the General Administration for Quality Supervision, Inspection and Quarantine, the China Administration for Accreditation and Certification, the China Administration for Standardization, the China Certification and Accreditation Institute and other correlated scholarly bodies[96].

The Chinese comments on the proposal of a platform remark the importance of harmonization and equivalence in the area of private standards, which is really the key point on this matter. 'Consistency, harmonization and equivalence between Chinese standards and those of ASEAN countries as well as the private sustainability standards applied by both trading partners are therefore of increasing strategic importance for market access, competitiveness and sustainability impact'[97].

Moreover, remarks have also pointed out that the VSS platform may also make an important contribution to debates on free trade agreements (e.g. the Trans-Pacific Partnership Agreement or Regional Comprehensive Economic Partnership) and that it could represent the involvement of China into ASEAN discussions about related regional standards for the ASEAN common market (mutual interest/ coherence of standards agenda); e.g. private GAP standards in ASEAN countries could be harmonized with Chinese standards, the new ASEAN GAP (+China) could offer an important opportunity for exchange in agricultural trade[98].

The building up of VSS platforms is a matter of transparency as well as of governance and strategic planning. Governments should not ignore the urgency of the matter and should plan in advance, before the concern becomes an unmanageable political problem for the country.

As the issue of market standards is an urgent one, as demonstrated above with the construction of VSS platforms in China and in India, the Brazilian government should also be concerned in the building up of a focal point that will gather together all concerns co-related - the ones that would be classified as TBT as well as the ones that would be SPS measures, in the name of transparency, governance, regulatory coherence and strategic planning.

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[93] UNFSS, National Platform on Private Sustainability Standards in India, Concept Note, 2014, at 1.
[94] UNFSS, National Platform on Private Sustainability Standards in China, Concept Note, 2014, at 1.
[95] UNFSS, National Platform on Private Sustainability Standards in China, Concept Note, 2014, Annex.
[96] UNFSS, National Platform on Private Sustainability Standards in China, Concept Note, 2014, at 6.
[97] 'Couching the National Platform on Voluntary Sustainability Standards into the Development and Export Strategy of the PR of China', In: UNFSS, National Platform on Private Sustainability Standards in China, Concept Note, 2014, Annex, General Observations.
[98] 'Couching the National Platform on Voluntary Sustainability Standards into the Development and Export Strategy of the PR of China', In: UNFSS, National Platform on Private Sustainability Standards in China, Concept Note, 2014, Annex, General Observations.

Bearing in mind the Ministerial structure of the Brazilian government and having as a good example the composition of the VSS platform in China, a good parallel for Brazil could be having an Inter-ministerial body as a focal point, which could join together INMETRO (a standardization entity under the Ministry of Development, Industry and International Trade), MAPA (a representative of the Ministry of Agriculture) as well as other Brazilian Ministries and entities - such as ABNT (Associação Brasileira de Normas Tecnicas), the Ministry of Environment, the Ministry of Foreign Affairs and some correlated scholarly bodies that could develop strategic research on the subject.

5. Conclusion

Although the definition of 'private standard' in itself is not a pacific one, it must be taken into consideration that private standards may be considered 'international standards' and their 'non-governmental character' does not exclude them from the multilateral trade system; instead they might be well accommodated within the TBT and SPS Agreements. Private standards have been considered voluntary in nature, but they are *de facto* mandatory and whenever they are backed by governments, they might fall within the scrutiny of the TBT and SPS Agreements and Committees.

Notwithstanding the present terminology used in practice ('private standard'), the present essay proposes also a new terminology - 'market standards', which would better comprehend all the transnational regulatory work that has been on-going, in fact. Nonetheless, a different terminology would not remove the concerns related to proliferation of such standards.

Proliferation of market standards has brought big challenges towards legitimacy on creation and setting of such standards as well as accountability and State responsibility towards the behavior of the bodies that have issued them.

Concerns related to legitimacy intend to answer questions such as:
i) 'who is producing the standards?'; and
ii) 'where such authority comes from?'

On the other hand, concerns related to accountability are related to:
i) are there scientific basis for the creation of such standards?;
ii) who responds for the setting of market standards under a market/government failure and a multilateral trade system perspective?

This essay proposes that meta-regulation would be the key to answer such questions and to calm down their related concerns.

Many meta-regulation efforts have been on-going, split in different sectors and strategic areas. In general, so far, the existent meta-governance efforts have taken the structure of 'an internally oriented collaboration between a limited number of like-minded peers active in the same sector, an inclusive process aiming to bring and influence as large as possible a subset of standards initiatives and other stakeholders in a particular industry, and a collaboration between frontrunners from a variety of different fields'[99]. In the end, their poor efficiency - as pointed out by some working papers and distinct scholars - is

[99] Derkx, 2013, at 15.

also related to legitimacy and accountability, since they do not diminish the overall problem of proliferation of standards, 'standardization of standards', and general confusion among producers and consumers, letting the market too free to decide whatever it wants to do.

Due to fragmented initiatives in the process of meta-regulation for market standards, 'the need for enhanced relationships, trust and understanding among the various actors involved is so big that these secondary effects of meta-governance initiatives are often considered just as important, if not more important, than the actual official outputs these processes generate'[100].

Perhaps, a multilateral stakeholder structure, such as ISO or UNFSS would gather together a larger number of stakeholders and could have more legitimacy on the setting of meta-regulation on market standards, which could diminish the problems of 'greenwashing', anti-competitive practices and malpractices in the standards- setting business.

One of the biggest challenges would be the choice between a model of meta-regulation based on a 'secretariat' or based on 'membership'[101]. A membership model – such as the one established by ISO - would generate more support for the meta-governance process among member organizations and States and perhaps would lead more easily to a plurilateral or multilateral collaboration[102]. On the other hand, a model based on secretariat - such as the one created by the UNFSS – would have more autonomy and as such could lead to a process of meta-regulation that operates faster, more decisively and more productively[103]. One should not forget that, in the end, the goal is to achieve effectiveness.

ISO has been 'stigmatized as a club dominated by private industrial groups, where civil society has no real role to play. ISO members are national standards bodies; many of which in turn are private non-profit groups, often dominated by private companies. Not only is civil society excluded from the decision-making process – it may not even exercise a critical role, as proposed standards are difficult to access. Even adopted ISO standards cannot be accessed free of charge but must be purchased. Such legitimacy and accountability issues may appear irreconcilable with the privileged status that ISO standards seem to have at the WTO'[104].

Due to 'their global reach, extensive expertise, strong legitimacy, perceived neutrality and ability to act as a gateway to more government involvement, UN agencies are particularly well-positioned to successfully take up such a meta-governance role (…) UN involvement would also be beneficial when it concerns the meta-governance of exclusively private standards setting fields'[105]. Thus the UNFSS could be well positioned in taking up such a role. In fact, under the auspices of the UNFSS, national platforms have been built in China and in India, which purport to become UNFSS focal points in order to coordinate between standardization composed of public/private sector, and policymakers, thus establishing a feedback system that would build on a whole scenario for private standards.

[100] Derkx, 2013, at 18.
[101] Derkx, 2013, at 21.
[102] Derkx, 2013,a t 21.
[103] Derkx, 2013,a t 21.
[104] Arcuri, supra, at 495.
[105] Derkx, 2013, at 19.

This essay also proposes the creation of a market standards focal point in all interested countries, particularly emerging countries as Brazil, so as to accommodate TBT and SPS measures and concerns and become an established structure to deal with issues related to different trade barriers caused by proliferation of market standards. Such national focal point could be an inter-ministerial body, which could combine together the works and staffs of different private and public national bodies.

Such an initiative would certainly enhance legitimacy and accountability, which is one of the main concerns in the punctual efforts of meta-regulating market standards, so far it would involve directly government, non-governmental entities as well as the private sector, thus levelling the playing field among developed and developing countries partners.

In summary, this article defends the creation of an international body on private standards, which will bear responsibility for the negotiation of these basic rules and also for the representation of their stakeholders in other trade international fora, such as the WTO – the meta-organization in charge of trade regulation – and its landmark Agreements on TBT and SPS measures.

In conclusion, standards could be mandatory, non-mandatory, private, governmental, transnational or from any other kind, but if they affect international trade, they must follow basic principles and rules and be represented by their stakeholders. Moreover, they must have an international body to guarantee their legitimacy and their accountability and defend their rules when they create impacts on other established international trading rules.

The WTO SPS and TBT Committees are committing a strategic error not taking more seriously the issue of private standards. The political maneuvers to always postponing decisions in the SPS Committee and the strategy not to discuss the issue seriously in the TBT Committee will damage the interests of all the WTO Members. Private-market standards are already affecting multilateral trade, and should be scrutinized jointly by the TBT and the SPS Committees, since they are growing in the grey area between TBT and SPS measures..

It is past the time that one could, on this matter, follow the ancient saying of Hippocrates – ‘prevention is better than cure'. Notwithstanding with such lapse of trade strategy, it is not too late to remedy the non-attended multiplication of market standards. Certainly, better late than never to meta-regulate the market.