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COMPETING FOR STANDARDS IN GLOBAL FOOD SUPPLY CHAINS

Olivier De Schutter¹

Abstract

The past twenty years have been characterized by the rapid expansion of the global supply chains in the agrifood sector. Concentration in the food production and distribution chains has been significantly increasing as a result, and so has the bargaining power of large retailers and commodity buyers over agricultural producers, particularly small-scale food producers. Adopting a measure of power that is correlated to the dependency of small-scale producers on the buyers and the retailers, this paper focuses on the power of agribusiness corporations to impose their standards, that are complementary to -- and sometimes more stringent than -- the standards imposed by the States. This article examines various strategies through which such private power to set standards in supply chains can be checked, in order to ensure that standards are not a source of exclusion, particularly for small-scale producers who face the most serious difficulties to comply. Based on an analysis of distributional effects of the current system, and of the respective role of States and private actors in global food chains, it proposes other ways of setting standards that would provide a better protection against existing imbalances of power for the weakest parties in the food chain. It concludes that the State has an important role in ensuring that regulatory capabilities are more equitably distributed in global food supply chains, and that by adopting a chain-wide approach, in which the participants can permanently learn and improve the choice of standards, the risks of abuse inherent in the current organization can be significantly reduced.

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1. Introduction

The past twenty years have been characterized by the rapid expansion of the global supply chains in the agrifood sector (Reardon and Berdegú 2002; Reardon et al., 2007 and 2009). Commodity buyers (wholesalers) are larger and more concentrated than previously. They seek to respond to the requirements of their food industry clients by increased vertical coordination, tightening their control over suppliers. The processing industry also is rapidly consolidating. After an initial period during the 1980s and early 1990s during which the parastatal large-scale processors were dismantled, this sector has been increasingly globalized and dominated by large transnational corporations. Global retailers and fast food chains, finally, are expanding (Schwentenius and Ángel Gómez 2002; Reardon et al. 2003). They reach currently also to China, India, Russia, Vietnam, and increasingly Southern and Eastern Africa (Kearney 2010). These retail chains are also diversifying from processed foods to semi-processed foods and, increasingly, fresh produce.

Large retailers tend to prefer to source from large wholesalers and large processing firms, leading to what has been called a "mutually reinforcing dual consolidation" (Farina et al. 2005): by sourcing from larger wholesalers and processors, retailers reduce transaction costs and have access to a diversity of product types in a "one-stop shop" ; they may benefit from the superior buyer power that such larger suppliers have, which allows such suppliers to obtain discounts from the producers of raw materials ; the invoicing system is formalized, allowing the retailers to discharge their accounting obligations for value-added tax accounting and product liability; and the packaging and branding of products is superior to that that smaller processors or wholesalers would be able to achieve (Reardon et al. 2010). In addition, since large buyers can obtain from the sellers a number of concessions that reflect their dominant buyer power, such as discounts from the market price that reflect the savings made by the seller due to increased production, or the passing on to the seller certain costs associated with functions normally carried out by the buyer, such as grading of the livestock or stocking of shelves, the dominant buyers also acquire a competitive advantage over less dominant buyers in the downstream markets, leading to the acquisition by the larger agribusiness firms of dominance on both the buying and selling markets (United Kingdom Competition Commission 2008, para. 5.27; Dobson and Inderst 2007). Due to these self-reinforcing mechanisms in which buyer power grows by the very fact of being exercised, the

modernization of global supply chains results in an increased concentration in the food production and distribution chains (Gibbon 2005).

The modernization of global supply chains described above thus tends to increase the power imbalances in the food chain, at the expense, potentially, of the least organized and most dependent segments: the consumers and the producers of raw materials (Foer 2010; Carstensen 2008). In particular, for small-scale producers in developing countries seeking to enter global supply chains, the implication is that a narrow set of large firms increasingly act as gate-keepers to the high-value markets of rich countries. The ability of these firms to control access to markets represents a key source of power in global food chains (Oleinik 2011; Anderson 2009; Hendrickson et al. 2008). For example, in the Brazilian soybean market there were roughly 200,000 farmers attempting to sell to five main commodity traders in 2003, as Bunge, ADM, Louis Dreyfus, Cargill and Avipal/Granóleo, together were controlling 60 per cent of the Brazilian soybean crushing industry (Vorley 2003, p. 44) ; three large transnational commodity buyers (ADM, Cargill, and Barry Callebaut) dominate the Ivorian cocoa industry (Vorley 2003, p. 50). Food processors sometimes also achieve the same degree of concentration : in 1996, two transnational food and beverage companies, Nestlé and Parmalat, together with the Brazilian-owned company Vigor, were reported to share fifty-three percent of the Brazilian dairy processing market, driving off a large number of cooperatives who were led to sell their facilities to these companies (Vorley 2003, p. 58). As part of the process of vertical integration that characterizes the agrifood sector as a whole, both wholesalers and retailers seek to secure stability of supply by the use of explicit contracts (long-term arrangements with producers, or 'contract farming') or techniques such as preferred supplier lists ; procurement is increasingly centralized, as the procurement-shed (the area from which companies source) expands from the national to the regional and global networks ; and more trade occurs intra-firm, with Cargill in Argentina selling soy to Cargill in Europe for example, rather than inter-firm or inter-country (Vorley 2003, p. 2).

These developments in turn work tend to favor comparatively large producers, and to exclude small-scale producers from access to modern supply chains. The larger producers have easier access to capital and thus to non-land farm assets such as storage, greenhouses, or irrigation systems, and they can more easily comply with the volumes and standards requirements that the agrifood companies -- the commodity buyers, the processors, and the retailers, depending on which sources directly from the producer of raw materials -- seek to impose. Thus, unless

they organize themselves into cooperatives or unless they are otherwise supported in the acquisition of such assets, small farmers can only compensate for this disadvantage by their lower labor costs (provided there is some substitutability between capital and labor, which depends on the crops concerned), or because they are a less risky sourcing option to the buyers, since the larger farmers have more market options and thus can be less reliable (Codron et al. 2004). The disturbing consequence is that small farmers pay a high entry fee into global supply chains : because of these structural obstacles they face, they can only compete by self-exploitation (Chayanov 1966), for instance by agreeing to low wages for those (often family members) working on the farm, and to be locked into a situation of high dependency towards the buyer.

This article focuses on the impacts on producers of how private standards are set and enforced by buyers in the upstream markets. This is one of the most striking manifestations of the shift from public regulation by governments, to the adoption of global rules by private actors colonizing the transnational space (Büthe and Mattli 2011). Indeed, as part of the current transformations of global supply chains, standards come to play an increasingly important role : in addition to public standards, processors and retailers impose compliance with a wide range of private standards, that now include not only requirements related to food safety and hygiene, but also social and environmental requirements, often imposed through codes of conduct adopted at sectoral level (Ponte 2002; Swinnen 2007).

Their buyer power and the resulting highly unequal distribution of regulatory capabilities in global supply chains, allows the major players of the agrifood industry to impose their standards on their suppliers. Such standards are complementary to -- and sometimes more stringent than -- the regulatory standards imposed by the States. The way private standards have developed, in combination with public standards, illustrates the respective regulatory capabilities of the participants in global food chains. This paper examines how imbalances the growth of buyer power may affect how such standards are designed and implemented, and how they may result in a transfer of costs to producers which the least well equipped among these may not be able to bear. It also identifies some ways in which the problems resulting from such imbalances could be addressed. In doing so, it sheds light on the relationship between buyer power and how the transnational regulatory space is colonized. But the paper also seeks to contribute to an urgent debate about how global food chains can be made more inclusive, particularly for the large number of small-scale food producers that face the greatest

obstacles in entering into these chains (and thus in having access to the high-value markets they lead to), or if they do enter, to reap adequate benefits. The rural poor, who still represent the majority of the food insecure people on Earth, may benefit from greater equity in global supply chains, both through product-market channels (as independent producers supplying large buyers) and through labor market channels (as farmworkers employed on agro-industrial estates) (Maertens and Swinnen 2008). This presupposes, however, that the current modernization of the food chains shall lead to a fair distribution of the outcomes, especially for the producers of raw commodities : a more equitable distribution of regulatory capabilities -- the ability, for each actor of the chain, to co-design the standards applicable -- is key to fulfilling that objective.

2. "Buyer power" and the imposition of standards

"Buyer power" is a contested notion, that is neither easily defined nor easily measured (Sheldon and Sterling 2003). It is linked, obviously, to the degree of concentration in the upstream market, and to whether the buyer is in a position of monopsony or oligopsony such that it can force sellers to "reduce price below the level that would emerge in a competitive market" (Noll 2005, p. 589). It is often said that in a situation of monopsonistic competition, the buyer may capture a disproportionate portion of the value in the food chain. However, if the buyer faces a sufficiently intense competition in the downstream market, a portion at least of that value shall have to be transferred to the consumers, who may thus benefit in the short run (Chen 2007). In addition, the figures mentioned above to illustrate the reality of concentration are not particularly instructive, since they say nothing about the disciplining function on buyers that results from the mere threat of a new competitor entering the market, and since they are also silent about the reality at local level of the access of producers to markets -- as such access depends on infrastructure, on information about price, and on the possibility to obtain credit for self-marketing, among other factors. But our interest in buyer power is that it can also be exercised not to force the seller to sell at a low price, but also to comply with certain conditions that will shift costs onto the seller: indeed, a slightly broader definition of buyer power is that it may be said to exist insofar as, "in relation to at least one supplier, [the buyer] can credibly threaten to impose a long term opportunity cost (i.e. harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself" (OECD 1998, p. 6; for a comparison of these various definitions, Chen 2008).

Buyer power thus defined allows the agrifood companies to impose on the producer that it complies with certain conditions. Such conditions are linked to food safety and hygiene (product specifications), or to compliance with basic labor or environmental standards (process specifications). The form and substance of these standards vary widely. They may take the form of clauses inserted into contracts with suppliers. They may be codes of conduct adopted unilaterally by the buyer, which all the suppliers are expected to comply with although this may not be explicitly part of the contract's terms. The standards may be set at the level of a particular sector, or instead designed unilaterally by the buyer. They may also be the result of a multistakeholder dialogue, with unions (in particular, in the form of international framework agreements (see Drouin 2010)) or with non-governmental organisations. While standards related to food safety and hygiene are often aligned with public (regulatory) standards, that is not necessarily the case, and other standards, such as those related to environmental sustainability and labor rights, do so less frequently.

The buyer's motivations in adopting private standards may determine both how the standards are set and whether they shall be enforced by a third party, or rather unilaterally by the buyer itself. A first reason why a buyer may wish to impose on the seller that it complies with certain standards may be in order to ensure that it will fully respect certain public regulations that aim at the protection of the consumer, but that may be underenforced : inserting a reference to such standards in the contractual arrangements with the seller thus strengthens the ability for the buyer to ensure that the product shall comply with pre-existing regulatory requirements (Cafaggi 2012). In some instances, this may be linked to regulatory developments imposing a due diligence liability on retailers for the products that they sell, even where the defect in the product is directly attributable to another actors upstream the food chain (Jaffee 2003; Jaffee et al. 2005; Fulponi 2004). For instance, the 1990 United Kingdom Food Safety Act provides that any person selling food that does not comply with food safety requirements is guilty of an offence, but allows for a defence for the person charged to prove "that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control", for instance by showing that "the commission of the offence was due to an act or default of another person who was not under his control, or to reliance on information supplied by such a person", or that "he carried out all such checks of the food in question as were reasonable in all the circumstances, or that it was reasonable in all the circumstances for him to rely on checks

carried out by the person who supplied the food to him" (United Kingdom Food Safety Act 1990, sect. 21, (1) and (3)(a) and (b)). By inserting requirements linked to food safety and hygiene in the contract, the buyer may protect itself both from reputational risks and from legal liabilities. An additional benefit from the buyer's point of view is that the standards are pre-existing, as they are defined in regulations protecting consumers in the downstream market, thus reducing the costs of identifying standards that provide sufficient safeguards against the risks to consumers' health.

A second motivation of the buyer in imposing standards may be to reassure consumers in a context characterized by significant information asymmetry about the safety and quality of products, as well as about the social and environmental conditions of production. Indeed, the development of private standards relating to food safety has in part been the result of certain food scares in the 1980s and 1990s, such as the beef hormone scare in the EU in 1987-8, the outbreak of E-coli in fast-food hamburgers in the United States in 1993, the brain-wasting disease linked to BSE in the United Kingdom in 1996, or dioxin in animal feed as seen in Belgium in 1999 (Jaffee 2005, p. 16). A buyer imposing strict standards on its suppliers may expect to be rewarded by consumers, aware that neither they, nor the public authorities, can adequately substitute for self-policing within the supply chains, due to the existing information asymmetries (Kirchhoff 2000). That seems to be the primary motivation in the establishment of the European Retailers' Protocol for Good Agricultural Practice (EurepGAP), which later evolved into GLOBALG.A.P., a certification covering the process from farm inputs to the farmgate that grew steadily over the years, to now include a total of 112,600 producers spread over more than 100 countries -- although three quarters of them are still in Europe (GLOBALG.A.P. 2011).

Third, buyers may seek to differentiate their products by resorting to standards that serve a "signalling" function, allowing them to segment the market in their favor and, if possible, to reduce the pressure of competition (Spence 1976; Mussa and Rosen 1978; Vandemoortele 2011). This quest for differentiation and for segmentation is a major factor explaining why, even in the presence of minimum quality standards imposed through public regulation, buyers may exhibit "voluntary overcompliance": they opt for even more demanding standards, that will attract consumers prepared to pay a premium for an even higher level of safety (Vandemoortele 2011, building on Arora and Gangopadhyay 1995).

Fourth, buyers may choose to adopt certain private standards in order to pre-empt the imposition of publicly imposed, regulatory standards, that they may consider could be ill-informed, insufficiently flexible, or too costly to comply with. This results in an implicit deal in which self-regulation allows the regulator to set only minimally protective standards: instead of lobbying directly for less demanding standards, the firms choose to influence the regulatory process indirectly, reassuring the consumers and the authorities by the adoption of standards developed within the industry. Such a pre-emption strategy may be successful for two separate reasons, which pull in opposite directions. First, the regulator may be convinced to settle on very low quality standards with the expectation that agrifood corporations shall 'race to the top', adopting higher standards as a means to differentiate their products and to attract consumers that express a preference for products that provide them reassurance beyond the minimum public standards. Second however, low quality standards in public regulation may be justified by the expectation that industry-wide initiatives shall be taken, so that a harmonized approach across the whole sector, rather than product quality differentiation by each individual buyer, shall take place. From the point of view of the buyers, private standards may be preferred either because of the product differentiation that they allow or because of the greater flexibility and responsiveness to technological change and consumers' preferences. However, where the costs of designing and enforcing such standards exceed the benefits for the individual firm, and the sector is insufficiently well organized to adopt sector-wide standards, the imposition of public regulatory standards may be seen as more desirable by firms as a means to ensure that competitors shall not increase their market by adopting lower-than-average product quality requirements, particularly where the consumer is unable to differentiate adequately among products (Swinnen and Vandemoortele 2011).

Fifth, private standards may be a way for the buyer to reduce the transaction costs that can result from the coexistence of different regulatory standards, set by different States in their respective jurisdictions. In the absence of private standards, a division of labour would exist in which the States where the producers are located shall impose on the production process certain requirements related to working conditions (including minimum wage, union rights, and occupational health and safety), and in which the States where the consumers reside regulate product quality standards, related to food safety and hygiene. Such a scheme would be in principle workable for the buyers and retailers, even where they sell on different markets, in part because requirements related to health and safety are increasingly harmonized through the work of the Codex Alimentarius Commission, established in 1963 by the Food

and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) to gradually develop internationally harmonized food standards. But this deceptively simple division of labour is breaking down, and it is becoming increasingly difficult to manage for the large players in global food supply chains. Not only is the harmonization of food safety requirements far from complete, making it sometimes difficult for retailers to adapt to a diversity of regulatory frameworks in the countries where they sell. But in addition, the preferences of consumers now relate not only to food safety (product quality) but also to compliance with certain environmental and labour standards (process). Retailers seek to respond to these preferences: their standards refer increasingly not only to which foods are sold, but also to the conditions under which such foods were produced. And since the food processors and retailers have enlarged their procurement-shed in recent years, they now source from suppliers that work under widely diverging regulatory environments, and the degree of enforcement of the labor and environmental regulations imposed on the suppliers is highly uneven. It may be therefore in the interest of processors and retailers facing this "piling up" of regulatory standards to set standards that shall apply uniformly across all their operations. Such standards may seek to ensure a level of protection of consumers, of the environment and of workers' rights, that will be at least as high as the highest regulatory standard applicable in the countries in which they operate. More often however, such standards shall operate by reference to some external standard, such as those set for labour rights in the core instruments of the International Labour Organisation, or by an international norm-setting body such as the Codex Alimentarius Commission. As regards labour rights, they typically will refer back to the domestic regulations applicable to suppliers. For instance, the Ethical Standards Program of Wal-Mart imposes Standards for Suppliers, that provide:

Suppliers shall comply with all local and national laws and regulations of the jurisdictions in which the suppliers are doing business as well as the practices of their industry. Should the legal requirements and practices of the industry conflict, suppliers must, at a minimum, be in compliance with the legal requirements of the jurisdiction in which they are operating. If, however, the industry practices exceed the country's legal requirements, Wal-Mart will favor suppliers who meet such industry practices. (Wal-Mart 2012).

These various motivations explain both the diversity of the channels through which private standards develop, and the ambiguous relationship such private standards entertain to public (regulatory) standards. They also can explain when a particular buyer shall choose to adopt its own standards and to control compliance itself, or when it shall instead rely on multistakeholder processes (often including independent third-party certification of the supply

chain or of certain lines of products, or involving unions as in the case of international framework agreements), or seek to work together with other buyers of the same sector in order to adopt a single set of standards or, at least, mutually consistent standards. More precisely, a stylized presentation of the relationship that may exist between the various motivations buyers may have in adopting certain standards and the different functions associated with rule making -- the setting of standards (legislation), the control over compliance (monitoring), and the imposition of sanctions in cases of non-compliance (enforcement) --, leads to propose the following summary :

	Norm-setting (legislation)	Controlling compliance (monitoring)	Imposing sanctions for non-compliance (enforcement)
Private standards as a means to ensure compliance with regulatory requirements	Standards set by regulation	Monitoring by individual firm, by third-party or sector, in addition to public authorities	Sanctions imposed by individual firm, by third-party or sector, in addition to public authorities
Private standards as a means to reassure consumers	Standards set by individual firm or by third-party or sector, stemming from a distrust with public standards	Monitoring by individual firm or by third-party or sector in order to strengthen trust	Sanctions imposed by individual firm or by third-party or sector
Private standards as a means of product differentiation	Standards set by individual firm with a view to market segmentation	Monitoring by individual firm or by third-party in order to strengthen trust	Sanctions imposed by individual firm
Private standards as a means to preempt public (regulatory) standards	Standards set by the sector	Monitoring by third-party or sector	Sanctions imposed by individual firm or by third-party or sector
Private standards as a means to overcome transaction costs associated with regulatory fragmentation	Standards set by individual firm, but may refer to public (regulatory) standards	Monitoring by individual firm or by third-party	Sanctions imposed by individual firm

Regulatory capabilities may be said to be shared across the different functions of rule making (norm-setting, monitoring and enforcement), and to be distributed unevenly across actors: depending on the particular standard under consideration, the public authorities (both of the country where the seller/producer is located and of the country where the buyer's consumers are located), the individual buyer, the sectoral association of buyers of which the individual buyer is a member, or other stakeholders such as unions (as in the case of international framework agreements) or non-governmental organisations (as in many multistakeholder processes that seek to promote fair trade, environmental sustainability, or compliance with

labor rights), may have a role to play. In order to assess the distributive consequences of how such regulatory capabilities are exercised, two questions are of particular importance. The first question concerns the relationship between private standard-setting initiatives, whichever form they may take, and public regulatory regimes. The second question concerns the impacts of standards on the weakest and least well organized sellers, particularly small-scale farmers located in developing countries. The following sections discuss these two questions in turn.

3. Private standards and public regulatory regimes

From one perspective, private standard-setting may be seen as a challenge to the monopoly of States in adopting regulatory standards. Instead of being territory-based, and the result of public, deliberative processes balancing the costs to suppliers and buyers of adopting and implementing standards against the perceived benefits to the consumers, the standards are linked to certain value chains or, where different actors of the same sector coordinate their efforts to set standards, to certain sectors ; and they are adopted by the buyers unilaterally and, often, with very little consultation. Private standards are thus being imposed on suppliers that are not the result of a political deliberation in the jurisdiction where they operate, but rather of actors located outside that jurisdiction. As a result, the interests of the suppliers and the specific conditions in which they operate may be insufficiently taken into consideration in how standards are designed, monitored and enforced: instead, the interests that will be paramount in the shaping of the standards shall be those of the consumers, and those of the shareholders, the two being linked by the interest of the latter to preserve the reputational value of the firm, as rewarded by the former.

Some authors have alleged that this will lead to a displacement of public norms by private norms, and in a net loss of States' authority to legislate. For instance, Larry Catá Backer writes :

Where regulation does not exist (in form or fact), or where markets in law break down or are inefficient, other competitors will enter the field. Where these competitors can deliver a better product—rules that optimize expectations, and perhaps that are even fair, consistent, predictable and stable in a larger sense—these competitors may well displace the territorial law making monopolies of nation states. (Backer 2007, p. 1749).

In fact however, the scenario in which private standards serve to compensate for failures of public regulatory regimes is only one among many others, and it may not be either the most

frequent or the most interesting. Indeed, even opposing private standards and public regulations, as if the two were mutually exclusive, may be misleading. First, just like private standards may refer to public regulatory regimes, conversely, State-based regulation may be based on existing standards, initially developed by private actors. A well-known example in the European Union is Regulation (EC) No. 853/2004 of 29 April 2004 on the hygiene of foodstuffs, which seeks to protect food safety "from farm to store". That regulation essentially encourages food business operators to establish and operate food safety programmes based on the principles of "hazard analysis and critical control point" (HACCP), that had been initiated by the food industry. The Preamble to the Regulation notes in this regard : "Successful implementation of the procedures based on the HACCP principles will require the full cooperation and commitment of food business employees. To this end, employees should undergo training. The HACCP system is an instrument to help food business operators attain a higher standard of food safety. The HACCP system should not be regarded as a method of self-regulation and should not replace official controls" (Recital 13). Here, the private sector experimented an approach that proved successful, and on which the State could then build by referring to it in legislation.

Second, what we observe increasingly are the hybridization of private and public standards, as well as an allocation of the different functions of rule making across different actors, that are both private and public. For instance, private standards may refer to public regulations, as when clauses in supply chain contracts state a requirement that suppliers comply with the domestic legislation applicable, or with standards set at universal level through the ILO, as often happens in the area of workers' rights (Christopherson and Lillie 2005). Such references are not mere redundancies, since they will allow the buyer to monitor compliance, and possibly to impose sanctions, in cases of non-compliance (Cafaggi 2012). Similarly, the public authorities may contribute to the monitoring and enforcement of some private standards, though these are chosen unilaterally by the buyer: public purchasing schemes may seek to reward corporations that adhere to certain voluntary initiatives, thus showing a measure of "corporate social responsibility" (as authorized in the UE, for instance, by Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts); both in the United States and in the European Union, codes of conduct that convey misleading information to the consumers may be treated as misleading advertising, a form of unfair commercial practice

that may give rise to certain legal liabilities² -- thus strengthening the role of such voluntarily adopted commitments and giving them a form of legal recognition, while at the same time resulting in a disincentive to companies who may fear to commit themselves to upholding potentially too demanding standards (Sutton 2003, pp. 1178-80). Yet other forms of co-regulation -- the combination, in hybridized form, of private standards and public regulatory regimes -- can easily be imagined, or have been proposed. For instance, the European Parliament recommended in 2002 that a multi-stakeholder platform be established to 'register voluntary codes of conduct and similar initiatives and verify them against minimum applicable international standards such as the OECD Guidelines for Multinationals and the ILO Core Labour Standards'.³

What these various examples show is that private standards and public regulatory regimes should not be opposed, as if they were competing against another for attention and relevance, or as if they were in a relationship of communicating vases. It would be therefore incorrect to suppose that, the more private standards are developed by buyers and imposed on their suppliers in food chains, the less relevant public regulation becomes. Instead, the two can be mutually supportive, reinforcing one another : what must be designed are appropriate combinations, in which the advantages associated with private standards (flexibility and adaptability to consumers' preferences, decentralized enforcement through contractual means, and ideally the legitimacy stemming from the fact that they will be co-designed by the buyers and the suppliers) are combined with public regulatory regimes that can confer greater

² In the case of *Kasky v. Nike, Inc.*, Marc Kasky, a California resident, sued Nike for unfair and deceptive practices under California's Unfair Competition and False Advertising Laws. Kasky argued that 'in order to maintain and/or increase its sales', Nike made a number of 'false statements and/or material omissions of fact' concerning the working conditions under which Nike products are manufactured by its suppliers, in factories in Southeastern Asia. The California Supreme Court took the view that California unfair trade practice and false advertising law applied to Nike's statements, notwithstanding that those statements were not made in product advertisements and included no product references : such statements were classified as 'commercial speech', subject to strict governmental regulation, although they did not constitute product advertising per se (*Kasky v. Nike*, 27 Cal. 4th 939 (2002), *cert. granted*, 123 S. Ct. 817, and *cert. dismissed*, 123 S. Ct. 2254 (2003)). In the EU, the 2005 Unfair Commercial Practices Directive (in Article 6(2)(b)) explicitly defines as constituting a misleading commercial practice a failure to comply with commitments contained in codes of conduct where 'the commitment is not aspirational but is firm and is capable of being verified' and where 'the trader indicates in a commercial practice that he is bound by the code'.

³ European Parliament resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility (COM(2001) 366 - C5-0161/2002 - 2002/2069(COS)), 30 April 2002 (rapp. R. Howitt), op. para. 14. See also the Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct (EP doc. A4-0508/98) (OJ C 104 of 14.4.1999, p. 180), recommending that business and industry 'provide information about their voluntary initiatives and conduct to [a monitoring mechanism to be set up in the form of a multi-stakeholder platform] so that their compliance with a European code of conduct, international standards and private voluntary codes of practice (if adopted) could be properly assessed' (para. 16-18).

legitimacy to such private standards (for instance, by 'labelling' them or recognizing them as providing an appropriate level of protection of certain values) and strengthen the incentives for companies to adopt such standards and to enforce them in ways that are both predictable and fair. I return to this idea in the conclusion.

4. The potential exclusionary impacts of private standards

There is ample evidence that shows that the growth of private standards in global supply chains has made it more difficult for small-scale food producers to enter into such chains and, thus, to have access to the high-value markets of rich countries. For instance, in their study of the vegetable export chain in Senegal, Maertens and Swinnen conclude that tightening standards led to a shift from smallholder contract farming to integrated estate production (Maertens and Swinnen 2009). It has also been reported that the sharp decline of the proportion of Kenyan smallholders contributing to the export earning of that country -- from 70 % in 1997 to 30 % in 2000 --, and especially the loss by 1,600 smallholders of their contracts with European retailers in 2002, were directly attributable to imposition by these retailers of new quality standards (New Agriculturalist online 2003). Indeed, research into the horticultural sectors of Kenya and Zambia also shows that “the average recurrent costs of *GLOBALGAP* compliance typically exceed half of the margin for [smallholders]”, often forcing them out of global supply chains (IIED and NRI 2008). While smallholders may find it too costly to invest in complying with standards, those who source from them -- especially the exporting companies who act as intermediaries between the producers and the retailers -- may consider that the costs of monitoring compliance over a large number of units are too high, so that they are encouraged to switch from smallholders to larger commercial farms: this process has been well documented in a multi-year research programme on agrifood standards led in 2005-8 by IIED and NRI with the support of UK Department for International Development (DFID) and the Swiss Agency for Development and Cooperation (SDC) (Boro de Batisti et al. 2009). Studies have also shown that the practice of dominant UK groceries retailers of passing on to Kenyan producers the cost of compliance with the retailers' private standards on hygiene, food safety and traceability has resulted in the moving away of food production from smallholders to large farms, and in an increase in vertical concentration as retailers seek to control more tightly the supply chains (Dolan and Humphrey 2004).

A number of initiatives could be adopted in order to reduce or mitigate this exclusionary effect of the tightening of standards in global supply chains. The Smallholder Guidelines, developed in 2006 by the Ethical Trade Initiative (ETI), provide a number of suggestions in this regard. These Guidelines set out a series of steps to be implemented sequentially within specified timeframes. They recommend that the nature and position of the smallholders within the supply chain should be identified, followed by an assessment of their needs and priorities regarding not just labour issues, but also operational matters. A 'development and improvement plan' should then be drawn up, the nature of which should vary according to the particular market. Lastly, there should be periodic evaluations of plans undertaken with smallholders, in which farmers and other supply chain actors should participate. A key question concerns the benefits are shared across the supply chain -- and specifically, where the costs of compliance shall be borne. Because such costs may be too high for smallholders to support, compliance should be rewarded by the payment of a premium by the wholesalers, at least during the first years of implementation, and the buyers should provide technical assistance to facilitate compliance with standards. Indeed, the ETI Smallholders guidelines take the view that: 'retailers cannot expect smallholders to bear all the burden of meeting new technical standards. [Retailers] can help smallholders by sharing the risk of transition to production processes that meet these standards. For instance, [they] can invest in technical assistance, funds or materials for smallholder production' (para. 4.5). Finally, the ETI Smallholder Guidelines note (in para. 3.4.5) that a 'needs and priorities assessment approach' may be preferable to a standard inspections/audits approach : smallholders need to be supported by participatory methods allowing the buyer to understand compliance problems and to assist in overcoming such problems, in a bottom-up rather than a top-down perspective.

We must go beyond compensatory payments and the provision of technical advice, however. Cafaggi and Pistor rightly insist on the need to pay greater attention to regulatory capabilities in how the transnational space is colonized, as such capabilities largely determine how power and wealth are distributed. The key issue indeed, is not simply how to help small-scale producers comply with the standards as they are set, but how the standards are being set, and which processes shall be put in place for the monitoring and enforcement to ensure compliance : in other terms, any sustainable solution towards inclusive global supply chains must address the question of the distribution of regulatory capabilities. At the very least, the future development of standards should only be adopted after a careful evaluation of the impacts and of the appropriate balance between the level of risk in different crop-types and

production practices and levels of control : for instance, since most small-scale producers in sub-Saharan Africa grow crops that present low levels of risk (particularly because of the low usage of chemicals), it would be justified to subject them to a reduced level of control, thus saving on compliance costs (Graffham and Cooper 2008). Such an evaluation can only be performed with the participation of the farmers themselves, who are better placed to identify the concrete obstacles they may be facing in seeking to comply: it is such a feedback that the Smallholder Ambassador/ Africa observer project launched by GLOBALG.A.P. in May 2007 seeks to achieve.

But that is only a first step. Moving beyond improving participation in standard-setting, we may adopt a chain-wide approach, aimed at accelerating learning across the whole chain in order to identify obstacles to developing more inclusive food chains. It is not in the interest of buyers that small-scale producers disappear as a result of their inability to comply with standards, as this would result in the buyers being dependent on a smaller number of suppliers, whose default may have severe consequences for the stability of supply. Food processors and retailers also have an interest in understanding the constraints commodity buyers face in sourcing from small-scale producers, particularly since consumers increasingly demand products that are sourced 'ethically', by which they mean that the sourcing practices of buyers should have poverty-reducing impacts. This demand is now expressed not only through purchasing choices, but also through the establishment of food policy councils (as developed in the United States since the early 1980s and in Canada since the 1990s) or through consumers' cooperatives, who seek to encourage conscious buying and to reform the food chain with a view to making it both more fair and more sustainable (Schiff 2007; Harter et al. 2009). The gradual replacement of relationships based on respective bargaining power by relationships that are founded on deliberative processes, in which each actor may understand the constraints face by the other actors and work towards arrangements that result from a mutual adjustment, may therefore be in the interest of all the actors of the chain. And Governments may support this, for instance by convening fora in which all the participants in the food chain can partake in deliberative processes, that shall address how to improve the sustainability of the chain as a whole. This is already done at domestic level: in South Africa for example, the Food Security Change Lab convened a series of "Innovation Workshops" since 2009 in which all the actors of the food chain, together with academics and non-governmental organisations, worked towards identifying innovations that could contribute to

more sustainable food systems -- an experiment that now may be institutionalized and made permanent under the remit of the South African Human Rights Commission.

At global level, the Sustainable Food Lab initiative seeks to disseminate the model illustrated by the South African Food Security Change Lab. One major benefit that could be expected from moving towards such a model, replacing relationships based on power by relationships based on deliberation, concerns the re-balancing of regulatory capabilities between governments. In global food chains today, countries from which the raw materials are sources are largely standard-receivers, while the countries where the consumers are located are standard-setters -- whether these are public standards set by governments or private standards set by the major retailers or other buyers. This is not precisely what Cafaggi and Pistor refer to as 'infant regulator syndrome', since the reason why countries from which agrifood companies source their produce do not partake in setting standards is not because they have arrived too late on the world stage or because their economies are smaller -- it is because of the existing international division of labour, in which many agriculture-based countries from the global South continue to produce raw materials, when food processing largely is dominated by agrifood companies based in the North : South Africa, the largest African exporter of processed food, had a global market share of only 1% in the period 2000-5 (OECD 2008). A "California effect" follows, in which the countries where the consumers with the highest purchasing power are based end up imposing their standards throughout globalized food chains, as it is the preferences of those consumers, and the need to attract them through strategies of market differentiation, that shall lead agrifood companies to shape standards. To overcome this, representatives of both raw materials producing countries and representatives of importing countries should be fully involved in the discussion concerning standards -- indeed, they should take the initiative of creating the space where such a discussion should take place.

"Power", it has been famously said, "is the ability to afford not to learn" (Deutsch 1963:111). Forcing to learn, it might perhaps be added, is a check against power being abused. It is this that reconceptualizing the process of standard-setting in global food supply chains as deliberative processes, aimed at learning about the constraints each participant faces and at identifying solutions that can best reconcile conflicting interests, would seek to achieve. Moving in this direction would simply be drawing all the consequences from the specific nature of the process of setting standards. Currently, such standards are seen as unilateral

requirements imposed by the buyer on its suppliers, and they are often resented as a barrier to market access for the producers whose capacity to comply is weakest. Instead, the design of "private" standards should be seen as a rule-making process, in which a wide range of stakeholders should be allowed to take part. In addition to the buyer (commodity buyer, processor, or retailer), these stakeholders include the producers of raw materials and the workers employed on the farm ; the exporting company or wholesaler, on which often the transnational agrifood companies rely to source their supplies ; and, at the other end of the chain, the consumers on the downstream market. The reason why all these actors should be encouraged to co-design the standards and to take part in the monitoring and enforcement, is not only because of a requirement of democracy -- or autonomy, understood as the ability for the addressees of the norm to be its co-authors. It is also because of the benefits, to the sustainability of the food supply chain as a whole, of such a broadened participation.

First, as long as the definition, monitoring and enforcement of standards remains purely bilateral -- addressed between the buyer and the supplier --, there is a risk either of underenforcement, or of arbitrary enforcement. Indeed, there is a tension between the pressure that the buyer seeks to exercise in order obtain the lowest prices from the seller, and the imposition by the buyer of requirements, in the form of standards, that imply certain compliance costs on the producer. Both the buyer and the supplier shall find themselves, as a result, in a double bind : what matters most, both might ask, low prices or full compliance with the standards? This tension may have particularly perverse effects, leading to an arbitrary manipulation of standards by the buyer based on prevailing market conditions, where there is no third party enforcement, for example through certification bodies, through global unions or dispute resolution mechanisms included in international framework agreements (Drouin 2010, p. 630), or through consumers' organisations. Horizontal monitoring and enforcement, as opposed to purely vertical monitoring and enforcement by the buyer alone, shall reassure the supplier that it will not have to satisfy conflicting expectations from the part of the buyer, and that the buyer will not use its standard-setting powers as a means to force out from the supply chains producers for reasons of convenience only.

In turn, a movement towards a co-designing of standards involving the producers themselves, and towards a more horizontal monitoring and enforcement -- in sum, a democratization of access to regulatory capabilities in the supply chains -- may benefit the producers, particularly the weakest and most marginal among them, beyond the greater objectivity they may expect

in how compliance is ensured. For, under certain conditions, the development of private standards may have impacts on small-scale producers that are not entirely negative (Swinnen 2007): in particular, by acquiring the technical capacity to comply, they may be in a better position to respond to requests from other buyers, thus improving their access to markets and strengthening their bargaining position. That however requires that the standards be widely recognized across the whole sector, rather than being specific to one buyer alone ; that they be designed in ways that are inclusive, and take into account the specific situation of small-scale producers with little or no capital to invest in compliance ; and that the monitoring and enforcement are not manipulated by unscrupulous buyers, but are trusted to a third party, that has an interest neither in squeezing producers between a requirement that they produce at low prices and that they comply diligently with the standards applicable, nor in using the standards as a means to shift to larger producers that will allow a reduction of transaction costs borne by the buyer.

Finally, the promotion of chain-wide learning through the establishment of appropriate institutional fora and the development and improvement of standards in a more participatory fashion, shall remain insufficient unless complemented by an improved organization of the producers of the raw materials themselves. Small-scale producers should be encouraged to organize into groupings, including cooperatives, in order to form what J.K. Galbraith called a "countervailing power" to the power exercised by large buyers, that allows the latter to impose standards unilaterally (Galbraith 1952). While in the 1960s and 1970s, cooperatives in many developing countries were controlled by governments and sometimes captured value instead of ensuring fair revenues for farmers, leading to their dismantlement during the 1980s, a large number of producers' organisations have emerged more recently, established at their own initiative: between 1982 and 2002 the percentage of villages with producer organizations rose from 8 to 65 percent in Senegal and from 21 to 91 percent in Burkina Faso (World Bank 2007, p. 88). For small producers, grouping together can be key to ensure access to markets (Markelova et al. 2009). Organisations or cooperatives can significantly reduce the transaction costs which commodity buyers associate with small-scale farming. They also enhance the capacity of farmers to obtain lower prices when they buy inputs, and higher prices when they seek to sell their produce. They can spread the risks across their membership; provide services and organize training sessions for their members, thus helping farmers meet the increasing complexity of norms and requirements from buyers and public authorities regulating regional and global food markets; provide infrastructures to members, such as storage or

transformation facilities; and disseminate price and other marketing information. In addition, as noted by researchers who sought to identify how the implementation of the GLOBALG.A.P. standard could be improved in order to be more inclusive, where individual growers produce very small volumes, the costs of compliance could be significantly reduced by "allow[ing] vertical traceability to the level of the producer group (rather than individual farms or plots)" (Graffham and Cooper 2008, p. 2), a reform that the grouping of farmers per definition facilitates.

5. Conclusion

Over the past ten years, global food supply chains have witnessed a growth of private standards developed by large processors and retailers. They have also seen a concentration of power linked to the increased shares of the market captured by certain large agrifood corporations, who have become the true gatekeepers to the high-value markets of rich countries. It is taken together, that these two developments have become a source of concern: the more the bargaining power in the food chains is imbalanced, the more there is a danger that the standards imposed by the dominant players will not be sufficiently inclusive ; that they will not achieve the appropriate balance between the reality of the risks against which standards constitute a form of insurance policy, and the compliance costs involved ; and that these costs will not be apportioned fairly. A more equitable distribution of the regulatory capabilities is therefore urgently needed. Governments may have a role to play in this regard. Section 3 of this article documented a number of ways in which, far from competing with one another, private standards and public regulations in fact are complementary and mutually supportive, dividing the labour between private actors and public authorities in designing the standards, and in monitoring and enforcing compliance. This complementarity has not, at yet, been an explicit goal : it has been the result of practice, rather than it has been achieved by design. But it must be seen as an opportunity. There are ways in which public authorities can encourage chain-wide approaches to the setting and monitoring of standards, with a view both to making the standards relevant -- which the flexibility and adaptability of private standards should allow -- and to ensuring that they shall be more inclusive and welfare-increasing for the suppliers who are in the weakest bargaining position. By recognizing certain standards or standard-setting processes into public regulation, by labelling schemes, by establishing mechanisms by which the failure to comply with certain standards can be denounced and assessed through objective means, or by using preferential public purchasing to reward certain

good practices, governments can influence how standards are being shaped, and they can re-enter the process of shaping such standards as participants, rather than simply as observers setting minimum benchmarks. An adequate hybrid between private standard-setting and public regulation can be achieved. For the reasons outlined in section 4, this must be put in the service of the democratisation of global food supply chains: away from standards that are unilaterally imposed and unilaterally enforced, towards standards that are the result of deliberative processes, involving representatives from all stakeholders, at all segments of the chain.

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