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Item 4(c) of the provisional agenda

PANEL SESSIONS

Panel session 3 – Private Standards

jointly organized with the Working Party on Agricultural Quality Standards

Note by the secretariat¹

Addendum

Background document²

Summary

At its seventeenth session of the Working Party, the Working Party asked its Group of Rapporteurs to consider possible actions to follow up on the issue of private standards or company specifications (ECE/TRADE/C/WP.6 /2007/13, para. 58). This document is part of the response to this request and will be the basis for discussion.

The Swedish National Board of Trade, which compiled this document, considers that neither the World Trade Organization Sanitary and Phytosanitary Agreement nor its Technical Barriers to Trade Agreement is applicable to private specifications. These specifications may fall within the scope of provisions on competition law or provisions on the prohibition of state aid.

¹ This document was submitted late for document processing as clearances from relevant parties were received late.

² Submitted by the Swedish National Board of Trade in September 2008.

This is a relatively new discussion topic in international trade. In practice, private specifications are more burdensome for suppliers in developing countries, therefore aid to developing countries should focus on the countries' infrastructure and not favour certain "private standards" or economic operators.

1. The issue of "private standards" became a discussion topic after some developing countries brought up the question in both the Committee on Sanitary and Phytosanitary (SPS) Measures and the Technical Barriers to Trade (TBT) Committee of the World Trade Organization. This document sets out the general view of the Swedish National Board of Trade on the issue³.

FRAMEWORK FOR THE SWEDISH NATIONAL BOARD OF TRADE ACTIVITIES

A. Concepts and problem definition

2. So-called "private standards" are specifications by private undertakings regarding one or several parts of the supply chain: production, processing or distribution of goods. The specifications concern aspects other than those in force under applicable technical regulations and standards which have been adopted by states or standardisation bodies.

3. In an open market economy the principle of free competition is a basic precondition for the market players, and thus for national and international trade. According to this principle a buyer is at liberty to formulate its own specifications regarding the characteristics or the manufacturing of a product.

4. According to the Organisation for Economic Co-operation and Development (OECD)⁴, so-called "private standards" encompass a large field: product quality, food safety (apart from the Codex rules), working conditions (employee safety and health, as well as age), working environment (access to toilets and changing room for employees) or animal welfare and the environment. There may also be requirements as to certification of the production process and to conduct self-audits. Sometimes the certification must be carried out by an accredited body⁵.

³ The National Board of Trade is the central administrative body for Swedish foreign trade and trade policy. Our activities are based on Sweden's interest in an efficient single market, an open and strong multilateral trade system and further liberalisation of trade policy. The Board's tasks include reducing or eliminating trade barriers and other problems within the European Union/European Economic Area (EU/EEA) and the World Trade Organization (WTO).

⁴ OECD (2006a) Final Report on Private Standards and the Shaping of the Agro-food System, AGR/CA/APM(2006)9/FINAL.

⁵ Third party certification is for instance required for EurepGAP, since 7 September 2007 called GlobalGAP. 'GAP' stands for their harmonised standards and procedures to achieve 'Good Agricultural Practices'. The body carrying out the third party certification of GlobalGAP must be an accredited body in accordance with ISO Guide 65 (EN 45011). More than 80,000 producers in about 80 countries hold GlobalGAP certification. More information is to be found at www.globalgap.org.

5. So-called “private standards” do not correspond to the concept of standards under the International Standards Organization/International Electrotechnical Commission (ISO/IEC) Guide and the TBT Agreement.

(a) Under the ISO/IEC Guide 2:2004, standards are adopted by consensus by a recognized body, and they are to provide rules, among others, for general and repeated use. According to the Guide, standards may be voluntary or compulsory, and they apply to both goods and services.

(b) The WTO TBT Agreement also contains definitions of the concept of standards. The definition is by and large similar to the one given by the ISO/IEC, with some minor differences. According to the definition in the WTO TBT Agreement, standards are voluntary and only apply to goods.

6. However, there is no clear definition of the concept of “private standards”. In the debate, the concept has been used as a general term for requirements as to products and production processes made by a buyer to a supplier in a purchasing situation. Thus they are rather specifications that private actors lay down in the framework of an agreement.

B. The WTO TBT and SPS Agreements

7. The WTO TBT and SPS Agreements are binding for the States that are members of the WTO, and they indicate a level of commitment for the national and regional standardisation bodies that have accepted the Code of Good Practice of the TBT Agreement (Annex 3 to the Agreement).

8. The Agreements are managed by a TBT Committee and an SPS Committee respectively. Some developing countries have asked these Committees to deal with the issue of “private standards”.

9. The objective of the TBT Agreement, in addition to fostering the principles laid down in the General Agreement on Tariffs and Trade (GATT) 1994, is to prevent members from preparing, adopting or applying technical regulations, standards and procedures assessing conformity with technical regulations and standards which may create new, “unnecessary” obstacles to international trade.

10. The WTO SPS Agreement has been negotiated on the basis of the WTO TBT Agreement. It regulates the right for WTO members to take sanitary and phytosanitary measures provided they are not unjustified or discriminatory.

11. There is no jurisprudence that may serve as a guide for the interpretation of the two Agreements on this point, since the issue has not been discussed by any panel or by the WTO Appellate Body in a WTO dispute.

12. In our opinion, neither the SPS Agreement nor the TBT Agreement includes commercial terms concerning contract specifications by private operators.

C. Other regulations may be applicable

13. On a free market, competition between market players creates a balance between “reasonable” and “unreasonable” commercial terms.

14. Many countries have competition rules which provide a framework for formulating or using commercial terms. In the EU, procedures where buyers unite (e.g. branch organisations) and establish terms which are discriminatory, non-transparent or unfair may fall under anti-trust law⁶. Furthermore, the EU provisions on abuse of a dominant position prohibit a buyer in a dominant position from using discriminatory or unfair terms against suppliers⁷. Procedures under competition law are examined by national competition authorities or the European Commission following complaints from the general public or on their own initiative.

15. Many countries also have regulations about state aid to private undertakings. In the EU, State aid is regulated in Article 87 of the European Commission (EC) Treaty. The main rule is that it is not permitted to favour certain undertakings or a certain production if this affects trade between Member States. There are, however, possibilities for exemption for certain types of aid. If a Member State wishes for particular reasons to favour the specifications of a certain undertaking over others, the Commission must first examine if the procedure is compatible with the common market.

D. Can development aid alleviate the problems of developing countries in this case?

16. The issue of corporate social and environmental responsibility is being raised with increasing frequency in industrial countries. The topics discussed are, among others, working hours and working environment, child labour and the use of dangerous substances in production. Some are of the opinion that these issues are now important for consumers in industrial countries⁸.

17. The use of private specifications implies that the suppliers must meet certain specifications relating to their products and production processes. It may be difficult for small and medium-sized supplier undertakings in both industrialised and developing countries to meet these requirements and thus take part in international trade. Generally speaking, unless the supplier's production already meets the requirements included in the specifications, the supplier will have to bear additional costs. It may be difficult for smaller supplier undertakings with limited liquidity and credit possibilities to meet private specifications which may for instance entail additional administrative requirements or higher fixed costs. In practice this means that private specifications may become more of a burden for suppliers in developing countries than in the industrialised world.

18. One way of assisting suppliers in developing countries might therefore be aid for general measures to improve trade, for instance focusing on infrastructure as such. Aid in order to meet

⁶ See Section 6 of the Swedish Competition Act (1993:20) and Article 81 of the EC Treaty.

⁷ See Section 19 of the Swedish Competition Act and Article 82 of the EC Treaty.

⁸ This issue was discussed during the informal meeting for WTO/UNCTAD on private standards on 25 June 2007.

certain private specifications, on the other hand, means that production is subsidised, which distorts competition for both the suppliers and the buyer.
