

1. Introduction

This article is concerned with animal welfare governance in an era in which both public and private bodies set standards by which animals are reared and sourced for food in a global market for agricultural produce. It explores the roles and responsibilities of standard setters in the regulation of farm animal welfare in a ‘transnational regulatory space’,¹ that is ‘one which crosses national borders.’² Private animal welfare assurance schemes purportedly set standards which go beyond, and fill lacunae in, the public animal welfare standards of the European Union (EU) and of the World Organisation for Animal Health (OIE)³ in its Terrestrial Animal Health Code (TAHC). Nevertheless, the potential exists for international collective private business standards to be able to steer the global agri-food chain and impact unfavourably on stakeholders affected by, and interested in, animal welfare standards for agricultural produce. Following the introduction, section two acknowledges the public animal welfare standards adopted by the EU and the OIE, respectively, regarding the wellbeing of food producing animals. The EU, a pioneer in animal welfare governance, endorses the intergovernmental, science-based animal welfare standards of the OIE in the OIE TAHC. The focus is on the evolution alongside of voluntary private transnational animal welfare standards and

*Diane Ryland, Senior Lecturer, Law School, University of Lincoln, Brayford Pool, Lincoln LN6 7TS, UK
dryland@lincoln.ac.uk ; PhD (PT) student, Law School, University of Leeds, UK.

¹ Fabrizio Cafaggi, ‘The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation’ (2015) 36(4) University of Pennsylvania Journal of International Law 101, 113.

² Burkard Eberlein et al, ‘Transnational business governance interactions: Conceptualization and framework for analysis’ (2014) 8 Regulation & Governance 1, 2.

³ The French acronym for ‘Office International des Épizooties.’

particularly collective schemes, which, in turn, raise questions as to whether they are able to justify their authority to determine standards of animal welfare in agricultural produce to stakeholders external to the business regulatory regime. This article characterises ‘regulatory regime’ as ‘that of a transnational non-state regulator,’ the activities of which ‘are not based on or mandated by national, supranational, or international law.’⁴

Section three then takes as a case study the international collective private standards scheme of GLOBALG.A.P. (Global Good Agricultural Practice) and the GLOBALG.A.P. Integrated Farm Assurance (IFA) Livestock Certificate. The methodology is desk-based in presenting GLOBALG.A.P. standard setting procedures for its Livestock Standard, inclusive of animal welfare. The organisation’s internal governance rules are extracted from the corporate information available on GLOBALG.A.P.’s website. GLOBALG.A.P. operates a business to business (B2B) Integrated Farm Assurance Certificate for Livestock, prima facie a private voluntary Standard but one with the potential to become the industry norm, de facto controlling producer access to the global agri-food market.⁵ Brief consideration is given to whether GLOBALG.A.P.’s Livestock Standard can accommodate small-scale producers, in particular from developing countries, seeking an outlet in the global agri-food chain.

Literature underscores the positive strategies undertaken by GLOBALG.A.P. which augment its legitimacy vis á vis significant stakeholder communities, for example beyond Europe - developing countries,⁶ or certification and accreditation organisations and indirectly,

⁴ Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) 2 Regulation and Governance 137, 138.

⁵ Linda C Botterill and Carsten Daugbjerg, ‘Engaging with private sector standards: a case study of GLOBALG.A.P.’ (2011) 65(4) Australian Journal of International Affairs 488, 499.

⁶ Yoshiko Naiki, ‘The dynamics of private food safety standards: a case study on the regulatory diffusion of GlobalG.A.P.’ (2014) 63(1) International & Comparative Law Quarterly 137, 146-55.

thereby, the State.⁷ This article identifies the need to seek consumer legitimacy since there is a noticeable gap in the reach of GLOBALG.A.P. to such a stakeholder external to the regulatory regime, the consumer albeit a key player in the global agri-food chain. Spencer Henson notes that '[c]onsumers have increasingly focused on a broader array of food ...process attributes when assessing food product quality... encompass[ing] the manner in which products are produced (for example...animal welfare) – which are credence characteristics.'⁸ Moreover, consumer interest in the welfare standards under which food producing animals are raised evidently is strong. The findings of a survey conducted for the European Commission⁹ established that more than nine in ten EU citizens (94 per cent) believe it is important to protect the welfare of farmed animals, with 82 per cent of Europeans surveyed believing that the welfare of farmed animals should be better protected than it is now. The relative majority of European respondents thought the welfare of farmed animals should be handled jointly, between businesses and public authorities (43 per cent), with an additional 40 per cent believing that animal welfare is a matter for all citizens, which should be regulated by public authorities.

It is deemed necessary, also, for GLOBALG.A.P. to enjoy legitimacy from the State. The State is external to the governance rules and private regulatory standards of GLOBALG.A.P. Yet, the State is also a stakeholder affected by GLOBALG.A.P.'s animal welfare standards; more precisely by the potential for the latter private organisation to

⁷ Donal Casey, 'Structuring private food safety governance: GLOBALGAP and the legitimating role of the state and rule intermediaries' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance* (Edward Elgar 2017) 31.

⁸ Spencer Henson, 'The role of public and private standards in regulating international food markets' (2008) 4(1) *Journal of International Agricultural Trade and Development* 63, 67.

⁹ Commission Special Eurobarometer 442, *Attitudes of Europeans towards Animal Welfare*, November – December 2015 (March 2016)

http://open-data.europa.eu/en/data/dataset/S2096_84_4_442_ENG >accessed 19 November 2017.

undermine the standards of the major international public animal welfare standard-setter, the OIE, and in that State interests in maximising trade may be negatively impacted.¹⁰

The general concept of legitimacy relied upon is that of empirical / social legitimacy, involving the subjective acceptance of the Standard by both the consumer and the State. This article, further, adopts the theory of deliberative democracy achieved through ‘reasoned participation’ and ‘deliberation’,¹¹ as a source of ‘output-oriented’ legitimacy¹² to underpin its proposals to enhance external legitimacy. Essentially, it proposes ‘real’ consumer participation,¹³ ‘thick proceduralization’,¹⁴ and mutually reinforcing dialogue¹⁵ manifest in a memorandum of understanding between the private organisation and the State. A second conception of legitimacy forms the substance of the proposals advanced, namely the need for science, also, to underpin the private collective Standard.¹⁶

¹⁰ World Trade Organization (WTO), ‘Considerations Relevant to Private Standards in the Field of Animal Health, Food Safety and Animal Welfare’ Submission by the World Organisation for Animal Health (OIE), G/SPS/GEN/822 (25 February 2008).

¹¹ Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21(3) *Oxford Journal of Legal Studies* 415, 431-433.

¹² Fritz Scharpf, *Governing in Europe. Effective and Democratic* (OUP 1999) 11.

¹³ Chiara Armeni, ‘Participation in Environmental Decision-making: Reflecting on Planning and Community Benefits for Major Wind Farms’ (2016) 28 (3) *Journal of Environmental Law* 415, 418, 422.

¹⁴ Julia Black, ‘Proceduralizing Regulation: Part II’ (2001) 21(1) *Oxford Journal of Legal Studies* 33.

¹⁵ Eberlein et al (n 2) 11; Lars. H Gulbrandsen, ‘Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs’ (2014) 8 *Regulation & Governance* 74, 86-88.

¹⁶ The fact that both conceptions of legitimacy remain important reflects the fact that we want ... institutions to be both effective in solving problems and subject to public control.’ Daniel Bodansky, ‘Legitimacy’ in Daniel Bodansky, Jutta Brunnee, Ellen Hey (eds) (2008) *Oxford Handbook of International Environmental Law* 705, 719.

The article then builds upon the external legitimacy thus gained from the consumer and the State. The approach taken is to project beyond the external legitimacy sourced through both deliberative discourse and a science base and to promote the positive prospects of private standardisation in animal welfare via market instruments and soft law mechanisms. It is in this regard that recommendations are made for an enhanced animal welfare private label and corresponding information – and for the adoption of positive terms within a public / private memorandum of understanding.

The emphasis in section four is on the steps GLOBALG.A.P. should initiate with the agri-food consumer, a stakeholder external to GLOBALG.A.P.'s governance rules based upon membership and its B2B certificate. This article examines ways in which interested consumers are, and might be, offered opportunities to partake in GLOBALG.A.P.'s Livestock Standard procedures and argues that GLOBALG.A.P. should cater for agri-food consumers with animal welfare credence demands. Deliberative democracy is advocated as the basis for consumer legitimacy, to be achieved through participation¹⁷ and two-way 'reasoned discourse'¹⁸ towards reaching a 'substantive solution'¹⁹ on animal welfare standards. The approach advanced is that expert-fed decision-making fuelled with science can work constructively with a participating public²⁰ and that there is a need to base standard-setting on both legitimising sources to reach an 'effective' outcome²¹ involving both science and values. Acting to reinforce its external legitimacy vis á vis consumers of added-value animal welfare produce, furthermore, could be

¹⁷ Steele (n 11) 429-433.

¹⁸ Black (n 14) 36.

¹⁹ Scharpf (n 12) 19-21.

²⁰ Bodansky (n 16) 719-21.

²¹ Scharpf (n 12) 13.

a catalyst to the continued success of the GLOBALG.A.P. Livestock Standard and raised animal welfare standards.

This article contends that GLOBALG.A.P., currently, is missing an opportunity constructively to engender behavioural change²² in consumers of agricultural produce in an extended value chain. Once consumer legitimacy is attained for GLOBALG.A.P.'s Standard a marketing opportunity is presented to GLOBALG.A.P. to promote its Livestock Standard to the ethical agri-food consumer *via* a GLOBALG.A.P. animal welfare label and an information platform, so as further to incentivise demand for its enhanced animal welfare agri-produce.

The major intergovernmental animal welfare standard setting organisation, the OIE, has serious concerns about the potential for private standards to have trade-limiting and trade-distorting effects and considers that it is important to prevent the haphazard introduction of non-science-based measures, in relation to both animal health and welfare.²³ Reciprocal interests ensue. It is necessary, therefore, for GLOBALG.A.P. also to realise the legitimacy of the OIE so that its private Livestock Standard is endorsed with the acceptance of the internationally recognised animal welfare standard-setter. Towards this end, section five explores the scope for a hybrid model of governance to legitimate GLOBALG.A.P.'s Standard. Recourse to a hybrid model of meta-regulation, which receives consideration, is not the proposed solution. Instead, this article suggests an alternative hybrid model, namely the soft law mechanism of a memorandum of understanding, its terms achieved through deliberative interaction and mutually reinforcing dialogue, and essentially based upon science. It is contended that the internationally recognised major public stakeholder may, thereby, accord external legitimacy to the Standard of the private animal welfare regulatory regime. In promoting such relations this article adds to the literature on transnational business governance

²² Black (n 4) 138-9.

²³ WTO (n 10) paras 14, 16.

interactions in several domains,²⁴ notably, for example, forestry,²⁵ fisheries,²⁶ climate change,²⁷ biofuels,²⁸ marine shipping²⁹ and food safety.³⁰ A soft-law hybrid model of animal welfare governance deemed relevant to the complex domain of animal welfare is proposed, which complements the diverse solutions adopted in the aforementioned policy areas. Such a legitimising model of hybrid animal welfare governance is projected to maximise the prospects presented by private standardisation in a global market for animal welfare added-value agri-food, with the objective of elevating animal welfare standards beyond a ‘niche’ market in an extended food chain. This article reasons that the deliberative interaction between the public and the private animal welfare standard setters is in the interest of GLOBALG.A.P. with the potential to raise animal welfare standards in agriculture. It portrays a positive role for the State

²⁴ Eberlein et al (n 2) 1.

²⁵ Christine Overdeest and Jonathan Zeitlin, ‘Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector’ (2014) 8 *Regulation & Governance* 22.

²⁶ Margaret A Young, *Trading Fish, Saving Fish*, (CUP 2011); Gulbrandsen (n 15).

²⁷ Kenneth Abbott, ‘Strengthening the Transnational Regime Complex for Climate Change’ (2014) 3 *Transnational Environmental Law* 57.

²⁸ Yoshiko Naiki, ‘Trade and bioenergy: explaining and assessing the regime complex for sustainable bioenergy’ (2016) 27(1) *European Journal of International Law* 129.

²⁹ Joanne Scott et al, ‘The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping’ (2017) 29 (2) *Journal of Environmental Law* 231.

³⁰ Tetty Havinga and Paul Verbruggen, ‘The Global Food Safety Initiative and state actors: Paving the way for hybrid food safety governance’ in Paul Verbruggen and Tetty Havinga (eds) *Hybridization of Food Governance* (Edward Elgar 2017) 183.

as the ‘facilitator’ of the private collective Standard’s³¹ higher standards of animal welfare in the global agri-produce market.

2. Animal Welfare Governance

2.1 Public Standards

The EU has been a pioneer in adopting legislation reconciling the welfare of certain farm animals with the common organisation of the EU market for agricultural produce. An early Directive established general minimum standards of farm animal welfare,³² followed by minimum standards of protection specific to calves, pigs, broiler chickens and laying hens.³³ EU animal welfare norms are not all encompassing, and species-specific standards do not exist, for example, for dairy cows, beef cattle, sheep, goats, turkeys and ducks, the sole requirements currently in existence being general in nature and difficult to apply in instances of an actual species’ needs.³⁴

The OIE has had a mandate to develop animal welfare standards since 2002. The then Ad hoc Group on animal welfare believed the OIE to be well placed to provide international leadership on animal welfare. It noted the OIE’s seventy-five year history of achievement as the international reference organisation for animal health, acknowledging the essential link

³¹ Kenneth W Abbott and Duncan Snidal, ‘Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit’ (2009) 42 *Vanderbilt Journal of Transnational Law* 501, 501-2, 576-7.

³² Council Dir 98/58/EC concerning the protection of animals kept for farming purposes [1998] OJ L221/23. Drawn up on the basis of the European Convention on the Protection of Animals kept for Farming Purposes ETS No. 87 (10 March 1976); approved by Council Dec (EEC) 78/923 [1978] OJ L323/12.

³³ See now, for example, Council Dir 2008/120/EC laying down minimum standards for the protection of pigs [2009] OJ L47/5.

³⁴ Commission *Strategy for the Protection and Welfare of Animals* (2012-2015) COM (2012) 6 final.

between animal health and animal welfare.³⁵ The International Committee of the OIE established a permanent OIE Working Group on Animal Welfare,³⁶ following which Member Countries have adopted science-based animal welfare standards in accordance with democratic procedures.³⁷ OIE guiding principles explain that the scientific assessment of animal welfare involves diverse elements, and that selecting and weighing these elements often involves value-based assumptions.³⁸ An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well-nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress.³⁹ Scientific assessment, thus, forms the basis for specific OIE animal welfare recommendations, measured, for example, by assessing the degree of impaired functioning associated with injury, disease, malnutrition, or, for example, by measuring preferences, motivations and aversions in order to

³⁵ World Organisation for Animal Health, Resolution No XIV (2002) *Animal Welfare Mandate of the OIE* <http://www.oie.int/about-us/key-texts/basic-texts/new-mandates/> >accessed 19 November 2017.

³⁶ World Organisation for Animal Health, Resolution No XXVI *Animal Welfare* 72 GS/FR-Paris (May 2004).

³⁷ OIE standards are approved by the World Assembly of Delegates meeting annually at the OIE General Session. Prior to this, the Animal Welfare Group reports to the Code Commission, which determines how to incorporate into the standards scientific recommendations received from, for example, OIE member Countries, OIE partner organisations and both private sector and non-governmental organisations, in order to ensure that the standards are based on comprehensive and up-to-date scientific information. Procedures used by the OIE to set Standards and Recommendations for International Trade, with a Focus on the Terrestrial and Aquatic Animal Health Codes,

http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_OIE_procedures_standards_2016.pdf >accessed 19 November 2017.

³⁸ World Organisation for Animal Health (OIE), International Terrestrial Animal Health Code (TAHC) Version 2017©OIE, art 7.1.2.

³⁹ *ibid* art 7.1.1.

provide information on animals' needs and affective states, such as hunger, pain and fear.⁴⁰ OIE TAHC Chapters address the welfare of beef cattle, broiler chickens and dairy cattle in their respective production systems.⁴¹ It is, however, conceivable that countries with diverse economies, cultures and environmental conditions reach consensus by the lowest common denominator and, in this regard, the OIE has resolved that '[a]nimal welfare is a complex, multi-faceted, international and domestic public policy issue, with important scientific, ethical, economic, cultural, and political and trade policy dimensions.'⁴²

The EU has confirmed its continuing endorsement of OIE standard-setting and implementation of OIE animal welfare standards.⁴³ EU animal welfare standards, currently, tend to be more prescriptive than those of the OIE, the latter orientated towards animal welfare outcome assessment. In a Joint Declaration, the OIE and the EU have committed to providing mutual support and to cooperating on all aspects of animal welfare, stressing the need for adequate scientific expertise.⁴⁴ The EU is represented in the OIE Animal Welfare Working

⁴⁰ *ibid* art 7.1.3.

⁴¹ OIE TAHC (2017) s 7 Animal Welfare Chs 7.9–7.11, http://www.oie.int/index.php?id=169&L=0&htmlfile=titre_1.7.htm >accessed 19 November 2017. General principles provide guidance for the welfare of animals in livestock production systems OIE TAHC (2017) art 7.1.4. Work is in progress in the ad hoc Group on Animal Welfare and Pig Production Systems and a draft chapter on Animal Welfare and Pig Production Systems is appended to the Report of the Fifteenth Meeting of the OIE Animal Welfare Working Group Annex 7, app VII (2016) http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/AWWG_Reports/A_Report_AWWG_2016.pdf >accessed 19 November 2017.

⁴² World Organisation for Animal Health, Resolution No 28 *Animal Welfare* 83 GS/FR-PARIS (May 2015).

⁴³ World Organisation for Animal Health, Report of the Tenth Meeting of the Animal Welfare Working Group (2011) <http://www.oie.int/doc/ged/D11313.PDF> >accessed 19 November 2017.

⁴⁴ Press Release, https://ec.europa.eu/food/sites/food/files/animals/docs/aw_international_joint_dec_aw_en.pdf > accessed 19 November 2017. Council of Europe 'Joint Declaration on Animal Welfare in Europe:

Group and action supportive of international cooperation in animal welfare remains a key EU objective.⁴⁵

2.2 Private Standards

Private farm assurance standards in animal welfare have arisen alongside these public standards, the private sector being motivated to ‘address consumer concerns and to harness these concerns as a means to compete in quality-defined markets.’⁴⁶ Private standards are those standards developed and adopted by private bodies.⁴⁷ They are voluntary and in this sense are standards with which compliance is not mandatory in accordance with the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT).⁴⁸ Standards, as such, are distinguished from regulations with which compliance is mandatory under the TBT Agreement.⁴⁹ Enhanced animal welfare is stipulated in private individual and collective international standards of good agricultural practice and accompanying B2B certification

achievements and future prospects’ (24 November 2006 Strasbourg)

https://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/seminar/CoE_EU_OIE_Final-Declaration_final.24.11.06.pdf

> accessed 19 November 2017

⁴⁵ Commission Staff Working Paper Impact Assessment SEC (2012) 55, 43, Annex 5C, 108.

⁴⁶ Henson (n 8) 68.

⁴⁷ Spencer Henson and John Humphrey, ‘Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries’ (2010) 46 (9) *The Journal of Development Studies* 1628, 1630.

⁴⁸ World Trade Organization Technical Barriers to Trade Agreement, 1868 UNTS (1994), Annex 1 2. Standard.

⁴⁹ *ibid* Annex 1 1. Technical regulation.

schemes.⁵⁰ Individual retailer animal welfare assurance schemes, including those of Marks and Spencer⁵¹ and Waitrose,⁵² for example, singularly focus on the promotion of higher animal welfare standards in their sourced food produce, which go beyond the minimum legislative norms. Private collective standards are developed by company / industry actors from beyond a single company / industry.⁵³

2.2.1 Regulatory concerns

According to Linda Fulponi, '[m]any of the private voluntary standards schemes are becoming global standards as the food system becomes interlinked across the world.'⁵⁴ Retailer consolidation aided by contemporary methods of doing business - by food, communications and transportation technologies - enables the sourcing of agricultural produce meeting animal

⁵⁰ OECD, Final Report on '*Private Standards and the Shaping of the Agro-Food System*', Executive Summary para 3; Report paras 13-15, AGR/CA/APM(2006)9/FINAL.

⁵¹ Marks and Spencer Policy for Farm Animal Health and Welfare (July 2016) <https://corporate.marksandspencer.com/documents/plan-a-our-approach/foods-2016/mns-farm-animal-health-and-welfare-policy.pdf> >accessed 19 November 2017.

⁵² Waitrose: Animal Welfare at Waitrose (July 2016) [http://www.waitrose.com/content/dam/waitrose/Inspiration/Waitrose%20Way/Animal%20welfare/Master%20BFAW%20narrative%202016.pdf?wtrint=1-Content--2-Inspiration--3-waitrose animal welfarecommitments--4--5-button--6-animalwelfare](http://www.waitrose.com/content/dam/waitrose/Inspiration/Waitrose%20Way/Animal%20welfare/Master%20BFAW%20narrative%202016.pdf?wtrint=1-Content--2-Inspiration--3-waitrose%20animal%20welfarecommitments--4--5-button--6-animalwelfare) >accessed 19 November 2017.

⁵³ Anne Tallontire, 'CSR and Regulation: towards a framework for understanding private initiatives in the agri-food chain (2007) 28(4) Third World Quarterly 775.

⁵⁴ Linda Fulponi, 'Private voluntary standards in the food system: The perspective of major food retailers in OECD countries' (2006) 31(1) Food Policy 1, 4.

welfare standards across State boundaries.⁵⁵ Private regulatory regimes are ‘frequently driven by the changes in global value chains and in international trade.’⁵⁶ Steven Bernstein and Benjamin Cashore maintain that ‘operationally, they use global supply chains’ and ‘aim to *reconfigure* markets.’⁵⁷ The potential exists, thus, for private international collective animal welfare standards schemes to become powerful regulatory regimes able to control the global agri-food chain, with consequences for countries’ economies.⁵⁸ The outcome could be that what are *prima facie* voluntary animal welfare standards may *de facto* become mandatory and in reality the industry norm, compliance with which determines market access. In this regard, concern has been expressed in the World Trade Organization, as articulated by Linda Fulponi,

the retailer scheme [individual or collective] may be *de facto* applied as the industry norm by all actors in the supply chain. Thus the choice of whether or not to comply with a voluntary standard becomes a choice between compliance or exit from the market.⁵⁹

Private collective international animal welfare standard and certification schemes may present particular problems for the small producer.⁶⁰ Exclusionary effects may result for those

⁵⁵ Spencer Henson and John Humphrey, ‘The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes’ 10 (2009) Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, ALINORM 09/32/9D-Part II.

⁵⁶ Cafaggi (n 1) 102.

⁵⁷ Steven Bernstein and Benjamin Cashore, ‘Can non-State global governance be legitimate? An analytical framework’ (2007) 1 Regulation & Governance 347, 348, 350.

⁵⁸ Botterill and Daugbjerg (n 5) 489.

⁵⁹ World Trade Organization (WTO), Communication from Linda Fulponi, ‘Private Voluntary Standards and Developing Country Market Access: Preliminary Results’ para 9 (2007) OECD G/SPS/GEN/763 (27 Feb 2007).

⁶⁰ The issue of private standards was first raised at the Committee on Sanitary and Phytosanitary Measures (SPS) (29-30 June 2005) (G/SPS/R/37/Rev.1, paras 16-20) when Saint Vincent and the Grenadines raised a concern

smaller producers who lack the capacity to engage with the schemes' substantive requirements because of the disproportionate costs of so doing.⁶¹ This would be the more likely prevalent especially for producers in developing countries where domestic laws have not protected animal welfare to the extent of the governing private standard.⁶² Could standards be determined by private interest market differentiation objectives⁶³ instead of being firmly embedded in science, especially where there are no legal norms? Do the private animal welfare standards exceed, or duplicate, the legal minimum animal welfare norms with which compliance is required, and at extra cost?⁶⁴ How is legitimacy to govern realised where private transnational regulatory regimes are not subject to the mechanisms in place constitutionally with which to hold public regulators to account?⁶⁵ This article considers the potential for private transnational animal welfare regulatory regimes to perpetuate their effects on stakeholders external to their

regarding the trade effects on small farmers of EurepG.A.P.'s standards for pesticides on imports of bananas. World Trade Organization (WTO), 'Private Standards and the SPS Agreement' Note by the Secretariat, G/SPS/GEN/746.

⁶¹ Henson and Humphrey (n 55) 30.

⁶² Miet Maertens and Johan FM Swinnen, 'Transformations in agricultural markets: Standards and their implications' (2006) Working Paper No 11, Leuven Interdisciplinary Research Group on International Agreements and Development, 10,

https://ghum.kuleuven.be/ggs/publications/working_papers/archive/wp11.pdf

>accessed 19 November 2017.

⁶³ Jane Korinek, Mark Melatos, Marie-Luise Rau, 'A Review of Methods for Quantifying the Trade Effects of Standards in the Agri-Food Sector' (2008) OECD Trade Policy Working Paper No 79, 5, note 1, TAD/TC/CAWP(2007)1/FINAL.

⁶⁴ Michael Scannell, 'Private Standards in the Sanitary and Phytosanitary Area' 76th General Session, International Committee, World Organisation for Animal Health (OIE) Paris (25-30 May 2008) 76 SG/10 points 2-4.

⁶⁵ Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) Journal of Law and Society 20, 49.

organisational governance, albeit those stakeholders having an interest in the private standards that ensue. In order to explore the problem identified, namely the lacunae in external legitimacy to govern, this article draws upon the leading industry Standard of GLOBALG.A.P.

3. The GLOBALG.A.P. IFA Standard Livestock

The European retailers' 1997 initiative, EUREPGAP, became GLOBALG.A.P. in 2007, the private collective business to business standard of Good Agricultural Practice. GLOBALG.A.P. claims to be 'the internationally recognized standard for farm production.'⁶⁶ GLOBALG.A.P. certification endorses animal welfare, food safety, sustainability, environmental protection and workers' health and safety in more than 120 countries.⁶⁷ The GLOBALG.A.P. Certificate / IFA Standard Livestock consists of Control Points and Compliance Criteria (CPCC) which define the requirements for the All Farm Base Module, the Livestock Scope Module and the respective Sub-scope Module[s] necessary to attain the Standard. There are six Sub-scopes, namely, cattle and sheep, dairy, calf and young beef, pigs, poultry and turkeys.⁶⁸ General Regulations further stipulate general compliance requirements.⁶⁹ The IFA Version V Livestock rules on animal welfare introduced changes

⁶⁶ http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/globalg.a.p./ >accessed 19 November 2017.

⁶⁷ http://www.globalgap.org/uk_en/who-we-are/about-us/history/ >accessed 19 November 2017.

⁶⁸ http://www.globalgap.org/uk_en/for-producers/globalg.a.p./integrated-farm-assurance-ifa/livestock/ > accessed 19 November 2017.

⁶⁹ GLOBALG.A.P. General Regulations Part I - General Requirements: Version 5.1 (1 July 2017, obligatory 1 October 2017) http://www.globalgap.org/.content/galleries/documents/170630_GG_GR_Part-I_V5_1_en.pdf

> accessed 19 November 2017. See also, General Regulations Livestock Rules: Version 5.1 (July 2017,

concerning the integration of outcome-based criteria; housing and facilities; feed and water provisions; livestock health; responsible use of medicines; livestock transport; and Chain of Custody Certification.⁷⁰

GLOBALG.A.P. offers two voluntary animal welfare ‘add-on’ modules, for poultry/broiler chickens and for pigs/finishers, to enhance certification.⁷¹ An ad hoc GLOBALG.A.P. Stakeholder Committee on Animal Welfare worked on these criteria from 2011-13, comprised of producers, processors, retailers, and representatives from certification bodies, academia and non-governmental organisations (NGOs). It is significant to this article’s stated aims that a representative of the OIE joined that committee to facilitate information exchange between the OIE and GLOBALG.A.P.⁷²

3.1 Governance

Retail and food service membership of GLOBALG.A.P. with voting rights accrues from the payment of a yearly fee determined by turnover. Group, and individual, producers pay a membership fee of 2,550 Euros or 1,550 Euros, respectively. Each type of membership includes one Sub-scope and Technical Committee voting right, with an additional fee for each extra

obligatory 1 October 2017)

http://www.globalgap.org/export/sites/default/.content/.galleries/documents/170630_GG_GR_Livestock_Rules_V5_1_TC_en.pdf > accessed 19 November 2017.

⁷⁰ GLOBALG.A.P. Annual Report (2015)

http://www.globalgap.eu/export/sites/default/.content/.galleries/documents/160923_Annual_Report_2015_en.pdf >accessed 23 September 2017.

⁷¹ http://www.globalgap.org/uk_en/for-producers/globalg.a.p.-add-on/animal-welfare/ >accessed 23 September 2017.

⁷² http://www.globalgap.org/uk_en/who-we-are/governance-old/stakeholder-comm./SHC-Animal-Welfare/ >accessed 23 September 2017.

Sub-scope.⁷³ Certified producer members are entitled to represent their producer interest in GLOBALG.A.P.'s governance structure and to use the GLOBALG.A.P. logo on their promotional materials at business level.⁷⁴ Retailers may use the GLOBALG.A.P. Brand in their corporate strategy and partake in standard-setting. Membership enables retailers to source certified produce and to identify GLOBALG.A.P. certified producers through preferential access to a producer's unique 13 digit certification ID number registered on GLOBALG.A.P.'s data base.⁷⁵

3.1.1 The Board

GLOBALG.A.P.'s governing Board is elected by GLOBALG.A.P. voting members. It is comprised of five elected producer representatives⁷⁶ and five elected retailer representatives for a four year term, headed by an independent chairman. The Board takes the final resolution on adopting standards, revisions and new modules. The Board provides direction to the

⁷³ GLOBALG.A.P. Fee Table (2017). For the IFA Livestock Standard, an annual producer registration fee is charged based on quantity produced determined for livestock, dairy (milk) and poultry, with a fee for each animal welfare add-on. Producer groups are accommodated in the certificate and assessment license fees.

http://www.globalgap.org/export/sites/default/content/galleries/documents/170411_General-GG-Fee-Table_2017_V4_en.pdf >accessed 19 November 2017.

⁷⁴ http://www.globalgap.org/uk_en/who-we-are/members/supplier/ >accessed 19 November 2017.

⁷⁵ http://www.globalgap.org/uk_en/buyers/ >accessed 19 November 2017.

⁷⁶ At least one producer seat must go to a Livestock representative.

GLOBALG.A.P. Secretariat, its acting management, operated by Food Plus GmbH a private limited company based in Germany which owns the GLOBALG.A.P. Brand.⁷⁷

3.1.2 Technical Committee Livestock

The Board also provides direction to GLOBALG.A.P.'s Technical Committee Livestock, comprised of five retailer members and five producer members with livestock expertise. It deals with animal health, safety and welfare and develops species-specific modules concerning livestock sourcing, identification, traceability, feed and water.⁷⁸ GLOBALG.A.P. members have organised National Technical Working Groups (NTWGs) to assist in applying GLOBALG.A.P.'s IFA Livestock Standard on a local scale, identifying local adaptation challenges. The NTWGs develop national interpretation guidelines⁷⁹ which are required to be submitted for approval to the Technical Committee Livestock and ultimately for approval to the Board.⁸⁰ National differentiation in interpreting GLOBALG.A.P.'s Livestock Standard may, however, be constrained, since GLOBALG.A.P. can withdraw or revise the national

⁷⁷ GLOBALG.A.P. Board, Terms of Reference (May 2017)

<http://oc8.globalgap.org/export/sites/default/.content/.galleries/documents/170530-GLOBALG.A.P.-Board-Terms-of-Reference.pdf> >accessed 19 November 2017.

⁷⁸ http://www.globalgap.org/uk_en/who-we-are/governance/technical-committees/tc-livestock/ >accessed 19 November 2017.

⁷⁹ http://www.globalgap.org/uk_en/who-we-are/ntwgs/ >accessed 19 November 2017.

⁸⁰ Terms of Reference, Technical Committee Livestock, TC ToR Livestock, Version 2: Sep17, http://www.globalgap.org/.content/.galleries/documents/170921_GG_ToR_TC_Livestock_en.pdf >accessed 19 November 2017.

interpretation guidelines at any time on an individual point basis if the global integrity of the IFA Standard is challenged.⁸¹

There would be the potential to appraise the ‘epistemic nature’ of the expert community taking decisions on the IFA Livestock Standard.⁸² This article, conversely,⁸³ is concerned to accommodate stakeholders external⁸⁴ to the system of committee governance, with an interest in the Standard’s animal welfare credentials.

3.1.3 Certification Bodies

A producer applying to be certified as compliant with the Livestock Standard must choose a GLOBALG.A.P. approved certification body, details of which are available on GLOBALG.A.P.’s website. The producer pays a fee for such approved third party certification and the certificate is valid for one year.⁸⁵ In turn, and in addition to their associate membership fee, certification bodies pay an annual certification licence fee and a certificate fee to

⁸¹ http://www.globalgap.org/uk_en/who-we-are/ntwgs/nig/nig-approval/index.html >accessed 19 November 2017.

⁸² Andrew Lang and Joanne Scott identify the concept of ‘managerialism’ in global governance - in ‘The hidden world of WTO governance’ (2009) 20(3) *European Journal of International Law* 575, 610-14.

‘An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.’ Peter Haas, ‘Introduction: epistemic communities and international policy coordination’ (1992) 46 *International Organization* 1, 3.

⁸³ A study of the roles and expertise of the internal standard-setters falls beyond the scope of this article.

⁸⁴ In doing so it advocates ‘soft law instruments’ and ‘stakeholder’ ‘inclusiveness,’ Young (n 26) 15, 16.

⁸⁵ General Regulations Part I (n 69) ss 4-5.

GLOBALG.A.P..⁸⁶ Third party certification fees compound the costs burden, which may be insurmountable for smaller producers in developing countries seeking market access via membership.⁸⁷ This raises questions of ‘fairness’ in the distribution of costs amongst developed / developing country producers.⁸⁸ GLOBALG.A.P. approved certification bodies must be accredited to ISO/IEC 17065⁸⁹ and, supplementary to having requisite competence, act independently, impartially, confidentially and with integrity. As associate members, certification bodies do not play a role in the internal governance of GLOBALG.A.P.. Not being full members and thus bereft of a vote, they do not have representative rights in the setting of the Livestock Standard.⁹⁰ GLOBALG.A.P. established the Certification Bodies Committee to coordinate and supervise the activities of its certifiers and, in 2012, created a South American Certification Bodies Committee Subgroup. GLOBALG.A.P. has, further, secured a Certification Integrity Programme (CIPRO),⁹¹ which monitors and assesses the performance of GLOBALG.A.P. approved certification bodies. The Board appointed Integrity Surveillance

⁸⁶ General Regulations Part III Certification Body and Accreditation Rules: Version 5.1 (1 July 2017, obligatory 1 October 2017) http://www.globalgap.org/content/galleries/documents/170630_GG_GR_Part-III_V5_1_en.pdf >accessed 19 November 2017.

⁸⁷ Hatanaka et al argue, ‘third party certification reorganizes, transforms and disciplines ... throughout the supply chain, with different social and economic implications for various participants.’ Maki Hatanaka, Carmen Bain, Lawrence Busch, ‘Third-party certification in the global agri-food system’ (2005) 30(3) Food Policy 354, 355, 361- 4.

⁸⁸ Henson and Humphrey (n 55) 36.

⁸⁹ ISO/IEC 17065 Requirements for bodies certifying products, processes and services (2012) <https://www.iso.org/obp/ui/#iso:std:iso-iec:17065:ed-1:v1:en> >accessed 19 November 2017.

⁹⁰ http://www.globalgap.org/uk_en/who-we-are/members/associates/index.html >accessed 19 November 2017.

⁹¹ http://www.globalgap.org/uk_en/what-we-do/the-gg-system/integrity-program/CIPRO/index.html >accessed 19 November 2017.

Committee⁹² takes the final decision on imposing sanctions⁹³ on certifying bodies, which are, in turn, implemented and enforced by GLOBALG.A.P.'s Secretariat.⁹⁴ This stringent system of oversight could be said to underscore the independence of the certifiers from their producer clients and the credibility of the IFA Certificate.⁹⁵ The extent to which third-party certification of a B2B Livestock Standard is, thus, centrally led, however, detracts from the certifiers' independence from GLOBALG.A.P.'s private regulatory regime.⁹⁶

3.2 Small-Scale Producer Credence

GLOBALG.A.P. membership status offered to producers and retailers is the definitive condition to accrue voting rights and to have a representative voice in the IFA Livestock Standard. Europe is GLOBALG.A.P.'s key market; its retailer and producer members are predominantly European.⁹⁷ GLOBALG.A.P. demonstrably has taken strides to engage with the smaller local producer to develop capacity to conform to the IFA Livestock Standard incrementally. This it has done by introducing an intermediate level localg.a.p. Standard⁹⁸ and

⁹²http://www.globalgap.org/uk_en/who-we-are/governance/Other-committees/integrity-surveillance-comm./index.html >accessed 19 November 2017.

⁹³ Defined by GLOBALG.A.P., General Regulations Part III (n 86) s 9.3.

⁹⁴ *ibid.*

⁹⁵ Paul Verbruggen and Rebecca Schmidt, 'The Role of Certification in the Enforcement of Transnational Private Regulation' (2012) 24, <http://dx.doi.org/10.2139/ssrn.2255918> >accessed 19 November 2017.

⁹⁶ Hatanaka et al (n 87) 356.

⁹⁷ Percentage share of members per continent: Africa 7; Asia 8; Europe 64; North America 10; Oceania 2. GLOBALG.A.P. Annual Report (n 70) 14, 38.

⁹⁸ http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p./ >accessed 19 November 2017.

a ‘resembling’ benchmarking scheme and status.⁹⁹ Resembling schemes partially conform to the GLOBALG.A.P. Standard and may proceed to develop ‘supplementary’ requirements that bridge the gap earning GLOBALG.A.P. recognition of equivalence. Equivalent status is accorded to G.A.P. certification systems worldwide that fully conform to GLOBALG.A.P.’s CPCC and General Regulations.¹⁰⁰ GlobalG.A.P.’s Standard is ‘diffusing’, ie entering other countries ‘through market mechanisms’¹⁰¹ raising standards within developing countries. GLOBALG.A.P. has, thus, made genuine efforts to engage with small producers, which is further evident in its concessionary fee structure for group membership. Notwithstanding such concession, additional rules require the further development of a Quality Management System.¹⁰² Also, pro rata, lacking the economies of scale¹⁰³ small producers in developing countries effectively bear the burden of the costs of GLOBALG.A.P. approved third party certification¹⁰⁴ and the consequential inevitability of exclusion from the global agri-food chain.

3.3 External Legitimacy

In its elevated role as a transnational private collective farm assurance scheme, purportedly the industry norm, GLOBALG.A.P.’s IFA Livestock Standard has the potential to impact upon

⁹⁹ Naiki (n 6) 153-4.

¹⁰⁰ GLOBALG.A.P. Benchmarking Regulations, Version V (2015)

http://www.globalgap.org/export/sites/default/.content/.galleries/documents/150701_GG_Benchmarking_Regulations_V5_0_en.pdf >accessed 19 November 2017.

¹⁰¹ Naiki (n 6) 143.

¹⁰² GLOBALG.A.P. General Regulations Part II Quality Management System Rules: Version 5.1 (1 July 2017, obligatory 1 October 2017) http://www.globalgap.org/.content/.galleries/documents/170707_GG_GR_Part-II_V5_1_en.pdf >accessed 19 November 2017.

¹⁰³ Henson and Humphrey (n 55) 30.

¹⁰⁴ Hatanaka et al (n 87) 361.

stakeholders who are external by definition to its organisational governance but who are affected by its regulatory regime.¹⁰⁵ This article argues that consumers should be accorded further privilege as an interested stakeholder in GLOBALG.A.P.'s regulatory regime and identifies the need to seek consumer legitimacy. Equally, the contention is made that it is necessary for GLOBALG.A.P., to cultivate external legitimacy for its IFA Livestock Standard by interacting with the major public authority, the OIE, in the governance of animal welfare.

The concept of legitimacy has two dimensions, namely, empirical and normative.¹⁰⁶ Empirical legitimacy is concerned with 'whether actors accept a rule of an institution as authoritative (social legitimacy),'¹⁰⁷ and is the approved conception for the purposes of this article. Legitimacy defined as 'the justification of actions to those whom they affect, according to reasons they can accept,'¹⁰⁸ is deemed to be a useful measure of the social / empirical legitimacy of GLOBALG.A.P.'s Standard to stakeholders external to the business regime.

Furthermore, this article explores the legitimating theories distinguishable as 'input-oriented' or 'output-oriented legitimacy beliefs'¹⁰⁹ and, in so doing, discards the former as being impracticable, while positively embracing the latter. In the classic work of Fritz Scharpf,

[i]nput-oriented legitimizing thought emphasizes '*government by the people*'. Political choices are legitimate if and because they reflect the 'will of the people' – that is, if

¹⁰⁵ Cafaggi (n 65) 46.

¹⁰⁶ Bodansky (n 16) 709. 'Normative theory asks whether the authority possesses legitimacy,' Steven Bernstein, 'Legitimacy in Intergovernmental and Non-State Global Governance' (2011) 18(1) *Review of International Political Economy* 17, 20.

¹⁰⁷ Bernstein, *ibid.*

¹⁰⁸ Melissa S Williams, 'Citizenship as Agency within Communities of Shared Fate' in Steven Bernstein and William D Coleman (eds) *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era* (University of British Columbia Press 2009) 33, 43.

¹⁰⁹ Scharpf (n 12).

they can be derived from the authentic preferences of ‘the members of a community, ... [a] pre-existing collective identity.’¹¹⁰

Fritz Scharpf’s theory of output-oriented legitimacy and effective decision making, ie of ‘substantive’ legitimacy, is adopted as the basis of this article’s conception of legitimacy, which places emphasis on the need to engage in deliberative dialogue in the development of an effective solution,¹¹¹

‘Government for the people’ derives legitimacy from its capacity to solve problems requiring collective solutions What is required is no more than the perception of a range of *common interests* ... in constituencies with a ‘thin’ identity lacking organismic overtones.¹¹²

Accordingly, in evaluating output oriented legitimacy, the relevant criteria would necessarily associate the consideration of diverse and complex interests ‘engaged in deliberative interactions’ with the improvement of the ‘substantive quality ‘of the policy outcome.’¹¹³

Fundamentally, Jenny Steele’s idea of deliberation is used as a basis for consumer legitimacy, which focuses ‘on citizens as a valuable source of knowledge and values’, and ‘associates reasoned participation with problem-solving ... in order to achieve the best available decisions.’¹¹⁴ Values are deemed to be ‘central’ in that ‘[d]eliberation’ is meant to foster a reasoned form of communication about values, distinct from mere compromises

¹¹⁰ *ibid* 6, 10.

¹¹¹ *ibid* 20, 21.

¹¹² *ibid* 11.

¹¹³ *Ibid* 13, 20.

¹¹⁴ Steele (n 11) 431, 433.

between clashing interests and competing preferences, and in this way to allow resolution of the most intractable problems.’¹¹⁵

This article, further, adopts Chiara Armeni’s characterisation of participation based on deliberative democracy, namely ‘dialogue and communication of rational arguments and transformation of participants’ views in deliberative models, ... *in which citizens have a real opportunity to influence.*’¹¹⁶ It is not evident that GLOBALG.A.P. consults other than from a business perspective and position, and in a manner of reasoning which necessarily corresponds to Julia Black’s hypothesis of ‘thick’ deliberative discourse, where ‘each participant speaks and each listens’ and, in consequence, ‘reflect on their views.’¹¹⁷

In such deliberative discourse there would be room for values *and* scientific expertise despite documented tensions, as epitomised and challenged in the literature.¹¹⁸ Science is needed as a basis for all animal welfare standards, since there is a strong correlation between animal health and animal welfare. Indeed, ‘disease in farmed livestock ... can be considered as anything that affects an animal’s wellbeing and welfare.’¹¹⁹ McEldowney et al stress ‘that sound science is intrinsic to a better understanding of risk management,’¹²⁰ and that an animal welfare regulatory system ‘must be evidence based.’¹²¹

¹¹⁵ *ibid* 423.

¹¹⁶ Armeni (n 13) 418, 422 (emphasis added).

¹¹⁷ Black (n 14) 34, 36, 41.

¹¹⁸ Bodansky (n 16) 719; Maria Lee, ‘Beyond Safety? The Broadening Scope of Risk Regulation’ (2009) 62(1) *Current Legal Problems* 242.

¹¹⁹ John McEldowney, Wyn Grant, Graham Medley, *The Regulation of Animal Health and Welfare: Science, Law and Policy* (Routledge 2013) 1.

¹²⁰ *ibid* 15, 167.

¹²¹ *ibid* 163.

This article reasons that standards of animal welfare must be based on more than science and advances three explanations why, on its own, a scientific basis for animal welfare, albeit essential, is not enough. First of all, it can be said that the science applied to determine a standard of animal welfare constitutes a ‘value judgement,’ in that there are, arguably, at least three separate conceptions of animal welfare and it will depend on the subjective view held as to the most appropriate criterion, which will then determine the science upon which the adopted standard is based.¹²² Scientific opinion may differ – it may overlap or diverge - according to which animal welfare criterion is, or criteria are, deemed appropriate based on: basic health and functioning (productivity) free from disease and injury; the ‘affective’ state of the animal and experiences of, for example, fear, hunger, pain, pleasure; and /or living a natural life.¹²³ Conflict inevitably ensues. For example, a scientific decision based on being free from injury and supportive of conditions in intensively farmed units would not be synonymous with a scientific assessment of animal welfare based on living a natural life, with more space and natural light. David Fraser contends that ‘[f]or actions to be widely accepted as achieving high animal welfare, in addition to being based on good welfare science, they will need to make a reasonable fit to the major value positions about what constitutes a good life for animals.’¹²⁴ Secondly, and closely related, science can determine the best course of action based on the evidence (and potentially that based on a mixture of all three animal welfare conceptions, where that is possible), but a scientific opinion will not be capable of taking a moral stance based on

¹²² David Fraser, ‘Understanding animal welfare’ (2008) 50(Suppl 1)SI Acta Veterinaria Scandinavica 1, doi: 10.1186/1751-0147-50-SI-SI.

¹²³ *ibid.*

¹²⁴ *ibid* 7.

the highest values of animal welfare.¹²⁵ Thirdly, scientific research may not have kept abreast of welfare needs in respect of which account should be taken pre-Standard¹²⁶ and which a values perspective could inject. To substantiate the Standard with the legitimating mechanisms of science *and* values would facilitate ‘effective problem-solving’ and ‘hinder’ any potential to act solely for purposes of market differentiation.¹²⁷

4. Consumer Legitimacy

GLOBALG.A.P.’s stakeholders are not treated equally regarding participation in its internal committee structures. There are no formal representative rights for those affected, for example as consumers of GLOBALG.A.P. certified produce. GLOBALG.A.P. is very much a business focused organisation and regulatory regime, in which its key stakeholders are producers and retailers at the business level. The retailers and producers¹²⁸ create the animal welfare standards against which compliance is exacted¹²⁹ and determine the outcome of any subsequent Standard review. GLOBALG.A.P.’s internal governance rules are thus the determinant of its Livestock Standard and animal welfare component. GLOBALG.A.P.’s standard-setting process does realise good practice in limiting decision making to its members when measured against the

¹²⁵ David Fraser ‘Science, Values and Animal Welfare: Exploring the Inextricable Connection’ (1995) 4 *Animal Welfare* 103.

¹²⁶ Helenka Telkanranta and Anna Valros, ‘Could pigs have unidentified behavioural needs that warrant inclusion in future welfare assessments’, *Proceedings of the 7th International International Conference on the Assessment of Animal Welfare at Farm and Group Level* (Wageningen Academic Publishers 2017) 220.

¹²⁷ Scharpf (n 12) 13.

¹²⁸ GLOBALG.A.P.’s organisational procedures include producers of agri-produce. It was, originally, solely retailer led. Henson and Humphrey (n 47) 1642.

¹²⁹ Carmen Bain, Elizabeth Ranson, Michelle R Worosz, ‘Constructing Credibility: Technoscience to Legitimate Strategies in Agrifood Governance’ (2010) 25 (3) *Journal of Rural Social Sciences* 160, 176-7.

‘meta-rules’¹³⁰ of the ISEAL Code of Good Practice for Setting Social and Environmental Standards,¹³¹ although it may be noted that GLOBALG.A.P. is not evaluated against ISEAL’s criteria directly. GLOBALG.A.P. is not voluntarily a Member or Associate Member of ISEAL,¹³² a procedural meta-regulator, its standards concerned with process.¹³³

Consumers, conversely, are not members of GLOBALG.A.P. and it may not be possible, because of the constitutional rules of its owning company FoodPlus GmbH,¹³⁴ for consumers to be accorded internal representative rights, as committee members, to vote ex ante on the IFA Standard Livestock.¹³⁵ Consumers do not constitute a ‘demos’; they are not able to amass the requisite ‘pre-existing commonalities of history, language, culture and ethnicity.’¹³⁶ Although it could be said that GLOBALG.A.P.’s animal welfare governance should always ‘strive continuously’ for ‘the fullest possible participation *and representation* of those

¹³⁰ ‘Meta-rules are framing principles that individual regulators implement in their own regulatory instruments.’ Cafaggi (n 1) 125 (fn 99).

¹³¹ The ISEAL Code of Good Practice for Setting Social and Environmental Standards (2014) Clause 5.6. <http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/standard-setting-code> >accessed 19 November 2017.

¹³² Associate members must meet the baseline criteria of the Standard-Setting Code. Full members are required to undergo an independent evaluation to assess compliance with the improvement criteria of the ISEAL. *ibid.*

¹³³ Fabrizio Cafaggi, ‘Transnational Private Regulation. Regulating Private Regulators’ in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 212. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615694 18 >accessed 19 November 2017.

¹³⁴ ‘Regulators’ scope for action may be bounded, and in any event structured by their institutional environment.’ Black (n 4) 157.

¹³⁵ Nicolas Hachez and Jan Wouters, ‘A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalGAP’ (2011) 14(3) *Journal of International Economic Law* 677, 701.

¹³⁶ Scharpf (n 12) 8, 11.

affected,¹³⁷ this article pursues ‘the practical need for diverse perspectives’¹³⁸ focusing upon output-oriented legitimacy founded upon deliberative and participatory democracy.

There are grounds upon which to realise optimism in that Spencer Henson and John Humphrey comment on the strides that GLOBALG.A.P. has made to open up its consultation procedures, in granting two opportunities for external stakeholders to feed into GLOBALG.A.P.’s four yearly Standard revision.¹³⁹ This would fall short of good practice principles since, although all comments received in a consultation need not be made public in order to be ISEAL compliant,¹⁴⁰ it is ISEAL stated good practice to prepare a written synopsis of how each material issue has been addressed and to make that synopsis publicly available.¹⁴¹ GLOBALG.A.P. did provide a brief list in its Annual Report of the revisions made in the Livestock Standard Version V, but did not go as far as the best practice countenanced by ISEAL in that its consultation process outcomes and how the responses fed into the revision in the case of each material issue were not transparently mapped. GLOBALG.A.P.’s internal code of conduct in which it commits to values which determine the way in which it communicates and acts within the company and with its stakeholders would appear primarily to be customer (member) orientated.¹⁴²

The producer and retailer / food service supplier are the targets and beneficiaries of its B2B Certificate. The focus is upon strong brand assurance of GLOBALG.A.P. certified animal

¹³⁷ (Emphasis added) Gráinne De Búrca, ‘Developing Democracy beyond the State, (2008) 46 (2) Columbia Journal of Transnational Law 102, 131.

¹³⁸ Young (n 26) xii.

¹³⁹ Henson and Humphrey (n 55) Executive Summary points 17, 18.

¹⁴⁰ It is ISEAL stated *aspirational* good practice to make any original comments per group of stakeholders received during a consultation exercise publicly available.

¹⁴¹ ISEAL (n 131) Clause 5.4.

¹⁴² http://www.globalgap.org/uk_en/who-we-are/about-us/code-of-conduct/ >accessed 19 November 2017.

welfare standard conformity on the part of certified producers sourcing to member retail buyers, with no direct link to the consumer. GLOBALG.A.P. should ‘respond’¹⁴³ to its interested and affected consumer stakeholders, since GLOBALG.A.P. requires their ‘active support’¹⁴⁴ in order effectively to govern through resort to higher animal welfare standards in an extended global agricultural produce market and to ‘prosper’.¹⁴⁵ Fabrizio Cafaggi explains, ‘...affected stakeholders have to participate and confer ... legitimacy.’¹⁴⁶ Yet, in order to do, consultation needs to be much deeper than a process.¹⁴⁷

The decisions taken by GLOBALG.A.P. manifest in its Version 5 IFA Standard following the two rounds of public consultation should be ‘defensible on grounds other than (just) the fairness of the [revision] process.’¹⁴⁸ The relevant concern does not lie with whether GLOBALG.A.P.’s ‘method is ‘legitimate’,’¹⁴⁹ but, with whether the revision consultations ‘allow for successful development and pursuit of collective goals’¹⁵⁰ in the animal welfare standards adopted. There is, further, the potential for invited external expertise in GLOBALG.A.P.’s Technical Committee Livestock.¹⁵¹ There is, however, no apparent guarantee, through sporadic invitation, of a two-way reasoned deliberative discourse undertaken ‘on an equal basis’¹⁵² in which evidenced based science (as opposed to business

¹⁴³ Black (n 4) 137.

¹⁴⁴ *ibid* 154.

¹⁴⁵ *ibid* 149.

¹⁴⁶ Cafaggi (n 1) 159.

¹⁴⁷ Steele (n 11); Black (n 14).

¹⁴⁸ Steele (n 11) 431. See GLOBALG.A.P. Annual Report (n 70) 22.

¹⁴⁹ Steele (n 11) 431.

¹⁵⁰ *ibid*.

¹⁵¹ Terms of Reference (2017) (n 80).

¹⁵² Black (n 14) 34.

policy) is discussed along with ethical or value oriented justification for standards of animal welfare.

A recommendation, accordingly, is made for deliberative participation, between consumers, representative organisations and other experts on the one hand, and GLOBALG.A.P.'s Technical Livestock Committee on the other, the participants meeting in an equal capacity, to be an ongoing practice in setting the animal welfare component of GLOBALG.A.P.'s IFA Livestock Standard, i.e. 'preceding' the Standard.¹⁵³ There is no requirement for there to be a formal structure¹⁵⁴ for such reasoned deliberation, so long as the voice of values has the opportunity to influence the decision taken on the Standard in a 'relatively stable' and 'semi-permanent pattern[] of mutual support.'¹⁵⁵ As David Levi-Faur maintains, '[r]egulation involves a continuous action of monitoring, assessment and refinement of rules rather than *ad hoc* operation.'¹⁵⁶ Chiara Armeni's rationale, furthermore, is adopted: In so far as an in situ (as opposed to the transient nature of an ad hoc) animal welfare committee would have 'the significant potential to catalyse participation as collaborative problem-solving and constitute an alternative forum for deliberative public dialogue' it 'might turn ...to being the beginning of the solution.'¹⁵⁷ This article underscores the scope for deliberative democracy, as defined, to introduce a values element of animal welfare into the Standard, i.e. a 'richer

¹⁵³ Scharpf (n 12) 20.

¹⁵⁴ *ibid* 19, 20.

¹⁵⁵ *ibid*.

¹⁵⁶ David Levi-Faur, 'Regulation and Regulatory Governance' in David Levi-Faur (eds) *Handbook on the Politics of Regulation* (Edward Elgar 2013) 3, 5.

¹⁵⁷ Armeni (n 13) 441.

rationality'¹⁵⁸ which goes above and beyond evidenced-based science, and by so doing elicit the legitimacy of the consumer.

A further contention is that GLOBALG.A.P. should build upon the consumer legitimacy thus attained and market the Standard directly to the interested consumer by way of an enhanced animal welfare label supported, separately, with the provision of related information. Such communicative tools potentially would increase demand for enhanced animal welfare agri-produce in a global value chain.¹⁵⁹

4.1 An Animal Welfare Label

The level of recognition of GLOBALG.A.P.'s Livestock Standard among consumers still remains in doubt. There is, currently, no prospect of promoting the brand directly to the consumer. The IFA Livestock Standard is a B2B Certificate. The GLOBALG.A.P. trademark - the word "GLOBALG.A.P." and its "G"- shape logo - may only be used directly as specified in a business context.¹⁶⁰ The GLOBALG.A.P. trademark is prohibited from appearing as a product label directly linked to certified products.¹⁶¹ GLOBALG.A.P.'s website dedicates one paragraph to consumers interested in verifying, against a thirteen digit GLOBALG.A.P. number (GGN),¹⁶² that the farm producing the agri-produce is a certified producer. This serial

¹⁵⁸ Lee's argument (n 118) 245, quoting Cass R Sunstein, *Risk and Reason: Safety, Law and the Environment* (CUP 2002).

¹⁵⁹ 'Where transnational private regulation is perceived as legitimate, a sense of obligation and active support may naturally follow,' Donal Casey and Colin Scott, 'The Crystallization of Regulatory Norms' (2011) 38(1) *Journal of Law and Society* 76, 95.

¹⁶⁰ General Regulations Part I (n 69) Annex I.

¹⁶¹ *ibid* 1 (iii) (vii).

¹⁶² http://www.globalgap.org/uk_en/for-consumers/Verification-of-GGN/ >accessed 19 November 2017. A 'QR code logo', a 'design quick response logo,' owned by GLOBALG.A.P. eg a chicken or a pig design, may appear

number bears no animal welfare significance at face value. There is no direct indication on the retailed produce of the animal welfare added value of agri-food which emanates from those producers who are certified to the GLOBALG.A.P. Brand. In marked contrast, GLOBALG.A.P. has introduced a consumer label for GLOBALG.A.P. certified aquaculture products,¹⁶³ with an aquaculture logo in addition to a GLOBALG.A.P. number (GGN) and a GLOBALG.A.P. website address¹⁶⁴ where promotional material creates a ‘virtual’ impression of responsible farming / sourcing and fish sustainability.¹⁶⁵

An animal welfare label which is visible to the consumer could serve to augment consumer belief in agri-produce both labelled and certified to a legitimated GLOBALG.A.P. IFA Livestock Standard. This article argues, therefore, that GLOBALG.A.P. is missing a valuable opportunity to market added-value animal welfare agri-produce,¹⁶⁶ in the absence of a clearly expressed label which signals the animal welfare credentials of its Standard to consumers.

Similarly, neither a mandatory, nor a voluntary, EU animal welfare label exists.¹⁶⁷ Labelling related to processes was foreseen to increase production costs and cited as a reason

on the certified product, bearing the GGN number or the URL of the GLOBALG.A.P. database. *ibid* 1 (iv), 2 (i) (iii) (iv).

¹⁶³ http://www.globalgap.org/uk_en/for-consumers/Aquaculture-GGN.org/ >accessed 19 November 2017.

¹⁶⁴ <http://ggn.org/en/> >accessed 19 November 2017.

¹⁶⁵ <http://aquaculture.ggn.org/en/principles.html> >accessed 19 November 2017.

¹⁶⁶ See, further, Christine Parker et al ‘Can the hidden hand of the market be an effective and legitimate regulator? The case of animal welfare under a labeling for consumer choice policy approach’ (2017) *Regulation & Governance* doi: 10/1111/rego.12147.

¹⁶⁷ Commission, ‘Options for animal welfare labelling and the establishment of a European Network of Reference Centres for the protection and welfare of animals’ COM (2009) 584 final.

why an EU animal welfare label has not materialised.¹⁶⁸ A majority of ministers agreed the need for further research to establish science-based indicators so that labelling would enable consumers to distinguish different levels of animal welfare.¹⁶⁹ Correspondingly, the European Economic and Social Committee strongly supported a ‘voluntary, harmonised and market-driven’ labelling scheme, ‘based on scientific criteria, ... to promote the marketing of animal products that exceed EU minimum requirements’, stating that the information should be ‘understandable’ and consumers ‘sufficiently alert.’¹⁷⁰

A decision should be taken as to the type of label or information¹⁷¹ that would prove effective to translate consumer demand into increased purchasing power¹⁷² for animal welfare added-value produce, such that consumers would trust this animal welfare agri-food label.¹⁷³ EU origin labelling requirements for beef did not prevent ‘foods claiming to have been made with beef ... contain[ing] horsemeat. ... raising concerns about the integrity of labelling

¹⁶⁸ COM (2012) 6 (n 34) 21 and SEC (2012) 55 (n 45) Annexes 5D, 2H.

¹⁶⁹ Council of the European Union, 2995th Agriculture and Fisheries Council, Brussels (22 Feb. 2010) 6678/10.

¹⁷⁰ European Economic and Social Committee Opinion on COM (2009) 584 [2011] OJ C21/44, paras 1.2, 2.4, 3.3.

¹⁷¹ Brook Lyndhurst Ltd, ‘Are labels the answer? Barriers to buying higher animal welfare products’ (2010) A Report for Defra; Lennart R Heerwagen et al (2015) ‘The Role of Quality Labels in Market-Driven Animal Welfare’ 28 *Journal of Agricultural and Environmental Ethics* 67.

¹⁷² Ellen J Van Loo et al, ‘Consumers’ valuation of sustainability labels on meat’ (2014) 49(1) *Food Policy* 137, demonstrate consumer willingness to pay more for a free range / animal welfare label on chicken; See also Beth Clark et al, ‘Citizens, consumers and farm animal welfare: A meta-analysis of willingness-to-pay studies’ (2017) 68 *Food Policy* 112 (reduced animal production disease).

¹⁷³ Emma Tonkin et al, ‘The process of making trust related judgements through interaction with food labelling’ (2016) 63 *Food Policy* 1.

disclosures.¹⁷⁴ GLOBALG.A.P.'s Chain of Custody Standard would serve to ensure a trail of traceability for farmed agri-produce. In application to Livestock beyond the slaughtering stage the Chain of Custody may only be inspected and certified in combination with a Global Food Safety Initiative (GFSI) post farm gate standard.¹⁷⁵ Additionally, voluntary resort to a private animal welfare label could enable producers to engender more trade in animal welfare added-value produce giving them a competitive advantage in terms of quality over price. Such a label would need to be complemented with clearly understandable information.

4.2 Credible information

In addition to, and separately from, an animal welfare label, there would be the need also to provide credible animal welfare information to the consumer. Nicolas Hachez and Jan Wouters caution that 'market mechanisms are hampered by serious information asymmetries and run the risk of being highly inaccurate. They also depend on the responsiveness of consumer audiences to issues of general interest extending beyond the simple act of consuming.'¹⁷⁶ In other words, there are ambivalent prospects, such that 'the market may fail to produce adequate information,' and / or the consumer may 'lack the expertise required to render technical data useful.'¹⁷⁷ This article rejects the perspective that 'individuals are not necessarily competent to undertake informed choices,' being firmly of the opinion that the circumspect consumer

¹⁷⁴ Caoimhín MacMaoláin, 'Food labelling requirements in European law: Creating the right package of measures to achieve the aims of the Common Agricultural Policy 2020' in Joseph A McMahon and Michael N Cardwell (eds) *Research Handbook on EU Agricultural Law* (Edward Elgar 2015) 269, 282-3.

¹⁷⁵ Chain of Custody General Regulations, CoC GR V5.0_Dec14, http://www.globalgap.org/export/sites/default/content/galleries/documents/170609_gg_CoC_GR_V5-0_en.pdf >accessed 19 November 2017.

¹⁷⁶ Hachez and Wouters (n 135) 708.

¹⁷⁷ Robert Baldwin, Martin Cave, Martin Lodge, *Understanding Regulation* (2nd edn, OUP 2012) 18.

‘should be placed in a position to exercise informed choice.’¹⁷⁸ There is evidence that a growing number of EU citizens,¹⁷⁹ (64 per cent) would like to have more information about the conditions under which farmed animals are treated in their respective countries.¹⁸⁰ This corroborates the positive view that, ‘the public response is not in fact characterised by ignorance or passivity.’¹⁸¹ It is crucial for accurate, transparent and verifiable animal welfare information to be posted onto GLOBALG.A.P.’s website supportive of a label providing GLOBALG.A.P.’s website address. To do so would lessen any potential inclination to deviate from the higher standards transparently portrayed.

A dedicated animal welfare ‘platform’ on GLOBALG.A.P.’s website is proposed which indicates, with examples, the welfare needs of different species of farm animal. Detailing the animal welfare standards of major public bodies, for example EU animal welfare norms and the Recommendations for animal welfare in the OIE TAHC, with links provided to their online data, would foster transparency and inform and educate an interested public. By visibly demonstrating exactly where its animal welfare standards are placed *vis á vis* international norms, ie by benchmarking to, and building upon, the public science basis, GLOBALG.A.P. would evade any allegations of serving the interests of its members ‘that shape it.’¹⁸² It is suggested that GLOBALG.A.P. point clearly to its animal welfare objectives, underlining what standards exist, for what reasons of welfare need[s] they exist, and in what ways and in respect

¹⁷⁸ *ibid* 352-3.

¹⁷⁹ Since the previous Commission Special Eurobarometer 270 *Attitudes of EU citizens towards Animal Welfare*, September-October 2006.

¹⁸⁰ Commission Special Eurobarometer 442 (2016) (n 9).

¹⁸¹ Lee (n 118) 245.

¹⁸² Elena Fagotto, ‘Private roles in food safety provision: The law and economics of private food safety’ (2014) 7(1) *European Journal of Law and Economics* 83, 94.

of which species they go beyond public norms. This would further rule out Julia Black's concern that 'regulators may attempt to create and manipulate others' perceptions of their legitimacy.'¹⁸³ Assuming such communicative responsibility would engender a measure of comprehension of the animal welfare constituent of the GLOBALG.A.P. IFA Livestock Standard that currently is absent.

It would also bolster credence were GLOBALG.A.P. to demarcate the animal welfare expertise that goes into setting its IFA Livestock Standard animal welfare component. GLOBALG.A.P. should clearly articulate who are its animal welfare scientific advisers and underline their credentials. It should, furthermore, build partnerships with other trusted animal welfare standard-setters in order further to promote the added-value animal welfare standards of its IFA Livestock Standard. GLOBALG.A.P. should also update an interested public of the major international bodies with which it collaborates in an animal welfare context, and provide details of the animal welfare research which underpins GLOBALG.A.P.'s IFA Livestock Certificate.

5. State Legitimacy

It is opportune to construct a viable hybrid model of animal welfare governance in the search for the external legitimacy of the State. An increasing portion of business regulation emanates from the dynamic interaction of hybrid public-private institutions operating transnationally,¹⁸⁴ yet there is an absence of such an effective governance interaction in the policy domain of animal welfare. The definition of hybrid governance is adopted in which the actors or

¹⁸³ Black (n 4) 139.

¹⁸⁴ Eberlein et al (n 2) 1.

stakeholders are public (State / intergovernmental) bodies and private (non-State) organisations.¹⁸⁵

5.1 Meta- Regulation?

A developing phenomenon in transnational private regulation is the growth of the private meta-regulator, and of sector-specific meta-standardisation, the rationale being to ‘bolster[] ... the integrity, legitimacy and accountability of private regulatory regimes’.¹⁸⁶ Meta-regulation implies a process in which ‘[t]he primary control responsibilities are ... carried out within the ... management systems of corporations and the regulator’s role becomes the auditing, monitoring, and incentivizing of these systems.’¹⁸⁷ One example of a sectoral meta-regulator would be the Global Food Safety Initiative (GFSI). Existing food safety standards schemes are evaluated for equivalence against the GFSI’s regulatory criteria on governance, procedure and content.¹⁸⁸ GLOBALG.A.P. is such a recognised scheme.¹⁸⁹ There is no formal meta-regulator of private animal welfare standards. Arguably, it could be necessary to form an operative system of coordination of practices which affect a range of stakeholders along an extended food chain, by introducing a system of meta-regulation of private transnational farm assurance standards and certification schemes operating with the potential to control the global agri-food chain.

¹⁸⁵ Paul Verbruggen and Tetty Havinga, ‘Hybridization of food governance: An analytical framework’ in Paul Verbruggen and Tetty Havinga (eds) *Hybridization of Food Governance* (Edward Elgar 2017) 1, 5.

¹⁸⁶ Paul Verbruggen and Tetty Havinga, ‘The Rise of Transnational Private Meta-Regulators’ (2014) Osgoode Hall Law School Legal Studies Research Paper No 71, Vol 10/Issue 16 (2014) 1, <http://ssrn.com/abstract=2512843> >accessed 19 November 2017.

¹⁸⁷ Baldwin et al (n 177) 147.

¹⁸⁸ *ibid* 7; Cafaggi (n 133) 18, 19.

¹⁸⁹ Havinga and Verbruggen (n 30) 190.

Would potential EU meta-regulation of private animal welfare standards¹⁹⁰ through accreditation by third party certification provide a meta-regulatory model for adaptation at the global level? Benchmarking could operate as a mode of animal welfare governance, whereby meta-standards would act as ‘catalysts for bringing about changes in practice in order that conformity with those target standards would be achieved.’¹⁹¹ The European Commission has proposed an option of a legislative framework which would authorise the benchmarking of private certification schemes with animal welfare claims. Instead of adopting higher public standards, there would be scope for the private agri-food sector to market to the higher animal welfare criteria in a proposed Regulation, within a transparent and controlled process. The Commission envisages that such a voluntary benchmarking structure for EU registered private schemes would increase market opportunity and price premiums for EU producers who engage with higher animal welfare standards, as well as efficiency gains in benchmarking to a single EU standard.¹⁹² An interesting comparative example would be the existing EU normative requirement for producers of biofuels marketed in the EU to benchmark to EU sustainability criteria, certification to which must meet formal accreditation conditions.¹⁹³ This meta-standard ‘sets basic requirements and then allows the regulated community to use existing standards that have been benchmarked to the meta-standard to certify compliance.’¹⁹⁴ The EU outsources

¹⁹⁰ EU best practice guidelines exist for voluntary certification schemes for agricultural products and foodstuffs [2010] OJ C341/5.

¹⁹¹ ‘Standards, Indices and Targets for Environmental Performance’ in Lisa Jack, *Benchmarking in Food and Farming* (Gower 2009) 75, 83.

¹⁹² SEC (2012) 55 (n 45) 32-6, 41-4, Annex 5c, 107-8.

¹⁹³ Dir 2009/28/EC on the Promotion of the Use of Energy from Renewable Sources [2009] OJ L140/16 as amended by Commission Dir 2015/1513 [2015] OJ L239/1.

¹⁹⁴ Jody M Endres, ‘Clearing the Air: The Meta-Standard Approach to Ensuring Biofuels Environmental and Social Sustainability’ (2010) 28 *Virginia Environmental Law Journal* 73, 76.

certification to private commercial for ‘profit’ third-party auditors.¹⁹⁵ Jolene Lin submits that ‘the need for certification schemes to maintain credibility in order to remain in the “marketplace” leads to behaviour that enhances legitimacy.’¹⁹⁶ Using ‘the principal-agent framework developed in delegation theory’, she continues, ‘the agent’s quest for legitimacy acts as a countervailing incentive against slack and, in fact, serves to align the preferences of the agent [auditor] and the principal [EU].’¹⁹⁷ While offering a comparative meta-regulatory model with the propensity to justify the legitimacy of private regulatory regimes, this article questions whether such a meta-regulator of transnational private animal welfare standards schemes would be opportune and submits that meta-regulation should be considered only as a last-resort.

Jody Endres maintains that ‘criteria and indicators of benchmarked standards need continual reassessment as scientific knowledge grows.’¹⁹⁸ More particularly, she cautions that, inter alia, ‘important question arise as to whether such standards can truly incorporate countries’ differing notions of social and economic welfare.’ In this light, this article deems meta -standards not to be as effective as resort to linking the major private and public animal welfare bodies, namely GLOBALG.A.P. and the OIE. The complex nature of animal welfare should be recalled together with the modus operandi of working to achieve consensus between developed and developing countries in the animal welfare recommendations of the OIE TAHC, which standards duly obtain as the international reference standards.

¹⁹⁵ Jolene Lin, ‘The Environmental Regulation of Biofuels: Limits of the Meta-Standard Approach’ (2011) 5(1) Carbon and Climate Law Review 34, 35, 39, 41-2.

¹⁹⁶ Jolene Lin, ‘Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism’ 24(1) (2012) Journal of Environmental Law 43, 69.

¹⁹⁷ *ibid.*

¹⁹⁸ Endres (n 194) 119.

This article places emphasis upon seeking the legitimacy of stakeholders external to the collective standard scheme, based on reciprocity and deliberative dialogue. A preference is held for an alternative hybrid solution, for a soft-law mechanism, namely a collaborative document undertaken on a horizontal¹⁹⁹ understanding, formally orchestrated, but more flexible and informal than meta-regulation. Governance, moreover, ‘encompass[es] non-state action and “soft” norms.’²⁰⁰ It is relevant and timely to secure a scientifically determined baseline of animal welfare protection underpinning the privately assured global Standard, and for GLOBALG.A.P. to identify its higher animal welfare standards going beyond the minimum norms with which compliance is a legal requirement. This stems from the effects of the regime on its external stakeholders, the capacity to control the global agri-food chain, and the overall complexity in, and lack of clarity of, GLOBALG.A.P.’s animal welfare information. At the same time, as Spencer Henson and John Humphrey confirm, ‘it is important ... to see private standards as part of broader trends in value chain coordination in the context of ongoing changes in regulatory controls, consumer demand, and so on.’²⁰¹ The hybrid nature of food governance in which public and private bodies increasingly coordinate their activities is further corroborated by Paul Verbruggen and Tetty Havinga.²⁰² This article reasons that its proposed soft-law hybrid model of transnational animal welfare governance undertaken in horizontal accord and deliberative mode would provide the requisite solutions. Such soft-law State ‘facilitation,’ it is argued, would legitimise and increase the effectiveness of the private collective regulatory regime.²⁰³

¹⁹⁹ Cafaggi (n 1) 105.

²⁰⁰ Eberlein et al (n 2) 3; citing Levi-Faur (n 156).

²⁰¹ Henson and Humphrey (n 47) 1630.

²⁰² Verbruggen and Havinga (n 185) 3.

²⁰³ Abbott and Snidal (n 31); Gulbrandsen (n 15).

5.2 Soft-Law

The World Trade Organization (WTO) and the OIE, in response to concerns about private standards, have adopted a Resolution on the role of public and private standards in animal welfare,²⁰⁴ which recommends, inter alia, that the OIE Director General encourage global private standard-setting bodies to work toward transparency of private standards. Meeting to discuss the next steps to be taken towards implementing its recommendations, the OIE noted that the global private standard-setting bodies such as the GFSI and GLOBALG.A.P. were well placed to foster and facilitate collaborative undertakings. The meeting participants suggested: identifying mechanisms for collaboration; assessing the state of the problem with certification association costs; exploring collaboration in capacity building; working level collaboration in the standard-setting process of agricultural practices (GLOBALG.A.P.); sharing information for transparency; input at advisory board level; and, significantly, to ‘continue to pursue the development of official agreements, starting with GLOBALG.A.P. and GFSI.’²⁰⁵

The case can be made for GLOBALG.A.P. and the OIE as major animal welfare standard-setting bodies to engage in coordinated dialogue and to draw up a joint memorandum of understanding, a soft-law hybrid²⁰⁶ governance tool, in which undertakings by both Parties are agreed and adopted under signature. Such a collaborative memorandum would offer an

²⁰⁴ WTO/OIE Resolution No 26 [2010] Roles of public and private standards in animal health and animal welfare, http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/A_RESO_2010_PS.pdf

>accessed 19 November 2017.

²⁰⁵ Report of the Meeting on Private Standards (2010) Annex XXXVII (10 September Paris) http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/Final_private_standards_report.pdf >accessed 19 November 2017.

²⁰⁶ Cafaggi (n 1) 101.

alternative solution to, and should be distinguished from, that of meta-regulation. Hybridity in meta-regulation where WTO Members and third parties participate in international standard-setting would be problematic, potentially, for the multi-lateral regulatory regime of the World Trade Organization with respect to technical regulations in accordance with the Technical Barriers to Trade Agreement 1994.²⁰⁷

In becoming Party to a memorandum of understanding with the OIE the internationally recognised intergovernmental animal welfare standard-setter, GLOBALG.A.P. would be adding to its associations with leading international organisations.²⁰⁸ Kaarlo Tuori would be a proponent of such ‘dialogue’, ‘discourse’ and ‘mutual communication’ in a transnational setting.²⁰⁹ The more deliberative inter-relational model of liaison and mutually reinforcing²¹⁰ discourse between the two major animal welfare standards bodies is this article’s suggested model for the complex topic of animal welfare, which has multi-dimensional elements, including those of economics, society and trade. Hans-W Micklitz considers ‘the outward interaction between the public and the private’ to be ‘essential to an understanding of

²⁰⁷ Agreement on Technical Barriers to Trade (1994) (n 48) arts 2 and 3, Annex 1. For a detailed account of the problems, both actual and potential, see Michael Cardwell and Fiona Smith, ‘Contemporary problems of climate change and the TBT Agreement: Moving beyond eco-labelling’ in Tracey Epps and Michael J Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2013) 391.

²⁰⁸ GLOBALG.A.P. collaborates in capacity building with the International Finance Corporation (IFC), a member of the World Bank Group, for example, and in raising transparency working with the International Trade Centre, the joint agency of the WTO and the United Nations (UN). GLOBALG.A.P. Annual Report (n 70) 12-13.

²⁰⁹ Kaarlo Tuori, ‘Transnational law. On legal hybrids and perspectivism’ in Miguel Maduro, Kaarlo Tuori, Suvi Sankari (eds) *Transnational Law. Rethinking European Law and Legal Thinking* (CUP 2014) 11, 42.

²¹⁰ Gulbrandsen (n 15) 86-88; Eberlein et al (n 2) 11.

hybrids.²¹¹ A proposed memorandum of understanding between the major public and private animal welfare standard-setting bodies would ‘open[..] up the perspective’²¹² Precedents exist²¹³ in the cooperation agreement entered into between the GFSI and the OIE,²¹⁴ for example, or in that entered into between the International Organization for Standardization (ISO) and the OIE.²¹⁵ The terms of such a hybrid soft law agreement would incorporate undertakings by both Parties, in which each pledges its own interest in entering into such an understanding in animal welfare, reciprocal meeting participation and, in particular, the promotion of the use of the international standards under the respective mandate of each Party, together with awareness raising in Member Countries. It is important that the interests of stakeholders should be accommodated by GLOBALG.A.P. pledging to engage with producer members fairly to distribute costs (membership / certification fees) geographically along the supply chain.²¹⁶ The memorandum of understanding between GLOBALG.A.P. and the OIE should also contain a clause in which the OIE science-based animal welfare standards would be recognised as constituting the basic minimum floor of animal welfare protection for those

²¹¹ Hans-W Micklitz, ‘Rethinking the public/private divide’ in Miguel Maduro, Kaarlo Tuori, Suvi Sankari (eds) *Transnational Law. Rethinking European Law and Legal Thinking* (CUP 2014) 271, 277.

²¹² *ibid.*

²¹³ Young analyses the entrenchment of regime interaction through a memorandum of understanding in the domain of marine species conservation (n 26) 176 -88.

²¹⁴ Adopted by the OIE and by the GFSI on 12 July 2011,

http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/GFSI_ENG.pdf >accessed 19 November 2017.

²¹⁵ Adopted by the OIE and the ISO on 27 October 2011.

http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/accords/ISO_ENG.pdf >accessed 19 November 2017.

²¹⁶ Henson and Humphrey (2009) (n 55) 36.

species of farm animal in respect of which an OIE Chapter exists.²¹⁷ GLOBALG.A.P.'s animal welfare standards would be required to be assessed scientifically to the same minimum level, *beyond* which it would then be able to market agri-produce certificated to GLOBALG.A.P.'s IFA Livestock Standard.

It is relevant to recall the documented tension between science and participation and to reinforce this article's argument both for deliberative dialogue and the need for a scientific base to establish the external legitimacy of the private animal welfare standards. Science on its own is not enough to legitimise the animal welfare component of the private collective Livestock Standard, but science is needed as a basis.²¹⁸ A minimum science-based floor would serve to remove any inclination solely for market differentiation goals and the tension / potential for conflict with the OIE. The scope exists, simultaneously, for 'reasoned discourse' through which 'public reason' would also 'invoke mutuality'²¹⁹ through the legitimating mechanism of a memorandum of understanding.

Reinforced GLOBALG.A.P. / OIE relations would align the former organisation's standards with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the 'science-based obligations' laid down therein,²²⁰ in which the OIE TAHC is accorded formal recognition as 'the relevant international organization.'²²¹

²¹⁷ Diane Ryland, 'Animal Welfare Standards in Agriculture: Drivers; Implications; Interface?' in Mariagrazia Alabrese et al (eds) *Agricultural Law - Current Issues from a Global Perspective* (LITES Springer 2017) 181.

²¹⁸ McEldowney et al (n 119) 167.

²¹⁹ Black (n 14) 36.

²²⁰ Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2007) 2.

²²¹ Art 3(4), The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (1995) https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm > accessed 19 November 2017. Joanne Scott explains that as one of three 'sister organizations' to the SPS Committee, the 'OIE develops normative documents concerning animal health and welfare, and animal production food safety.' *ibid* 244-9. The 1995 Agreement on

GLOBALG.A.P.'s Standard would be reinforced by the link with the 'international standards, guidelines and recommendations developed under the auspices of the OIE' as defined in the SPS Agreement.²²²

Fabrizio Cafaggi claims that 'public and the private spheres influence each other.'²²³ For Eberlain et al 'interaction' means the myriad ways in which governance actors and institutions *engage with and react to one another*.²²⁴ Not only would the memorandum of understanding constitute 'retrospective recognition of privately designed standards'²²⁵ by the OIE, it may also serve to instigate the adoption of public animal welfare standards for those species where currently a chapter does not exist. This would bolster further the need for private standards to be justified in accordance with a developed existing science base, removing the scope for private standards merely to be marketing tools. Moreover, the reinforced higher private standards would be bolstered by the promotional endorsement of GLOBALG.A.P.'s standards by the OIE in the memorandum of understanding. Building upon this latter, the scope and incentive would exist for GLOBALG.A.P. to justify its corporate mission statement and objectives²²⁶ as the global industry standard inclusive of animal welfare and to transcend the 'bottom-line' in accordance with David Vogel's 'race to the top'.²²⁷ It is in GLOBALG.A.P.'s

the Application of Sanitary and Phytosanitary Measures makes explicit reference to the international standards of the OIE Terrestrial Animal Health Code. Certain sector specific animal welfare standards and guiding principles have evolved subsequently, which form a part of the OIE TAHC.

²²² *ibid* Annex A 3(b).

²²³ Cafaggi (n 65) 40.

²²⁴ Eberlain et al (n 2) 3 (emphasis added).

²²⁵ Cafaggi (n 65) 45.

²²⁶ *Cf* the account of the GFSI in Havinga and Verbruggen (n 30) 193,194.

²²⁷ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard UP 1995).

interest to generate revenue for its certified added-value agri-produce and accordingly to ratchet up its standards in order to do so.

Deliberative dialogue is advocated because of the dual roles and responsibilities of public and private animal welfare bodies concerning the interest of raising animal welfare standards in developing countries, which responsibility GLOBALG.A.P. evidently is developing incrementally. Linda Fulponi alludes to the capacity of private standards to ‘provide incentives for physical and human capital development in order to raise technical competencies, leading to market access and earnings.’²²⁸ GLOBALG.A.P.’s incremental local development schemes further support and bolster the process in presenting positive opportunities for stakeholders in the global agri-food chain. GLOBALG.A.P., conversely, cannot be expected to reflect stakeholder interests to the extent of destroying the market opportunities its elevated collective animal welfare standards would present.²²⁹ It is in the public interest and therefore in the interest of the OIE that producer stakeholders develop capacity to meet the higher animal welfare requirements. Public animal welfare standards tend to be minimal or lowest common denominator standards based on science, ‘leaving market actors to define private standards that extend beyond this minimum.’²³⁰ For this reason, Spencer Henson and Thomas Reardon underscore the role of public policy-makers in ‘facilitating compliance with private standards ... where these predominate and have become the basis of competitiveness, especially in the case of vulnerable groups that face potential marginalisation.’²³¹ A clause in the proposed memorandum of understanding should,

²²⁸ Fulponi (n 54) 11.

²²⁹ Henson and Humphrey (n 55) Executive Summary point 26.

²³⁰ Spencer Henson and Thomas Reardon, ‘Private agri-food standards: Implications for food policy and the agri-food system’ (2005) 30(3) Food Policy 241, 252.

²³¹ *ibid.*

accordingly, record the respective responsibilities of each Party toward those producers who would struggle to meet the higher private standards.

It is with further regard to the building of bridges between the major public and private animal welfare bodies of the OIE and GLOBALG.A.P. respectively, in the hybrid governance of animal welfare that this article explores the contextual significance of the aforementioned Cooperation Agreement concluded between the OIE and the ISO.²³²

5.3 Bridging the Public / Private Divide

The OIE has been working with the International Organization for Standardization (ISO) under the terms of their joint Cooperation Agreement, pursuant to which the ISO has adopted a Technical Specification, ISO T/S 34700, on ‘Animal welfare management - General requirements and guidance for organizations in the food supply chain.’²³³ The drafting of this management tool was the subject of negotiation in Working Group 16 (the OIE having Observer Status),²³⁴ prior to its adoption by the ISO Technical Committee 34 Food Products.²³⁵ Its objective is to facilitate the implementation of the animal welfare standards of the OIE, supportive of developing countries meeting science-based minimum floor animal welfare standards. It will further provide guidance for the implementation of public and / or private

²³² (n 215).

²³³ 01-12-2016 [ISO/TS 34700:2016(E)]. See Sandrine Tranchard, ‘New ISO Specification for better management of animal welfare worldwide’ <https://www.iso.org/news/2016/12/Ref2147.html> >accessed 19 November 2017.

²³⁴ World Organisation for Animal Health, Report of the Twelfth Meeting of the Animal Welfare Working Group (2013)

http://www.oie.int/fileadmin/Home/eng/Animal_Welfare/docs/pdf/AWWG_Reports/A_AWWG_2013.pdf

>accessed 19 November 2017.

²³⁵ <https://www.iso.org/committee/47858.html> >accessed 19 November 2017.

standards that meet at least the OIE TAHC, and the integration of animal welfare principles in business to business relations. It is anticipated that the ISO T/S 34700 will act as a bridge between the public and private sphere in the setting and monitoring of animal welfare standards. Working towards the implementation of the animal welfare standards of the OIE TAHC, which are embedded in science, it will serve to embed a minimum floor of animal welfare protection, and be a determinant of market access for agri-produce. It should prove a valuable tool for developing countries, otherwise largely dependent on meeting the animal welfare requirements of the privately set and certified farm assurance schemes and any transnational private animal welfare regulatory regime with the potential to be the industry norm with exclusionary effects.

ISO T/S 34700 is a welcome addition to the hybrid governance of animal welfare, which, it is foreseen, will interact in parallel with the proposed GLOBALG.A.P. / OIE memorandum of understanding. ISO T/S 34700 is a landmark management tool, albeit it may not be a perfect bridge between private and public animal welfare standard-setting bodies, since conformity with / benchmarking to the ISO animal welfare management tool would be to the basic level of animal welfare protection, albeit based on science, although not comprehensive in application to certain species of farm animal. In the absence of any associated system of conformity assessment it is lacking in terms of assurance. It may prove a useful exercise, on review, to assess whether guidance is needed in its implementation and, *inter alia*, whether more transparent information to the consumer should be forthcoming. In the event that it is facilitative of developing countries meeting the OIE science-based animal welfare standards and of securing market access, it underpins sustainability and entry to the global agri-food chain. Its successful implementation may prove to be the catalyst to GLOBALG.A.P. pledging to meet the minimum science-based level of animal welfare standards emanating from the OIE. The significance of such an occurrence should be emphasised. The success of the ISO

management tool may be the added impetus to GLOBALG.A.P. engaging in coordinated dialogue with the OIE so as to highlight its enhanced animal welfare standard-setting and certification role transnationally, firmly embedded upon the OIE science-based animal welfare standards. It would incentivise GLOBALG.A.P. to differentiate its IFA Livestock Standard in aiming higher and exceeding the animal welfare standards of the OIE TAHC the facilitation of which latter standards only is promoted in the ISO Technical Specification.

The scope would exist beyond ISO T/S 34700 for GLOBALG.A.P. to elevate standards of animal welfare in a global market for added-value agricultural produce in which small producer access also is incentivised, with the *proviso* that these higher standards have been legitimated in the process. It has been the focus of this article to capture the external legitimisation of these higher standards via soft-law deliberative mechanisms ‘tuned’ to the respective interests and reciprocal dealings of stakeholders external to the private regulatory regime. It is timely to remind of the proposed animal welfare informative GLOBALG.A.P. platform. A periodic monitoring and evaluative review of the constituent elements of the memorandum of understanding and the roles of the Parties in practice would be reinforced by the transparent exchange of data. GLOBALG.A.P.’s IFA Livestock Standard, duly substantiated, could ‘provide a bridge between producers in developing countries and consumer preferences in high-income markets’²³⁶ presenting opportunities for such stakeholders in opening up a global animal welfare added-value agri-food chain.²³⁷ GLOBALG.A.P.’s collective private Standard possesses the potential to raise animal welfare in instances where countries inter-governmentally have not been able to agree because of

²³⁶ Maertens and Swinnen (n 62) 12.

²³⁷ Garry Smith, ‘Interaction of Public and Private Standards in the Food Chain’ (2009) OECD Food, Agriculture and Fisheries Working Paper No 15 para 7, 5.

different national animal welfare standards per country – per species.²³⁸ Although, the need alongside continues for a public interest role and responsibility. Hybrid governance through reinforced complementary between major animal welfare standards is the way forward: major public and private bodies working together to get the best out of private standardisation²³⁹ for stakeholders, with improvements in animal welfare in globally sourced agri-food.

6. Conclusion

This article has considered the potential for private business collective animal welfare standards to become the de facto industry norm controlling the global food chain, with effects for stakeholders in agri-food who are outside the internal workings of the regime, in particular the consumer and the State. It has engaged in a desk-based case study of the governance rules relevant to the private collective IFA Livestock Standard of GLOBALG.A.P. and has identified the apparent need for GLOBALG.A.P. actively to seek external legitimacy, placing emphasis on the legitimating mechanism of output-oriented deliberative democracy. It has made some proposals towards changing the status quo, since there are opportunities for influential participatory discourse and dialogue undertaken in horizontal accord that would effectively legitimate private collective animal welfare standards infused, thus, with both science and values.

In particular, GLOBALG.A.P.'s consultation procedures and committee systems need further to harness the voice of the animal welfare ethical consumer, through mutually

²³⁸ Fulponi (n 54) 11.

²³⁹ Jan Wouters, Axel Marx and Nicolas Hachez, 'Private Standards, Global Governance and Transatlantic Cooperation. The Case of Global Food Safety Governance' (2008) Leuven Centre for Global Governance Studies 22-4,

www.transatlantic.be/publications/wouters-marx-hachez_final. >accessed 23 September 2017.

supportive deliberation and participation in which the consumer is influential, such that both a values element and a minimum floor of science become integral to the IFA Livestock Standard. There could be a link in developing consumer credence and, potentially, increased demand for higher animal welfare agri-produce. The potential further may exist for external smaller producers to engage with animal welfare improvements and to disperse their costs over increased output to meet that demand in an extended value chain.

Likewise, a memorandum of understanding between the major public and private animal welfare standard-setters, namely the OIE and GLOBALG.A.P., which incorporates their respective and mutually reinforcing undertakings achieved through deliberative discourse, may also have positive spill-over effects. Reciprocal pledges by the major public and private bodies in which each Party endorses the animal welfare standards in the mandate of the other, concerned with the interests and capacities of developing countries in meeting science-based animal welfare standards and aiming higher would underscore the dual nature of the public / private responsibilities. In parallel, the recently adopted ISO Technical Specification provides a management tool facilitative of market access to those producers who meet OIE animal welfare standards while also accommodating private higher standards of animal welfare meeting ‘at least’ those science-based standards. The legitimacy gained through the interaction of the major public and private standardisation bodies would bolster GLOBALG.A.P.’s Livestock Standard with the potential to enhance animal welfare in the global market for agricultural produce.

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