

Private Standards and Global Governance:
Prospects and Challenges

(Record of the 76th GSDM Platform Seminar,
International Symposium on “Private Standards and
Global Governance: Prospects and Challenges”, held
at Ishibashi Memorial Hall, Graduate School of
Interdisciplinary Information Studies, The University
of Tokyo, 12 December 2016)

Edited by Junji Nakagawa

ISS Research Series No. 62

INSTITUTE OF SOCIAL SCIENCE UNIVERSITY OF TOKYO

Private Standards and Global Governance: Prospects and Challenges

(Record of the 76th GSDM Platform Seminar, International Symposium on “Private Standards and Global Governance: Prospects and Challenges”, held at Ishibashi Memorial Hall, Graduate School of Interdisciplinary Information Studies, The University of Tokyo, 12 December 2016)

Edited by

Junji Nakagawa

TABLE OF CONTENTS

Preface.....	iii
Panelists and the commentator.....	iv
Session 1: Regulating private standards: Challenges and possibilities.....	1
Session 2: Private standards and global governance: Prospects and challenges.....	24

Preface

This is the record of the 76th GSDM Platform Seminar, International Symposium on “Private Standards and Global Governance: Prospects and Challenges”, held at Ishibashi Memorial Hall, Graduate School of Interdisciplinary Information Studies, University of Tokyo, on 12 December 2016. The Seminar was sponsored by Global Leaders Program for Social Design and Management (GSDM), University of Tokyo, and it was assented by the Institute for International Studies and Training (IIST).

In the global marketplace of today, private firms, in particular large retailers and consumer goods manufacturers, business associations and NGOs set standards addressing social issues such as environmental protection and resource conservation, labor conditions, human rights protection and food safety, and they implement them by making the accreditation with such standards as conditions for the purchase and procurement of goods and services.

These standards, coined as “private standards”, are playing an important role of global governance, because private standards promote tackling with social issues throughout the whole global supply chains and they complement domestic regulations of the countries comprising the global supply chains, in particular developing countries where governments occasionally lack the capacity to implement high standard social regulations.

On the other hand, as private standards are increasing rapidly and with little coordination among them, they lead to occasional fragmentation of standards. Also, compliance cost of private standards are soaring, to the detriment of, in particular, small-scale producers in developing countries.

Accordingly, private standards present us challenges of global governance under which we should aim at addressing global social issues while enhancing fair and inclusive global supply chains.

The symposium focused on the challenges of global governance arising from the rapid increase of private standards. Experts of international relations, international economics and international economic law discussed the prospects and challenges of private standards for the governance of global economy and social issues.

As an organizer of the symposium, let me express my sincere gratitude to the panelists and the commentator, notably to those who came all the way to Japan to join us. Let me also thank Professor Hideaki Shiroyama, Program Co-ordinator of the GSDM, who generously supported the symposium, Ms. Yuki Lockman and Ms. Akiko Goda of the GSDM, who handsomely and efficiently supported the preparation, organization and implementation of the symposium, and Mr. Yasushi Niwa, who supported the publication of this Research Series.

February 2017

Junji Nakagawa, Professor, Institute of Social Science, University of Tokyo

Panelists and the commentator (in alphabetical order)

Yuka FUKUNAGA is Professor, School of Social Sciences, Waseda University. Her major is international economic law and she has published a number of articles, book chapters and books on WTO dispute settlement and investor state dispute settlement. She has worked for the WTO as an intern at the Appellate Body Secretariat and she has also worked for the Permanent Court of Arbitration in the Hague as assistant legal counsel.

Masahiro KAWAI is Professor, Graduate School of Public Policy, University of Tokyo. He is also a Representative Director and Director General of the Economic Research Institute for Northeast Asia since April 2016. Before assuming this position at University of Tokyo in 2014, he was the Dean of the Asian Development Bank Institute. He has also worked for the Japanese Ministry of Finance as Deputy Vice Minister, has worked for the World Bank as Chief Economist of the East Asia and Pacific Region.

Kazumochi KOMETANI is a Counsel at the law office of Nishimura & Asahi; Professor, School of Law, Hosei University, Japan. He has also worked for the Ministry of Economy, Trade and Industry, or METI in various capacities, including, from 2008 to 2015, the chief of the international economic DS division. He also worked for the WTO Legal Affairs Division.

Akihiko Tamura is Consulting Fellow, Research Institute on Economy, Trade and Industry (RIETI); Deputy Director-General for Trade Policy, Trade Policy Bureau, Ministry of Economy, Trade and Industry (METI), Japan. He has been working for the METI for over 25 years in various positions in Trade Policies Bureau, among others. He has also worked for the WTO at Legal Affairs Division.

Colette van der Ven is an Associate at the law firm of Sidley Austin Geveva Office. She advises and represents governments, businesses and trade associations on international trade law with a particular focus on WTO law and WTO dispute settlement. Prior to joining the firm, Colette was a summer associate at the World Bank's Integrity Vice Presidency, where she worked with the legal division. Colette also worked at the Acumen Fund in India, where she advised on India's agricultural legal and policy framework. Colette was also a Humanity in Action Fellow and completed various internships, including the United Nations Khmer Rouge Tribunal in Cambodia, the U.S. District Court for the District of Massachusetts and International Bridges to Justice in the Philippines. Colette holds a joint J.D./MPP from Harvard Law School and the Kennedy School of Government, respectively, and an undergraduate degree from Middlebury College. At Harvard, Colette served as the co-President of the Harvard Law and International Development Society and co-founded the Trade Innovation Initiative, which helps small businesses overcome their trade barriers.

Vera Thorstensen is Professor, School of Economics, Head of the Center on Global Trade and Investments, Getulio Vargas Foundation, Sao Paulo, Brazil. Professor Thorstensen also holds a WTO chair there. She's currently the president of the Brazilian Committee on Technical Barriers to Trade. Before assuming these positions in Getulio Vargas Foundation, Professor Thorstensen worked for the Government of Brazil as a diplomat working at WTO in various capacities, including the chairperson of the WTO Committee on Rules of Origin.

Session 1: Regulating private standards: Challenges and possibilities

Junji Nakagawa

Good afternoon everybody and welcome to The 76th GSDM Platform Seminar, International Symposium on "Private Standards and Global Governance: Prospects and Challenges." My name is Junji Nakagawa. I'm a GSDM program faculty as well as a professor of international economic law at the Institute of Social Science, University of Tokyo. Let me briefly explain the theme and background of the topic of today's symposium, namely, private standards and global governance. Then let me introduce you to the first three speakers of session 1 of the symposium.

First of all, let me explain the background and issues to be discussed today in the symposium, private standards. In the global marketplace of today, private firms, in particular large retailers and large consumer goods manufacturers, business associations and NGOs set standards addressing social issues such as environmental protection and resource conservation, labor conditions at work places, human rights protection, animal welfare and food safety, and they implement these standards by making the accreditation or certification with such standards as conditions for the purchase and procurement of goods and services globally. These standards, frequently named or coined as private standards, are playing an important role of global governance because private standards promote tackling with social issues throughout the whole global supply chains, and they complement domestic regulations of the countries comprising the global supply chains, in particular developing countries, where governments occasionally lack the capacity to administer and implement high standard social regulations within their jurisdictions.

That is the bright side of the phenomenon of private standards, but on the other hand, private standards are increasing rapidly with little coordination among them. They lead to occasional fragmentation of standards. Compliance cost of private standards are also soaring to the detriment of, in particular, small-scale suppliers and producers in developing countries.

Accordingly, private standards present us challenges of global governance, under which we should aim at addressing global social issues throughout the whole global supply chains while enhancing fair and inclusive economic development throughout the global supply chains including developing countries. These are the background of the phenomenon of private standards and the issues to be tackled with, to be dealt in this symposium.

The symposium will focus on the challenges of global governance arising from the rapid increase in private standards. Experts of international relations, international economics and international economic law will discuss the prospects and challenges of private standards for the governance of global economy and social issues.

Let me introduce you to the three distinguished speakers of session 1 of the symposium, which will deal with "Regulating private standards: Challenges and possibilities". The first speaker is Professor Vera Thorstensen. She is a Professor at the School of Economics and Head of the Center on Global Trade and Investment at Getulio Vargas Foundation, Sao Paulo, Brazil. Professor Thorstensen also holds a WTO chair there, and she is also President of the Brazilian committee on TBT, or technical barriers to trade. Before assuming these positions, Professor Thorstensen worked for the Government of Brazil as a diplomat working on WTO matters in Geneva in various capacities, including the chairperson of the WTO committee on Rules of Origin.

Our next speaker is Professor Yuka Fukunaga. She is a Professor of international economic law at the School of Social Sciences, Waseda University, Tokyo. Her major is international economic law and she has published a number of articles, book chapters, and books on WTO dispute settlement and investor-state dispute settlement, among others. She has also worked for the WTO as an intern at the Appellate Body Secretariat and she has also worked for the Permanent Court of Arbitration in the Hague, Netherland as Assistant Legal Counsel.

Our third speaker is Professor Kazumochi Kometani. Professor Kometani is a professor at the Hosei University Law School. He is also a counsel at the Law Office of Nishimura, Asahi and associates. He has worked for the Government of Japan, Ministry of Economy, Trade and Industry or METI in various capacities for the past two decades, including from 2008 to 2015 as the chief of International Economic Dispute Settlement Division of METI. He has also worked for the WTO Legal Affairs Division.

Each panelist will have about 20 to 25 minutes for their presentations. We will listen to the three consecutive presentations first, and then we will have about 20 to 25 minutes for discussion. Now, let me invite Professor Thorstensen as the first speaker.

Vera Thorstensen

Thank you very much, Professor Nakagawa. My first thoughts are to say thank you Professor Nakagawa, and express my gratitude to the University of Tokyo. This is my first time in Japan. I am really enthusiastic about what I am saying and talking about. Private standards are now an important issue for us who spend part of our life with WTO matters. It's a very challenging issue. It is challenging because it has the capacity of destroying a little bit what we built during so many years. As Professor Nakagawa said, I spent many, many years in Geneva and now I am back in Brazil, but I am following with care what is going on in Geneva.

Let me show you how I approach this issue. First of all, we are talking about governance and this is a part of the result of the work I am doing together with Georgetown University. We are discussing how to teach governance to our students and the main focus of our discussion is that you cannot talk about only WTO and the rules of trade, but you have

to move around and talk to the students a lot about IMF, a lot about what's going on in investment and finance and taxation because here you have a new universe. You have to talk about climate change, women's rights, and so on. This is new: the internationalization of governance. The main questions are how you can sustain coherence and conversions among all regulations. We are trying to teach students to have a global view on this issue.

If you move to the next slide, what we are going to see is other side of the internationalization. It is about the privatization of governance. What's the difference? Again, you are talking about trade, you have again the WTO rules and the power of dispute settlement and you have the internationalization of governance. The main focus is the OECD and you have a lot of transnational corporations and NGOs. NGOs now are playing the role of government. They are producing rules that are being used by supermarkets and transnationals establishing private standards. This is the new kind of governance and the big question is how we are going to guarantee coherence and conversion of these rules. Here you have two very important new issues. One is that in the US, Mr. Trump is saying that he is going to make trade through bilaterals, not the mega TPP anymore. The consequence is what's going to happen with Japan? What will be the reaction of China? And how about the emerging countries like Brazil and India? They are rule takers now. There is now a kind of new dominance by standardizations, a kind of power trying to compete on who is going to follow what kind of standards.

Now, what are the big trends and challenges of our world? Certainly one is the multiplication of preferential arrangements. The rise of mega regionals is on hold because of the US. But you still have the larger global chains that are based on preferential arrangement and on standards that are imposed on the whole chain. Now you have the privatization of the governance. Now the trade is no more determined by tariffs and instruments on the border.

Trade is made now by regulations made by governments and private sectors. It is another kind of barriers - the regulatory barriers.

In summary, the first challenge is the multiplication of PTA, preferential trade agreements. They are of different types, with scope of goods and service, intellectual property, investment, competition and climate. They have rules based on the WTO but also have new rules beyond the WTO. In this slide you can see the explosion of the number of PTAs just to show that preferential arrangements are the main issues now. You have China saying already what China is going to do, with the famous Belt and Road Initiative. You can see how China is trying to build new processes of trade expansion. In this slide you have the numbers and the percentage of these arrangements.

Now, what's the conclusion of this explosion of PTAs? It is that the new agreements are not based on tariffs anymore and measures at the border. When you start negotiating an agreement, you do not have to spend too much time negotiating tariffs because this is not important

anymore. This is a kind of old agreements. What you have to do is to start discussing the conversion of rules.

Concerning trade, you have a lot of rules. When you talk about rules for trade you have a lot of barriers: technical barriers, sanitary and phytosanitary measures and a lot of rules of services, intellectual property and even investment. You have a lot of new things and new paradigms.

In Geneva they are talking about the old generation of preferential trade arrangements. They were talking about agricultural industry and services. But governments are talking about these new barriers. They appear in the new agreements between Korea-United States, and European Union-Korea and now in the CETA, between Canada and the EU. They included in the agreements the concepts about coherence and convergence. Coherence is the organization of regulation inside a country, where all the agents must be coherent among themselves. Convergence is how you are going to talk with other countries and to guarantee that you can export because your rules are accepted by other countries. For this issue, the most important points are TBT, SPS and the environment, and also what are called sustainability standards. Some agreements include digital economy, anti-corruption and even the issue of currency.

These are the new points on the tables. Forget a little about old trade instruments and talk about the new ones and the political consequence of them. The question is that you have a dual system: one is the WTO and the other is the new agreements with new rules. One is old and the other is new. The impacts will be for the outsider, like Brazil and India that are outside of this development.

The second big challenge are the transnational corporations. Transnational corporations are in charge of 60% or 70% of trade. If you want to talk about trade, you have to talk about the transnational corporations and they are the ones that are pushing hard for private standards. They are also pushing hard for globalization and have a very strong representation in national governments and international arena. They are really dictating new rules, they are responsible for the privatization of governance.

Let me give you just some examples of how you measure degrees of globalization in economic terms, through global value chains. It is through the amount of imports that is incorporated and then exported as a percentage of GDP for several countries. You can see the numbers of Germany and India compared with Brazil. Here you have the index of countries and how they are behaving when they talk about globalization. Germany is a hub, United States is another hub, Japan and China are considered the other hubs. That is, you have to import to re-export and then you have to add services on the product. What are the consequences? On one hand you have the logic of trading goods with tariff and quotas controlled at the border and, on the other hand, you have another kind of logic, the transnational logic, when you have trade of goods with a lot of services inside, against tariffs, anti-dumping, and

subsidies. The new trade is not controlled at the border but through regulation. This is a really an important point.

The conclusion is that you have to build another WTO: the WTO 2.0 based on regulation, not based on the control of borders anymore.

Now my third point. We arrive in public and private standards and what is this new regulatory war? The war is exactly about how countries impose rules upon other countries, how they impose standards of technical barriers and sanitary and phytosanitary barriers and more important than all, how they impose sustainability standards. They are not in the WTO. There are no multilateral rules on these standards. They are being imposed by transnational corporations and big supermarkets that have their own standards forcing producers to behave the way they want. This is another kind of regulation. This is a completely new world for us that used to be in Geneva.

Now, when you talk about regulatory barriers, you have to talk about regulatory coherence, conversions, and cooperation. You have coherence inside the countries, and you have to have your agencies, your regulatory bodies talking to each other. This is not an easy thing because officials want to protect their own space. But you have to force them to do coherence among rules. Then you have to talk to other countries, you cannot export anymore if your products are not accepted because they are not certified. Your enterprises must talk to other enterprises in the south-south world and in the north-south world because now the north is imposing standards on the south. There is a new discussion about what are the instruments that you are going to use to reach this goal. You have to talk about harmonization, equivalence or mutual recognition. These are the instruments and for outside countries you discover that there are two main models: the US or the EU. The question for Japan is to decide which one you are going to follow.

In the European Union, we have a model of standardization from the top to the bottom, where the European organizations establish the standards that they want to impose. Each European country is going to follow this kind of big regulations by the harmonization process. United States is completely different. The model is from the bottom to the top. You have hundreds of agencies or bodies producing standards open to the decision of the market. Then they have an umbrella that is taking care as the representation as a federal organization. The US defends that this model is important to maintain the novelties, the innovation, technology and so on. The conclusion is that we have two completely different systems and they are imposing standards with two different logics. For the rest of the world, you have to follow one or both and use the standards decided by the buyers of the product, so the costs are increased. This is the new reality of the world.

Let me show you some numbers of technical barriers to trade. Today we have more than 28000 TBT standards or regulations and 15000 SPS measures. Their objectives are that countries are using them to protect human and animal health or safety and quality.

Members that are frequent users are the European Union and United States and even China as the most important users. Japan is not a big producer of sustainability standards.

On VSS – voluntary sustainability standards. UNCTAD has counted more than 500 of them. What's the difference? They are related to environment, labor and animal welfare. Because there is no such a standard developed by international organizations, non-governmental organizations are creating them. They are related to quality and consumers' choice and supermarkets are imposing them. They are a new kind of label. The transnational corporations are leading the global value chains and asking producers to follow specific standards created by these NGOs.

Let me give you an example. Brazil is a huge exporter of chickens and now producers are changing the way they raise chickens. Nestlé has just imposed a new standard. Now producers have to raise chicken under a limited quantity by square meter, and they have to allow the chickens to get out walking freely. They cannot allow the chicken to eat day and night, because the chicken must sleep during the nights not eating for days and nights. The question is about the consequences. What are the costs of transforming a huge producer of chickens to abide by these standards? The costs that they impose are huge. This is discrimination and this must be discussed at the WTO.

Then you have collective groups that are imposing new standards or international standards. The discussion starts in the WTO when in 2005 Saint Vincent and the Grenadines arrived in the WTO and exposed that she cannot export their bananas anymore to European Union because the EU asked her for a label named EurepGAP. This label concluded that she was using too much pesticide. The problem is that Grenadines is in a tropical area and has to use more pesticide to kill tropical insects and bugs.

These are the big questions. Regulations are mandatory, but standards can be public or private but they are voluntary. The problem is that governments are using these private standards to impose their own control, resulting in a number of private standards without control. Several countries are producing these standards. Europe is the main example. UNCTAD through UNFSS is mapping these sustainable standards. They are verifying the volume of production affected by sustainability standards.

What are the consequences? When I am talking about TBT - technical barriers to trade and SPS - related to agricultural goods, we have agreements in the WTO establishing rules for their use, based on international organizations. The exporters and importers have to follow them. Violations can bring them to the WTO dispute settlement procedure and to the panel of the WTO. For private standards there is no responsibility of the government, so when somebody raises this issue in the WTO, the United States and the European Union said no, because they are private. But this is wrong because in the agreements it is clear that

governments are responsible for the standards their internal bodies are producing, even private ones. The question is where we are going to discuss this issue if not in the WTO.

We are talking about discrimination and governments are responsible for their acts.

Questions:

Where we are going to discuss private standards?

There is one organization discussing them – it is ISO in Geneva. It is an international standards organization, but NGOs are saying, not there, because ISO is dominated by multinational corporations. They want another place. The problem has multiple faces: there are animals, plant and people and also environment. There are many organizations dealing with it. But all their regulations must not violate WTO rules. The question is where we are going to discuss all these issues if not the WTO?

The NGOs do not want to use these organizations, so they are replicating the standards. The cost is huge, and you have a lot of problems related to the certification of these standards. The central points are: who is going to prove the legitimacy of these standards, who is going to enforce them and where we are going to discuss violations of the rules? This is the reason why all the groups that are discussing these issues are looking to the WTO. Because all is related to trade and it is only in the WTO that you can discuss regulation for standards.

This is probably one of the most intriguing issues in WTO arena nowadays. Thank you very much.

Junji Nakagawa

Thank you so much Professor Thorstensen for your broad-based and comprehensive presentation. I trust that your presentation was a very good starter for today's symposium. Now let me invite the next speaker, Professor Yuka Fukunaga. She will talk about the legitimacy of private standards. The title is "Does transparency remedy legitimacy concerns of private standards?" Now let me ask Professor Fukunaga for the presentation.

Yuka Fukunaga

All right. Thank you very much for having me here in this symposium and my presentation title is a question: "Does transparency remedy legitimacy concerns of private standards?"

Here is the structure of my presentation. First, I start with the concept of private standards. Of course, Professor Thorstensen has just explained the concept, but I will try to provide my version of the definition. Then I move on to the second part. Although my presentation title is a question, my presentation is not about answering the question, because

I'm sure that the answer is pretty simple: transparency does improve legitimacy. What I'll try to do here is to explain a bit about this proposition: What do I exactly mean by saying that transparency improves legitimacy? In the third section, I'll explain the rules on transparency of private standards. Vera has just explained the outline of the WTO rules on private standards, and I'll go on a bit further and I'll try to present some possible improvements to the WTO rules on private standards. Then in the final section, I'll try to mention some implications for Japanese companies, and I'll try to provoke a discussion in this symposium.

I start with the definition of private standards. There have been several attempts in the WTO context to define the concept of private standards, but these attempts have not been so successful, so I am not going to discuss these attempts and just move onto my definition of private standards.

According to my definition, private standards are, first of all, developed and assessed by non-governmental entities including producers, retailers, and NGOs. Well, I think most private standards are developed by NGOs, but some private standards are developed by some retailers or suppliers. This is a very straightforward feature of private standards. The second feature is that they could be related to any subject including health, environment, and labor. It could be about a product like bananas or the working conditions of people or, as Vera has just mentioned, it could be about the happiness of chickens even. So, it could be about anything. The third is an essential feature of the private standards. They are not legally mandatory. So, for example, if one company imposes a high private standard and another company imposes a low private standard, you don't necessarily have to comply with the high private standard. You can simply avoid business with the company with the high standard and do business with the other company with the low standard. Thus, you are not legally obliged to comply with all the private standards provided by retailers or other companies; however, this only means that private standards are not legally mandatory, but they could be de facto mandatory. If a company that imposes a high standard has a dominant position in the relevant market, then you cannot avoid business with this dominant company. You are forced to comply with the high standard of the company as long as you stay in the market. In short, a private standard offered by a major company could be a de facto mandatory requirement. It could have almost the same effect as a legal requirement. So, the third feature is very important. The last feature, which I think is also important, is that private standards are not primarily aimed at harmonizing standards, unlike ISO standards, which are normally aimed at harmonizing national standards. NGOs tend to prefer to keep their own standards original and different from others. This is a very different and distinctive feature of private standards. By the way, I would like to remind you that, according to my definition, ISO standards are not included in private standards.

Now, I move onto the second section of my presentation. I have just mentioned that transparency does improve legitimacy. What do I

mean by saying that transparency improves legitimacy? When we speak about legitimacy, we need to think about from whose perspective we are discussing because legitimacy can be different from different perspectives. For example, one of the most frequently discussed perspective in the context of private standards is the legitimacy from the developing countries' perspective, because most private standards are developed by developed countries' NGOs and companies, and developing countries' producers are obliged to comply with them. In that sense, there is an issue of legitimacy from the developing countries' perspective: however, I will focus on other perspectives.

First, there is a conflict between a private perspective and a public perspective because private standards are, by definition, developed by private bodies. From a private perspective, private standards are, of course, legitimate, but from a public perspective, i.e. the perspective of governments or international organizations, they may not be legitimate. I'll explain why. In the past, standards on labor or standards on the environment were exclusively developed by the governments or international organizations, but as private standards proliferate, the governments and international organizations are losing their powers in regulating labor issues or the environmental issues. In short, the emergence of private standards would mean the erosion of the public authority to regulate social issues. In that sense, there may be a problem of legitimacy with private standards from the public perspective.

The second point is a Japanese companies' perspective. I have to say that most private standards are created by European or American entities, and the presence of Japanese companies in the development of private standards is very limited. So, we may have to think about the legitimacy from the Japanese companies' perspective. I'll come back to this point later in the last part of my presentation.

I also want to emphasize that there are two aspects in the legitimacy; one is the legitimacy with respect to the substance or the level of private standards. I think I should not spend too much time on the first aspect because the legitimacy of the substance may not be so important, compared to the second aspect, i.e. the legitimacy of the process. The legitimacy with respect to the process is concerned about the process of how private standards are created or how private standards are assessed. There are several issues in the process legitimacy, but I think transparency is the most important issue. So, let me move on to the meaning of transparency.

I think there are again two aspects in transparency: one is result-oriented. I think the mapping that Vera has mentioned may be related to the result-oriented transparency. The result-oriented transparency means that we need to be able to see what a result is. In other words, what kinds of private standards exist should be transparent. However, the second aspect, i.e. the process-oriented transparency is perhaps more important. The process-oriented transparency means that the process of how private standards are developed and assessed should be transparent. Moreover, there are two ways to ensure the process-oriented

transparency: one is a passive way and the other is an active way. The first one, the passive way is just to make information publicly available. This is important, but more importantly, the active way is to allow public participation in the process of private standards. In other words, the process-oriented transparency in the active way requires that stakeholders be allowed to participate in the processes of development and assessment of private standards. We need to ensure transparency in both passive and active ways.

To sum up my argument so far, private standards should be legitimate, not only from developed countries' perspective, but also from developing countries' and public perspectives. Second, private standards should be transparent in the sense that information concerning the development and assessment processes of these standards is made publicly available and that such processes are open to participation by stakeholders.

Then based on this argument, let me move on to the third section of my presentation and review the WTO rules on transparency of private standards. I am not going into the details of the rules under the WTO agreement, but there are some rules in the WTO agreement, such as article 4.1 of the TBT agreement, which in a way deal with transparency of private standards. Briefly speaking, the WTO agreement, including the TBT agreement and the SPS agreement, requires the governments to take reasonable measures to ensure that private standards are transparent, but there are some limitations in the WTO agreement. The first limitation is the indirectness of the WTO rules, which means that the WTO agreement does not directly deal with private standards. They only require the governments to ensure private standards are transparent. Consequently, the WTO agreement can have impact on private standards only through the intervention of the governments, only by asking the governments to take some measures. That indirectness is the first limitation. The second limitation is the vagueness, which means that the WTO agreement only requires the adoption of reasonable measures, and there is no guidance about what the reasonable measures are. Thus, the rules are very vague under the current WTO agreement.

There are some ways to improve those rules under the WTO agreement. A very simple solution is to make clearer rules. For example, I have just mentioned that the governments are only required to take reasonable measures, and that there is no guidance about what the reasonable measures are, but we can clarify the rules by simply adding a provision which explains what reasonable measures should be taken by the governments. Another very simple solution is to make direct rules, which directly apply to private standards. Well, the WTO rules normally deal with governmental measures, but that does not necessarily mean that the WTO cannot directly deal with private standards. Of course, the WTO cannot impose legally binding rules on private standards, but it can adopt some kind of non-legally binding guidance on private standards. The non-legally binding guidance can be called as "meta standards," which govern both public and private standards by providing how private

standards should be developed and assessed. These meta standards I think should be made by public bodies such as the WTO.

There have already been several attempts to improve the WTO rules or to make up for their limitations in line with my argument. For example, there is a provision in the TPP, which tries to give guidance to governments about what measures should be taken to ensure the transparency of private parties. In a different context, the EU has adopted some kind of a meta standard about private standards. What the EU has adopted is best practice guidelines for voluntary certification schemes, and these guidelines could function as a meta standard for private standards. Interestingly, even within the WTO, recently China proposed the adoption of best practice guidelines regarding private standards. The guidelines could be a direct guidance by the WTO for private standards. These guidelines would not be legally binding, but I think they could be a very important, useful meta standard for private standards. However, unfortunately, the European Union, the United States, and also Japan are not supporting this China's initiative because these WTO Members believe that the WTO as a public body should not deal with private standards. Personally, I think China's proposal could be an effective way to give an appropriate role to the WTO in the governance of private standards.

Finally, what are the implications for Japanese companies? First, legitimacy is not given, but it has to be taken. If you look at major private standards like GLOBALG.A.P., these standards are very much transparent. They are open to the participation by any stakeholder. Anyone is welcome to participate in the development and assessment of those major private standards. However, only a limited number of Japanese companies participate in the development and assessment of those private standards. The only company I could find as a member of major private standards organizations is Aeon, a major retailer in Japan. Having said that, Japanese companies seem to be very sensitive to complying with private standards. Many Japanese producers get certification/accreditation from private standards entities, but they are not involved in the development and assessment of these standards. In short, Japanese companies do have the opportunity to participate in the process of private standards, but they haven't taken it sufficiently. I'm not necessarily arguing that Japanese companies should participate in the development and assessment of private standards like western companies. Perhaps, a Japanese way of dealing with social issues may be different from the western way. However, we should at least think about how we want to get involved in the process of private standards in the future.

To sum up my presentation, the development and assessment of private standards should be transparent in order to ensure their legitimacy, and the existing WTO rules fail to ensure the transparency of private standards. Public meta-standards are needed to provide guidance on this matter. Finally, Japanese companies and citizens need to reflect on how they should be involved in the proliferation of private standards. Thank you very much for your attention.

Junji Nakagawa

Thank you Professor Fukunaga for your presentation. Now, let me invite our third speaker, Professor Kazumochi Kometani. His topic of presentation will be "Private Standards and Competition Law: Why Should 'Competition' Be Protected?".

Kazumochi Kometani

Thank you very much for the introduction, Professor Nakagawa. I'd like to make a presentation concerning the relationship between the private standards and the competition law. I am not a competition law expert, so what I am going to say here will be limited to the general discussion.

The starting point of my presentation is that private standards are hardly subject to the WTO disciplines. As you know, the WTO Agreement is basically applicable to governmental actions and only some of the provisions in the WTO Agreement require the government to take action on private activities. For example, GATS Articles VIII and IX, which address the private monopoly, provide that the government may take or may need to take some actions to ensure that market access which is committed in the service negotiation will not be harmed by the private monopoly. For example, GATS Article VIII.1 provides, "Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments." In contrast, the GATT has only few provisions on the private activities; for example, Article 17, paragraph 1(c) provides "No Member shall prevent any ... enterprise under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph." I think this is the provision in the GATT that most directly concerns activities of private enterprises. Subparagraph (b) says, "subparagraph (a) ... shall be understood to require that such enterprises make any such purchases or sales involving either imports or exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale." This indicates that the government should not intervene in the decision of the private entities so as to prevent them from acting solely in accordance with market considerations. It appears that the private standards are by definition activities of private enterprises, which are to be left to their market considerations, and thus, not subject to WTO disciplines.

Private standards, as I said, are activities by private entities, and therefore normally subject to national competition law. The Act of State Doctrine excludes private actions from the scope of competition law, to the extent that they are deemed as Act of State. With this exception, all activities by private enterprises are subject to competition law.

From this viewpoint, I would like to make some observations on the issue of private standards. The next slide is excerpt from a WTO document concerning private standards, and the Table 1 classifies private standards by standard setting entities.

Table 1: Examples of Private Standards

Individual firm schemes	Collective national schemes	Collective international schemes
Tesco Nature's Choice Carrefour Filière Qualité	Assured Food Standards British Retail Consortium Global Standard - Food QS Qualitat Sicherheit Label Rouge Food and Drink Federation/British Retail Consortium Technical Standard for the Supply of Identity Preserved Non-Genetically Modified Food Ingredients and Product	EurepGAP International Food Standard Global Food Safety Initiative ISO 22000: Food safety management systems Safe Quality Food (SQF) 1000 and 2000 ISO 22005: Traceability in the feed and food chain

[Excerpted from "Private Standards and the SPS Agreement", G/SPS/GEN/746]

This is important, but from the viewpoint of my presentation, other aspects of private standard are more important. Table 2 summarizes them.

Table 2: Private Regulations and Labelling requirements – Informational basis

	Regulations	Labelling Requirements
Product-related (Product quality)	(1)	(2)
Non-product-related (Production process and method)	(3)	(4)

The first point is what aspect of products the standards are directed at. The first distinction should be made between those standards directed at the property or specifications of subject products (Columns (1) and (2)), and those at the production method of products (Columns (3) and (4)). The first category is the ordinary type of standards, which include, for example, the food safety standards or other types of private standards related to certain nature or quality of products, but the other category of private standards are concerning the production process of products, for example, the environmental protection in the process. The environmental protection objective is not necessarily related to the product process of products. For example, the emission control on exhaust gases of automobiles are concerning the product quality. But some private standards concerning environmental protection are directed at production processes and methods of products which are unrelated to the product

quality, for example, labor standards. Private standards concerning the labor standards in the production of subject product, those standards are related not to the products' nature, but to their production process and method. The production processes and methods are customarily referred to the "PPM" in the international law context.

In my view, this is one important distinction and another important distinction is the one between regulations (Columns (1) and (3)) and labelling requirements (Columns (2) and (4)). This is because the labeling requirements are relying on the consumer choice in ensuring the effectiveness of product regulations. For example, the organic food labelling or fair trade labelling, those labelling requirements are designed to help consumers make a proper choice of products they purchase. These standards are expecting to make it possible that those labeled products will be chosen more or highly paid by consumers. This is from my viewpoint, another important distinctions that should be discussed.

With these distinctions in mind, I am going to discuss the following two questions here. The starting point is that a private standard may be basically inconsistent with competition law if agreed by two or more business enterprises or by a business association. Such standard may be significantly limiting competition between competitors and thus be found inconsistent with competition law, for example, as cartel or joint boycott or something like that. My first question is whether no justification is available to such a private standard if it intends to promote certain non-economical objective, like environmental protection, food safety, or something like that. That's one question we should ask.

The second question I would like to discuss is concerning PPM-type private standards. Suppose that a private standard is adopted by a single private enterprise representing its preference with respect to product or services it procures or sells. It appears not inconsistent with competition law. The adoption of a private standard appears purely a market decision or business decision, and therefore there appears nothing that is inconsistent with competition law. Thus, my second question is whether it is still permissible even if such private standard relates to concerns of production process or product rather than the quality of products. If it relates to the product quality, I think, it's very, very hard to say that it is inconsistent with competition law. The same applies to PPM-type private standards? I will discuss these questions.

The first question is the consistency with competition law of common or shared private standards adopted for non-economic objectives. There is some jurisprudence in Japan, under the Japanese anti-monopoly law. The relevant cases include "Osaka Bus" case¹ and "Air Soft Gun" case². In these cases, the relevant business associations have adopted product standard which applied to their members. It was an obvious fact

¹ Decision, Fair Trade Commission Hearing Court, 10 July 1995, No. 1 (Han), 1991, *Shinketsushu*, Vol.42, p.3.

² Judgement, Tokyo District Court, 9 April 1997 (No.7544 (Wa), 1993, *Hanreijihō*, Vol.1629, p.70 and *Sinketsushu*, Vol.44, p.635.

that the competition between the members and non-members, outsiders, was limited substantially. But in these cases, it was claimed that the standards, or the regulations, were adopted to promote certain social objectives, which appear legitimate. For example, in the Air Soft Gun case, it was claimed that the regulation was designed for product safety. The public standard on air soft guns was too lenient, and thus, they voluntarily raised the level of regulations. That was the line of defense proposed by the association. In these cases, the jurisprudence is that such private standards may be justifiable, but if three tests have been being passed. These tests are summarized in the slide. The jurisprudence does not say so simplistically, but I summarize the points.

The first point is the legitimacy of objectives. The objective of the private standard has to be legitimate. I discussed this later, but here I'd like to point out that this legitimacy is different from what Professor Fukunaga discussed shortly before. This legitimacy is an objective one. The second point is that the design of measures has to be rational in light of the objective, that's the second test. The third test is that enforcement has to be reasonable, that is, the enforcement has to be equally applied. If enforcement is directed only to outsiders of the association, for example, the private standard will not be justifiable under the Japanese monopoly law. In this case, the Air Soft Gun case, these first two tests may have been passed, but the third test was failed. Thus, in this case, the standard was found inconsistent with the competition law. There are a lot of discussions over the acceptability of this jurisprudence, and this discussion relates to discussion over the objective of the Japanese competition law. If the objective of the Japanese competition law is the pure protection of competition, then it will be dubious to say that any non-competitive consideration may provide justification. In contrast, some say that the objective of the competition law is to achieve healthy and democratic development of the national economy. This is a bit broader objective. In light of this objective, then a non-economic consideration or non-competitive consideration may provide justification for joint actions by private enterprises.

The next question is how the competitive consideration and non-competitive consideration can be reconciled. That question really remains if it takes that position – non-competitive consideration may give justification. In this light, I think the starting point should be the same as the discussion over the acceptability of the jurisprudence. That is, why should competition be protected under Japanese competition law? One explanation is that competition or the market mechanism can produce optimal economic outcome. To ensure such optimal economic outcome is the objective of the competition law. If this position is taken, the legitimacy of the objective would be rephrased in this way. The existing market mechanism is not necessarily perfect, and it means that there would be market failures. Then it is justifiable to correct any such market failure by taking actions for, for example, environmental protection, safety protection for some other things. In order to produce optimal economic outcome, not only actions by government, but also those by private entities, including private standards may be permissible if they are aimed at a legitimate objective.

Second, the corrective measures should be chosen reasonable or rational in light of their objectives. The optimal measure should be chosen to correct the subject market failure while minimizing negative side effects. That may be what the second test requires. If the objective of competition law is understood in this way, the Japanese competition law may provide for the guidance for or disciplines on private standards in this way. In respect of the second question of PPM-type private standards, I'd like to discuss two points here. One point is whether private entities are capable of assessing properly the market situation and articulating needed actions for foreign markets and foreign governments because the PPM-type private standards, are not only related to the production process in that country of consumption, or the consuming country, but also that private standard will be applicable to the production process in foreign countries in respect of the imported product. But in this case, my question is if private entities, in particular those in the foreign countries, are really capable of accessing more properly the market situation in a foreign country than the foreign government; that's a question.

The second question is important, in particular for the labelling requirements. The labelling requirements by definition depend on the consumer's preference or consumer's choice in respect of the effectiveness of standards or the capability of standards of achieving the ultimate goal, but for PPM-type standards applicable to foreign markets, consumers are really capable of understanding properly how the relevant market situation is operated or what standards work in the market to correct or solve the problem in foreign countries, in foreign markets?

These two points can be raised in respect of the PPM type private standards. This concern regarding the informational basis or measures is common to the governmental PPM measures. Take, for example, the mandatory labelling requirements on organic foods. I have come up with this example as in Japan that mandatory labelling requirements on organic foods is provided for in the food safety law, and the law allows organic labelling not only for foreign products which meet with the Japanese standards, but also permit foreign food products which meet with their own requirement, their own organic food labelling requirement, if Japanese Government deems them equivalent to the Japanese requirements. It appears that the optimality of the organic food regulations depend on the situation of the lands or farms in each country. That is the case for the PPM type private standard. I think the concern may arise in respect of the informational basis for the measures.

From that viewpoint, I think this sort of deficiency in informational basis for PPM-type private standards apparently requires that the competition law may take a strict position on the PPM type private standards, but consideration has to be made on the competition of standards. Even if PPM private standards is not accurately responding to the situation of foreign countries, the competition of standards may solve the problem. If it does not properly, accurately take into consideration the situation of foreign countries, another company or distributor may come up with different PPM private standards and then the latter may

survive through the market competition. In light of that possibility, I believe that competition law should not be so strict as to prohibit the PPM type private standards even if it is taken by a single enterprise. But if that enterprise or private standard setting enterprise has a dominant position in the market, that competition of regulations may not work in a manner that will make more proper private standard survive through the market of competition, and thus, I think competition law may intervene in the competition of private standards.

In this regard, I would like to refer to EU's action against Google. In my view, the EU's action against Google recently appears to tackle some minor erroneous representation of advertisement, but normally the issue of inappropriate advertisement should be addressed by information law, and rather generally such type of advertisement problem may be solved through the market competition. Therefore no government intervention may be needed, but in the Google case, Google has a dominant position in the market, and therefore the competition law rather than information law may have been invoked to regulate Google's action.

The same consideration may apply to this case, the PPM-type private standards. From this viewpoint, even international private standards may be challenged under competition law if they are not adopted for any legitimate objective and they have no mechanism to adjust themselves to the particular situation of the international market. They are accepted by relevant enterprises. This may highlight the difference in the concept of "legitimacy". If a private standard is designed properly, objectively for the market situation of each country, it may be fine, but if not, the standard may be challenged under competition law. Of course the informational basis for private standards or information gathering by private entities or something like that may be contributory to ensure the appropriateness or objective optimality of private standards, but that's not relevant to whether they have subjective legitimacy.

I am coming to an end of the presentation. The private standards are not subject to WTO Agreement, but can be subject to competition law. From that viewpoint, or from the viewpoint of informational basis to ensure that private standards are designed properly for the relevant market situation, it may be useful to make a distinction between product-related private standards and PPM private standards, in respect to the differences in the involvement of consumers. I mean the latter is providing another topic or factor which may need to be discussed. But even if the information basis of private standards is dubious, but competition between private standards may still matter. Then intervention by the competition law is not as strict as the WTO Agreement in the public standards.

As I noted Article 17 at the beginning of my presentation, which says that the Article 17 requires the Member government not to prevent private enterprises from acting solely in accordance with commercial consideration. On this point, if this commercial consideration is equated with profit maximization, then I think that intervention by the competition law in private standards I propose today may be found inconsistent with

the principle of Article 17. But if the commercial consideration is not equated with profit maximization, then I think the competition law intervention in the private standards I proposed today may be found consistent with the WTO Agreement. That consideration may ensure or may be helpful to ensure the coordination between the WTO law and competition law.

Junji Nakagawa

Thank you, Professor Kometani for your presentation. Now let me ask the three panelists to come here, sit on the tables. We are now rising the screens for 15 to 20 minutes' discussion. In this session, we listened to the three presentations. Although they used different approaches, generally speaking, they took up the issues of private standards from legal perspectives. Vera Thorstensen introduced us a very wide view on private standards, and issues of how to regulate private standards. Professor Yuka Fukunaga made a proposal to improve the current discipline of the WTO law, and to introduce a new set of rules to improve the legitimacy of private standards, focusing on the transparency in the process of setting private standards, assessing and certifying them. Finally, Professor Kometani explained a relatively new aspect of disciplining private standards from domestic competition law perspective.

I will ask the panelists a few questions, and then I will ask the floor about how and where to regulate private standards. First of all, I'd like to ask whether the WTO will be the most appropriate forum for disciplining private standards. We all know that WTO has been trying to regulate the phenomenon of private standards for quite some time. But the result has so far not been so promising as we had expected. Then, if WTO is not an optimal or realistic forum for disciplining private standards, which alternative is available? Would it be a regional trade agreement like the TPP (Trans-Pacific Partnership), as suggested by Professor Fukunaga? Or, will there be any other international forum or agreement? Finally, if competition law is available for regulating private standards, what are the challenges of applying competition law, especially when it comes to private standards that are applied on a voluntary basis in remote countries in, for instance, Africa to those products originated from Europe?

These are the questions that I'd like to ask the panelists according to the order of presentation. So, Vera is the first.

Vera Thorstensen

Let's start with the first. I agree with you that perhaps WTO is not a place to start the discussion. There are some alternatives that are being discussed already. I fully agree with Professor Fukunaga that transparency is the big issue. The big problems of private standards now are: who is behind these standards, who is certifying these standards and who is establishing the accreditation. That is, how you are going to establish the kinds of processes a laboratory has to follow to guarantee that the information is right or not. The idea behind the group that is discussing private standards proposal is to go to a new option, and start

outside of WTO, in a plurilateral agreement. Then bring this discussion to the WTO. It is like WTO members are doing with the service area. In my opinion, we have a basis to discuss private standards.

If you go to normal private standards, you can discuss them in the International Organization for Standardization, or ISO, because they are dealing with private standards. ISO is a private organization. What is important is to establish an international organization to discuss openly the transparency of private standards. It can be made in the ISO, the Codex Alimentarius Commission, or the FAO. It can be anywhere. The question is that private standards are a myriad of items. For sustainable standards, perhaps you have to go to some kind of environmental organization. For labor, you can go to ILO, perhaps it's already there, but for animal welfare it is a completely European issue, so where to go? The idea perhaps is to create a new organization. The alternative is to do something outside WTO, but after the solution, bring it inside the WTO.

On the issue of competition, I have a problem with using competition law. You have to go to the country to litigate. And this is too complicated for several countries to go to different countries to solve the issue there.

Junji Nakagawa

Thank you, Vera. And now Professor Fukunaga.

Yuka Fukunaga

Well, about the forum to discuss private standards issues, I think every kind of organization can be a forum to discuss private standards. For example, in the WTO context, there has already been a discussion about private standards issues. Outside the WTO, some NGOs are trying to create, what I call, meta private standards to regulate private standards. So, any institution could be a forum to discuss private standards; however, I think we need an institution with a public nature where many stakeholders may be able to get involved in the discussion of private standards on equal footing. In that sense, I think the WTO is one of the best forums.

As I said in my presentation, China is trying to discuss some of the issues of private standards in the WTO context, but there is a strong opposition from the EU, the US and Japan, but I personally don't understand why these Members are not supporting China's proposal. As a multilateral trade organization, I think the WTO is one of the best places to discuss the issues.

In addition, the ISO could be another forum. There is one standard on the sustainability issue created by the ISO: ISO 26000 on social responsibility: however, I doubt such standard could be useful in harmonizing private standards. Even if the ISO is trying to create a harmonized standard on the issue of sustainability, its relevance to private standards may be limited, because private organizations who create

private standards often prefer not to harmonize their standards with international standards. So, from my perspective, it doesn't make much sense for the ISO to create a standard on the sustainability with the aim of harmonizing private standards on the sustainability. What the ISO could do, however, is to create a public meta standard on how to develop and assess private standards. If we have that kind of a meta standard created by the ISO, we can assess private standards in the light of the ISO's meta standard. In this sense, I think the ISO could be a very good forum to discuss that meta standard.

Junji Nakagawa

Before asking Kometani to express the opinion, let me make a follow-up question to Professor Fukunaga. You argued that the WTO should be the preferable forum for the public regulation of private standards. But, as you know, the WTO is a member-driven organization and 'member' means the government. In your argument you said that the WTO should impact all stakeholders, not necessarily the government, but also private sector and consumers, NGOs, suppliers in developing countries. How can the WTO manage to do that?

Yuka Fukunaga

I am just improvising an idea, but if the WTO tries to create some kind of a meta standard, it would definitely have to get stakeholders involved in the process of creation, and it would have to take into account views of consumers, NGOs and other private entities. That said, at the stage of making a decision, it is the Member governments who make a decision. Since the WTO is an agreement to regulate actions of governments, it cannot directly impose rules on NGOs, but at least it can indicate the governments' desire about how private standards should look like. In short, the WTO or WTO members should take into account views from as many stakeholders as possible, but when the members make a decision, it is their decision. It's not a private stakeholders' decision, but it is a governments' decision about what stakeholders should do.

Junji Nakagawa

Thank you. Now let me ask Professor Kometani.

Kazumochi Kometani

That's a very difficult question to answer. First, I'd like to raise two concerns about applying the WTO or treating private standards as quasi-public standards. I think at first, the diversity of the private standards is very important. From that viewpoint, I think private enterprises have their own hearing processes or other fact-finding processes. They develop their own standards, procedural standards and practices. The guidelines produced in the international fora may restrict the diversity of procedures. I think that is one concern. The other concern is the other way around. If a private standard is legitimized through that procedures sanctioned by an international forum, it may obtain worldwide effectiveness or lead to

the uniform application of that private standard. I think that's too much. I think the private standards have to be in competition, and to compete with each other on the superiority as standards. But, if one private standard is given legitimacy by meeting with the requirements set by an international forum like WTO, that standard may have a very strong and too strong status, bigger status in standards on a particular subject. In light of these two considerations, I must say that although the competition law may not be an effective tool for the developing countries to challenge or to tackle the problem of private standards, the international competition forum like ICN or ICD or other forum for the competition law may produce a better solution for the private standards.

I don't mean that this is the best forum, but on the other hand, some concerns have to be raised in respect of legitimization of private standards in a public forum like WTO.

Junji Nakagawa

Thank you, Professor Kometani. Though the time is already up, we can extend 5 minutes.

Vera Thorstensen

It's more or less like anti-dumping. Anti-dumping is a measure against an enterprise, but the government negotiates the rules. You can do something similar. You have to discuss a meta-language and meta-rules first to what private standards should do or should not do. Then NGOs and transnational corporations can use these rules and the government can be responsible for the application of these rules.

Junji Nakagawa

Let me ask one more question. It seems that all of you agree that there could be or there should be a uniform content on private standards. It's unrealistic, but rather some types of a process, transparency mechanism should be introduced by some international public forum like the WTO or something else. This is a kind of consensus for the time being, but if we say this as a conclusion, the end result will be that private standards could be legitimized in rule making, but the diversity of private standards would not disappear, and the problem would remain for small producers or suppliers in developing countries as to how to pay the cost of complying with diverse private standards with a very small chance of price premiums. This is my concern. How can we solve that part of the problem arising from private standards?

Vera Thorstensen

Easy answer, you are not going to solve it at all. This would be a continuous problem that will be there. You can try to solve the diversity of standards and to put some order on them. But you cannot solve the effect on the market access for developing countries or small firms. It is a thing that is going to increase. I do not see how consumers are going to

accept all this. We forgot another very important issue that is the precautionary principle followed by the European Union. More than the standards, the European Union is developing another concept, another principle that is against the principle of risk assessment and on science presented in the WTO.

In terms of the European Union, they can use the precautionary principle to impede imports because they are afraid that a product can affect something or somebody but they are not sure. In the WTO, panels said already that the precautionary principle cannot be accepted as international principle or international law. But the European Union is producing a lot of standards based on the precautionary principle, so this is another thing that is going to open a new question to be discussed. Sorry with your small firms, but they are not going to solve this problem soon.

Junji Nakagawa

Professors Fukunaga and Kometani, do you have something to say?

Yuka Fukunaga

As I mentioned, the diversity is a key feature of private standards, and they should be allowed to remain diverse. When I said in my presentation that we need to focus on the process legitimacy, I mentioned the legitimacy in the development of standards and the assessment of standards, but I didn't mention another important aspect of the process legitimacy, which is the legitimacy in the implementation of private standards. Now many NGOs make the development of private standards transparent to the public and they make the assessment of private standards open to the public: however, they don't normally care about the implementation of private standards. They simply impose private standards on others, and simply assess the compliance with them, but they don't help in any way the implementation of private standards by developing countries. I think it's too much to ask private organizations to help the implementation of private standards. This is perhaps the place where public bodies like governments or international organizations can play a role. In other words, governments or international organizations can and should help the implementation of private standards in developing countries. This is how public entities can get involved in the governance of private standards.

Kazumochi Kometani

I don't have much to say. One thing is that what are in our mind should be private standards set by big or large corporations. I think that image suggests that it may be useful to have guidances generally applicable to the standard setting. But private standards may be set even by small companies. Then, I think there must be a distinction – we have to draw a line between private standards subject to strict disciplines and private standards not subject to strict disciplines. I think we have to draw that line in order to have generally applicable disciplines, but it is very difficult.

From that viewpoint, flexible approach may be needed and that may be another factor that may be taken into consideration in setting up the global disciplines over private standards.

Junji Nakagawa

Thank you so much. So far we reached at some extent of consensus, but everything was not settled. However, we have to stop here to take a break.

The second session will be resumed after about 15 minutes' break. Thank you so much.

Session 2: Private standards and global governance: Prospects and challenges

Junji Nakagawa

Now let me start Session 2, titled "Private standards and global governance: Prospects and challenges". This session has two speakers and one commentator. Let me introduce to you the two speakers and the commentator. Our first speaker is Professor Masahiro Kawai. Professor Kawai is a professor at the Graduate School of Public Policy, University of Tokyo. He is also a Representative Director and Director-General of the Economic Research Institute for Northeast Asia (ERINA) since April this year. Before assuming his position at the University of Tokyo in 2014, Professor Kawai was the Dean of the Asian Development Bank Institute. He has also worked for the Japanese Ministry of Finance as Deputy Vice Minister for International Affairs, and for the World Bank as Chief Economist of the East Asia and Pacific Region.

Our second speaker is Ms. Colette van der Ven. Colette is an Associate at the law firm of Sidley Austin, Geneva Office. She advises and represents government, businesses and trade associations on international trade law with a focus on WTO law and WTO dispute settlement. Prior to joining the firm, Colette has various experience in various international organizations focusing on economic development and poverty reduction. She holds a joint J.D. and Master's degree in Public Policy from Harvard Law School and Kennedy School of Government, respectively and an undergraduate degree from Middlebury College. At Harvard, Colette served as Co-President of Harvard Law and International Development Society and co-founded the Trade Innovation Initiative, which helps small businesses overcome their trade barriers. And at Sidley Austin, she has been working quite intensively on pro bono Sidley activities in support of small producers in mainly African and South Asian developing countries to come up with private standards presented by European big suppliers, so she will tell us her experience as pro bono Sidley associate work.

Finally, we will have a commentator, Mr. Akihiko Tamura. Mr. Tamura is a Consulting Fellow at the Research Institute of Economy, Trade, and Industry or RIETI, and he is a Deputy Director-General for Trade Policy at the Trade Policy Bureau of the Japanese Ministry of Economy, Trade, and Industry or METI. He has been working for METI for over 25 years in various positions in the Trade Policy Bureau, among others, and he has also worked for the WTO at its Legal Affairs Division. Let me invite the first speaker, Professor Kawai.

Masahiro Kawai

Good afternoon. I am Masahiro Kawai. I would like to thank Professor Nakagawa for proposing this challenging subject matter, 'Private Standards.' Until recently I have not focused on this issue in my research. But when he proposed this new subject matter, I started to

study it. So I feel a bit awkward being here because I am not an expert on the issue, but perhaps because of that, I can give an objective assessment on the issue.

I want to begin with what private standards are, talk about some benefits and challenges for private standards, and explore public policy implications. In Session 1, there were related discussions by Professor Fukunaga and Mr. Kometani, from which I learned a lot. In my presentation I argue that private standards provide benefits to consumers as public goods, but that they also carry some costs, in the areas of market access (particularly for developing country producers), competition policy, consumer protection, and proliferation and multiplicity. There are also development implications for private standards. I would like to discuss how public policy should address these challenges posed by private standards and what implications they may have for global governance like the WTO.

First, what are private standards? This has already been mentioned in Session 1, but I reiterate the definition. Private standards are non-governmental voluntary standards that are set and used by private sector actors such as firms (including manufacturers, processors and retailers), farmers, and NGOs. These actors want products to be harvested or manufactured, processed, and distributed in a manner to protect the environment, human health and safety, labor rights, and other social values (even including animal rights). Private standards are voluntary, not mandatory, and in contrast, public or governmental standards are mandatory, relying on laws, regulations, and institutions for enforcement and sanctions.

The WTO's Sanitary and Phytosanitary (SPS) Committee has been discussing SPS-related private standards, and the committee has defined them as follows:

"An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority" (WTO, SPS Committee, "Summary of the Meeting of 15-17 October, 2014," G/SPS/R/76, 2 December, 2014).

Such SPS-related private standards are set by private firms, national and/or international associations of retailers or producers, for products they produce or sell. They are often based on national, regional, and international standards, and can include administration schemes, specific certifications and other requirements. Retailers' food safety management systems may establish parameters which include food safety, social responsibilities, environmental preservation, and labor requirements. These requirements can be those at pre-farm gate (growers and farmers) and/or post-farm gate (food packing and processing).

WTO's Agreement on Technical Barriers to Trade (TBT) and its Committee on Trade and Environment also face similar issues with regard to non-governmental standards.

Another type of private standard is a sustainability related private standard. Importers and distributors of certain commodities have been working with technical bodies to promote voluntary sustainability standards (VSS), often in a multi-stakeholder group or roundtable, to develop standards prescribing the sustainable production (or harvesting) practices of commodities. Then the plantations, farms or other enterprises, opting to use these standards, have been submitted to auditing by independent third parties with a view to having their production declared VSS-compliant, so this auditing is very important. Providing certification is also an important process of private standards. VSS-compliant areas of commodities, including coffee, cocoa, and palm oil, more than 10 standards have shown exceptional growth, so farm growers have been quite successful.

Second, what are the benefits and challenges of private standards? I argue that several positive aspects of private standards should be identified. Private standards can: facilitate compliance with national and international standards by encouraging firms and farmers to adopt private standards and providing comprehensive guidance on achieving them; promote best practices on ensuring product quality and production process management; improve brand reputation and access to markets and credits; and enhance the ability to address emerging risks in a rapid manner, fill gaps, and pave the way for the adoption of standards. In this sense private standards can work as public goods provided by private entities.

On the other hand, there are concerns associated with private standards. In the context of SPS-related private standards, some of these have already been implied. These concerns include the following: there is often no scientific basis for requirements posed by private standards; some deviate from international standards or from official government requirements (for example, including maximum residue limits); there is a multiplicity of standards and no harmonization, mutual recognition or equivalence among them; there are high costs of compliance and certification, especially with the proliferation of standards nationally and internationally; there is an issue of the lack of transparency, consultation, and appeal mechanisms; operational procedures tend to be prescriptive rather than outcome-based; and there are disproportionate negative effects on small- and medium-sized enterprise (SME) producers, farmers and exporters in developing countries.

These concerns become particularly serious when private standards become the industry norm, because in this case suppliers' choices are obviously limited. As Prof. Fukunaga showed when a large company dominates the market and requires its own standards, suppliers who want to provide their products to the company have to comply with the required standards. As a result, the distinction between private voluntary standards and public or government mandatory requirements can be

blurred for such suppliers. By becoming a high-quality benchmark for SPS or sustainability, private standards can further enhance their public goods nature. However, there exist no specific rules or regulations over private standards at the national or international level; for example, these standards are not subject to the WTO law. I sensed some divided views on this issue in Session 1. Prof. Fukunaga tended to advocate some rules and regulations over private standards, while Mr. Kometani was taking a more hands-off approach unless there is a problem in the context of a country's competition law. I am sympathetic to both views, but from public policy perspectives, my view is relatively close to Mr. Kometani's. I will come back to this issue in a minute.

One important issue that I would like to mention is the certification, auditing and verification procedures, which are often required by private standards. The discussion in Session 1 did not take up this issue.

Credibility of the standards can be judged by the quality of auditing and verification conducted either by third party certifiers (who are independent, arm's length, accredited bodies) or by a second party (a party other than the producing firm but with a user interest in the products such as traders, retailers, and consumers). These certifiers inspect a unit using a testing protocol and then pronounce in a pass or fail manner on whether a production unit is producing in conformity with standards. Access to certification as well as price and quality of certification are apparently one of the hottest debated issues among experts in voluntary standards. The certification industry, including the accreditation business, that sets the norms and decides who may audit and certify according to the norm in question, is sometimes criticized for abusing its market power to exert anti-competitive practices, such as unfair pricing, inadequate inspections, and corruption. In addition, big certifiers often refuse to share their testing protocols, thereby impeding a move to greater harmonization, mutual recognition or equivalence of standards. And stakeholders are also increasingly demanding that the objectives of private standards (such as environmental sustainability, food safety, health protection, and labor standards) be demonstrated and measured. It looks like not much serious study has been undertaken about the impact and outcome of standards.

Third, what are the public policy implications of private standards? I have argued that there are some concerns about private standards while there are also positive aspects of private standards, so balancing these two would be a sound approach. That is, public policy should try to maximize the potential benefits and minimize the potential costs of private standards. Then we need to identify the areas where public policy can play a role. Should private standards be integrated with the SPS standards of the WTO? My view is that this will be very difficult. I would like to focus on issues of market assess, competition policy, consumer protection, multiplicity and proliferation, and development challenges.

To do so, it would be useful to clarify the principles of public policy regarding private standards. As long as private standards reflect "legitimate" (or socially accepted) consumer preferences for safer and

healthier products or environmentally sustainability modes of production, there is no reason for the public sector to intervene, that is, the public sector should remain neutral. The public sector may even take a favorable bias to private standards that can contribute to the welfare of consumers and society at large. But the public sector may take a negative bias to private standards when they damage consumer interests by limiting market competition and market access by foreign competitors and failing to deliver the intended outcomes of standards. These are some of the basic principles of public policy.

There are market access issues. Private standards can limit market competition and particularly market access for foreign suppliers. This takes place when firms set private standards in a more restrictive manner, say on maximum pesticide residue levels, than public mandatory requirements, and these standards become de facto requirements for suppliers, as entry by new suppliers may be limited. If these standards are set in a way to protect domestic suppliers and prevent foreign suppliers' entry, market access is limited and consumer interests tend to be damaged. These practices can be subject to trade disputes with foreign countries that have potential suppliers.

There are issues of competition and consumer protection with regard to the certification industry, including the accreditation business, as the industry may distort the market by abusing its market power to exert anti-competitive practices, such as unfair pricing and inadequate inspections. Also, big certifiers often refuse to share their testing protocols. When noncompliance of standards becomes wide-spread, due to inadequate auditing and verification, the interests of consumers who purchase products with private standards may be damaged. The first approach to tackle these issues is to encourage the certification industry to disclose information and improve market transparency. Greater transparency in certification can reduce anti-competitive practices on the part of the certification industry. If this is not sufficient, the government may take over the inspection and certification role and set the fees for certification as in the case of Denmark and Finland on voluntary sustainability standards. So there may be a case for government to intervene.

There is an issue of multiplicity and proliferation of standards. Are there any solutions? Suggested solutions are to seek mutual recognition, equivalence, and/or harmonization of schemes. Mutual recognition of standards or accepting several standards as equivalent would be a feasible solution, but harmonization of standards would be difficult. The good news is that the proliferation of standards has stimulated a trend towards "benchmarking" – which provides a means to compare requirements. For example, EurepGAP has a process through which other schemes may be "benchmarked" against it (Gretchen Stanton, "WTO's Work on Private Standards"). Mutual recognition or equivalence is challenging but doable, if the certification process becomes more transparent and more credible and the benchmarking exercises spread.

The last issue is that of development implications. Critiques of private standards argue that there are costs associated with private standards so that developing countries' firms, particularly SMEs and small farmers, find it difficult to comply with costly private standards. At this point, it is useful to talk about global value chains and the role of multinational companies. Multinational companies have been forming supply chains by choosing who should be their suppliers. Often without setting clear criteria in a transparent manner, multinationals have been forming global supply chains in an informal, nontransparent way, and it has been difficult for developing country SMEs to participate.

In contrast, private standards make the requirements and conditions more transparent, though not perfect. They show them in writing. This means that developing country firms, or any firm in the world for that matter, can choose to adopt private standards by looking at written documents publicized by large multinationals, join value chains formed by these large companies, and benefit from this. I know it is still difficult for SMEs from any country, in particular from developing countries, to comply with private standards, but encouraging them to do so would be a useful developmental process. So private standards should not be taken in a very negative way, as they can have a positive role to play. In this sense, private standards are one step forward in comparison to the present world of nontransparent global supply chains.

Let me conclude my presentation. Through private standards, the private sector provides international public goods. The public sector should encourage such a practice, as these standards complement and strengthen public sector-driven global governance, such as the WTO. The WTO and the private standards can complement each other, although private standards are not subject to WTO disciplines. The public sector may remain neutral as long as private standards contribute positively to the welfare of consumers and society at large. At the same time, the public sector may regulate private standards, if they are intended to create and/or enforce monopoly power, and if they are driven by protectionist incentives, thereby damaging consumer interests, through competition policy and making the certification industry more transparent. Essentially, there is a need to ensure that firms adopting such standards maintain open access for foreign suppliers and comply with the requirements in a market-friendly manner, and that the certification industry should not use its market power to distort the market. I also tend to think that there may be a case for crafting non-legally binding guidance on private standards set by large firms in specific sectors. Finally, I have argued that developing country firms, farmers and exporters are encouraged to join global value chains by adopting market-friendly private standards. Some capacity building support would be useful for this purpose. Thank you for your attention.

Junji Nakagawa

Thank you so much, Professor Kawai, for your presentation. Now, let me invite Colette.

Colette van der Ven

Thank you very much everybody for being here, and a special thanks to Professor Nakagawa and the University of Tokyo for organizing it. So, as Professor Nakagawa mentioned, I work in private practice and my day job mainly consists of litigating WTO disputes, with a focus on sanitary and phytosanitary measures covered by the SPS Agreement. However, today I am not going to speak about the legal nature of private standards within the framework of the WTO, as this has already been dealt with by previous speakers. Rather, I am going to focus on small and medium enterprises (SMEs) in the agricultural sector and how they are impacted by private standards. I am focusing on SMEs because in my firm, we have a program which is called the *Emerging Enterprises Pro Bono Program* through which we provide pro bono legal assistance to SMEs in Africa, Asia, and Latin America. I have provided legal advice to numerous small businesses through that program and most of what I am presenting today is based on this experience.

So, to begin, the issue of private standards was first brought up in the WTO in 2007. St. Vincent and the Grenadines filed a complaint in the TBT Committee concerning private standards, and I'm just reading it out here the basis of their complaint:

- *"...the proliferation of standards developed by private interest groups without any reference to the SPS Agreement or consultation with national authorities ... presents numerous challenges to **small vulnerable economies**. These standards are perceived as being in conflict with the letter and spirit of the SPS Agreement, veritable barriers to trade (which the very SPS Agreement discourages) and having the potential to cause confusion, inequity and lack of transparency". (G/SPS/GEN/766)*

Why do I start by citing this excerpt? I think it is quite telling that this complaint was raised by St. Vincent and the Grenadines, two small islands in the Caribbean with over 95% of small holder farmers dependent on a very specific farming method. This means that St. Vincent and the Grenadines are more disproportionately impacted by private standards, to the extent that it felt compelled to file a complaint at the WTO. Specifically, the complaint filed refer to three different factors related to private standards that were considered especially problematic. First, it mentions that private standards marginalize small farmers. Second, it raises issues of objectivity with respect to auditing standards. Third, it notes the high cost of compliance, which, annually (and for 3000 farmer) amounts to the following:

- *Initial cost of US\$ 3,000,000*
- *Monitoring cost US\$ 45,865.*
- *Training US\$ 5000*
- *External audit US\$ 8,560*

In sum, small economies and particularly small farmers and SMEs are disproportionately affected by private standards.

Before we dive into the specifics on how private standards impact SMEs, I would like to provide just a quick overview on what differentiates private standards from other typical non-tariff barriers that are covered under the SPS and TBT agreements. I am sure a lot of you have heard that SPS and TBT barriers also constitute a major barrier to SMEs, so why are these two categories different?

Technical Regulations	Private Standards
Set by government	Set by private sector/NGO
Focus on procedural fairness (order/legitimacy)	Focus on distributional fairness (equity)
Transparent standard development process (Code of Good Practice, TBT); transparency requirements SPS/TBT	Lack of transparency in standard development
Encourages uniformity and harmonization	Does not encourage harmonization
Must be based on science (SPS)	Not required to be based on science
Limited to technical and scientific topics	Broad scope, including labor, human rights, environment, indigenous

This table highlights key differences between technical regulations on the one hand, and private standards on the other hand. The first difference is that a key element of the SPS and TBT agreements is procedural fairness, which is reflected in concepts such as non-discrimination, necessity, transparency and the importance of adopting measure on the basis of scientific principles.

Now, the *fair trade movement* developed because there was this notion of insufficient equity and insufficient fairness in trade and the concern that small farmers and certain developing countries were marginalized. That is why certain NGOs stepped up and said well, we want to make sure that the small farmers get a higher price for its products. The market is not taking care of that. The WTO is not taking care of that. As a result of this movement, private standards, such as Fair Trade Max Havelaar, were born.

Not all private standards aim to address inequality. Large retailers may adopt private standards mainly to enhance product quality and brand promotion. Indeed, in response to a number of food scandals, certain retailers adopted food safety and quality standards more stringent than national regulatory standards.

Turning back to key differences between technical regulations and private standards, the problem with private standards from a regulatory point of view is that they are not currently subject to scrutiny under WTO law. This means that private standards are not required to conform with the key WTO principles and, as a consequence, may be significantly trade distortive yet cannot be challenged. For instance, WTO Members adopting SPS measures must either conform to the international standard or base their measures on a risk assessment. However, private standards can be more stringent than the international standard and not be based on a risk assessment – without being subject to WTO scrutiny.

Another problem with private standards is the lack of harmonization. There are so many private standards. This means that a business may need to meet the requirements of numerous private standards in order to sell products in one country. Compare this to government-set SPS and TBT standards, which typically establish the main regulatory standard(s) a product entering the market must comply with.

For all these reasons, private standards are more onerous for small and medium enterprises to meet than technical regulations.

Table 9: Average share of reported NTMs

Non-technical measures	29.4%
Pre-shipment inspection, other customs formalities	8.3%
Price control measures	1.4%
Quantity control measures	2.6%
Charges, taxes and other para-tariff measures	5.3%
Finance measures	2.7%
Export related measures	6.6%
Other	2.5%
Technical barriers to trade	71.6%
Tolerance limits for residues...*	2.9%
Labelling, marking and packaging requirements	8.3%
Traceability requirements	6.5%
Testing requirements	5.1%
Certification requirements	12.7%
Other technical measures	35.1%

Note: This table is based on the (face-to-face) reports of exporting and importing companies (and forwarding companies) in Chile, India, Philippines, Thailand, Tunisia, Uganda, Burkina Faso, Hong Kong (SAR China), Peru, Sri Lanka.

This is confirmed by the literature and research on trade barriers to SMEs. For example, this table is from the International Trade Centre, whose mandate is to help bring the benefits of trade to small businesses.

The table indicates that the biggest technical barrier to trade encountered by SMEs is certification requirements – at 12.7%.

I want to give a quick example from Sidley’s pro bono work on how this plays out in practice. I represented a small bean-to-bar enterprise from Indonesia, which produces chocolate bars. The business trains farmers and provides extension services to grow beans sustainably, after which it processes the beans into chocolate. A team of Sidley lawyers assisted this client with various issues, including how to sell chocolate into high value markets, such as the European Union and the United States.

When presented with a market access question like that, we research relevant EU and national customs and food safety regulations. and present an assessment of what the enterprise must do to meet these requirements. However, less obvious for lawyers is how to deal with issues that arise from private standards.

This came up when we represented the Indonesian chocolate enterprise, as they had not applied for any private certifications. This spurred a really interesting discussion amongst the lawyers, which involved questioning whether giving legal advice included providing advice on complying with private standards.

Including private standards in a legal market access assessment requires a different type of lawyering. For instance, it requires asking to what extent is a certain type of certification *de facto* mandatory? Which certification would be most cost-effective? Can an enterprise focus on only one certification and market its products in various markets? How does an SME go about comparing and contrasting the pros and cons of different certification schemes?

Another key problem is the costs of certification and compliance, as I demonstrated in the beginning of my presentation. This is particularly problematic for SMEs as they are in the very early stages of their business and are heavily reliant on investments. While being able to get certified is often contingent on getting the requisite investment, getting the investment is often a reflection of the enterprise’s expected profitability, which in turn depends on obtaining the requisite certifications. These issues are often intensified by the fact that many of the costs associated with certifications are recurring.

Even when small enterprises have the requisite financing, they often experience problems in meeting the requirements stipulated by the private standard. As other speakers already mentioned, many of these private standards are very prescriptive, telling you exactly what to do. For instance, some standards set out the number of trees that must be planted per hectare, or specify the minimum distance between the toilet and the processing area, etc. etc. Many of these standards, like GLOBALG.A.P. or Euro GAP, were developed for large commercial farmers in Europe, which means that small producers from developing countries are often unable to comply.

In summary, it is difficult for SMEs to comply with/benefit from private standards because: they go beyond regulatory requirements without a clear scientific basis; they contain requirements that may not be relevant for farmers in developing countries; they require resources and technical capabilities which smallholder farmers do not have; they involve recurring certification/audit costs; and a price premium is not guaranteed.

So, what can we do? Is there a way to get SMEs to benefit from private standards or to help them meet those private standards?

At a government level, there are a number of possible solutions that can be adopted to better streamline private standards, some of which have already been mentioned by other speakers. For instance, governments can push for guidelines to be followed in private standard setting processes – a meta framework. This will increase transparency, and will encourage developing a framework that moves away from prescriptive standards towards outcome-oriented standards – adapted to specific crops and a country's specific agricultural situation.

Likewise, governments can encourage the utilization of the principle of equivalence to acknowledge the similarity between various different private standards. Trade associations can facilitate this process. For instance, COLEACP, an organization comprised of accredited or professional association of exporters and importers encourage horticultural export associations to harmonize their codes of practice by incorporating high-value standards into national laws. As a result of this process, they made Kenya Gap based on COLEACP and currently they're trying to benchmark that with GLOBALG.A.P.

However, companies, especially SMEs, often do not have time to wait for the government to get its act together. So what options do small enterprises have to comply with, and/or overcome the obstacles created by private standards?

I wanted to focus on three different potential solutions for SMEs in developing countries: cooperatives, vertical integration and contract farming, and e-commerce.

I first turn to discuss cooperatives. Organizing in a cooperative enables farmers to share the cost of certification and auditing, and the cost of investing in certain types of equipment that may be required to comply with certain private standards. It also helps enhance product quality. This cooperative model is being used quite a bit – and may be even required – such as is the case in obtaining the Fair Trade Certification – in order to comply with a private standard.

Some examples: in Tanzania, a producer marketing organization organized small vegetable farmers into cooperatives and linked them to one big exporter. Three out of the seven cooperatives managed to meet the GLOBALG.A.P. requirements. The Kilimanjaro Native Co-operative Union is another example. They are quite old cooperatives, and they basically helped get organic certifications for Kenyan farmers, and within

that scheme a lot of smaller Kenyan farmers are currently exporting organic products to the EU. So organizing in a cooperative is no guarantee, of course, but it presents one organizational model that could minimize the costs related to obtaining the relevant certifications for individual SMEs.

Another advantage of organizing like a cooperative is that – provided the cooperative becomes big enough – it could eventually lead to the cooperative creating its own quality certification. Of course, for these local quality certifications to work internationally, it would require trust from major retailers that these quality certifications are trustworthy and safe. While it may be a long stretch for small cooperatives in Sub-Saharan Africa to make this case, the possibility of this should not be excluded.

Second, I turn to vertical production integration with large agribusinesses. Typically, when you are a small agricultural producer in Africa, you access high value markets only indirectly: you supply to a large multinational, who then sells the products to the high value markets. There are two ways in which this happens: on the one hand, you have multinationals that want to have full control over the production process and thus are fully integrated. In this model, contract farming is obliterated; instead, the multinational company hires farmers as direct employees to the company. The rise of private standards has seen an increase in this model. This trend has been reviewed in the literature as something quite negative, but there are some studies, and the one I looked up here was Maertens et al. from 2011¹, which found that the net benefits for smaller farmers are positive because through the employment, farmers now have income levels they didn't have before, even though they lose ownership and control over their production.

On the other hand, farmers can integrate into the supply chains of large multinationals through contract farming. This basically happens where a big multinational has contracts with a large number of smaller farmers and controls to a certain degree how these smaller farmers engage in production. For example, I read about a large Malagasy business that follows this model, and contracts with 9000 smallholder farmers.² To ensure quality control, it supplies extension services on a weekly basis to supervise the smallholder farmers. Smallholder farmers are not allowed to apply pesticide; this is done by the company to ensure that it is applied in line with strict technical regulations and private standards.

SMEs can also meet private standards by partaking in various company-driven initiatives and projects. One is the Unilever Sustainable Trade Initiative, which collaborated with the Kenyan Tea Development Agency to provide training to a number of different farmers. By doing so,

¹ Maertens et al., Globalisation and poverty in Senegal: a worst case scenario? *European Review of Agricultural Economics* Vol. 38 (1) (2011), pp. 31-54.

² See, e.g., Minten, B., L. Randrianarison, and J. F.M. Swinnen. 2006. "Global Retail Chains and Poor Farmers: Evidence from Madagascar" LICOS Discussion Papers no. 164, Leuven: LICOS.

numerous farmers were able to obtain the Rainforest Alliance certification, and their production subsequently increased by 30%. So while this is another way to help SMEs, it may not be sustainable because, of course, this is a temporary company-dependent initiative.

Third and finally, I want to touch upon something a little bit more novel, which is how SMEs in developing countries can enter high value markets – and potentially bypass private standards - through e-commerce. One of my recent pro bono clients is the E-Com Coop Ltd., an ITC-driven initiative. The E-Com Coop constitutes a platform through which SMEs from a number of African countries can sell their products online – on the Cooperative’s website, and on eBay or Alibaba. Once operational, the E-com Coop will enable SMEs bypass a number of key obstacles to trade: located in the UK, it will allow SMEs from various African countries to sell on international e-trade fora; it will enable them to sign on to international payment systems such as PayPal; and it will allow them to share shipping costs and overcome the issues related to shipping small quantities through sharing containers. Moreover, it allows SMEs to sell to high value markets directly – without requiring an intermediary such as retailer.

In the context of private standards, the E-com Coop will have great potential to help small businesses comply with private standards by operating as a cost sharing model. However, there are other ways in which e-commerce could help SMEs overcome obstacles set by private standards. E-commerce creates a business-to-consumer (B2C) structure. This means that technically, SMEs would no longer need to comply with private standards set at retail level as a retailer is no longer involved. Of course, that does not mean the entire landscape is different. Presumably, consumers would still want quality control and certainty that products are produced in equitable ways. Indeed, you still need to get the trust from the people, which means you would still have to put in place some sort of brand or certification or something that makes the consumer in Europe or in US or Japan say, well I think this product is ethically produced and of high quality, and I want to buy it. Thus, since private standards are created in response to consumer demand, you don’t bypass it entirely by taking out the retailer. However, e-commerce has a potential to enable SMEs to retain ownership of their products, and to directly advertise its brands to international consumers. The more sophisticated SMEs can also use this opportunity to become a standard makers – and not just be a standard-taker.

Thank you.

Junji Nakagawa

Thanks so much, Colette, for your much interesting presentation. Now, let me invite Mr. Tamura for comments.

Akihiko Tamura

Good afternoon. My name is Aki Tamura. I’m currently with METI, trade ministry of government of Japan, but obviously my comment does never

represent the official position of the Government of Japan. All I will state today is my personal view. First of all, thank you very much for having me as a commentator. I also should say two guests from abroad in particular, "Welcome to Japan". I hope that you will take advantage of your stay here to enjoy yourself. I hope that you have time to explore a supermarket to see whether the product you have just shown is actually on the display of that supermarket or not. I am quite proud of the fact that a lawyer from Geneva paid attention to the labeling system promoted by our agricultural association. By the way, all of you must be sympathetic to my role because my previous two speakers are, one is economist and the other is lawyer. It's quite difficult to synthesize the remarks of these two speakers. Everybody admits that lawyers and economists, these two viewpoints are kind of oil and water, so it's quite difficult for me to synthesize these two previous speakers and try to come up with my personal comment on that. Nevertheless, I will try to do that.

I carefully listened to the previous speakers not only in this session but also in the previous session. I found it quite interesting to see so many discussions, particularly as to what to do to enhance or maximize benefit of private standards without undermining upside of private standards. Particularly, Professor Kawai emphasized upsides of private standards. I have to agree with Professor Kawai that private standards have a lot of upsides and advantages. It does provide the public good, and particularly given the fact that at this moment, government level international negotiations are not going anywhere on many fronts, I think we have to shed a positive light onto the role of private standards to enhance public good in the global setting.

I have to admit that even though there are so many suggestions on what to do, I saw little on how to do it. How to do is quite difficult to answer, and myself I don't have any answer on it. I take note of the previous two speakers, Professor Kawai and Ms. Van der Ven. I guess that Professor Kawai and Ms. Van der Ven both shed light on both upside and downside of public and private standards. My impression is that Professor Kawai rather emphasized the public policy dimension of private standards such as competition, market access, and consumer protection. Ms. Van der Ven rather focused on developmental dimension or exporter's dimension such as small vulnerable economies or SMEs. But I found it quite interesting that both presentations have lots of commonalities such as the private standards have a lot of shortages or lots of downsides such as lack of transparency and multiplicity of regulation and lack of scientific basis.

We have to address these problems somehow, and there have been lots of suggestions on how to deal with it, without undermining the upside of private standards. I don't have any brilliant suggestion on how to deal with it. All I can say at this moment is that there are lots of difficult factors surrounding this issue. First of all, there were several suggestions such as maybe we could improve the WTO rules to address this issue. The other suggestion is that maybe we can pay attention to the enforcement of competition policy. Well, at this moment the WTO itself is in quite a difficult situation. The Doha Round is not going anywhere,

therefore at this moment, creating a new rule in the multinational setting is quite challenging. Competition law may be promising but on the other hand, according to what I heard from Mr. Kometani, it seems the suggestion is boiled down to enforcement of the competition law in the domestic setting. But individual countries have different enforcement jurisprudence of competition policy. This means that even though originally our intention is trying to harmonize or at least trying to address multiplicity of private standards, since each jurisprudence is going to pursue different approaches of the enforcement, maybe multiplicity issue of private standards is going to be just translated to multiplicity of domestic jurisprudences of competition policy and fundamentally the multiplicity problem is not going to go anywhere.

Therefore, I think that both suggestions I carefully listened to have a kind of limits. I also have to admit as a government official I have been going through lots of negotiations, and I feel that I am facing lots of very big sea changes in the global governance per se. At this moment, we are talking about the importance of private standards, and I also think that private standards are continuing to be quite important. But I guess that the importance of private standards has been highlighted since 10 or 20 years ago, particularly after the Cold War was over. When the Cold War was over, we expected that Pax Americana would continue and maybe power game was going to be over and maybe based on that relatively stabilized global order, private players such as private companies and NGOs were going to emerge. That was what we expected at the end of the 20th century and the beginning of the 21st century. I think this multiplicity of players in the global politics was what we expected, but now what we see seems to be slightly different. For instance, in East Asia, the significance of private players is more and more diminished because China is emerging, Russia is emerging. I mean that lots of emerging big players are trying to exercise "real power". So, in a kind of sea change of geopolitics, unlike what we expected 10 or 20 years ago, I think the multiplicity of players in the global governance seems to be less and less relevant, and the power of the NGOs and the power of private companies seems to be getting more and more relative. Therefore, my suggestion is that of course private standards themselves are quite important, and in order to address the downside of private standards, we have to do something, but what I feel like is that not only private standards but also public law itself is the subject of concern in a sense. I think that we are going towards a kind of realism of global politics. In this sense, not only private standards but also even WTO law itself is at crisis; therefore, I think more important thing is fairness, particularly as the previous speaker mentioned, private standards are quite important because they tend to achieve the distributional fairness. This is quite important concept, and distributional fairness is one of the key concepts from now, I believe.

Therefore, in order to highlight the importance of private standards, maybe we should rather highlight not private standards. Whether they are private or public, I think more important thing is fairness or legality or distributional fairness. Therefore, I think we don't need to draw the line between the private and public, but rather, we have to think about how to realize fairness. That is quite important. We should have a larger picture

and try to put the problems of private standards in the larger context and try to explore the better way to realize a fairer global order. That is my suggestion. Thank you very much.

Junji Nakagawa

Thank you so much, Mr. Tamura, for your very insightful and provocative comments on the two presentations. And now we will prepare for the final panel discussion here. I invite Colette and Professor Kawai and Mr. Tamura to continue our discussion here. Thank you.

I think there are a lot of issues to discuss in the two presentations in this session, but let me just start by the remarks of Mr. Tamura on the presentations. The first one, not necessarily limited to the two presentations but also aimed at the other presentations in Session 1 as well, that is, we discussed a lot about what to do with the private standards, but little was heard about how to do that or how to improve or how to solve the problems, so if you have any suggestions or thoughts about how to solve the problems presented by the proliferation of private standards, please let me know. That's one thing. And towards the end of his comment, Mr. Tamura raised a very important but big question of the sea change in global governance, where geopolitical change for the past several years may endanger not only the private standards or other global governance mechanisms but also now already seven decades old post-war global governance system led by the United States. To put it differently, we are facing the risk of demising global governance and the rise of power politics to the detriment of public law or public institutions in global governance. What shall we do with not only private standards but also the demise of global governance, especially the distributive justice or fairness and who will assume the role of reconstruction? These are the issues that were presented by Mr. Tamura. So, first of all please let us focus on these questions and let me invite Professor Kawai and Colette for your responses.

Masahiro Kawai

Thank you Professor Nakagawa. What should we do about private standards to improve them? There are so many private standards, ranging from those developed by a large number of NGOs and association to those developed by large companies. From public policy perspectives, those private standards led by large companies would have potentially significant implications for economic activity in a country and international trade, so they could be potential targets for public policy because they could distort market competition, limit market access for foreign competitors, and damage consumer interests. On concerns related to small-island, small-economy farmers and producers, I thought Colette's presentation was excellent. She identified significant problems and issues for small farmers, small exporters in small economies, and offered various ways to get around those problems, to cope with difficulties posed by private standards, like forming cooperatives, joining multinationals' supply chains, and doing business through e-commerce. These activities can support small producers and perhaps international NGOs may provide

capacity building for these small producers. I don't know if any international organization may want to come and support small producers in developing countries in this area. Using private consulting firms, like Colette's, is certainly useful but this may be a bit expensive.

Colette van der Ven

Well, it's pro bono!

Masahiro Kawai

I understand, your firm provides services without compensation. That is great, but you cannot handle all producers in all countries. At any rate I liked the presentation very much.

Secondly, Professor Nakagawa posed a very big question. What to do with global governance, rise of power politics, and the issue of distributive fairness. I don't think global governance has really collapsed, at least not yet. Global governance led by the WTO has not been functioning well for over twenty years since the end of the Uruguay Round. The WTO has been functioning in the areas of dispute settlement, trade policy reviews, addressing the trade liberalization of new accession countries, and sector-focused plurilateral agreements, but the WTO has not been effective in leading multilateral trade liberalization or rule-setting as has been observed in the stalling of the Doha Development Round. We have been living in this unfortunate world for some time, but at least the WTO rules are there, and protecting those rules is recognized as very important by WTO members. I do not think the rise of power politics itself would destroy those rules. For example, it will be in the best interest of China to abide by the WTO rules. However, the Brexit vote in the U.K.'s national referendum, Mr. Donald Trump's victory in the U.S. presidential election, and a rising tide of nationalism and anti-immigration in the EU and the U.S. may increase uncertainty about the future course of global governance based on multilateral economic cooperation. A related issue is how to ensure distributive fairness given the results in the Brexit vote and the U.S. election. I think this is an issue that every country needs to address. Fortunately in Asia, the distributive fairness issue is not causing a significant problem because many Asian countries are still embracing globalization, trade openness, and multilateralism, including in Japan, China, and most other Asian countries, but potentially even Asian countries may be affected by this issue. So each Asian country is advised to adopt the so-called inclusive growth strategy, addressing equity issues and income distribution. It is a very important challenge, particularly for each national government.

Junji Nakagawa

Thank you Professor Kawai, and Colette, you already presented us a number of the ways as to how to tackle with the issues presented by the proliferation of private standards at company level. But I still would like to ask your insights on how to tackle with the issues of private standards

and also I would like to ask for your thoughts on the risk of global governance presented by Mr. Tamura. It's a big issue.

Colette van der Ven

Thank you so much. To address the first question, how to do it from a government level, not specifically a company level, I believe the best way to do or to tackle some of the perceived unfairness of the private standards is by making them more transparent - through establishing some sort of guidelines to organize the process in which those standards come about. Focus should be on making them less prescriptive, more result-oriented. This will allow specifically developing countries to be in a better position to comply with the private standards.

In terms of how to go about setting up a meta framework, this has been addressed pretty well in the previous discussion. Regarding the question of location or under where it should sit - under which international organization's umbrella - I think that this should be primarily done at national level. I don't think the WTO is the best place for this, although given the relevance of private standards for the WTO framework establishing a working group to deal with this specifically may not be a bad idea.

Also, I think another important issue is benchmarking, which was addressed briefly by Professor Kawai's presentation. The GLOBALG.A.P. already allow for other standards to be considered equivalent to the GLOBALG.A.P. standard, and I think in the standardization guidelines, this should really become a principal idea. And this also mirrors the principle of equivalence in the WTO, which basically requires members or gives members the option to demand equivalence if they have different measures that get to the same regulatory outcomes.

Then, with respect to the second question, I wish I would share your optimism. This year has been particularly damaging for globalization: not only through Brexit and the US presidential elections, but also generally, you see that in many countries, especially in Europe, the general psyche of the people. In my country, the Netherlands, you see the rise of right-wing extremism, you see it in France, you see it in other European countries. Then you have the global order as such. The EU is now without one member. Countries are trying to leave the International Criminal Court, just to name a few. It looks like an unraveling of the global order that has been constructed over the last 60 years, which I find very worrisome.

How do private standards fit within this broader political context? I think the current state of the world minimizes significantly the chance that private standards will be addressed through a global framework. In addition to these recent events, we are operating in a WTO framework that is still dealing with a failed Doha Round. So within this context, I think the feasibility of having the WTO Members agree on another framework to regulate private standards is very slim. I wish I could be more optimistic.

Junji Nakagawa

Thank you so much. Professor Kawai and Colette presented us a number of means and ways to how to implement or how to tackle with the issues, the challenges presented by private standards: for instance, a big company-led private standard should be controlled within the framework of the public policy; Professor Kawai also mentioned the capacity building for small enterprises; Colette as well as other panelists in Session 1 suggested that we need to introduce procedural guidelines or meta rules on private standards, and benchmarking is also important to reduce the cost of complying with the private standards; and I like the idea of e-commerce enabling pro bono activities of Sidley, where private suppliers can make use of the state of the art information technology to sell themselves without the intervention of big retailers. So, these types of innovative ways of tackling with private standards is, it seems to me, a very attractive and hopeful means to tackle with the problems arising from private standards. These are the rough explanations of my understanding of the answers from the two panelists. I would like to ask Mr. Tamura what is your thought after listening to the answers of the two panelists.

Akihiko Tamura

Actually my position and somewhat pessimistic view in terms of addressing the downside of private standards remain unchanged even after carefully listening to the previous speakers. I guess what we have been discussing is how to address the problems of private standards by putting them under the framework of public policy context or a kind of government public policy. But I think that one of the problems of private standards is multiplicity of standards. It means that for public sector to deal with this problem, public sector has to unite itself or somewhat even loosely has to have certain common direction on how to deal with it, but at this moment, the global community is more and more fragmented, particular even so after the US election as we saw. I guess that after the World War II human beings have been trying to promote liberal global order, but the premise of liberal global order is to have somebody to take risk and cost as a leader. The US has been playing that role for more than 70 years. I think there is no pure win-win. I think somebody has to bear more cost than others, and US did that to maintain this liberal global order. But I think US has now reached a situation where they cannot pay extra price for maintenance of this global order. That is what we observed in the context of the presidential election. Therefore, I personally admit we have a reason to be pessimistic for the future of the liberal global order, not only in the multilateral setting but also even in the regional. What happened to TPP? What happened to TTIP? Even not only the multilateral but also even megaregional is now in crisis. Therefore, I guess that for now we have to take back what we see at this moment and try to come up with a new kind of creative ideas to rectify and address the more fundamental problem that faces global order. Then we will be able to see that problem we have been discussing today as to the private standards in that larger context. Then we will be able to see some

solution out of that. This is a kind of what I said as a comment, and my comment is unchanged, but I hope that I will be wrong.

Junji Nakagawa

Thank you so much for the clarification. Then, let me ask you about the role of Japan or Japanese Government in dealing with the demise of liberal global order as a result of presidential election in the United States and Brexit in Europe. I think Japan has been one of the biggest beneficiaries to the liberal global order, and we are now facing the risk of its demise, and can the government or should the government do something to counter that trend? I am not asking the public opinion or official opinion of the government.

Akihiko Tamura

Seems like what I am saying is kind of rumor. I am asking so many questions and you are asking the same question back to me and so it's difficult for me to answer. No, I think Japan is one of the key players in operating the liberal global order since the late 20th century together with other like-minded countries we continue to be so. So, I think even though at this moment temporarily what we see in the United States is not really promising. Whenever the last I guess after Mr. Trump becomes the US president on January 20th. We hope that he is going to be more rationalized, and we already have seen some sign of the rationalization of his position. It seems likely he tried to modify his position, which has been expressed in the process of the presidential election. We hope that his modification will continue to be more rationalized, but I guess that this is not only the matter of the United States. I think what's going on in the United States is kind of reaction to what's going on in global community. I think that it's quite difficult for the United States to stop the relative getting weaker in the relative sense; therefore, this is kind of history. This is difficult to escape from. So, in the sense that more and more we have to live in a global community in which other players are also rising and multiplicity of players will be more conspicuous. But finally, what I am convinced is that, in the long term, human beings have a history of having coming up with solution to no matter what the problems are. Therefore, I guess in long term, we will be able to find some convergence point on the public policy issue such as this and the important thing is that if you ask me what Japan can do for this issue, maybe convening this symposium is one of the contribution to it and I'm not joking. The only recipe we have at this moment is to generate the discussion and try to draw as many people's attention as possible to the importance of these issues, and try to stir some public opinion in global community and try to find our partners and try to enhance our voices for the public good. So, it's the only recipe we have at this moment.

Junji Nakagawa

Thank you so much. Before wrapping up, Professor Kawai, you have the final words.

Masahiro Kawai

Thanks. I just want to suggest Mr. Tamura and METI and the Japanese Government how Japan can take some leadership in maintaining an open trading system. If Mr. Trump actually withdraws from TPP, Japan could still pursue TPP among the 11 countries, excluding the United States, without renegotiation of TPP, without changing any part of the agreement, and sticking to the six-country, 85% GDP-share requirement stipulated in Chapter 30 for TPP implementation. My suggestion is to put a small addendum to Chapter 30 to the effect that "the chapter is effective even without the United States." To satisfy the 85% requirement, both Japan and Canada would have to ratify and in addition either Australia or Mexico would have to do so. The advantage of this proposal is that Japan can lead in putting the 21st century trade and investment rule in place and in actually implementing it, even without the U.S. If Mr. Trump changes his mind in the future, the U.S. can always come back to TPP. So, in that way, Japan can show to the rest of the world that it cares about greater trade and investment liberalization and high-standard trade and investment rules. So that is my suggestion to Mr. Tamura, METI and Prime Minister Abe.

Junji Nakagawa

Thank you so much Professor Kawai. The time is up, but let me take just one question/comment from the floor.

Male Participant

I'm sorry. I didn't mean to take out the role as final word, but I carefully listened to Professor Kawai's comment as one of the most prominent scholars in Japan. Once I go back to the office, I'm going to write a memo and circulate that within our policymaking circle including the prime minister's office, but I'm not in-charge of the TPP directly, so maybe my memo could be totally ignored, but at least since Professor Kawai is considered as one of the most prominent scholars in Japan; therefore, I think I don't take his word lightly. Thank you.

Junji Nakagawa

Thank you so much. Now, the time is up and thank you so much all the panelists for your presentations, special thanks for Vera and Colette for coming all the way from the other parts of the world, and thank you so much for the audience who gathered to listen to and share our thoughts and insights on private standards and global governance. Now, the time is up and please let me join by applauding the participants. Thank you.

