

THE RIGHT TO FOOD AND PRIVATE VOLUNTARY FOOD STANDARDS

EL DERECHO A LA ALIMENTACIÓN Y LAS NORMAS ALIMENTARIAS PRIVADAS Y VOLUNTARIAS

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Abstract

The right to food is a human right stipulated in different human rights treaties. It demands availability, accessibility, sustainability and adequacy of food supplies to be realised. Private voluntary food standards govern international food chains. They define procedures and conditions under which food is produced. These standards have multiple impacts on all actors in the food chain. They may support the fulfilment of the right to food, in particular concerning food safety and other human rights, but they also might negatively affect the income of small-scale farmers. This article argues that home state governments and host state governments governed of the private standards are obliged to mitigate the negative effects on human rights. There are multiple avenues for mitigation because states have a margin of appreciation regarding the realization of the right to food and the effectiveness of different options depends on the context of the particular standard in question.

Keywords: Right to food; Food standards; Human rights; Global food governance; Voluntary standards; Food safety.

Resumen

El derecho a la alimentación es un derecho humano estipulado en diferentes tratados internacionales de derechos humanos. Exige disponibilidad, accesibilidad, sostenibilidad y adecuación de los suministros de alimentos. Las normas alimentarias privadas y voluntarias rigen las cadenas alimentarias internacionales. Definen procedimientos y condiciones bajo las cuales se producen los alimentos. Estas normas tienen múltiples impactos en todos los actores de la cadena del sector alimentario. Pueden apoyar el cumplimiento del derecho a la alimentación, en particular en relación con la seguridad alimentaria y otros derechos humanos, pero también pueden afectar negativamente los ingresos de los pequeños agricultores. Este artículo argumenta que los gobiernos de los estados de origen y los gobiernos de los estados receptores regidos por los estándares privados, están obligados a mitigar los efectos negativos sobre los derechos humanos. Existen múltiples vías para la mitigación porque los estados tienen un margen de apreciación con respecto a la realización del derecho a la alimentación y la efectividad de las diferentes opciones depende del contexto del estándar particular en cuestión.

Palabras clave: Derecho a la alimentación; Estándares alimentarios; Derechos humanos; Gobernanza alimentaria mundial; Normas voluntarias; Seguridad alimentaria.

Summary

1. Introduction
2. Sources of the Right to Food and its Content and Obligations
 - 2.1 International and regional human rights treaties containing a right to food
 - 2.2 The normative content of the right to food
 - 2.3 Obligations from the right to food
3. Private Voluntary Standards
4. Impacts of Private Voluntary Standards on the Right to Food
5. Obligations and options to mitigate negative effects
6. Conclusion
7. Bibliography

1. Introduction

Neoliberal reforms in the last third of the 20th century, in particular the foundation of the World Trade Organization (WTO), have encouraged globalization in the food industry. This has resulted in a massive growth of trade in food and agricultural products. Moreover, supermarkets now face fewer barriers to entry into the trade of food and agricultural products and are able to operate in markets that had previously been closed off. The new trade regime of the revised General Agreement on Tariffs and Trade (GATT) from 1994 and other agreements of the WTO (particularly the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement) offered them opportunities to internationalise. Previously, tariffs and quotas, different regulations, and laws made it difficult, if not impossible, to source and distribute food globally. However, after the new trade regime was introduced, supermarkets were able to reorganise their supply chains and distribution systems and gained greater market power largely based on their power of demand². At the same time, supply chain governance changed because, after eliminating quotas and tariffs, many trade possibilities

2 BUSCH, L., *Quasi-states? The unexpected rise of private food law*. In: B. M.J. van der Meulen (Edit.): *Private Food Law*, Wageningen Academic Publishers 2011, p. 54.

arose but issues such as specifications, standards, quality, and safety were not yet addressed at an international policy level. Therefore, companies set up their own governance structures in the form of standards, accreditations, and certifications to be able to realise the trade potential³. Indeed, many different kinds of voluntary private standards developed in various sectors as a result of this, particularly in the agri–food sector⁴.

These standards set requirements for the products and the methods of production in various ways. Several of the standards are concerned with sustainability issues in a very broad sense, covering social, ecological, and economic aspects and are viewed as tools to promote production conditions that respect human rights⁵. Others are specifically designed to tackle food safety. These kind of standards have proliferated over the years, particularly in the wake of the bovine spongiform encephalopathy (BSE) scandals in Europe in the late 1990s. This article focuses on how these private voluntary standards interact with the right to food, which is recognised in international and national law as a fundamental right.

This article will first demonstrate the basic obligations from the various treaties in which the right to food can be found. It will then briefly explain the features and attributes of private voluntary food standards, followed by a review of the impact of private voluntary standards, with a particular focus on the right to food follows. It then addresses the question of the legal responsibility for the impacts of those standards. This is of particular interest given that the private voluntary standards are defined by the fact that they are set by private entities. The question to be asked in relation to the impact of such standards on human rights is two–fold: Firstly, are such impacts the responsibility of the standard setter or the standard user? Secondly, are states that allow the use of the standards responsible, or is it the state in which the standard is developed or demanded by private actors? Due to the fact that human rights obligations

3 *Ibidem*, p. 59.

4 HENSON, S., HUMPHREY, J. – *Understanding the Complexities of Private Standards in Global Agri–Food Chains as They Impact Developing Countries*, *Journal of Development Studies* (2010) 46 (9) 1628, p. 1628.

5 UNFSS, Meeting Sustainability Goals – Voluntary Sustainability Standards and the Role of Government, 2nd Flagship Report of the United Nations Forum on Sustainability Standards, p. viii.

target primarily states, the second question will be mainly addressed in this paper. I conclude this article with my findings and highlight some open questions requiring further research.

2. Sources of the Right to Food and its Content and Obligations

2.1 International and regional human rights treaties containing a right to food

According to a study from 2011, the right to food is implicitly or explicitly recognised by 56 states in their national constitution⁶ and it is stipulated in different international human rights treaties, such as article 25 of the Universal Declaration of Human Rights (UDHR) and article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to food is also found in treaties protecting particular vulnerable groups. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stipulates the right of pregnant and lactating women to special protection with regard to adequate nutrition. The Convention on the Rights of the Child (CRC) recognises in article 25 the right to the highest attainable standard of health, and in article 27 the right to an adequate standard of living, both of which include articles food and nutrition. Furthermore, article 28 of the Convention on the Rights of Persons with Disabilities stipulates the right to food as part of a right to an adequate standard of living in article 28.

Regional human rights treaties (such as article 12 of the Protocol of San Salvador) contain the right to food as well. According to a decision by the African Commission on Human and Peoples' Rights, *SERAC v. Nigeria* (2001), there is also a right to food in the Banjul Charter that is included in its provisions on the right to life (article 4), right to health (article 16), and right to development (article 22).

2.2 The normative content of the right to food

According to article 11 of the ICESCR, the right to food contains two different kinds of rights to food. In article 11.1 of the ICESCR, the right to

6 KNUTH, L., VIDAR, M.; *Constitutional and Legal Protection of the Right to Food around the World*, Food and Agriculture Organization of the United Nations, 2011, p. 22.

adequate food is stipulated as a relative standard, whereas the right to be free from hunger in article 11.2 of the ICESCR is an absolute right and the only one that is qualified as “fundamental” in the ICESCR and the International Covenant on Civil and Political Rights (ICCPR)⁷. In order to determine the content more precisely, in particular the right to adequate food, the General Comments (GC) No. 12⁸ of the Committee on Economic Social and Cultural Rights (CESCR), which is said to be “the most authoritative interpretation of the right to food within the [United Nations] human rights system”⁹, is helpful. The important status of the GC has been reassured in resolutions of the United Nations (UN) General Assembly¹⁰. In the GC, the CESCR has set out what is understood regarding the right to food. Apart from the ideal that at all times everyone has sufficient food as it is proclaimed in the GC¹¹, there are four elements that the CESCR identified for the right to adequate food to be fulfilled: the availability, accessibility, sustainability and adequacy of food supplies have to be realised.

According to the GC, “food has to be available in a quality and quantity sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture”¹². In order to fulfil the requirement of availability, there either has to be a well-functioning system of food distribution, or people must be able to feed themselves from natural resources. Furthermore, this sets some requirements regarding quality as the “dietary needs” have to be met, which means that the food must contain all nutrients being necessary for physical and mental development and maintenance. Likewise, food has to be safe for consumption, meaning that it must contain no toxins and must be free from other contaminations. In addition to these scientifically measurable

7 NARULA, S., *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 Colum. J. Transnat'l L. 691 (706).

8 CESCR, General Comment No. 12 (1999): The right to adequate food (article 11 of the Covenant).

9 SÖLLNER, S., *The “Breakthrough” of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food*, In: Max Planck UNYB 11, 2007, p. 391.

10 UN General Assembly, Resolution on 17 December 2018, A/RES/73/171, para. 44.

11 CESCR, General Comment No. 12 (1999): The right to adequate food, para. 6.

12 *Ibidem*, para. 8.

requirements, there is the requirement that food has to be acceptable from a cultural standpoint¹³.

Moreover, the GC states that the accessibility of such kinds of food has to be provided "in ways that are sustainable and that do not interfere with the enjoyment of other human rights"¹⁴. Accessibility is meant in two ways here. First, from an economic point of view, everybody, including particular vulnerable groups with low or no income, must have the financial capabilities to buy the adequate food to cover their basic needs. Secondly, there has to be a physical possibility for everybody to access the adequate food¹⁵. The meaning of sustainability in this context is that the accessibility and the adequacy of food needs to be provided not just on a short term basis, but also in the long term, for future generations¹⁶.

As this sets out the normative content of the right to food, it is necessary to determine the obligations following from that to see finally, whose responsibility mitigating the impacts of private voluntary food standards on the right to food is.

2.3 Obligations from the right to food

Article 11.2 of the ICESCR stipulates a core obligation of states to take necessary actions against hunger¹⁷. In addition to that, according to the CESCR, states have the "principal obligation [...] to take steps to achieve *progressively* the full realization of the right to food"¹⁸. In order to fulfil this principal obligation, three different obligations, which the right to adequate food imposes on state parties, can be differentiated. Firstly, the obligation to respect existing access to adequate food. Secondly, the obligation to protect individuals against any threats by businesses or individuals to interfere with their access to adequate

13 EIDE, A., *Adequate Standard of Living*, In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): *International Human Rights Law*, 2018, p. 191.

14 CESCR, General Comments No. 12..., Op. Cit., para. 8.

15 *Ibidem*, para. 13.

16 *Ibidem*, para. 7.

17 *Ibidem*, para. 6.

18 *Ibidem*, para. 14. Original emphasis.

food and, finally, the obligation to fulfil, which can be split into the obligation to facilitate adequate food and the obligation to provide adequate food. Here, to facilitate means to strengthen the existing possibilities of access but also to facilitate activities that guarantee food security and people's livelihood. By contrast, the obligation to provide adequate food specifically tackles situations in which people themselves are unable to enjoy their right; for example, in the case of a natural catastrophe¹⁹. Thus, a violation of the right to food might be any kind of legislation that leads to a denial or a suspension of access to food, as well as a failure to regulate private businesses and hold them accountable for acts that restrict people's access to food, prevent people from earning a livelihood, or allow the trade of unsafe food²⁰. As these obligations hold the state parties ultimately accountable, the CESCR also clearly states that all parts of society have the responsibility to recognize the right to adequate food. Additionally, it explicitly refers to the national and transnational business sector obligation to conduct business in a way that respects the right to adequate food²¹. In that regard, it is interesting to see how private voluntary standards work because it may be that some of them provide helpful function for the realization of the right to food but the opposite is likewise possible. However, before turning to see how private voluntary standards affect the right to adequate food, it is important to clearly define what is meant by these standards.

3. Private Voluntary Standards

Mostly, when the term “voluntary private standards” is used in literature it means a standard that is backed up by a certification that proves whether the standard is met or not. This covers a wide variety of standards but they have several things in common. First, they are not legally binding, but they may be required as de facto standard to enter a supply chain²². Second, private actors such as companies, non-governmental organizations (NGOs), associations of

19 *Ibidem*, para. 15.

20 *Ibidem*, para. 19.

21 *Ibidem*, para 20.

22 WTO, World Trade Report 2012, p. 14.

companies, or a multi-stakeholder entity set these standards, not governmental agents. Consequently, this article excludes ISO-standards since the International Organization for Standardization (ISO) is not strictly private because some members are public organizations.

The issues the standards are concerned with are very diverse but, in general, it is possible to differentiate two functions; first, the management of risks and, second, the differentiation products. In addition to that, two different aims of standards can be found. Those are food safety on the one hand, and attributes not related to food safety on the other hand. Thus, there are four possible combinations of the two functions and the two goals²³. The ones covering attributes not related to food safety are often concerned with different aspects of sustainability, such as workers' rights, environmental protection, and fair trade conditions.

As the standards pursue different aims and serve different functions, they differ in several ways from one another.

Usually standards are invisible to the consumers but have high importance in business-to-business (B2B) relations when they are meant to cover food safety and are used as risk management tools. Due to efficiency issues, these kinds of standards are predominantly set collectively by retailers who have a strong interest in maintaining the consumers' trust in the safety of the food they sell. From the perspective of the retailers, it is more efficient to share the costs for developing the standards since these standards are not meant to cause competition against other retailers²⁴. Instead, they set standards for the whole value chain that the suppliers to the retailers have to meet and, hence, increase the competition between the suppliers.

Other standards set by retailers are used for product differentiation, which means these standards promote certain characteristics of the product or its production process that consumers are willing to pay for. Labels and certificates show these standards to consumers. Often the characteristics are related to fair trade or sustainability issues. There are also standards that mix food safety

23 HENSON, S., HUMPHREY, J. - *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, *Journal of Development Studies* (2010) 46 (9) 1628, p. 1636.

24 *Ibidem*, p. 1637.

attributes and other attributes for product differentiation. Individual firms, NGOs, or multi-stakeholder initiatives usually set standards like these²⁵. Working conditions or environmental safety can be covered by standards without being meant for product differentiation, but only for the use in B2B relations, so they are invisible to the final customer. There are not many of those standards but, for example, a national group of producers might set them to compete against other groups of producers²⁶.

Standards that use food safety for product differentiation are rare because it is an attribute that consumers already expect to be fulfilled and they are not willing to pay a price premium for over-achievements. Nevertheless, some groups of producers have developed such standards, specifically after food scandals such as BSE, to restore consumers' trust²⁷.

In sum, the requirements of flexibility, quality, and delivery of food have constantly risen, which increases costs for producers. As a result, smallholders are especially affected since they usually lack both opportunities to use economies of scale and proximity to the market, both geographical and in regard to the information side of the given market. Additionally, smallholders' standard of education is often quite low, which means they are reluctant to use new technologies and have difficulties obtaining capital and information. Thus, they often are weak in negotiations. Smallholders are also more risk-averse because they lack large amounts of savings and are often placed on inferior land without access to irrigation²⁸. In addition to that, due to bad infrastructure such as roads and lacking cooling facilities close to the farms, smallholders cannot guarantee stable quality, which makes them unattractive as suppliers for large retailers²⁹. Standards differentiating the products are visible to the consumers and usually

25 Ibidem, p. 1638.

26 Ibidem, p. 1639.

27 Ibidem, p. 1638.

28 JAFFEE, S., HENSON, S., DIAZ RIOS, L.– *Making the grade: Smallholder farmers, emerging standards, and development assistance programs in Africa, a research program synthesis*, World Bank Documents & Reports, No. 62324-AFR (2011), p. 27.

29 WORLD BANK – *Horticultural Producers and Supermarket Development in Indonesia*, Report No. 38543-ID (2007), p. vii.

set by multi-stakeholder initiatives, NGOs, groups of producers, or individual firms, specifically retailers. By contrast, groups of retailers or producers usually set standards that are used in B2B relations. Thus, the participation in the standard setting is very different, as well as the market level in which competition is increased by the standards. Standards that are used in B2B relations usually increase the competition on the producer level while visible standards in the business-to-consumer (B2C) relations increase the competition on the retailer level. Regardless of which level the competition is increased by the standards, the costs for their implementation is mostly passed on to producers because retailers have the market power due to their power of demand³⁰, and thus the standards they demand can be de facto mandatory, even if they are legally voluntary. How this and other effects of private voluntary standards affect human rights and especially the right to food is covered in the next section.

4. Impacts of Private Voluntary Standards on the Right to Food

As the private voluntary standards are usually certified, there are five different steps to perform a standard, which may affect the right to food.

First, the process of setting the standard in the beginning, meaning one or more entities discussing certain rules and requirements for procedures and putting a final version down in writing;

Second, is adoption of the standards, meaning that an entity which may be the same as the entity that has set the standard has decided to use the standard. For example, a retailer that wants to satisfy the consumers' demand for organic production, or an association of exporters from a country wants to protect the image of the product or brand from exporters that use forced labour;

Third, is implementation, meaning the application of the rules and procedures, usually down the supply chain of the entity that has adopted the standard;

The fourth step is conformity assessment, which is to verify whether the

30 FAO, *The State of Agricultural Commodity Markets – Trade and food security: achieving a better balance between national priorities and the collective good*, 2015, p. 32.

implementation of the entities was successful, so that only those who comply with the standard can make this claim. Usually third party audits are used, which means that an accredited body assesses the entity against the set standard.

Finally, step five is the enforcement of sanctions against those certified who do not comply with the standard in reality. This usually takes the form of an opportunity to align production procedures with the standard and if this is not done in a certain time or is a severe breach of the standard, the recognition and the certification is withdrawn³¹.

The right to food is affected in different ways by these steps. The process of standard setting differs from case to case and so does the participation of stakeholders. There are standards that include smallholders, civil society, and companies, but there are also standards that are set by corporations with market power alone or only producer groups.

The consequences of the implementation of standards might have outcomes or impacts on different human rights. For example, a standard may prevent child labour or a standard to reduce fertilizer can have positive impacts on water resources. Likewise, there might be positive effects on the right to food. Some standards ensure food safety for exported food in order to guarantee the right to food to the final consumers³². Most of these standards are not visible to northern consumers but are B2B standards developed to coordinate the supply chain and manage food safety risks. European retailers are aware of the fact that food safety is not an attribute that should be used to compete against other retailers because it may lead to a general erosion of consumers' trust in retailers³³. Those standards usually do not increase the income of the producers.

31 HENSON, S., HUMPHREY, J. – *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries...*, Op. Cit., p. 1631.

32 HALABI, S. F., LIN, C.-F., *Assessing the Relative Influence and Efficacy of Public and Private Food Safety Regulation Regimes: Comparing Codex and Global GAP Standards*, 72 Food & Drug L.J. 262 (2017), p. 278 ff.

33 HENSON, S., HUMPHREY, J., *Codex Alimentarius and private standards*. In: B. M.J. van der Meulen (Edit.): *Private Food Law*, Wageningen Academic Publishers 2011, p. 161.

By contrast, producers usually carry the lion's share of the costs³⁴. Nevertheless, it is possible that producers benefit from such standards as well, if the standard helps to improve the quality of the product. As a result, the producers can get a better price which leads to an increase of income for farmers³⁵; thus, to a more secure access to food. Similar effects are achieved by standards that pay price premiums to farmers; mostly standards that refer to aspects of social and economic sustainability. These standards and improved trading relationships based on these standards benefit the stability of access to food because long-term trade relations allow better planning and help to mitigate the effects of price volatility³⁶. Gaining information on markets, training, and skills can increase the quality of products, the efficiency, and the yield of farmers, which all contribute to secure the income necessary for the access to food³⁷. Since some standards demand that farmers group together in an organization, this can also improve the farmers' situation because they gain bargaining power and might be able to reduce costs by sharing machinery or gaining access to financial and technical support³⁸. In sum, private voluntary standards can be beneficial for farmers to improve their income, thus improving their access to food. They can also be beneficial for consumers because they provide food safety, which means consumers can enjoy their right to adequate food.

However, the consequences of the implementation of standards might also have negative effects. In particular, the high costs to implement the standard are problematic. Some smallholders cannot afford all the necessary changes, which means they will fail to comply with the standard. As the standard is a requirement to enter the supply chain, the failure to comply with the standard would result in the loss of their livelihood. This means that implementation of standards creates the risk that some smallholders lose their access to adequate food. The problem with high costs also relates to the fourth step, the conformity

34 BLACKMORE, E., KEELEY, J.- Pro-poor certification – Assessing the benefits of sustainability certification for small-scale farmers in Asia, IIED, 2012, p. vi.

35 *Ibidem*, p. 7 f.

36 *Ibidem*, p. 8.

37 *Ibidem*, p. 10.

38 *Ibidem*, p. 8 ff. w.f.r.

assessment. The costs of these audits can be a problem, especially for smallholders³⁹. As smallholders likely live in poverty, their livelihood and their access to food depend strongly on the global value chains of which they are a part off⁴⁰.

To sum it up, private voluntary standards affect the right to food for two different groups: the consumers of the food and the producers of the food. For consumers, private voluntary standards can help provide access to safe food, which relates to the aspect of quality and safety in the right to food. For producers, the focus is more on the access to food. The implementation of private voluntary standards can improve the income farmers generate from their land, and thus strengthen their access to food. Private voluntary standards can also impinge the right to food by way of the high costs for the implementation and conformity assessment, resulting in some farmers, in particular small-scale farmers, losing income which means they lose access to food.

Hence, private voluntary standards can improve and worsen the situation concerning the right to food, especially the access to food. As the states are primarily obliged to guarantee access to food, the next section will deal with the states possible avenues to mitigate the negative effects of private voluntary standards, and then discuss what obligations the private entities have that develop, use, and enforce the standards.

5. Obligations and options to mitigate negative effects

Primarily, the right to food creates obligations of the states. Since the states do not set the standards themselves, the obligations are not about the duty to respect the standards, but more the duty to protect individuals against the violation of their rights by private actors. Due to these obligations, states have to create a legal framework that allows individuals to enjoy their right to food. Thus, states have the duty to regulate the private voluntary standards. However, this may be not as easy as it sounds for the following reasons.

The countries in which the negative effects of the private voluntary standards occur are the ones in which the producers are based. Because the producers

39 Ibidem, p. 12.

40 FAO, *The State of the Agricultural Commodity Markets*, 2015–16, p. 33.

voluntarily, from a legal point of view, accepted the standards, it is difficult for the countries to implement regulations. To ban the use of private voluntary standards would not help, because the retailers would just change their supply sources. Hence, the result would be the same or even worse as all producers then lose their income, and therefore access to food. Furthermore, it would also destroy the positive effects the standards may have on some producers in the country. Therefore, to prohibit the use of the standards is not sensible for less developed countries. However, there are some options that the governments have. The governments could try to use the standards in their development policy. Several countries have chosen this approach: Chile took the Global G.A.P. standard and benchmarked its own standard against it. Around 2000, different organizations such as the Fruit Development Foundation (a research institution founded by Chilean exporters-growers of fresh fruits), the Chilean Fresh Circuit Association (CFFA), and the Association of Exporters (ASOEX) in Chile lobbied the Chilean Ministry of Agriculture to support Global G.A.P. As a result, in 2003, Chile GAP was launched, which is a national certification standard⁴¹. The private and the public sector in Chile worked together to support and to develop this national standard to harmonise USA and European requirements, thus making market access to industrialised consumer markets easier by lowering the costs. Fulfilling Chile GAP is legally binding according to Chilean law but the certification is voluntary. Even if the Chilean government is not actively involved in the certification process, it supports growers and exporters to meet international standards and regulations. It also set up a program helping particularly small-scale farmers to fulfil the standards' requirements and to become certificated. Nevertheless, there remain some challenges with the standard relating to the high implementation costs⁴². Launching programmes that help small-scale farmers to fulfil the standards' requirements by providing financial support is also one option for countries to protect the right to food. However, since not all countries have the financial abilities, it is not a silver bullet to solve the problem. Furthermore, the lack of information farmers have on the

41 CARRERA, A.C., *Global G.A.P. and Agricultural Producers: Bridging Latin America and the European Union*,

21 Drake Journal of Agricultural Law 155 (2016), p. 170.

42 *Ibidem*, p. 171 f.

different standards is also an issue that governments can mitigate by providing information to farmers who can then engage in a dialogue with the standard setters to lobby their producers' interests; in particular, if producers are not formally part of the standard setting process.

However, while the governments in which the producers lose income –and therefore access to food– can financially support producers, make sure producers know about the standards' requirements, and lobby for producers on the international level to create multiple options in which to sell their products, these governmental actions are not really regulating the standards. As the standard operators are usually not based within the jurisdiction of these countries, this is not possible.

Voluntary private standards are usually developed by a legal entity in the global north. For example, Global G.A.P. is registered in Germany as a private company, the Marine Stewardship Council is registered as private company in London, and the Social Accountability International (SAI), which sets the SA8000 standard, is registered as an NGO in the USA. Therefore, the states that would have to regulate these standard developers are Germany, the UK, and the USA. Taking a closer look, their legal framework eventually demanded, or at least incentivised, the development of the private voluntary standards⁴³. Making the retailers liable for the food they sell, put pressure on them, which they try to evade by setting up compliance structures in the form of standards and certifications. As the reasons for this kind of regulation was to prevent food scandals, and therefore to make sure that the sold food is safe for human consumption⁴⁴, this can be seen as protecting the consumers in the global northern countries right to food. Simultaneously, it affects small–scale producers in the global south. This raises the question of whether these northern states also have an obligation to protect the right to food beyond their jurisdiction.

From a logical point of view, that would be the easiest answer to the problems that southern countries face because they cannot regulate the standards themselves. By contrast, the northern states in which the standards are based could regulate them in various ways. They could oblige the entities that develop

43 HENSON, S., HUMPHREY, J., *Codex Alimentarius and private standards...*, Op. Cit., p. 153 ff.

44 HENSON, S., *Private Standards in Global Agri–Food Chains*. MARX, A., MAERTENS, M., SWINNEN, J., WOUTERS, J. (Edit.): Private standards and global governance, Edward Elgar Publishing 2012, p. 104 ff.

the standards to carry out human rights assessments, so that the standard setters are aware of the effects their work has, particularly on those who are not using their standards. In addition, an obligation to include the affected parties in the standard setting process could help, as this would offer the possibility to tailor standards to the needs of the producers *and* the retailers. Being aware of the potential problems their standards cause for smallholders, some standards have introduced programmes tailored to the needs of smallholders. Such programmes can include financial support for the investments, the possibility of group certifications, and trainings⁴⁵. Making impact assessments and supporting instruments mandatory for standard setters could help to avoid negative impacts on the right to food. The same potential regulations could be applied to retailers that are not concerned with standard setting but only adopting a given standard. For example, a German food retailer that might use the Marine Stewardship Council standard, which is based in the UK.

However logical and practical these suggestions might be, the question remains as to whether there exists any obligation for these states to implement such procedures and programmes because the northern states do not typically experience a potential restriction of access to food in their jurisdiction.

The Human Rights Committee has encouraged Germany to stipulate clear rules to respect human rights to all businesses based in Germany⁴⁶. Concerning Canada, the Committee used even stronger language:

“The State party should(a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad”⁴⁷.

45 FIORINI, M., SCHLEIFER, P., TAIMASOVA, R. *Social and environmental standards: From fragmentation to coordination*. International Trade Centre, Geneva 2017, p. 11.

46 CCPR, Concluding Observations on Germany, CCPR/C/DEU/CO/6, 12 November 2012, para. 16.

47 CCPR, Concluding Observations on Canada, CCPR/C/CAN/CO/6, 13 August 2015, para. 6.

This seems to lead to the conclusion that, in principle, home states have a duty to protect individuals from being harmed by domestic businesses operating abroad. Yet, this refers to the ICCPR and not the ICESCR but the statement in article 2(1) that states have to progressively realise the rights of the ICESCR individually and through international cooperation, can be read as meaning that states should step away from anything that impinges these rights because that would not help in realising the rights and be anti-cooperative⁴⁸. Reading this as an obligation of the home states of voluntary private standards to respect human rights means that these states have to consider extraterritorial human rights in their actions. That could suggest that home states should refrain from setting standards that impinge human rights abroad or support businesses that set such standards, e.g. by subsidising them or promoting the standards through development agencies. From the point of view that human rights are deemed to be universal, and the fact that the right to food is essential to enjoy any other right in the long term, it makes sense to say that there is at least a duty to respect the right to food extraterritorially.

According to the CESCR, state parties also have a duty to protect rights in other states because in General Comment 15, regarding the right to water, it says that states should “prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”⁴⁹. As food is as fundamental to the existence of humans as water, this should be transferred to the right to food as well. Thus, home states of standard setters and standard users have to make sure that businesses that use their standards avoid negative effects, also on those who are not using the standards. Providing assistance to producers and their governments through state aid or developmental aid, e.g. by financing a programme of the International Trade Centre that supports smallholders’ certification, is also a way in which home states could assist in avoiding the negative effects of private voluntary standards⁵⁰.

48 JOSEPH, S., DIPNALL, S., *Scope of Application*. In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): *International Human Rights Law*, 2018, p. 126.

49 CESCR, General Comment No. 15: The Right to Water (articles. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para. 33.

50 See <http://www.intracen.org/news/Kenyan-avocado-farmers-receive-GlobalGAP-certification/> [accessed on

Stating that there also exists a duty to fulfil ICESCR rights extraterritorially is very controversial because that would mean that rich states must support poorer states. The CESCR sees a duty of the states to assist other states if they are capable, but to determine the exact conditions of this duty is almost impossible⁵¹. Yet, the 2030 Agenda of Sustainable Development⁵² and the Declaration on the Right to Development⁵³ can be read as if there were such a duty, while still leaving open the question of what exactly is a rich country and how it has to support whom.

The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights are not binding and cannot be signed by states but should be seen as guidance and moral argument⁵⁴. According to principle 9 of the Maastricht Principles, states are responsible under certain conditions:

“A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law”.

17 April 2019].

51 JOSEPH, S., DIPNALL, S., *Scope of Application...*, Op. Cit., p. 127.

52 UN General Assembly Resolution 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (21 October 2015).

53 UN Declaration on the Right to Development, particularly article 4.

54 JOSEPH, S., DIPNALL, S., *Scope of Application...*, Op. Cit., p. 128 w.f.r.

According to this, home states of standard setters and users have extraterritorial duties because they could mitigate negative effects on the right to food by regulating the standards and financially supporting affected people.

In sum, there are good reasons to argue that also those states, where the retailers and the standard setters are based, have obligations to mitigate the negative effects of private voluntary food standards.

6. Conclusion

Private voluntary food standards are a double-edged sword in terms of the enjoyment of the right to food. As positive as some of the standards' effects may be – improved traceability and thus improved food safety – there are also potentially negative effects that could deprive smallholders of their access to food. Yet, private voluntary food standards are not designed to violate the right to food. In contrast, they are meant to be tools that help promote the right to food for some. However, they can also have negative effects on the same right for others. Thus, in some cases, private voluntary food standards may promote and impinge the right to food at the same time. It should be possible to design private voluntary food standards in such a way that small-scale farmers can use them to improve their production, and thus improve their access to food. Providing information on the existence and requirements of the standards, giving financial support, or using them as development tools are just some possible options to mitigate potential negative effects. While there are standards that already have some of these features, from a human rights perspective, some standards still have to improve. If the standard setters do not see this demand or are not willing to change the standard, it is the states' obligation to take steps to change this. Because there is a margin of appreciation regarding the states' options to promote the right to adequate food⁵⁵, taking the context in which the standards operate into account, coordination and exchange of information is particularly important to reach positive results.

There is also a need for further research. Although some standards have

55 MÈGRET, F., *Nature of Obligations*. In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): *International Human Rights Law*, 2018, p. 02 f.

been subject to case studies, meta-studies on the effects of the different features of various standards are widely missing, making comparing standards a difficult task. Most of the case studies focus on the potential exclusion of smallholders from the supply chain, yet often not from a legal perspective. Moreover, studies systematically assessing the impacts of different forms of standards on the human rights situation apart from the exclusion of smallholders are widely missing. Indeed, the right to food is not the only human right that those standards can have an impact on. Thus, another open field for further research is to assess the standards against other human rights and see what options exist to mitigate potential negative effects. As the standards are constantly evolving and changing, research sees particularly indicated.

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