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PRIVATE ACTORS AND PUBLIC PRACTICES IN GLOBAL ADMINISTRATIVE LAW

ACTORES PRIVADOS E PRÁTICAS PÚBLICAS NO DIREITO ADMINISTRATIVO GLOBAL

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Abstract: Based on the examination of the powerful, industry-based food safety regulator GlobalGAP this paper revisits the public-private distinction in Global Administrative Law (GAL). It argues that defining public as practice is the most coherent approach both from a practical as well as from a theoretical point of view. Using the GAL framework it is possible to identify acts and processes which are of common concern and ultimately public. In fact, looking at the normative goals of GAL it is striking what significant impacts an actor such as GlobalGAP has on common public concerns. Under these circumstances ‘complying’ with GAL principles can be a venue even for formally private actors to create public processes which ultimately better correspond the public character it has in some of its regulatory activities.

Abstract: Este artigo revisita a distinção *público-privado* no Direito Administrativo Global, baseado na análise do poderoso regulador de segurança alimentar GlobalGAP. Sustenta-se que definir como aquilo que é público como uma prática constitui a abordagem mais coerente, tanto de um ponto de vista prático como teórico. Usando o enquadramento do Direito Administrativo Global, é possível identificar actos e procedimentos que respeitam a interesses comuns os quais, nessa medida são, em última análise, públicos. De facto, tendo em conta os objectivos normativos do Direito Administrativo Global, são patentes os impactos significativos que um agente como a GlobalGAP tem nos interesses públicos comuns. Nestas circunstâncias, o cumprimento dos princípios de Direito Administrativo Global pode ser um espaço inclusivamente para actores formalmente privados criarem procedimentos públicos que, ao fim e ao cabo, melhor correspondem ao carácter público que aquele tem em algumas das suas actividades de regulação.

Keywords: Public-Private Distinction; Global Governance; Private Actors; Public Practices; GlobalGAP.

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Palavras-chave: Distinção Público-Privado; Governança Global; Actores Privados; Práticas Públicas; GlobalGAP.

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1. Introduction

The paper will provide a short examination of a powerful, private, industry-based regulator – GlobalGAP. This organization provides certification schemes mainly designed to ensure the security of foodstuff along the supply chain. Despite being a private entity and not necessarily being considered an obvious addressee, GlobalGAP implemented a number of “administrative”² standards, including for example participation and review processes.³ GlobalGAP adopted these measures because, among other reasons, it faced fierce criticism regarding its governance practices and the impacts these had on different constituencies (particularly small farmers in the Global South).⁴

The application of Global Administrative Law (GAL) principles by formally purely private actors such as GlobalGAP illustrates an increased demand for harmonization and formalization in the global and transnational realm. Thus, despite general fragmentation and functional differentiation observable at the global level, interactions (conflictual or harmonious) between different regimes and actor groups trigger what I call “a return to publicness”. The implementation of administrative principles into the GlobalGAP regime is an example for this as much as the adherence to a certain set of values (the ban of any kind of slave labor on the farming sites for instance) is another. Different examples have been addressed in various places within the GAL literature.⁵

In light of this I suggest that we must take a second look at what regulatory/administrative actors and acts count as “public” at the global level. For the case at hand I use a practice-based approach to show that GlobalGAP fulfills both a public and private role. GAL can fulfill a dual function in such a practice based approach. First, it sets normative requirements for acts which are deemed of common concern and are considered public. Secondly, it enables even non-state related actors to implement processes which ultimately enhance the publicness of their actions.

This paper, however, does not aim at a global redefinition of the public private distinction. It instead uses a case study to offer suggestions and modes of think-

2. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, *The Emergence of Global Administrative Law*, *Law and Contemporary Problems* 68, 2005, pp. 15.

3. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART mention “some private regulatory bodies exercising transnational governance functions of particular public significance” (at 17) which could include private food safety regulation, or not – depending on whether they would ascribe the regulatory actions of GlobalGAP “particularly public significance”; though in the following sections I will argue that this is the case.

4. See for instance MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, *Third-Party Certification in the Global Agrifood System*, *Food Policy* 30, 2005, p. 354, at p. 356 The criticism even reached the WTO, when a group of states filed a complaint in the SPS Committee in 2005 (Complaint by St Vincent and the Grenadines, supported by Jamaica, Peru, Ecuador, and Argentina, Doc No. G/SPS/GEN/766, as well as the document put forward by the Bahamas G/SPS/GEN/764).

5. See for instance SABINO CASSESE et al. (eds), *The GAL Casebook*, 3rd ed. 2012, see particularly also section I C dealing with hybrid and private bodies exercising public functions.

ing for integrating actors traditionally conceived as private into a broader understanding of what constitutes publicness.

The paper consists of three parts. First I will introduce current understandings of the public-private divide in the law and global governance literature. Here I will follow recent works which define public as practice and develop the main argument that such an approach is also useful in the context of GAL (2). This will be followed by a short introduction into food safety regulation and into the GlobalGAP as a regulatory organization (3). Finally, I will analyze the case within the theoretical framework introduced in Section 2. I will show that by applying the GAL framework, it is easier to identify acts and processes which are of common concern and ultimately public; and furthermore how by abiding to GAL principles even an industry-based actor such as GlobalGAP can create public processes (4).

2. Current Conceptions Of The Public-Private Distinction – Towards A Practice-Based Approach

The following section provides a short overview of the different conceptions of a private public distinction in law and governance literature over time. It will show that the currently prevailing state-centric and formalistic approach creates a number of problems. Therefore, the second part of this section will then introduce a practice-based approach as a more coherent way to define what constitutes private and public acts, in Global Governance and in GAL.

2.1 Current Conceptions of the Public-Private Divide in Global Governance and GAL Literature

Whether in the law or political science literature one often encounters seemingly fixed understandings of what is public and what is private. In legal scholarship depending on the historical context or the specific legal system one finds general theories providing a distinction on the “public or private nature” of laws and relevant actors.⁶ Roman law for instance differentiated between public and private by using the so-called “interest theory”; thus public law serves public interests, whereas private law serves private interests.⁷ Countries in the Roman law tradition such as Germany, adopted this distinction. It was however adapted in later years to meet the particular requirements of the modern nation state with its separation of state and citizen. Therefore the so-called “subordination theory”

6. See HARTMUT MAURER, *Staatsrecht I*, 3rd ed., München, 2003, p. 7. However, there were times and legal system such as the Common Law system in England where a distinct public law could be argued to not have been existent. See “Common Law” *Encyclopaedia Britannica. Encyclopaedia Britannica Online Academic Edition*, 2015, available at: <http://www.britannica.com/EBchecked/topic/128386/common-law/280077/Public-law?anchor=ref1023189>, last accessed 30 September 2015.

7. HARTMUT MAURER, *Allgemeines Verwaltungsrecht*, 16th ed., München, 2006, p. 49, referring to the Roman jurist Ulpian’s famous expression: “Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem”.

emerged, in which public law is characterized by a hierarchy between the state and the citizens; whereas private law is characterized by equality between the individuals. Public law works through directives and orders whereas “the” private law works through contracts.⁸ A final theory distinguishes formally between law directed at the state (when it is acting in its sovereign capacity) and private law, which is directed towards “everyone” (including the state when acting in a “private capacity”).⁹ Public international law is traditionally concerned with the inter-state relations and therefore states, or institutions set up by states are its habitual subjects. Activities by the latter in an international context are considered public (or more precisely – sovereign) acts and under certain circumstances they crystalize into public international law.¹⁰

However, these distinctions only apply to certain legal systems in particular contexts, and as will be outlined below, even within systems that once provided rather clear distinctions borders are blurring. In many states, public law fields such as administrative law have been supplemented by an array of different instruments often inspired by or following private law examples (e.g. administrative contract, public private partnerships, etc.).¹¹ In international law there was not only an expansion of subjects of international law but also did traditional subjects start to adopt or be subjected to private law instruments.¹² Thus, in the current context it is becoming more and more difficult to provide a distinction based on one of the more state-centered theories just outlined.

Nonetheless, political scientists and in particular international relation scholars have generally accepted the dichotomies found in the legal scholarship. As Jaqueline Best and Alexandra Gheciu have observed, there is a tendency in literature on global governance, private authority, public sphere, and public goods towards an input-driven, fairly determined distinction of what constitutes a public and what a private act and actor. To some degree this prevalent distinction is comparable to the “subordination” (and a narrower formalist) approach. Best and Gheciu take issue with this approach:

8. Ibid.

9. Ibid., pp. 49-50.

10. See Article 38 (1) ICJ Statue, and for a more detailed overview MALCOLM NATHAN SHAW, *International Law*, 6th ed., Cambridge, 2008, pp. 69ff.

11. See examples in the new governance literature, e.g.: See IAN AYERS / JOHN BRAITHEWAITE, *Responsive Regulation – Transcending the Deregulation Debate*, New York, 1992; CHARLES F SABEL / JONATHAN ZEITLIN, *Learning From Difference: The New Architecture of Experimentalist Governance in the EU*, in CHARLES F SABEL / JONATHAN ZEITLIN (eds), *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford, 2010, pp. 1 ff.; and CHARLES F SABEL / JONATHAN ZEITLIN, *Experimentalist Governance*, in: DAVID LEVI-FAUR (ed.), *The Oxford Handbook of Governance*, Oxford, 2012 pp. 169 ff.; or ROBERT BALDWIN / JULIA BLACK, *Really Responsive Regulation*, *LSE Legal Studies Working Paper No. 15/2007*.

12. PHILIP C. JESSUP, *Transnational Law*, New Haven, 1956, or see within the framework of GAL literature: NICO KRISCH / BENEDICT KINGSBURY, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, *European Journal of International Law*, 17, 2006, pp.1 ff.

The literatures [...] all exhibit certain similar weaknesses. Each tends to treat the public as a coherent space or site, thereby reproducing the liberal tendency to think about public/private as ontologically separate domains of social life, marked by their distinct (pre-given) logics and associated with specific institutional locations.¹³

There are several problems with such a formalistic approach: First, it does not acknowledge the specific (historic) context in which these distinctions emerged. A public private distinction which focuses strongly on state pedigree was also “socially constructed” and was also at the time of its emergence “subject to contestation”.¹⁴

Second, it fails to take account of complexities, especially those found in a fluid and unsettled sphere such as the transnational context.¹⁵ As I will discuss below, one actor can serve a private and public function at the same time or can start out as clearly privately oriented only to find out that there is also a public component to its activity.¹⁶ Formalistic distinctions which evolved out of a specific context fail to describe these situations and therefore should be abandoned in favor of the more flexible approach outlined in the next section.

However, before getting there we shall look at some of the GAL literature and identify how the public private divide is conceptualized there. The GAL project starts from the premise that “much of global governance can be understood and analyzed as administrative action”.¹⁷ Global administrative law can therefore be defined as

“[T]he mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”¹⁸

13. See JAQUELINE BEST / ALEXANDRA GHECIU, *Theorizing the Public as Practices: Transformations of the Public in Historical Contexts*, in: JAQUELINE BEST / ALEXANDRA GHECIU, *The Return of the Public in Global Governance*, Cambridge, 2014, pp. 15 ff., at p. 25.

14. Ibid.

15. Cf. for instance Calliess and Zumbansen’s discussion on GILLIAN HADFIELD’s article (Privatizing Commercial Law, *Regulation*, 2001, pp. 40 ff.) where she makes the claim that the legal system can be divided into its economic and its “justice” function, one which can be administered privately, whereas the other functions should maintain with the state (GALF-PETER CALLIESS / PEER ZUMBANSEN, *Rough Consensus and Running Code – A theory of Transnational Private Law*, Oxford, 2012, pp. 87 ff.).

16. See particularly Section 3 and see also STEVEN BERNSTEIN, *The Publicness of Non-State Global Environmental and Social Governance*, in: JAQUELINE BEST / ALEXANDRA GHECIU, *The Return of the Public in Global Governance*, Cambridge, 2014, pp. 120 ff., at p. 122.

17. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, *The Emergence of Global Administrative Law*, p. 17.

18. Ibid.

Benedict Kingsbury thus identifies three broad categories of Global Administrative Law: The first one is what in national law would be called “constitutive administrative law”; it refers to “the institutional design, and legal constitution of the global administrative body”.¹⁹ The second category comprises “norms and decisions” by the administrative bodies, thus comparable to substantive administrative law in the national context. Finally, there is procedural global administrative law which regulates the conduct of global administrative bodies, and which more or less comprises the “mechanisms, principles and practices” of the earlier definition just outlined.²⁰

The question relevant for this paper is whether formally private actors qualify as global administrative bodies, capable of producing GAL? In the GAL literature the answers to this question are to a certain degree ambivalent. On the one hand forms of “private ordering” are readily included into the “global administrative space”²¹. Thus, Benedict Kingsbury, Nico Krisch and Richard Stewart state that:

“In national law, [...] private bodies are typically treated as clubs rather than as administrators, unless they exercise public power by explicit delegation. But in the global sphere, due to the lack of international public institutions, they often have greater power and importance. Their acts may not be much different in kind from many non-binding intergovernmental public norms, and may often be more effective. We cautiously suggest that the margins of the field of global administration be extended to the activities of some of these non-governmental bodies.”²²

This indicates a rather flexible understanding of what a global administrative body and an administrative act is. Of particular importance are the reasons they name for the inclusion of private regulators within the GAL scheme: First, the absence of public institutions in many issue areas; and second that the acts originating from private regulators might not be much different than public ones and sometimes even more effective.²³ Private actors, in other words, are functionally equivalent to public ones in the global realm. Yet, they also caution that this comes with “[s]ignificant normative and practical problems”.²⁴ When developing the concept of law in GAL Kingsbury therefore shows reluctance to entirely abandon a formalistic distinction between public and private based entities. Rather, he argues that for “private ordering” to amount to GAL there has to be a linkage to “public institutions”.²⁵ In the following it will be argued that by adopting a practice-based approach towards a definition of the public, GAL can integrate private actors and their activities more easily and more flexibly. This

19. BENEDICT KINGSBURY, The Concept of Law in Global Administrative Law, *European Journal of International Law*, 20, 2009, pp.23 ff., at p. 34.

20. Ibid.

21. BENEDICT KINGSBURY, The Concept of ‘Law’ in Global Administrative Law, p. 25.

22. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, The Emergence of Global Administrative Law, p. 23.

23. Ibid.

24. Ibid.

25. BENEDICT KINGSBURY, The Concept of ‘Law’ in Global Administrative Law, p. 57.

might also help to overcome some of the normative problems linked with their inclusion.

2.2 Towards a Practice-Based Approach and the Advantages of a Fluid Understanding of the Public Private Divide in Global Governance and GAL

As an alternative to the more formalist public private distinction just depicted, a “practice-based approach” is suggested here. There are particular merits of this approach: As outlined in the previous section, the transnational sphere is fragmented and lacks an overarching framework. There is no world government. Actors that set out to regulate aspects of “global” life are founded by and relate back to a treaty (in the case of international organisations), to private contracts, or to some kind of even less formal understanding. Governance is then not exercised within a fixed framework, but in many different forms. Many organisations, public or private, are active in a particular issue area, and do not govern over a territorial domain. This division, often described as functional differentiation,²⁶ also affects the ways in which political authority is distributed.²⁷ Against this background, the common approach of seeing (at least political) authority as being synonymous with state-based authority is problematic. Here, a practice based approach can be of help.

Practices are “knowledge-constituted, meaningful patterns of socially recognized activity that structure experience and that enable agents to reproduce or transform their world.”²⁸ In the context of international relations they have been defined as consisting of five characteristics: A practice is a performance (1) which is patterned in the sense that “it exhibits certain regularities” (2), it is “competent in a socially meaningful and recognizable way” (3) it rests on background knowledge (4) and finally brings together the “discursive and material world” – “[p]ractice typically is enacted in and on the world, and thus can change the physical environment as well as the ideas that individually and collectively people hold about the world”.²⁹ As such practices are public when they “are recognized by the community in which they are carried out as being of common concern” and are enacted “on behalf of the common (rather than a particular) interest.”³⁰

Thus, social recognition by the concerned communities is decisive in evaluating a practice as public and in putting it in context. Yet this recognition does

26. Cf. NIKLAS LUHMANN, *The Differentiation of Society*, New York, 1982; see also ANDREAS FISCHER-LESCANO / GÜNTHER TEUBNER, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Michigan Journal of International Law* 25, 2004 pp. 999 ff.; GÜNTHER TEUBNER, ‘Global Bukowina’: Legal Pluralism in the World Society’, in: GÜNTHER TEUBNER (eds), *Global Law without the State*, Dartmouth, 1997, p. 3.

27. Cf. NICOLE ROUGHAN, *Authorities: Conflict, Cooperation, and Transnational Legal Theory*, Oxford, 2013.

28. JAQUELINE BEST / ALEXANDRA GHECIU, Theorizing the Public as Practices: Transformations of the Public in Historical Contexts, p. 26 italics omitted.

29. EMANUEL ADLER / VINCENT POULIOT, International Practices, *International Theory* 3 (2011) pp. 1, at pp. 6 ff.

30. Ibid., p. 32.

not stand isolated. It happens in a “wider social context of meaning, or social structure that produces expectations around public authority in the issue area.”³¹ Thus, even though the determination of what is of common concern and thus public depends on social recognition, such recognition is not entirely arbitrary, as it is based on wider background knowledge. Communities assess and evaluate practices in line with what they recognize as common patterns in their domain.³² Important to mention in this context is also the connectedness of different issue areas and domains. Thus, most communities are facing multiple claims of authority with regard to distinct issue areas or geographical location, etc. This structure constitutes a venue to adapt and harmonize expectations. Thus, when faced with a practice in one issue area that very much resembles the practice that in another area is considered public, addressees might align their understandings of both regulators, such as that both are considered as public. In this then also lies a transformative potential.³³ As such practices are “empowering actors that in other contexts might be considered private into public authorities subject to similar legitimacy demands as pre-constituted public authorities like governments.”³⁴ For example, private food safety regulation like GlobalGAP would only be considered public because communities affected by its regulation identify the latter’s practices with those they are used to seeing from state regulation.

To summarize this section, rather than providing general and fixed public private divide, what is opted for here is a broader and more contextual distinction which takes into consideration particular societies in specific settings. It is not wed to a specific distinction made at one point in time, but rather leaves room for innovation and transformation, a vital requirement for understanding of global law. Nor, however, is it arbitrary because it is based on the recognition of the relevant audience which will base their assessment on the wider context they are located in.³⁵

Using a practice-based approach to establish distinctions between public and private actors and acts is also useful in the context of GAL. First, as pointed out in the foregoing section GAL is open to moving beyond the formal public private distinction and to including actors and their activities that are not directly tied to the state in the field of global administration.³⁶ From a more theoretical point of view, a practice-based approach aligns the actor level with the question of what constitutes law in GAL and thus makes it conceptually more coherent. Kingsbury in his paper on the concept of law in GAL has adopted an amended version of

31. STEVEN BERNSTEIN, *The Publicness of Non-State Global Environmental and Social Governance*, p. 129.

32. EMANUEL ADLER / VINCENT POULIOT, *International Practices*, p. 18, stating: “The performance of practices in socially recognizable ways is the source of ontological stability in social life”.

33. Ibid. “Practice-qua-performance is a process; change, not stability, is the ordinary condition of social life”.

34. STEVEN BERNSTEIN, *The Publicness of Non-State Global Environmental and Social Governance*, p. 129.

35. EMANUEL ADLER / VINCENT POULIOT, *International Practices*, p. 7.

36. As seen in the foregoing section for taking this step, Kingsbury, Krisch and Stewart are using a justification which is very similar to the practice based approach just outlined. See above section 2.1.

Hartian positivism, based on social practices, sources of law, and recognition.³⁷ He also acknowledges that such recognition does not have to be globally valid but that “there may well exist [...] different rules of recognition within different social-institutional-sectoral groupings in specific areas of global administrative law”.³⁸ Thus, for the question of what constitutes law in GAL, Kingsbury is adopting a practice-based approach which is to some degree pluralistic. Going beyond Hart, Kingsbury furthermore requires the element of “publicness” as “a necessary element in the concept of law under modern democratic conditions.”³⁹ Publicness is thereby defined as “the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.”⁴⁰

We can apply the same standards used by Kingsbury to identify law in GAL to determine which actors are addressed by GAL and which create it. This can be achieved by using a practice-based approach to define public actors and public actions in global governance. This approach emphasizes and strengthens the publicness requirement rather than limiting it as Günther Teubner does, who is criticized by Kingsbury for shifting “practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that is barely accessible to civil society or even to most of the educated elite.”⁴¹ Here the opposite is the case, rather than using formal “private orderings” as a reason to conceptualize law in a way that it does not contain any requirements of publicness, the public nature of the practices and goals of “private entities” lead to a reconceptualization of these acts and actors as public. As such “formally” private actors can be understood as global administrative bodies and subjected to procedural GAL claims and the publicness requirement if their practices call for it. In line with what was said above, such reconceptualization does take place in an organic manner through reassessment and recognition by the concerned communities. Thus, GAL principles are not necessarily directly applicable, or even enforceable within the specific sector (e.g. food safety). It is the individual communities that start reassessing practices of a ‘private’ actor, comparing it to other forms of political authority they are faced with, and deciding that its practices amount to common concern. At that point they might require higher legitimacy standards and demand the implementation of publicness requirements as provided for by GAL. Thus, when GlobalGAP started regulating food safety in a manner that resembled trade regulation as usually exercised by states; or when its regulation provided hardship on small farmers to a degree that it impacted their economic survival, voices demanding increased publicness considerations also became stronger.⁴² At the same time regulators aiming to enter domains of

37. BENEDICT KINGSBURY, *The Concept of ‘Law’ in Global Administrative Law*, p. 29.

38. Ibid. p. 30. See also NICO KRISCH, *The Pluralism of Global Administrative Law*, *European Journal of International Law*, 17, 2006, pp. 247 ff.

39. BENEDICT KINGSBURY, *The Concept of ‘Law’ in Global Administrative Law*, p. 31.

40. Ibid.

41. BENEDICT KINGSBURY, *The Concept of ‘Law’ in Global Administrative Law*, p. 55.

42. See below and also ibid. p. 31, who states: “typically, compliance with publicness considerations becomes more and more important in determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met, the more doubt there

common concern might want to adopt practices that would solidify their public authority. This can be done by adopting practices usually exercised by public actors. GAL, as will be outlined in more detail below, is helpful because it provides a blueprint of what is already “*generally* understood as intrinsic to public law”.⁴³

Admittedly, this approach can face significant difficulties regarding its application in practice, as it might be rather difficult and even affected communities might not always be successful in determining whether something is of “common concern” or not. Yet, as stated above GAL can play a useful role in this process: It can first provide indicators to determine whether common concerns are at stake and second it can provide tools for different types of actors to create public practices to respond to these concerns. In the next two sections this development will be depicted by looking at GlobalGAP, a private, industry-based food safety regulator.

3. Globalgap – Food Safety Regulation And The Public Private Dichotomy

3.1 Changes in Food Safety Regulation over Time

For the longest time food safety was regulated privately. However, in the mid-19th century a shift took place to public food safety regulation, with governments, or more precisely various government departments being responsible for inspection, safety determination, and its assurance to the public.⁴⁴ Yet, the demand for transnationally uniform standards that would lead to a reduction of transaction costs and a better prevention of market failures increased permanently.⁴⁵ Finally, starting in the early and mid-nineteen-nineties another shift took place, this time turning again towards a privatization of the governance of food safety.

One major driver was globalization, which led to a very rapid change of the agri-food system, and in particular to two major consequences: First, it had become increasingly difficult for states to monitor and enforce their standards within supply chains that reached across several borders. Products were placed in supermarkets that came from countries with much different safety standards than those of the country where they finally reached the consumer.⁴⁶ As markets were globalized and liberalized greater responsibility rested on private actors (as well as transnational organizations (such as the WTO or FAO)).⁴⁷ As a result food

is about recognition, the greater the levels of resistance, and the greater the extent to which individuals or other private actors and their basic rights and welfare are affected.”

43. Ibid, p. 30 (italics added).

44. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, p. 356; LOWELL D. HILL, *Grain Grades and Standards: Historical Issues Shaping the Future*, Urbana, 1990; KENNETH C. CLAYTON AND WARREN P. PRESTON, The Political Economy of Differentiating Markets: Facing Reality Inside the US Department of Agriculture, *American Journal of Agricultural Economics*, 85, 2003, pp. 737 ff.

45. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, p. 356.

46. Ibid.

47. Ibid.; LAWRENCE BUSCH / CARMEN BAIN, New! Improved? The Transformation of the

safety responsibility was shifted to the food industry⁴⁸ either by direct regulation or by a change of the liability laws, putting primary responsibility on the supplier of the product, i.e. the supermarkets. Most prominently in this regard is the British Food Safety Act of 1990, as well as respective EU law.⁴⁹ Under these circumstances the industry, and in particular retailers, who according to the new schemes faced primary liability, were urged to set up a regulatory regime that would reduce their liability risk.⁵⁰

Second, globalization led to global oligopolies in retailing, especially in developed countries.⁵¹ As a consequence retailers tried to compete less on price than on quality. This however required direct contracts with suppliers, centralized procurement and in-house brand names. Consequently retailers were confronted with the practical problem of how to effectively rationalize their expanded supply chains and thereby save transaction costs. Due to the emergence of certification systems such as GlobalGAP retailers could standardize products as well as processes. Furthermore, costs of standardization could be shifted towards suppliers since they were to carry the burden of certification costs as an entrance requirement into lucrative markets.⁵²

Last but not least, consumer concerns about the safety of their food led to an increased demand for private food safety regulation. These concerns grew out of a number of food scandals in the early- and mid-nineties.⁵³ Most prominently, mad cow disease shattered the belief that the public regulatory schemes in place ensured safety effectively,⁵⁴ and increased consumer awareness and demands for increased food safety regulation.⁵⁵ GlobalGAP as well as other regimes filled this

Global Agrifood System, *Rural Sociology* 69, 3, 2004, pp. 321 ff.

48. DONAL K. CASEY, Three Puzzles of Private Governance: GLOBALGAP and the Regulation of Food Safety and Quality, *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 22/2009*, p. 8; HUGH CAMPBELL, Consultation, Commerce and Contemporary Agri-Food Systems: Ethical Engagement of New Systems of Governance under Reflexive Modernity, *Integrated Assessment Journal*, 6, 2006, pp. 117, at p. 118.

49. European Parliament and Council Directive 1999/34/EC, 10 May 1999, [1999] OJ L 141/20 included agricultural products within the strict liability regime of Council Directive (EEC) 85/374, 25 July 1985, [1985] OJ L 210/29; European Parliament and Council Regulation 178/2002, 28 January 2002, [2002] OJ L31, 1.2.2002/1 which puts primary responsibility for compliance with food law on the food business.

50. Working Party on Agricultural Policies and Markets; Final Report on Private Standards and the Shaping of the Agro-Food System, AGR/CA/APM(2006)9/Final OECD, 2006, p. 23; DONAL K. CASEY, Three Puzzles of Private Governance: GLOBALGAP and the Regulation of Food Safety and Quality, p. 9.

51. LAWRENCE BUSCH / CARMEN BAIN, New! Improved? The Transformation of the Global Agrifood System.

52. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, pp. 356 ff.; DONAL K. CASEY, Three Puzzles of Private Governance: GLOBALGAP and the Regulation of Food Safety and Quality, p. 9.

53. DONAL K. CASEY, Three Puzzles of Private Governance: GLOBALGAP and the Regulation of Food Safety and Quality, pp. 1 ff.

54. LADINA CADUFF / THOMAS BERNAUER, Managing Risk and Regulation in European Food Safety Governance, *Review of Policy Research*, 23, 2006, pp. 153 ff.

55. DONAL K. CASEY, Three Puzzles of Private Governance: GLOBALGAP and the Regulation of Food Safety and Quality, p. 10; MICHAEL MORAN, Review Article: Understanding the

perceived loopholes by setting up independent private regulation.⁵⁶ Moreover, on top of general safety concerns modern consumers worry about the impact of their own buyer behavior on certain social or environmental developments. Thus, questions of animal welfare, environmental impact, and worker welfare are an additional factor when making the decision for a particular product or supermarket chain.⁵⁷ Retailers discovered private regulation as a “strategic business tool”⁵⁸, aiding them in accessing new markets by providing quality and safety assurance to consumers and by defining a certain niche product or market.⁵⁹ GlobalGAP, as one among several private regulatory systems, proved to be an effective tool for retailers to explore and deploy new markets, restore consumer confidence, and differentiate their products without increasing their own logistical costs dramatically. Yet, importantly it also helped them to live up to the changes in the market environment generally and the duties local and regional laws bestowed on them.

3.2 Short Introduction into GlobalGAP – Its Standards and Governance Processes

a) General Information

GlobalGAP started in 1997 as EUREPGAP and was an initiative by retailers belonging to the Euro-Retailer Produce Working Group (EUREP). “GAP” refers to “Good Agricultural Practice”. Its mission is to “create private sector incentives for agricultural producers worldwide to adopt safe and sustainable practices”.⁶⁰

Over the years a growing number of producers and retailers joined and EUREPGAP and it quickly evolved from a retailer dominated organization to one that has partnerships with producers and consults regularly with consumer groups, NGOs and governments in the developments of its protocols. In 2007 the Board decided to change the name from EUREPGAP into GLOBALGAP to align the name to the globalized membership of the organization. The organization has grown significantly since its establishment. Whereas in 2002 there were only 3889 certified growers in 20 countries in 2015 GlobalGAP standards are now implemented in over 100 countries.⁶¹ Participation in developing countries is ris-

Regulatory State, *British Journal of Political Science*, 32, 2002, pp. 391 ff., at p. 407 who states that a risk society (referring to Beck’s claim that the modern industrial society has created a new magnitude of risks that the individual is not able to separately secure protection from, ULRICH BECK, *Risk Society: Towards a New Modernity*, London, 1992) produces a regulatory society.

56. On its website GlobalGAP states as its mission: Globally connecting farmers and brand owners in the production and marketing of safe food to provide reassurance for consumers. See: http://www.globalgap.org/uk_en/who-we-are/about-us/ (last accessed 30 September 2015); Working Party on Agricultural Policies and Markets; Final Report on Private Standards and the Shaping of the Agro-Food System, AGR/CA/APM(2006)9/Final OECD, 2006, p. 23.

57. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, *Third-Party Certification in the Global Agrifood System*, p. 357.

58. *Ibid.*, p. 356.

59. *Ibid.*

60. See GLOBALG.A.P. - Putting Food Safety and Sustainability on the Map, available at: http://www.globalgap.org/uk_en/who-we-are/about-us/ (last accessed 30 September 2015).

61. See GLOBALG.A.P. History, available at: http://www.globalgap.org/uk_en/who-we-

ing especially quickly. Though the regime was originally developed to regulate the production of fruits and vegetables, it now includes many other food-related standards dealing with crops, livestock, aquaculture, as well as issues such as animal welfare or general chain of custody safety.⁶²

b) Governance Processes: Standard Setting, Certification and Membership

GlobalGAP's standards and governance processes are extensive and complex. Here I can only provide a very rough overview of some of the major themes. Generally, one can distinguish between two levels – the general standard setting level and the certification level. Unlike other private regulatory schemes using certification, GlobalGAP has integrated certification into its regulatory systems. Thus, even though certifiers are independent private bodies they are accredited by GlobalGAP and there is an extensive body of rules governing their activities.⁶³ These rules set the requirements certifiers have to fulfill in order to become and stay accredited by GlobalGAP. It also sets monitoring and sanctions procedures in place to guarantee conformance with GlobalGAP obligations and to handle violations.⁶⁴

Apart from the certification level there are, of course, the food safety standards themselves. They consist of two types – more general procedural standards found in the General Regulations (divided into Part I and II, and IV depending on the type of certification);⁶⁵ and the specific requirements for different types of production, named Control Points and Compliance Criteria.⁶⁶

Standards are developed by the different Technical Committees, the Stakeholder Committees and the Certification Body Committee. The overall responsibility for GlobalGAP lies with the Board which is supported by the Secretariat. In the

[are/about-us/history/](#) (last accessed 30 September 2015).

62. Information taken from the general website: http://www.globalgap.org/uk_en/ (last accessed 30 September 2015); see also OECD, Working Party on Agricultural Policies and Markets, Final Report on Private Standards and the Shaping of the Agri-Food System, 31 July, 2006, AGR/CA/APM(2006)9/FINAL, p. 20.

63. GlobalG.A.P. General Regulations, Part III/Certification Body and Accreditation Rules, English Version 5.0, available at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/150630_GG_GR_Part-III_V5-0_en.pdf (last accessed 30 September 2015) (hereinafter: GR, Part III).

64. Ibid. particularly para 8.

65. The General Regulations regarding the certification process are found in GlobalG.A.P. General Regulations, Part I/General Requirements, English Version 5.0, available at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/150630_GG_GR_Part-I_V5-0_en.pdf (last accessed 30 September 2015); Part II/Quality Management System Rules, English Version 5.0, available at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/150630_GG_GR_Part-II_V5-0_en.pdf (last accessed 30 September 2014); and GlobalG.A.P. Benchmarking Regulations, English Version 5.0, available at: http://www.globalgap.org/export/sites/default/.content/.galleries/documents/150701_GG_Benchmarking_Regulations_V5_0_en.pdf (last accessed 30 September 2015) (hereinafter: GR, Part I, GR, Part II, and GR, Part IV).

66. Information about the individual standards can be found at: http://www.globalgap.org/uk_en/for-producers/livestock/ (last accessed 30 September 2015).

Board and the Technical Committees a 50/50 ratio between producers and retailers is required.⁶⁷ The Stakeholder Committee is set up of a broader range of representatives including NGOs and other non-members.⁶⁸ There are also National Technical Working Groups, whose task is to identify specific local adaptation and implementation challenges and develop guidelines.⁶⁹ As a final remark, it is important to keep in mind that GlobalGAP is a strongly industry-driven organization. Thus, regardless of being a producer or retailer, many members come from big, often globally operating, corporations.

c) How Producers Are Certified

GlobalGAP foresees different certification options: Certification of individual producers (option 1), producer groups (option 2), and the benchmarking of other standards against GlobalGAP's (option 3 and 4).⁷⁰ Before any certification process can take place the producer / producer group has to register and be accepted by GlobalGAP.⁷¹ Each certification process uses "Control Points and Compliance Criteria document" (CPCC) which consists of separate modules that cover "different areas and levels of activity on the production site". These modules are grouped into "Scopes" that cover general production issues, and "Sub-scopes" that are concerned with specific production details. When a "Sub-scope" is certified the relevant "Scope" also has to be assessed.⁷²

The CPCCs are divided into three types: Major musts, minor musts and recommendations.⁷³ The compliance level with major musts has to be 100 %. Minor musts have to be complied with to at least 95 %, whereas recommendations do not require compliance.⁷⁴ Compliance or non-compliance will be marked at each control point. For all major musts and QMS control points evidence (comments) are obligatory, regardless of whether the inspection was conducted by a CB or internally through self-assessment, internal inspections, or audits. The same has to be done with regard to all minor musts that are not met or not applicable. Comments and evidences can include information on the types of documents that were sampled, the workers interviewed, etc. They are site specific and must be included into the checklist to confirm that the assessment was conducted properly.⁷⁵

67. See GLOBALG.A.P. Board 2013 – 2017, available at: http://www.globalgap.org/uk_en/who-we-are/governance/board/ (last accessed 30 September 2015); and GLOBALG.A.P. Technical Committees available at: http://www.globalgap.org/uk_en/who-we-are/governance/technical-committees/ (last accessed 30 September 2015).

68. See Stakeholder Committees (SHC), available at: http://www.globalgap.org/uk_en/who-we-are/governance/stakeholder-comm/ (last accessed 30 September 2015).

69. See The GLOBALG.A.P. National Technical Working Groups (NTWG) -Think Global, Act Local, available at: http://www.globalgap.org/uk_en/who-we-are/ntwgs/index.html (last accessed 30 September 2015).

70. Detailed information about the different certification processes can be found in the respective General Regulation documents: The General Regulations regarding the certification process are found in GR, Part I; GR, Part II; and GR, Part IV.

71. GR, Part I, 4.

72. See for instance at: http://www.globalgap.org/uk_en/for-producers/livestock/ (last accessed 30 September 2015).

73. GR Part I, 6.2

74. Ibid.

75

Ibid.

Within GlobalGAP three types of sanctions exist, warning, product suspension and cancellation.⁷⁶ First, if a warning is issued for any form of non-compliance, the producer will agree with the CB on a timeframe within which he will correct the non-compliance. This can be up to 3 month, depending on when the non-conformity occurs and the impacts (e.g. on workers and consumers) it might have.⁷⁷

If the producer fails to address a problem in the compliance period, a suspension will be imposed. During suspension the producer may not use any form of license, certification or other document related to GlobalGAP for the relevant product. Only the CB or the producer group that issued the suspension can lift it if there is evidence that the non-conformance has been removed.⁷⁸ Suspension can however also be self-imposed by the producer. It can also set the deadline within which it will eliminate non-compliance.⁷⁹

The last available level of sanctions is the contract cancellation. It will be issued in three main cases. If fraud has been discovered, or if there is a lack of trust that the producer complies with GlobalGAP requirements; in case that no corrective action took place after a suspension; or if a breach of contract took place.⁸⁰ The consequences of a cancellation are severe: The producer is prohibited to use any certificate, license, logo, trademark or document that relates to GlobalGAP. Moreover there is a 12 month period within which the producer will not be eligible for certification.⁸¹

To avoid cancellation the producer can either remove the non-compliances or appeal to the CB in writing against the non-conformance. Sanctions will be lifted if the producer can provide evidence that the relevant non-conformance is resolved or the appeal was granted.⁸² It is important to note that appeals are directed at the certifier and not at GlobalGAP. The certifier is supposed to have an appeals procedure in place for this purpose. Only if the certifier does not adequately respond to the complaint the producer can turn towards the GlobalGAP Secretariat using the so-called “Complaints Extranet”.⁸³

4. Private Actors, Public Practices And Authority: Gal In Globalgap

The previous section provided a small introduction into the context under which GlobalGAP emerged and into its main modes of operation. I will now turn to the role which GAL plays in this regulatory scheme and to my main argument that a practice based approach towards what constitutes a public actor and act is a useful also within the GAL framework. Going back to the definition I provided

76. Ibid., at 6.4.

77. Ibid. at 6.4.1.

78. Ibid. at 6.4.2.

79. Ibid. at 6.4.2.1.

80. Ibid. at 6.4.3

81. Ibid.

82. Ibid. at 6.3 and 6.5.

83. Ibid. at 6.3.

in Section 2 on what constitutes a public actor or action when adopting a practice based approach I will look at how GAL helps in understanding what is a common interest (4.1) and secondly how it provides a blueprint actors can use in order to create processes which allow for wider public participation and ultimately increased publicness (4.2).

4.1 GAL as a Requirement for Formally Private Actors which Affect Common Interests

If one takes a closer look at the “potential normative foundations”⁸⁴ of GAL one can see reasons for the importance of also including formally private activities within this framework and for why GAL can help to redefine those activities as public, when applying a practice based approach. Kingsbury, Krisch and Stewart point to three types of normative goals: “internal administrative accountability, protection of private rights or the rights of the states and promotion of democracy”⁸⁵. All of these goals can be relevant to myriad of private regulation as well. In the following I will outline it for the example of GlobalGAP

The purpose of internal accountability is first and foremost a functional one. It is designed to ensure that actors and components of a particular regime perform according to the roles they were assigned and within the legal framework governing them.⁸⁶ Private regimes and in particular GlobalGAP and its certification processes are subjected to such mechanisms. It is of crucial importance for the functioning of the entire regime, since the different stakeholders of GlobalGAP actually have significant financial interests which if not curbed by a strong enough framework constitute a risk for the integrity of the organization as a whole. To prevent irregularities that could stem from these partially conflicting interests, GlobalGAP introduced various measures to ensure conformance with its regime and rules as outlined above.⁸⁷

In domestic environments the second normative concept of GAL – the protection of individual and state rights – requires that any infringement with individual rights is based on a prior hearing, reason giving and the possibility of review. This is a crucial determinant for the publicness of a transnational actor.⁸⁸ The regulatory processes of GlobalGAP (particularly certification) take place on private contractual basis and hence it seems questionable whether such regimes should have any obligations towards individuals outside the contractual regime (privity of contract).⁸⁹ Yet, GlobalGAP goes beyond these relationships. When

84. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, *The Emergence of Global Administrative Law*, pp. 42 ff.

85. *Ibid.*

86. *Ibid.*

87. See the detailed prescription of how the certification process ought to be conducted. See furthermore the integrity regimes BIPRO and CIPRO, and the sanctioning regime in the case of non-compliance, information available at The GLOBALG.A.P. Integrity Program, http://www.globalgap.org/uk_en/what-we-do/the-gg-system/integrity-program/ (last accessed 30 September 2015).

88. See the definition given above in Section 2.2.

89. For a more detailed description of the contractual model see: FABRIZIO CAFAGGI, *Private Reg-*

examining the implications the process has on suppliers and producers a necessity for certain considerations of individual rights could be established: Certification regimes such as GlobalGAP provide market access advantages – in some cases they open new and potentially more profitable markets to suppliers; but in many others they are the only way to ensure access to a market.⁹⁰ Hence, for the economic success or even survival of a business, certification in many cases is crucial. Certification, however, is also costly for suppliers. The huge investments that are necessary in order to fulfill the requirements set out in the standards and to finance the certification process can become prohibitive for small and medium size suppliers.⁹¹ Further problems arise for producers in developing countries, which often have limited access to information.⁹² Western retailers might further require the use of certifiers from industrialized countries, because they view them as more competent than southern based ones. For producers in developing countries this has the consequence of additional high costs (e.g. travel expenses) and a reduced understanding of local specificities.⁹³ In sum, food safety regimes and in particular the certification processes have an extremely high impact on individual producers. These impacts often exceed by far obligations under local administrative law and possibly public international regulation.⁹⁴

The protection of rights of states⁹⁵ is another issue relevant to private food safety regulation and its certification process. In order to receive certification, suppliers have to comply with domestic legislation. This, in itself is not a big threat to the rights of states, and rather seems to foster national legislation. Yet, it creates a link between GlobalGAP standards and domestic laws and regulations. If one further considers the global reach of GlobalGAP one can see how the global regime can put local frameworks under pressure.⁹⁶ And indeed, countries

ulation, Supply Chain and Contractual Networks: The Case of Food Safety, *EUI Working Papers*, 2010, p. 15.

90. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, p. 360.

91. LAWRENCE BUSCH / CARMEN BAIN, New! Improved? The Transformation of the Global Agrifood System, p. 321; YUICHIRO AMEKAWA, Reflections on the Growing Influence of Good Agricultural Practices in the Global South, *Journal of Agricultural and Environmental Ethics*, 22, 2009, pp. 531 ff., at p. 541.

92. H. R. BARRETT, et al., Organic Certification and the UK market: Organic Imports from Developing Countries, *Food Policy*, 27, 2002, pp. 301 ff., at 310 ff.; MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, p. 362.

93. MAKI HATANAKA / CARMEN BAIN / LAWRENCE BUSH, Third-Party Certification in the Global Agrifood System, p. 362.

94. See FABRIZIO CAFAGGI, Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety, p. 3 who states that “there is still some rather controversial evidence that private standards are stricter than those defined by intergovernmental organizations like the Codex Alimentarius Commission”.

95. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, The Emergence of Global Administrative Law, p. 47.

96. See, for instance regarding agricultural related social practices where GlobalGAP states the following: “Legal requirements regarding the control points differ from country to country (e.g. minimum wage, age of legal employment, working hours etc.). Where the requirements are stricter, local legislation overwrites GRASP. Where there is no legislation (or legislation is not so strict), GRASP provides the minimum compliance criteria for a good social management system.” GRASP National Interpretation Guidelines, available at: <http://www.globalgap.org/>

regarded GlobalGAP's regulation as interference with their sovereignty, since they perceived it as exceeding their commitments under the WTO regime.⁹⁷ In summary, GlobalGAP can severely interfere with individual rights and can even be perceived as a threat to state interests.

Lastly, Kingsbury, Krisch and Stewart mention democracy as a normative goal of GAL.⁹⁸ They also make clear that GAL cannot fulfill the same function as national administrative law plays in this regard. Hence, a more "pragmatic" methodology is proposed focusing on the inclusion of affected social and economic interests or even focusing solely on the concepts outlined above.⁹⁹

Admittedly, privately incorporated actors such as GlobalGAP first and foremost cater their members and are therefore not really responsible towards a broader community. Yet, as outlined in the previous paragraphs their reach goes well beyond their members, it can therefore be argued that there is a growing necessity to take regulators such as GlobalGAP out of their club-like structures and connect them with the array of stakeholders they impact.

Is GAL relevant for formally private regulatory schemes? As the foregoing paragraphs showed, it is certainly with regards to GlobalGAP. In turn this should also affect its status as a private actor because what the applicability of the normative goals reflect is the fact that GlobalGAP's regulation is, at least in part, of common concern. GlobalGAP understood its increasingly public role to a certain degree and has implemented some GAL principles into its governance structures. The next part will focus on this and on how much GAL principles can be used to create public processes and ultimately public practices.

4.2 GAL as a Blueprint for Public Practices

Whereas in the last section I looked at the normative goals pursued by the GAL project and their relevance for private regulatory schemes; here I will shift perspective and look at the actual implementation of GAL principles into those schemes. In the sections above I have called this the constructive aspects of GAL. Thus, GAL provides a blueprint for processes and practices that increase participation by a wider public and thus help to create publicness.

Kingsbury, Krisch and Stewart provide a list with the emerging principles of GAL. Among them are procedural participation, reasoned decisions, the possibility of having a decision reviewed, as well as substantive standards such as

uk_en/what-we-do/globalg.a.p.-certification/globalg.a.p.-00001/GRASP/GRASP-National-Interpretation-Guidelines/index.html (last accessed 30 September 2015).

97. There have been official complaints concerning private requirement for bananas with regard to the access European market (complaint was brought forward in the SPS Committee on June 2005 by St Vincent and the Grenadines, supported by Jamaica, Peru, Ecuador, and Argentina (Doc No. G/SPS/GEN/766), as well as the document put forward by the Bahamas (G/SPS/GEN/764).

98. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, *The Emergence of Global Administrative Law*, pp. 48 ff.

99. *Ibid.*

“proportionality, means-ends rationality, avoidance of unnecessarily restrictive means, and legitimate expectations”.¹⁰⁰ In the following the GlobalGAP standard setting and certifications process will be examined in light of these requirements and principles. However a disclaimer has to be made here: As the governance processes of GlobalGAP are comprehensive and complex, GAL principles also find application at numerous points. At this stage I can therefore only provide a rough overview for the reader to gain a general understanding.

Procedural Participation: Responsibility for standard development lies in the technical committees which consist of retailer, producer and associate members (though only retailer and producer member have voting rights).¹⁰¹ They are, not surprisingly, dominated by their industry-based members. As stated above, GlobalGAP also has so-called Stakeholder Committees, which are also involved in the standard setting process, particularly at the preparatory and review level.¹⁰² They consist of a broader set of actors including also NGOs and they are also required to review public input to the standard setting process.¹⁰³ Finally National Technical Working Groups make sure that standards are in line with local requirements.¹⁰⁴ It remains unclear, however, how much input into the standard setting process is obtained from actors (public or private) from outside the GlobalGAP system.

Procedural participation is automatic within the certification process, since GlobalGAP's standards are at least formally voluntarily and any form of certification requires registration with GlobalGAP and the conclusion of a certification agreement between the certifier and the producer.¹⁰⁵ Participation also takes place in almost all stages of the certification process. First, individual producers as well as producer groups have to conduct self-inspections based on the checklist provided by GlobalGAP.¹⁰⁶ In producer groups, participation is enhanced by the Quality Systems Management (QMS).¹⁰⁷ This system requires the producer group to conduct much of the certification requirements independently by first setting up a management structure that ensures that each producer within the group meets the GlobalGAP requirements and second by providing internal auditors and inspectors, who verify the compliance of the QMS with GlobalGAP rules.¹⁰⁸ External auditing and inspections conducted by the certifiers are then

100. Ibid.

101. See Terms of Reference, Technical Committees for the Integrated Farm Assurance Standard V4 Crops, Livestock and Aquaculture available at: http://www.globalgap.org/export/sites/default/_content/_galleries/documents/120814-GLOBALGAP_TC_ToR_Final_Jan12_rev1_en.pdf (last accessed 30 September 2015).

102. See Stakeholder Committees (SHC), available at: http://www.globalgap.org/uk_en/who-we-are/governance/stakeholder-comm/ (last accessed 30 September 2015).

103. Ibid.

104. See The GLOBALG.A.P. National Technical Working Groups (NTWG), available at: http://www.globalgap.org/uk_en/who-we-are/ntwgs/

105. GR Part I 4.2.

106. Ibid. at 5.

107. Ibid. at 5.2.

108. Ibid.

only assuring the correct functioning of the internal management systems.¹⁰⁹

One crucial problem associated with the certification process is, as mentioned above, its impact on small producers in particular of those in the global South. The GlobalGAP certification process introduced a number of measures to meet the needs of such groups. A special certification process for producer groups, allows smaller producers to receive certification as a group and thereby reduce costs for the individual. Through this method they also conduct parts of the assessment themselves, which further reduces costs but also provides them with more experience regarding safe food production.¹¹⁰ Another program particularly targeting producers from emerging country backgrounds is “localg.a.p.”. The goal of this program is to help “producers gain gradual recognition by providing an entry level to GLOBALG.A.P. Certification”.¹¹¹

Reasoned Decisions: Reasoned decisions are a well-developed principle in domestic administrative law regimes.¹¹² According to GR Part I 6.2 certification bodies need to supply comments for Major Musts as well as control points where non-compliance was detected. Thus, reason giving is guaranteed in the certification process and hence, it can be said that the requirements set out by the GlobalGAP regime in this regard also exceed the current international practice of this GAL principle.

Transparency: Transparency, as well as access to information are said to be “absolutely crucial to the promotion of accountability, and to the exercise of meaningful participation and review”.¹¹³ With regard to the certification process of GlobalGAP transparency has to be evaluated acknowledging the specific nature of the contractual regime. Despite the importance the regime has concerning market access and despite its similarities to public regulation¹¹⁴ its certification process is first and foremost a bi/multi- lateral contract between GlobalGAP, the certifier and a producer (group). Hence, transparency regarding individual certification processes beyond the involved actors is limited. However, general regulations that govern the process and the individual standards are accessible on the homepage of GlobalGAP.¹¹⁵ Moreover, GlobalGAP also provides information about the status of certifiers, in particular concerning their compliance

109. Ibid.

110. GR Part II.

111. See localg.a.p. - The Stepping Stone to Safe and Sustainable Agriculture, available at: http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p/ (last accessed 30 September 2015).

112. See, e.g. THOMAS VON DANWITZ, *Europäisches Verwaltungsrecht*, München, 2008, p. 11 ff.

113. BENEDICT KINGSBURY / RICHARD STEWART, Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations, p. 7, available at: <http://www.iilj.org/aboutus/documents/LegitimacyAccountabilityandgal.unatvolumefinalAug82008.pdf> (last accessed 30 September 2015).

114. See above.

115. http://www.globalgap.org/uk_en/index.html (last accessed 30 September 2015).

with GlobalGAP standards.¹¹⁶ Business partners can use GlobalGAP's database to check the current certification status of their suppliers.¹¹⁷ GlobalGAP now also started to open this information to the broader public and has integrated a consumer portal on its website. At the moment, however, this links only to its aqua-cultural program. Consumers can trace the origin of GlobalGAP certified products by using a code to be found on the package of their food products.¹¹⁸

Review: On the standard setting level GlobalGAP as already shown above has a number of bodies which contribute to the standard-setting process, particularly relevant in this regard are the Stakeholder Committees whose task is, among others, to "[review] public input and [make] revisions to the standard drafts."¹¹⁹ Furthermore, also the National Technical Working Groups provide a certain form of review by detecting local implementation challenges and by providing guidelines to overcome those.¹²⁰

On the certification level, GlobalGAP has several instances where review is foreseen. First, the General Regulations prescribe that certification bodies allow producers to appeal their decision.¹²¹ The General Regulations of GlobalGAP do not provide any further details concerning the concrete form of the appeal procedure. These are to be defined in the contract between the certifier and the producer. However, providing an appeal mechanism is also a prerequisite for ISO/IEC 17065:2012 accreditation, which certifiers are required to obtain before engaging into GlobalGAP certification.¹²² In Section 7.1 of the ISO standard requires the certifier to review its own evaluations, to safeguard important documents and to provide appeal mechanisms where impartiality is ensured.¹²³

Furthermore, GlobalGAP provides internal review mechanisms. First of all, as stated before, in case a producer feels that the CB did not adequately deal with its complaint it can address the GlobalGAP Secretariat.¹²⁴

Secondly, GlobalGAP installed an integrity system, called IPRO (Integrity Program), which consists of two pillars – the Brand Integrity Program (BIPRO)

116. See Find Your GLOBALG.A.P. Approved Certification Body (CB) available at: http://www.globalgap.org/uk_en/what-we-do/the-gg-system/certification/Approved-CBs/index.html (last accessed 30 September 2015).

117. See Here's How Buyers Can Benefit From GLOBALG.A.P. Certification, available at: http://www.globalgap.org/uk_en/buyers/ (last accessed 30 September 2015), where it is stated that buyers can "[b]enefit from GLOBALG.A.P.'s traceability system. All GLOBALG.A.P. producers are identified in the GLOBALG.A.P. Database with a unique 13-digit GLOBALG.A.P. number (GGN), which allows you to monitor your producers and validate their certificates."

118. ee GlobalGAP – My Fish – Where Does my Fish Come From? available at: <http://www.my-fish.info/en/myfish/ggnsearch.html> (last accessed 30 September 2015).

119. See Stakeholder Committees (SHC), available at: http://www.globalgap.org/uk_en/who-we-are/governance/stakeholder-comm/ (last accessed 30 September 2015).

120. See The GLOBALG.A.P. National Technical Working Groups (NTWG), available at: http://www.globalgap.org/uk_en/who-we-are/ntwgs/ (last accessed 30 September 2015).

121. GR, Part I 6.3.

122. GR, Part III, 2.1.1 f and 2.1.2 a.

123. See ISO/IEC 17065:2012.

124. See above.

dealing with a misuse of the GlobalGAP Logo; and particularly relevant here the Certification Integrity Program (CIPRO).¹²⁵ Responsibility for this system lies with a special unit within the secretariat. In case of persisting mal-performance the so-called Integrity Surveillance Committee (ISC) can be asked to conduct an overall performance classification of certifiers.¹²⁶ The assessment can be followed by different sanctions of a five step sequel. Step 3 involves the publication of the decision on GlobalGAP's website (CBs will be marked by a yellow card). Step 4 includes temporary full or partial prohibition of certification and step 5 requires contract cancelation.¹²⁷

Substantive Standards: The list of substantive standards provided by Kingsbury, Stewart and Krisch includes proportionality, means-ends rationality, avoidance of unnecessary strict means and the consideration of legitimate expectations.¹²⁸ One might wonder whether such principles are applicable to highly technical institutions like GlobalGAP. After all, the certification process is mainly procedural. However, there have been returning issues particularly regarding proportionality and the avoidance of unnecessary strict means considering the impact of the process for smallholder and southern producers.¹²⁹ Another problem has been the impact of private standards on public policy, an issue that has, as remarked above, already been addressed in the WTO. As has also been pointed out above, GlobalGAP tried to address these challenges by several governance changes. Most prominently were the measures to better include small farmers from developing countries, as well as the creation of National Technical Working Groups.¹³⁰

In summary, what can be observed is that GlobalGAP has spent considerable efforts to implement GAL principles into its governance framework. This, as outlined, often happened after its governance schemes faced critique for negatively affecting certain stakeholder groups or impacting national and international law. However it also shows the relevance of GAL for a formally private actor. In cases where impacts go beyond the actual members and a broader public is concerned, private actors need to adapt their processes. GAL principles thus help actors to create public practices and thus to more appropriately deal with impacts of their regulation on matters of common concern.

125. See GR, Part III, 9.

126. See GR, Part III, 9.2 and CIPRO - The Certification Integrity Program, available at: http://www.globalgap.org/uk_en/what-we-do/the-gg-system/integrity-program/CIPRO/index.html (last accessed 30 September 2015). There are 5 classifications from 1 (unacceptable) to 5 (high level of implementation).

127. See GR, Part III, 9.3.

128. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, *The Emergence of Global Administrative Law*, pp. 40 ff.

129. See above.

130. See above.

4. Conclusion

This Article made the case for using a practice-based approach to determine what constitutes a public actor and a public act within the GAL framework. Such a flexible determination is more appropriate in the global context, which is characterized by the absence of an overarching framework that would have the capability to set more generalizable distinctions. Furthermore it also fits the fragmented and fluid character of the global sphere. With regards to the GAL framework it allows for a better alignment between the question “who are global administrative bodies” and “what constitutes law in GAL”; and thus make it conceptually more coherent.

Using the example of GlobalGAP the paper showed how GAL plays a dual role in the application of a practice-based approach. Looking at its normative goals, GAL provided a useful starting point in determining whether the activities of GlobalGAP stayed within the limits of club-like self-regulation or whether they reached a degree where they became of common concern. Secondly, GAL principles were used by GlobalGAP in order to respond to such concerns and thus to create proper public practices. However, a word of caution is necessary at this point. This article is not claiming that GlobalGAP has turned into a showcase example of a (global) public regulator. It merely points out to the significant impact actors such as GlobalGAP has on common public concerns. Under these circumstances it seems necessary to require compliance with public requirements such as the GAL principles.
