ISS Research Series

Private Standards and Global Governance: In Pursuit of Social Protection throughout the Global Supply Chains

Edited by Junji Nakagawa

ISS Research Series No. 64

INSTITUTE OF SOCIAL SCIENCE UNIVERSITY OF TOKYO

ISS
Institute of Social Science
The University of Tokyo

Private Standards and Global Governance: In Pursuit of Social Protection throughout the Global Supply Chains

(Record of the 95th GSDM Platform Seminar, International Symposium on "Private Standards and Global Governance: Possibilities and Challenges", held at SMBC Academia Hall, International Research Building, The University of Tokyo, 15 January 2018)

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Junji Nakagawa

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Preface

This is the record of the 95th GSDM Platform Seminar, International Symposium on "Private Standards and Global Governance: Possibilities and Challenges", held at SMBC Academia Hall, International Research Building, The University of Tokyo, on 15 January 2018. The Seminar was sponsored by Global Leaders Program for Social Design and Management (GSDM), The University of Tokyo, and it was assented by the Institute for International Studies and Training (IIST).

In the global marketplace of today, private firms, in particular large retailers and consumer goods manufacturers, business associations and NGOs set standards addressing social issues such as environment protection and resource conservation, labor conditions, human rights protection and food safety, and they implement them by making the accreditation with such standards as conditions for the purchase and procurement of goods and services. These standards, coined as "private standards" or "voluntary sustainability standards (VSS)", are playing an important role of global governance, as they promote tackling with social issues throughout the whole global supply chains and complementing domestic regulations of countries comprising the global supply chains. On the other hand, with the rapid increase of private standards, which results in occasional fragmentation of standards, compliance cost of private standards are soaring, to the detriment of, in particular, small-scale producers in developing countries. Accordingly, private standards present us challenges of global governance under which we should aim at addressing global social issues while enhancing fair and inclusive global supply chains.

The symposium focused on the possibilities and challenges of global governance arising from the rapid increase and diffusion of private standards. Experts of international economic law and international economics discussed the possibilities and challenges of private standards for the governance of global economy, in particular the global supply chains, and social issues.

As an organizer of the symposium, let me express my sincere gratitude to the panelists and the commentator, notably to those who came all the way to Japan to join us. Let me also thank Ms. Akiko Goda and Ms. Yuki Lockman of the GSDM Secretariat, who efficiently supported the preparation, organization and the implementation of the symposium, and Mr. Masanori Kobayashi and Mr. Tomohiro

Kaneko of the Graduate School of Public Policy (GraSPP) for their efficient and devoted assistance to the symposium, and Mr. Yasushi Niwa, who supported the publication of this Research Series.

March 2018

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

Panelists and the commentator (in alphabetical order)

Rogerio CORREA is Desk Officer of the Brazilian Platform of Voluntary Sustainability Standards. In this capacity, he is responsible for managing the office of the platform, for the activities related on raising awareness on VSS in Brazil, for the homepage and all other activities connected to the platform and the Brazilian Committee on Technical Barriers to Trade. He is also a Researcher at the Brazilian National Institute of Metrology, Quality and Technology (Inmetro).

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

Steffen HINDELANG is Professor at the Department of Law, University of Southern Denmark. Before assuming this position, he was a Junior Professor at Free University of Berlin. He has written extensively on international investment law, and was legal expert and consultant for the European Parliament, legal expert for the Deutsche Bundestag, for the German Federal Government, for the United Nations Conference on Trade and Development, and others on matters of regulating foreign investment.

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

Kazumochi KOMETANI is Director of International Legal Affairs, Ministry of Economy, Trade and Industry (METI). As a trade lawyer, he has worked for the METI in various capacities, including, from 2008 to 2015, the chief of the international economic dispute settlement division. He has also worked for the WTO Legal Affairs Division.

Junji NAKAGAWA is Professor of International Economic Law at the Institute of Social Science, The University of Tokyo. He has written extensively on international economic law. He is a Co-treasurer of the Society of International Economic Law, and a Chairman of the Steering Committee of the Asian International Economic Law Network. He is also an Associate Editor of the Journal of World Trade.

Fiona SMITH is Professor of International Economic Law at School of Law, University of Leeds. Before assuming this position in 2017, she previously held positions at University of Warwick and University College London. Her research focuses on international trade law in the World Trade Organization (WTO), particularly agricultural trade. She is also Editorial Board member and European Book Review Editor for the Journal of International Economic Law.

Akihiko TAMURA is Professor at the National Graduate Institute for Policy Studies. His research major is international economic law and global governance. Before assuming this position in 2017, he had been working for the Ministry of Economy, Trade and Industry (METI) for over 25 years in various positions in Trade Policies Bureau, among others. He has also worked for the WTO Legal Affairs Division.

Session 1: Private Standards and Global Governance: Legal Issues and Challenges

Junji Nakagawa
Let's start the 95th GSDM Platform Seminar, "International Symposium on Private Standards and Global Governance: Possibilities and Challenges". My name is Junji Nakagawa. I'm a Professor of International Economic Law at the Institute of Social Science, University of Tokyo. I will moderate this symposium.

This symposium is the 95th Platform Seminar of the GSDM. GSDM stands for the Global Leaders Program for Social Design and Management. This is one of the nine Ph. D Course Leading Programs of the University of Tokyo, where students of different majors, from nine graduate schools of the University of Tokyo, including Graduate School of Public Policy, Medicine, Engineering, Agriculture and Life Sciences, Law and Politics, and Economics join and take various courses, workshops, seminars like this, and international projects, and toward the end, will get a credit for the future global leaders, especially for social design and management. This is fairly a brand new program of the University of Tokyo, inaugurated in 2013. However, due to strong supports from a number of faculties including myself from various graduate schools and research institutes within the university, and other supporters, lecturers from outside the University of Tokyo and various financial sponsors, the program has steadily developed and we will celebrate the 100th platform seminar this year.

The focus of today's symposium is on the private standards and global governance. Please let me make a brief explanation or introduction to the theme of the symposium. As you can read from the brochure of the seminar, I put some words on the background of the theme and issues to be discussed for today. As you know, in the global marketplace of today, private firms, private business associations and a number of NGOs set standards addressing social issues such as environment protection and resource conservation, labor conditions of workers, human rights protection, food safety and even animal welfare these days. These non-state actors implement such standards by making certification or accreditation with such standards as conditions or requirements for the purchase and procurement of goods and services traded. These standards are coined as "private standards" because they are not set by governments or other official institutions. They are playing an important role of global governance because they promote tackling with social issues throughout the whole supply chains, which are now getting more and more global. And they are complimenting domestic regulations of countries comprising the global supply chains on such social issues.

On the other hand, the rapid increase of private standards, whose number are estimated to be over several hundreds these days, results in occasional fragmentation, duplication or conflict of standards. And then the compliance and certification cost of such private standards are soaring, to the detriment of suppliers, in particular small scale suppliers/producers in developing countries. In that sense, the private standards present us challenges of global governance, under which we should aim at addressing global social issues while enhancing fair and inclusive global supply chains.

These are the background and issues to be discussed in the course of today's GSDM seminar, "International Symposium on Private Standards and Global Governance: Possibilities and Challenges". The symposium will focus on the possibilities and challenges of global governance arising from the rapid increase of private standards. We are happy to announce you that we gather a small number of very, very strong panelists from around the world.

I will introduce you to the panelists of today according to their alphabetical order. The first panelist is Dr. Rogerio Correa from Brazil. He is the desk officer of the Brazilian Platform of Voluntary Sustainability Standards. Voluntary sustainability standards or VSS is a new naming of private standards, based on their characteristic that they aim at enhancing sustainable development. And he is also a researcher at the Brazilian National Institute of Metrology, Quality, and Technology or INMETRO Brazil. He is from Rio Janeiro. We are happy to announce you that we could pay him a business class air ticket for 20-hour flight. Thank you Rogerio for coming.

And our second panelist is Ms. Yuka Fukunaga. She is a Professor of International Economic Law at the School of Social Sciences at Waseda University. And our third panelist is Professor Dr. Steffen Hindelang from Germany. He is currently associate professor of law at a Faculty of Law of Free University of Berlin. Upon returning from this trip, he will move to his new post, from Berlin to Denmark; Department of Law, University of Southern Denmark as a full professor while holding joint appointment as an Adjunct Faculty and Senior Fellow at Walter Hallstein Institute at the Faculty of Law of Humboldt University, Berlin. He told me that he will not move from Berlin. He is going to commute from Berlin to Denmark, 6- hour round trip train ride. But while on train, maybe he can read and write and think.

Our fourth panelist, who has not showed up yet, is Professor Masahiro Kawai, professor at the Graduate School of Public Policy of the University of Tokyo. And the fifth panelist is Mr. Kazumochi Kometani. He is currently the General Counsel for the International Legal Affairs, at the Ministry of Economy, Trade, and Industry or METI, Japan. In that capacity, he is in charge of dealing with a broad range of legal affairs including the WTO dispute settlement. He has been a practicing lawyer, and he used to be a professor at Law School of Hosei University. And our sixth panelist is Professor Dr. Fiona Smith. She is a Professor at School of Law at the University of Leeds, United Kingdom. Professor Kawai now shows up. She is one of the leading experts of WTO law and private standards on agricultural products.

The seventh and the final panelist is Dr. Akihiko Tamura. He is currently a Professor at the National Graduate Institute of Policy Sciences or GRIPS. He graduated the University of Tokyo and then he joined the Ministry of International Trade and Industry, or MITI, which was later renamed METI. Having worked for the ministry over 20 years, mainly in the field of international trade, he is currently teaching and doing research at the GRIPS. I asked him to make comments on the panelists' presentations of the first session. He will make his comments at the beginning of the second session, because he will have to leave here at around 3:30. These are the panelists of today's symposium.

Now, I would like to start the Session 1 of the symposium. Session 1 is titled "Private Standards and Global Governance: Legal Issues and Challenges". And we have four distinguished speakers, who will make presentations focusing mainly on the legal and international legal aspects of private standards. Our first speaker is Professor Fiona Smith, followed by Professor Yuka Fukunaga, Professor Steffen Hindelang, and Mr. Kazumochi Kometani. Each speaker will have 20 minutes for presentation. In total, 80 minutes for four consecutive presentations. After that I'm afraid that I will take only 10 to 15 minutes for discussion, mainly among the panelists. I am afraid we will be able to collect comments and questions from the floor toward the end of this symposium, namely, at the end of Session 2 due to time constraints. Having said that, I would like to give the microphone to Fiona for her presentation. Her presentation focuses on "Agriculture Standards and Global Supply Chains: A Regulatory Challenge for the WTO". Now Fiona you have the floor.

Fiona Smith
I would like to thank Professor Nakagawa for this very kind invitation to speak to you all today. It's a great honor for me to be here at the University of Tokyo in your beautiful city with such amazing weather. And I would like to thank you too for the opportunity to fly in with an amazing view of Mount Fuji, so that was really fantastic. Thank you to Ms. Akiko Goda and her colleagues for the administrative support enabling me to travel to your esteemed institution. I am grateful for all the help and support I have received.

I would like to speak to you today about agricultural standards in global supply chains and the challenge such standards pose for global governance, particularly in the World Trade Organization (WTO).

As the UN Food and Agriculture Organization (FAO) reported in its 2017 report, *The Future of Food and Agriculture: Trends and Challenges*, food production has undergone significant changes since the 1960s: more land has been turned over to agricultural production, and, together with reliance on improved technology, agricultural production has trebled over the last fifty years.[1] Food production is now industrialized: the small, mixed production, family run farm is giving way to intensive livestock reared in large, indoor barns, and large scale, single-crop production that

[1] FAO, *The Future of Food and Agriculture: Trends and Challenges,* (2017), 4.

relies on chemical fertilizers to increase yield. Even organic foods have not escaped mass production, even though to many consumers, organic food production conjures up images of a small, family farm with limited adverse effects on the environment (FAO, 2017, 106).

Growing urbanization, in both high and middle-income countries, has increased the demand for food - particularly processed food - often purchased from single outlets, like supermarkets, hypermarkets and small convenience stores. For example, the FAO estimates that by 2014, supermarkets distributed 50% of all processed food in upper middle-income countries, and over 75% in high-income countries, like the United States (FAO, 2017, 106). Whilst lower, middle-income countries did not experience the same exponential change in food purchasing patterns, the FAO did record, to 2014, a 27% increase in processed food purchases from supermarkets, hypermarkets and small convenience stores in these countries (FAO, 2017, 106). Regional differentiations exist: for example, purchases of all foods from supermarkets, large hypermarkets and small convenience stores only accounted for 36% of all consumer purchases in Asia, compared to 90% in North America (FAO, 2017, 107).

Growth in food for processing increased demand for large volumes of standardized agricultural products. For example, Heinz only uses specific tomato varieties in its foods, supplied by certain farmers under contract. All agricultural products sent for processing must stay fresh during the food's long journey from the farm to the processor, and on from the processor to the supermarket. Today food - whether it is fresh or processed - is transported long distances into towns and across borders before it reaches its final destination on our plates.

It is difficult to understand the speed, scale and impact of these changes to the way our food is produced, processed and distributed; and the effects our own food choices and purchasing habits have. Scholars, policymakers and civil society approach this challenge from multiple perspectives. One approach, that I focus on in this short presentation, is to see food production, processing, distribution and consumption as points on a chain: a global supply chain that enables analyses of food's journey from farm to fork.

In my paper today, I want to focus on one aspect of the food supply chain. My focus is particularly on the standards used in food supply chains.

Standards are a way to guarantee the safety, quality and sustainability of food produced, processed and transported in global food chains, and to monitor the safety of farm practices, farm and factory workers' conditions and animal welfare. Standards may be public (set by the state) or private (set by NGOs, or private organisations). Private standards may mirror or go beyond public - legally binding - standards in which the production, processing or transportation of food takes place. Equally, and often more importantly, private standards, developed outside the scrutiny, democratic processes and legal framework of the state(s), are designed to protect the brand of the corporation at the head of the value chain (usually the large

supermarket/hypermarket); and/or the named processor for whom the product is grown. Standards have been described therefore as:

"…instruments to codify information and rules, reducing the needs for coordination and communication among actors in supply chains and thereby facilitating 'hands-off' governance 'from a distance'."
(International Trade Centre, *Influencing Sustainable Sourcing Decisions in Agri-Food Supply Chains,* (2016), 11).

I think looking at agri-food standards in global supply chains is a very interesting topic for four reasons. I think the first reason is consumers are anxious about the quality of the food they purchase from supermarkets, hypermarkets, local convenience stores as well as the vending machines commonly seen here in Japan. Globalization of the food supply chain means the distances between the farm and the processor, and between the processor and the end retailer have increased, with the result that it can be difficult to maintain the quality throughout the chain. Standards imposed at each stage along the chain help maintain quality by imposing hygiene standards, labelling requirements to facilitate traceability when problems arise, as well as temperature controls during transportation of semi-processed and processed foods. Standards act as a signal to consumers that the food they purchase is of good quality. Standards can also signal to other users along the chain (e.g. processors) that the produce coming into the processing plant is of good quality. I think maintaining the quality of food is a concern particularly for Japan, as Japan remains a net food importer.

The second reason is that there is interest in standards, particularly private standards, not becoming barriers to trade. One of the difficulties is that when food standards are mandatory, they operate as restrictions on the importation of products. A global supply chain's size means that private standards formulated outside the state can become *de facto* compulsory for suppliers due to the market dominance of the lead corporation at the head of the chain, like the US supermarket Walmart, for example. This means that it is difficult for small producers, particularly in developing countries, to supply into the chain. In these cases, private standards act as barriers to trade. Such private standards formulated away from the democratic processes of the state often raise broader accountability and legitimacy concerns, too.

Thirdly, there is interest in pushing multinational corporations that head up the chains to monitor their supply chains, particularly when the chain is very long. Food safety and food hygiene standards may be imposed through public agri-food standards, but monitoring by supermarket buyers at the head of the supply chain, is a good supplement to formal legal enforcement of safety and quality standards. For example, we experienced problems in the UK recently. In October 2017, 2 Sisters Food Group (2SFG), a major chicken processor and supplier, was found to be operating poor hygiene and food safety standards. UK supermarkets Tesco, Marks and Spencer (M&S) and the German supermarket, Lidl, based in the UK, all sourced their chicken from 2SFG, until undercover footage shot by UK newspaper, The Guardian, and TV network, ITV news, uncovered the issues. Tesco

subsequently put inspectors into one of the 2SFG sites, and all supermarkets stopped sourcing chicken from the company. UK formal regulator, the Food Standards Agency, is also now involved.

These reasons relate to the role standards play in food supply chain governance: standards play a positive role because they impose quality and safety standards; but standards have a negative impact on the chain when they operate as barriers to trade.

However, there is a fourth dimension to food standards in global supply chains that is interesting. Whilst the lead company at the head of the chain may focus on imposing standards along the chain to maintain quality etc., those standards must be sufficiently flexible that other actors further down the chain are still willing to participate in the chain: in other words, the standards cannot be so rigid that they stop companies trading effectively. Although we may raise concerns that agri-food standards - particularly, private agri-food standards - are not adequately regulated, we should be careful how much regulation is put in place in case that regulation stifles, rather than facilitates trade.

My presentation here today is based on a previous study I did with a colleague at University of Leeds, Professor Michael Cardwell. There is a reference on this slide and I can make this piece available for anybody who is interested but what I am presenting today is an expansion of this topic.

Very briefly in my time, I am going to cover three issues in a little bit of detail and then I am happy to answer questions either at the end of the session or maybe we can have a discussion. First, I am going to give some examples of food standards. Second, I move on and say which rules of the WTO apply to food standards in supply chains. And finally, I will end with some reasons why these standards are problematic. I am not able to address the way all WTO rules apply to food supply chains, so I will focus in particular on the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

In this first slide, you can see a typical food global supply chain, ranging, at the start, from input companies, like companies supplying seeds, or fertilizers, for example, through to the farmers, the fresh produce traders, through to the food companies like Heinz; and on to the retailers, finally ending with the consumers at the end of the chain. Food supply chains now cover many different food types, including 'smart foods' that improve health. As the 2016 International Trade Centre's report, 'Influencing Sustainable Sourcing Decisions in Agri-Food Supply Chains,' noted, supply chains as a whole generated over US$600billion total profit for the US economy in 2016.

I want to move on now and look at some of the standards that govern food supply chains. In the time I have, I cannot do justice to all agri-food standards, but I want to give a few examples. The first is the Codex Alimentarius (the CODEX). The CODEX was created in 1963 as a joint initiative of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) as part of the International Food Standards Programme. CODEX is the world's preeminent standard setting body,

setting standards to protect human health and facilitate trade in food. Its standards are based on expert scientific advice and consensus; its General Principles and the Food Code are designed to facilitate elaboration and the establishment of definitions and requirements with a view that harmonized standards may be agreed. CODEX standards are advisory and only become legally enforceable when they are directly incorporated into national law. CODEX has 189 members (188 states and one member organization, the European Union), and its membership represents about 99% of the world's population.

CODEX is the most important of the agri-food standards because where a state bases its sanitary and phytosanitary measures on CODEX standards, its measures are deemed to be in conformity with the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement, Article 3.2). Another reason that CODEX is important is because reliance on CODEX as an international standard is reducing the proliferation of private standards and as a consequence, reducing trade costs for companies in the global food supply chain.

The second standard I want to talk about is GlobalGAP. GlobalGAP began as a European initiative in 1997 and was a food retailer initiative from the Euro-Retailers Produce Working Group. Retailers, who were working with supermarkets, became aware of consumers' concerns regarding product safety and the impact on health safety and welfare of workers and of animal welfare. The solution was to create the industry's own standards and an independent certification scheme was developed. EurepGAP, as it first was, was a certification scheme based on "good agricultural practices" or GAP. European standards started to become more important and more widely adopted throughout the world through supply chains, especially for those global companies supplying into European markets, and so in 2007 EUREPGAP changed its name to GLOBALGAP.

As you see from the slide, GlobalGAP is very widespread in terms of the products it certifies, the producers that adhere to the standard and the country reach. It has over 18,000 inspectors under 154 certification bodies under its administration. It's a major standard. It has three tiers of standard, two focused on developing countries that can be tailored to those countries and then the main GlobalGAP standard.

Just going back to this slide, GlobalGAP is used by suppliers in the lower and middle parts of the supply chain, that is, it applies as between farmers and processors and between processors and food retailers. GlobalGAP is not designed to be domestic consumer-facing. It's rare for the consumer to be able to tell whether GlobalGAP standards have been adopted because there is just a "GG" on the barcode of the product. GlobalGAP is much more about signaling quality to the processor and the retailer, than signaling quality to the domestic consumer.

My next example, is the UK based standard, Red Tractor. This standard is a consumer-facing standard and is run by a small, not-for-profit company. Red Tractor was created in 2000 by the UK food industry to signal food

quality, food safety, traceability, animal welfare and the environmental impact of the product to the ultimate consumer of the product. Red Tractor, the company, sets farm standards, supply chain standards and fresh crop protocols. Accredited companies can use the Red Tractor label on their products, but those companies who do not comply with the standards, can have their certification removed. This label you can see on the slide is prominently displayed on any products that have reached the Red Tractor standard. The Red Tractor certification is used as a marketing tool, with the consequence that those products that meet the level are able to charge a premium on their products.

I want to move on now and highlight a wholly private standard. Marks & Spencer, or M&S, is a UK domestic brand I think many people may have heard of here in Japan. I mention it as my example of a user of private standards, because M&S was founded in 1884 in Leeds, which is the city where my university is located.

M&S has a significant international turnover of £10.6billion (as at 2017). It has over 979 UK stores and 450 stores abroad. M&S has a very strong ethical and sustainability agenda, which it imposes throughout its supply chain. M&S identifies itself as a food specialist, rather than a food retailer. The standards imposed throughout its supply chain are designed to keep products safe, legal, high quality, whilst "respecting planetary boundaries and need for social equity." A key aspect of M&S' standards is also to maintain M&S' brand integrity and customer trust.

My final example of an agri-food standard, is what might be described as a 'hybrid standard' - that is a mixture between a public and private standard. In a conference two weeks ago, the UK's Secretary of State for the Environment and Rural Affairs, Michael Gove, made an announcement, which I have outlined on this slide, that I want to share with you today as I think it might be of interest to colleagues.

Michael Gove announced that he is seeking to put in place a meta-standard: in other words, he plans to create a single set of standards that will apply to the UK that will bring together existing global standards on agri-food production, like CODEX, with other standards, like GlobalGAP, Red Tractor and perhaps private standards, where possible. The UK government then plans to put in place a certification process. This certification process will be very similar to the EU certification process for the sustainability criteria in biofuel. What this will mean is that there will be a greater link between the private and industry standards and the state because the quality in the standards and the type of standards will be guaranteed by British legislation.

Moving on to the second part of my presentation, the application of the WTO rules to standards in food supply chains. I am going to be focusing particularly on three agreements: the SPS and TBT Agreements that I have mentioned earlier, and also the General Agreement on Tariffs and Trade (the GATT). We can talk a lot about the WTO rules, particularly the difficulties caused by private standards, like GlobalGAP, when they are a required standard for goods supplied as part of a government procurement contract and the compatibility of those standards with the WTO Government

Procurement Agreement (GPA). However, I want to leave that problem aside for today. There are three other agreements in particular that impact on standards imposed through the food supply chain: first, the SPS agreement regulates government measures whose purpose is to protect food safety, or animal or plant life or health from a set of specific risks. The government has a right to regulate in these areas, but this right is subject to the government showing that these measures - the SPS measures - are based on sound science and an appropriate risk assessment. Second, the TBT Agreement, is very much focused on measures designed to signal to consumers the general quality (not safety) of food, the impact that food production has on animal welfare (wellbeing, rather than health), the sustainability of agricultural production and processing, together with the sustainability of food's transportation from farm to fork. The final agreement on this slide is the General Agreement on Tariffs and Trade (the GATT). It is an agreement that governs all these areas. One thing that is important to note is that in the second *US-Tuna II* arbitration in October 2017, the panel found that if a government measure complied with Article II (1) of the TBT Agreement, this will also mean that the government measure complies with the GATT, specifically Article XX GATT.

As many WTO Agreements seem to cover standards applied through the food supply chain, which agreement should be applied? Essentially, the distinction is that unless the purpose of the measure is to protect food safety or animal or plant life and health from a particular set of risks, then the TBT agreement applies. Private standards raise several issues for the WTO rules so, for the remainder of the presentation, I will focus on this issue giving examples of challenges particularly in the context of the TBT Agreement.

Our first challenge is whether WTO rules will actually apply to private standards. What's been made very clear - and we had a very interesting discussion over lunch about this - is that WTO rules only apply as between. This is made clear in Article II (1) of the Marrakesh Agreement Establishing the WTO. And as we know from Articles 11 and 12 of the Marrakesh Agreement, only states and any independent customs territory "possessing full autonomy in the conduct of its external commercial relations" can be members of the WTO. This seems to completely exclude private corporations' activities - including standard setting - from the scope of the WTO rules' application. However, the position is not so clear. In the famous *Japan-Film* case back in the 1990s the panel said that it is very difficult to draw a bright line - a very clear line - between government activity and corporate activity and that in certain cases corporate activity can be "attributed to the state." The panel in the *Japan-Film* report said for the corporation's activities to be attributable to the state, there must be either some connection to, or endorsement of the activities of the corporation by the state.

One of the things that the panel in that case pointed to as indicative of the right connection between the state and the corporation, was whether the activities undertaken by the corporation were of a governmental character. In the context of agri-food standards, activities like, for example, approving certain corporations' standards through the certification process of a hybrid meta-standard of the kind proposed by Michael Gove in the UK, may mean

those standards are sufficiently close to the activities of government in so far as they are endorsed by the government. To the extent that the UK's proposed hybrid meta-standard scheme includes approval of the monitoring function of some standards like GLOBALGAP, and possibly the Red Tractor standard, these standards may also be caught in principle by the WTO rules. The only problem with the "attribution" test from *Japan-Film* is that attribution of an action to the state normally occurs only when there has been a positive delegation of government function. It has to be government actively delegating responsibility to the private sector, so incidental or coincidental delegation to private standard setting bodies would not be included. This may also mean that wholly private standards, like those of M&S, may not be included because the link between the government and the corporation in the setting and monitoring of standards, may be too remote.

The second problem is that private standards are often used to indicate the inherent quality of a product, like, for example, food's production method, including the welfare of farm animals during rearing and processing. WTO rules historically have only regulated products, not their production process. For example, WTO rules treated tomatoes imported via air transport as "like" tomatoes grown within the state, even though the environmental impact of the tomatoes imported by air have a greater impact on the environment than those grown locally. To the extent that a government sought to regulate the volume of tomatoes imported by air and not domestic tomatoes, this different treatment would result in a violation of the principle of non-discrimination in the WTO rules. This position has somewhat eased under the TBT Agreement for products, like the tomatoes in my example, that may be required to display a label indicating that they have been air-freighted (and perhaps this principle will also extend where the label indicates, as is the case for GlobalGAP standard, that the meat is from animals reared to high welfare standards). Annex 1.2 TBT Agreement indicates that the TBT Agreement will apply to voluntary standards that provide "rules, guidelines or characteristics of products, or *related processes and production methods*." This point has yet to be subject to litigation at the WTO. However, the equivalent wording for compulsory measures (technical regulations) has been tested through dispute settlement. After the *US-Tuna II* case, if the process by which a product is manufactured leaves a product changed in some way, then that would be sufficient to bring the TBT Agreement into play. For example, for a tomato to be labelled as organic production cannot involve the use of certain chemical fertilizers. Some would argue that the reduced input of chemical fertilizers required for the product to carry the organic label, means that the product is not "like" the non-organic tomato because the nutritional content of the organic tomato has changed as a result of the reduced amount of chemical fertilizer (this argument is controversial). So, the "organic" process leaves an impact on the tomato and therefore the "organic" process would come automatically within the Annex 1.1 (i.e. "technical regulation") definition. More tricky is the case for livestock production and animal welfare. If I have animals that are reared in high welfare conditions that improves their social wellbeing, above merely rearing that sustains their health, will that come within the TBT Agreement? Because the product itself, the meat in this case, is not changed in any way.

U.S.-Tuna II seems to indicate that this differentiation - labelling a product to indicate a "non-product related process" - will come within the scope of the TBT Agreement too even though the product itself is not changed by the process of production.

And what about the information on the certification or label indicating compatibility with the standard that is attached to food indicating its origin, the sustainability of its production, or the welfare of animals reared on the farm for slaughter? The problem here is whether the claims made on such a label amount to an "unnecessary barrier to trade.". For example, some products - like imported products - cannot gain access to some domestic-specific labels like Red Tractor. Article II (2) of the TBT deals with this problem and says that to the extent that such standards in reality are mandatory (in the language of the WTO - the standards would be "technical regulations") - if a supplier wants to supply into the chain, or into the state, those standards cannot be prepared, adopted, or applied in a way that creates an unnecessary barrier to trade. The Appellate Body said again in *US-Tuna II* and then later in *US-Cool* that this meant that the measure (the right to use the label) could not be "more restrictive than necessary to achieve a legitimate regulatory objective." This is a "necessity test" that balances the trade restrictiveness of the measure against the degree of contribution that the measure makes to achieving a particular legitimate objective, like for example, animal welfare, raising consumer awareness of the way food is processed, or environmental sustainability of the food's production.

To the extent that food standards are covered by the WTO rules and are mandatory, several difficulties arise. The first problem is obtaining information about the degree of contribution that the standard makes to the achievement of the sustainability, or animal welfare objective, because companies who certify industry labels like GlobalGAP and Red Tractor, don't necessarily keep this information, and even if the information is available, it may be commercially sensitive and the companies may not wish to make it publically available. The second difficulty is that private standards, like those in the M&S supply contracts, are designed to protect the company's brand. The pro-environmental or pro-animal welfare objectives may be important, but incidental to the standard's function. For the measure to comply with the TBT Agreement, it must be very targeted, so some private standards aimed at brand integrity may not fulfil this requirement.

In my last three minutes, there are a couple of things that I want to say. The WTO panels and Appellate Body are moving towards an idea of calibrating the standard accurately to the level of harm envisaged by the trade measure in the context of the TBT Agreement. I think that it will be much more difficult to establish that a standard designed to signal to the consumer that, for example, meat conforms to high animal welfare standards, or that a product's production has a high nutritional content as these ideas can be contested (particularly by countries who may not accept that improved social conditions for animal necessarily improve animals' welfare). The panel's position in *US-Tuna II Second Arbitration* will require a move towards a form of risk assessment in the TBT Agreement as well as the SPS Agreement. The report went to appeal in December 2017 but at

the current time (January 2018) there remains an uncertainty how the calibration test will be applied going forward.

One final point I would like to say is that private companies are outsourcing the monitoring of their standards to third parties. For example, Marks & Spencer and McDonalds outsourced compliance to FAI, which is a separate company that monitors standards throughout their client's supply chain. As monitoring is outsourced, it will be difficult to trace a direct link from the monitoring company, to the client company and back to the state for the purposes of compliance with "attribution" test where corporate activities can be traced back to the state for the purposes of WTO. The more fragmented monitoring becomes, the more difficult it will be to say that the WTO has any role to play here.

Voluntary standards to all extents and purposes are standards that are wholly outside the WTO. They are voluntary. But as you can see from the quotation here about concerns raised by some developing countries in the WTO's SPS Committee, the point at which an industry standard becomes the norm is the point at which it becomes mandatory. And if you look back to *US-Tuna II* again, the Appellate Body very much focused on the fact that the more mandatory a measure seems to be, the more likely it is to be a "technical regulation" rather than just a simple standard and therefore will be subject to WTO rules.

To conclude: it's very important to think about food standards in global food supply chains. These standards may be set by the state (i.e. they are public standards), but are more often set by private companies away from the democratic scrutiny and accountability procedures of the state. This lack of transparency suggests these standards may lack legitimacy, especially where they operate as barriers to trade. The prevalence of private standards developed by a single dominant supplier means the standards, though private, are mandatory: suppliers from developing countries in particular may find it difficult to comply with these standards, and therefore fail to gain access the supply chain. The WTO rules can bridge this legitimacy gap to some extent as its rules apply to public standards and to private standards where the act of standard setting can be "attributed" to the state. However, problems remain because not all private standards can be seen as activities of the state, and even where standards attributed to the states, the WTO rules may not impact on every problematic aspect. I think WTO rules could help to eliminate some of the problems I have highlighted in my talk, but challenges remain. Thank you.

Junji Nakagawa
Thank you so much, Fiona for your presentation. It was a much informative and very comprehensive presentation that covers the legal aspects of agricultural private standards and the WTO law. Now let me invite our second speaker of this panel, Professor Yuka Fukunaga. She will talk about "Private Standards and Regulatory Cooperation".

Yuka Fukunaga

Thank you very much. As introduced by Professor Nakagawa, I am going to speak about private standards and regulatory cooperation. And the structure of my presentation is as follows. I will start with a brief definition of private standards. And then I will explain what regulatory cooperation is. I am going to focus on regulatory cooperation under two FTAs. One is under CETA, the Comprehensive Economic and Trade Agreement between Canada and the EU. And the other is the regulatory cooperation under JEEPA, the Economic Partnership Agreement between Japan and the EU. And then I will conclude my presentation by discussing how private standards can be dealt with by regulatory cooperation.

Now I start with a brief definition of private standards. As the previous panelists have already discussed some issues of the private standards, I think you have become familiar with the concept to some extent by now. But I'd like to revisit it briefly. Private standards are developed and assessed by non-governmental entities such as NGOs, retailers, and producers. They can be related to any subject. But as Professor Nakagawa has mentioned, many of them are related to social issues such as health, the environment, and labor. And they are not of course legally mandatory as they are developed by non-governmental stakeholders. This [Fair Trade Label on the slide] is just one example of private standards. Perhaps you have seen this label at shops or somewhere else.
There are many benefits to private standards. For example, we as consumers can make a better choice. We can see whether products are produced in a sustainable way, for example. They are also beneficial to producers. Producers can add value to their products by complying with private standards. But there are also concerns. The previous speakers have also mentioned the concerns about private standards. For example, the lack of credibility. We are not sure whether private standards are based on objective evidence. And the problem of fragmentation. As professor Nakagawa and Fiona have mentioned, there is little coordination among private standards.

And what I am going to argue in this presentation is that regulatory cooperation could be a solution to these concerns. This slide is an illustration of how regulatory cooperation works in terms of private standards. Fiona mentioned about a statement by the minister in the UK, who suggested that the government should intervene in the governance of private standards and that there has to be some kind of governmental control over private standards. And that is exactly what I am going to say. There has to be some kind of public governance over private standards. And also, considering the fact that these private standards exist on a global scale, the public governance has to exist on a global scale as well. In my view, the global public governance can be achieved through regulatory cooperation.

Now, I will move on to my second section. What is regulatory cooperation? There are some key features of the regulatory cooperation. First, objectives. I think the regulatory cooperation has three objectives in general. The first objective is harmonization. Well, perhaps you know what harmonization is, but the concept of harmonization is to reduce the differences between different regulations. The second objective of regulatory cooperation is

coordination. Coordination does not seek to reduce the differences as such, but instead, tries to reduce trade restrictive impacts that may be caused by the inconsistent regulations. The third objective, which is not so widely recognized, is convergence. Convergence is quite similar to harmonization, but the difference between them is that, while harmonization basically deals with the differences of the existing regulations, convergence tries to encourage the introduction of new regulations which are compatible with each other. In other words, convergence does not principally address the existing regulations but rather tries to encourage the introduction of consistent regulations in the future. These are the three objectives of the regulatory cooperation.

Then there are some other features in regulatory cooperation. For example, actors. One of the important features of regulatory cooperation is that not just trade officials but also regulatory departments are expected to be directly involved in the process of regulatory cooperation. In addition, stakeholders like producers, retailers and NGOs are also expected to participate in the regulatory cooperation.
And then, frameworks. I have already mentioned this, but regulatory cooperation may happen both outside and inside the FTA context, but what I am going to speak in this presentation is the regulatory cooperation under FTAs.
The timing. In regulatory cooperation under an FTA, what is important is not what was agreed in the text of the FTA, but rather what happens after the adoption of the FTA. Regulatory cooperation is a long-term continuous process that would happen after an FTA comes into force.
The nature. Regulatory cooperation is basically done on a voluntary basis. The parties to an FTA are not legally obliged to cooperate, but simply encouraged to cooperate with each other on regulatory matters.
Finally, the measures. The measures that are directly addressed by regulatory cooperation are governmental regulations. However, considering the fact that private standards are so closely connected to governmental regulations, private standards could also be addressed by regulatory cooperation.
These are the features that are common to regulatory cooperation.

Now, I will move on to the comparison of the regulatory cooperation under two specific FTAs: CETA and JEEPA.

I start with the background of CETA and JEEPA. First, CETA was signed in 2016, and it has been provisionally applied since September 2017. And JEEPA. The negotiations of JEEPA were finalized in December 2017 but the text has not yet been signed.

I am going to make a comparative analysis of the chapters on regulatory cooperation under CETA and JEEPA. CETA is the first FTA which has a comprehensive chapter on regulatory cooperation. And JEEPA. Although I have to say that the chapter on regulatory cooperation in JEEPA is not as ambitious as the chapter in CETA, still there is a rather comprehensive chapter on regulatory cooperation in JEEPA as well.
I also want to mention that there are three chapters in CETA which deal with non-trade concerns. Among these chapters, I will make a few

statements later on the chapter on trade and sustainable development, which could have some impact on the regulatory cooperation under CETA. And again, even in JEEPA, there is a chapter on trade and sustainable development, which could have some impacts on the regulatory cooperation under JEEPA.

I am moving on to more specific issues concerning regulatory cooperation under CETA and JEEPA. Under both CETA and JEEPA, regulatory cooperation is expected to be conducted on a voluntary basis. The parties are not obliged to undertake regulatory cooperation activities, but they are only encouraged to undertake such activities. However, CETA provides that the parties are "committed" to further develop regulatory cooperation. Thus, there is some kind of commitment of the parties under CETA. On the other hand, under JEEPA, the parties are only entitled to propose regulatory cooperation activities. Again, I have to say that regulatory cooperation under JEEPA is less ambitious than regulatory cooperation in CETA.

I have already mentioned the objectives of the regulatory cooperation in general. But I would like to draw your attention to the fact that, in CETA, one of the objectives of regulatory cooperation is to contribute to the promotion of human life, health, and safety, animal or plant life and health and the environment. So, it is noticeable that the contribution to social issues is one of the objectives of the regulatory cooperation under CETA.

Activities. This slide provides some examples of regulatory cooperation activities, which are provided for under CETA. But I limit myself to simply mentioning that there are many kinds of activities that are expected to happen under CETA and JEEPA. I would also like to mention that the scope of information that is expected to be exchanged under CETA is very broad. This may be an interesting point to note.

Next, institutions – under both CETA and JEEPA, an institution is established to manage regulatory cooperation. Under CETA, a regulatory cooperation forum (RCF) is established. Under JEEPA, a committee on regulatory cooperation will be established. Again, there are some interesting features to note about the RCF under CETA. For example, CETA explicitly states that individual regulators, regulatory departments and agencies may be involved in the process of regulatory cooperation under the RCF. In addition, meetings of the RCF will be co-chaired by a senior representative of both parties. On the other hand, JEEPA only states that meetings of the committee will be chaired at an appropriate level by representatives. The provision of JEEPA is not clear about what kinds of officials will be participating in the regulatory cooperation in JEEPA.

Stakeholders. Under both CETA and JEEPA, the parties are not required to consult with non-governmental stakeholders. However, they are at least allowed to do so. Thus, there is a possibility for private parties to get involved in the process of regulatory cooperation under these FTAs.

In this connection, I would like to make a few remarks on the chapters on trade and sustainable development under CETA and JEEPA. What is very interesting for our purposes is that CETA explicitly recognizes the

importance of private schemes. For example, in CETA, the parties encourage the development and use of voluntary best practices of corporate social responsibility (CSR). Also, the parties shall facilitate a joint civil society forum. Even under JEEPA, the parties recognize the importance of contribution of voluntary and private initiatives to sustainability. I think it is very important to note that both CETA and JEEPA recognize the importance of private standards.

To sum up, both CETA and JEEPA provide, to some extent, a comprehensive framework for regulatory cooperation. Especially under CETA, regulatory departments and agencies are expected to get involved in the regulatory cooperation process, and a high level political commitment is assured. Moreover, both CETA and JEEPA encourage regulatory cooperation to address non-trade concerns. And under both FTAs, non-governmental stakeholders may participate in the process.

This is what is provided in CETA and JEEPA.

Now, I am going to try to speculate on what would happen under JEEPA's regulatory cooperation in terms of private standards. For this purpose, I am going to take animal welfare for example.

Very briefly, the animal welfare is about the happiness of animals. And what is important for my purposes is that JEEPA has a special provision on the animal welfare. And the provision states that the parties will cooperate for the mutual benefits on animal welfare matters. It also provides that the parties may adopt a working plan and establish an animal welfare technical working group, exchange information, expertise and experiences. It is expected that the two parties will address the issue of animal welfare under the framework of regulatory cooperation. I would also like to draw your attention to the situations of animal welfare in Europe and Japan, respectively. There is a specific provision in the EU basic treaties, which states that the Union and the member states shall pay full regard to the welfare requirement of animals. In addition, the EU has adapted directives and regulations concerning minimum standards on animal welfare. In the meantime, it is said that the EU has been shifting its emphasis from the adoption of binding public regulations towards the encouragement of private standards. At the same time, awareness is growing that they need to have some kind of public control over private standards on animal welfare.

In Japan, I have to say that the Japanese government and Japanese people are not so keen on the issue of animal welfare but several guidelines on animal welfare have been adopted under the auspices of the Japanese government. Moreover, the JGAP 2017 on livestock and its products was adopted last year. One of the guidelines in the JGAP 2017 addresses animal welfare concerns. Thus, there is a momentum in Japan to create some standards on animal welfare. Given these circumstances, this is perhaps a perfect timing for both the EU and Japan to address private standards on animal welfare under the framework of JEEPA.

Now, my last question is how private standards on animal welfare can be dealt with under JEEPA. More specifically, how would regulatory cooperation

under JEEPA benefit the Japanese government and Japanese stakeholders in terms of private standards on animal welfare? First, it could help them obtain information on private standards on animal welfare in Europe. It can also help Japanese producers comply with them. In addition, it can ensure the credibility of these standards. It could also help formulate private standards on animal welfare in Japan, which are compatible with the ones in Europe. Finally, it could make animals happier.

In conclusion, I argue that private standards require a certain level of public and global control. And what I was trying to say is that the regulatory cooperation under FTAs may provide such an effective governance framework for private standards.

Well, I don't have time to explore on the World Trading System 3.0 on the slide, but what I wanted to suggest is that this regulatory cooperation may not be just a model for the governance of private standards, but it could also be a model for the World Trading System 3.0. Maybe this is another story. This is the end of my presentation. Thank you.

Junji Nakagawa
Professor Fukunaga, thank you so much for your very concise and beautiful presentation and slides. I enjoyed it very much. Now let me invite our third panelist, Professor Steffen Hindelang. He will talk about "Mapping the Grey Areas, Private, Public Standards Referenced in International Investment Agreements".

Steffen Hindelang
Domo Arigato Gozaimasu. Thank you very much Nakagawa-sensei, dear Junji, for the kind invitation to take part in this most timely international symposium. I am very grateful for the opportunity to contribute and to address this distinguished audience on an aspect of private standards and global governance. The use, function, and legitimacy of private standards in international trade relations has been debated intensively for some time. Just our gathering today demonstrates that there are many issues still worth studying: private standards and the WTO regime; private standards and regulatory cooperation, or private standards and competition issues.

All these are prominent and challenging problems addressed by learned colleagues in my panel today. Compared to these expert contributions, my share to this symposium can only be a more modest one. Describing myself as being relatively new to the field of private standards, I am basically here to learn. I hope though to be able to add a few points to our discussion from a European and a German perspective and to add some food for thought in light of my international investment law and arbitration background.

This having said, for today's talk I task myself to look out for private standards in the field of investment. To begin with, it's not very difficult to identify all sorts of investment related standards. If a certain standard addresses the process of product production or service provision, it may also condition the way I can productively use capital.

Straightforward examples for investment-related private standards include the so-called Equator Principles and the Carbon Disclosure Project.

According to the so-called Equator Principles, banks and insurers can require implementation of management or certification programs as a condition for doing business; that is, before project finance is available. These programs, involving inter alia environmental or social impact assessments, may influence the way where and in which way an investment is made, if requiring external funding.

Under the heading of the Carbon Disclosure Project, institutional investors, representing over US$100 trillion, use data provided by the Project to form their investment decisions. Measuring and reporting environmental data becomes, thus, important for those companies which want to present themselves as potential targets for investors relying on data from the Carbon Disclosure Project.

These private standards may impact, in one way or another, investment activities. However, there is no legal obligation attached to them. Banks or insurers may or may not subscribe to it.

What I am interested in, in today's talk, is the "legalization" of private standards; that is, private standards which are given the authority of law by states, that is standards turned into legally binding obligations. On that note, investment agreements come into the picture.

With investment agreements, I mean treaties in public international law which deal with the admission and treatment of foreign investment. Traditionally, investment matters were dealt with separately from trade matters. However, lately, negotiation concessions made on trade and investment have been bound together more frequently in one agreement. First, only the admission of foreign investment was added to international trade agreements. Today, comprehensive free trade agreements do not only cover trade and the admission of investment but also the so-called treatment of investment. Treatment means the conduct accorded to foreign investment post-establishment. For example, a foreign investment may be expropriated only in return of compensation. It may not be treated discriminatory and it has to be accorded fair and equitable treatment at all times.

Hence, investment agreements comprise of the "famous or infamous" bilateral investment agreements, much spoken and written about lately, and comprehensive free trade agreements such as NAFTA or CETA.

Now, what kind of rules can be found in investment agreements which incorporate private standards? Or using the term heading my talk: What are these "public-private standards"?

While hardly referred to as such; however possibly a prime example for private standards hardened into law are the investor-state dispute settlement provisions in investment agreements.

The "classical" bilateral investment agreement, until maybe 10 years ago, delegated law-making on investor-state arbitration procedure, to a significant degree, to arbitration institutions such as the International Chamber of Commerce (ICC) and others.

States frequently included in their bilateral investment agreements a dynamic reference to certain sets of arbitration rules from which the investor could freely choose.

Yes, investment agreements also reference procedural rules which were drawn up by intergovernmental organizations, that are the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). However, typically, you also find references to the arbitration rules of the said International Chamber of Commerce, or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), or even the German Institution of Arbitration (DIS), just to mention a few. All these latter organizations are private in nature and are run by businesses.

Within the body of scholarly literature on private standards, much attention has been devoted to the role and function and legitimacy of such organizations as the International Standardization Organization, the ISO, and the "implicit-explicit" reference to its standards in WTO law. We all know, the TBT Agreement requires its parties to '"adopt relevant international standards." In the Code of Good Practice, ISO is explicitly referred as organization producing such standards. Commentators repeatedly expressed concerns that this link may create legitimacy concerns as WTO members would be tied to ISO standards in several ways while decision-making within ISO lacks transparency and sufficient representation of stakeholders.

If compared with the phenomenon of "legalization of ISO standards through WTO law", the case of private arbitration rules referenced in investment agreements seems a considerably more obvious case of "legalization of private standards".

And indeed, in my view, dynamically referencing arbitration rules, developed by private arbitration institutions, raises the question of legitimacy all the more. Besides, also constitutional law issues, at least from a German constitutional law perspective, come into the picture which I shall though not further discuss today.

Back to the legitimacy question: Arbitration institutions are not overly transparent when it comes to the drafting of their arbitration rules. Furthermore, typically only business interests are represented in the governance bodies of the respective arbitration institutions.

If you now consider that procedural rules so created are frequently used to settle disputes between private entities, that are investors, and a sovereign, a state, balancing private property interests and public interests such as

public health or the environment, you may wonder whether there is a sufficient degree of input, throughput, or output legitimacy.

These issues of a possible lack of legitimacy are increasingly being recognized by governments. The European Union, for example, significantly moved away from arbitration rules of private arbitration institutions and, let's see, may eventually abandon arbitration as a mode of dispute settlement altogether.

The link to private dispute settlement standards seems not to be the only connection between investment agreements and private standards though.

Let me turn now to a relatively new trend; that is the reference in international agreements to so-called "global standards" on investment.

The United Nations Conference on Trade and Development (UNCTAD), identified a potpourri, I should say, of "global standards" whose reference may serve as policy instrument to reform international investment agreements.

In this sense, global standards are "multilaterally recognized standards and instruments" which would reflect a "broad consensus on relevant issues" and allegedly "can help overcome the fragmentation between investment agreements and other bodies of international law and policy making."

UNCTAD refers, among others, to the UN Framework Convention on Climate Change; just reformed in Paris lately. You have, furthermore, the 2030 Agenda for Sustainable Development, you have the Addis Ababa Action Agenda of the Third International Conference on Financing for Development and so forth. Surprisingly, the OECD Guidelines for Multinational Enterprises or the OECD Principles of Corporate Governance were not referred to as "international standards" by UNCTAD.

In any event, all the standards mentioned – broadly relating to corporate social responsibility – origin from intergovernmental organizations. However, corporate social responsibility standards may not only be formulated by intergovernmental or governmental bodies.

Private or non-governmental entities also engage in drawing up codes of conduct and other guiding principles which relate to corporate social responsibility. More widely known are the examples of the Forest and Marine Stewardship Councils. Those Councils certify what they perceive as sustainable forestry or fishing businesses. Other sector-specific initiatives are, for example, the Roundtable for Sustainable Palm Oil or the International Council on Mining and Metals.

Now, to what degree have such – private – corporate social responsibility standards been "legalized" in investment agreements?

Consider for example Article 16 of the Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investment. In the said article the parties agree that they

"should encourage enterprises operating within [their respective] territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies".

What could be the potential effect of such or similar openly worded clauses now included in investment agreements?

To start with, these clauses leave tremendous room for investment tribunals to interpret them. It would be at least conceivable that, for example, standards formulated by non-governmental actors such as within the Forest and Marine Stewardship Councils could be perceived as "internationally recognized standards" for the specific business sector. In that case, these standards could be used in diverse ways influencing the scope of investment protection afforded by bilateral investment agreements or free trade agreements.

Of course, as always, everything depends on the agreement forming the basis of a claim, the underlying facts of the case, and the arbitral tribunal itself. One way such standards could creatively be used in investment arbitration, especially against developing countries, is to shield investors from an all-too-sudden implementation of much stricter regulation which go beyond the CSR standards, the host state agreed to encourage businesses to incorporate, as in Article 16 of the Canada Burkina Faso BIT.

Investors could, for example, argue that governmental measures would violate the fair and equitable treatment standard regarding the protection of legitimate expectations if no transition periods for the implementation of a certain stricter-than-CSR environmental standard is provided for.

Also, it's equally conceivable that the implementation of much stricter protection standards, if not backed by scientific evidence, could be perceived as disproportionate, as significantly going beyond business sector CSR standards.

This is one side of the coin. There can be also a quite different way to be conceived in which way arbitral tribunals deal with such private standards.

Consider that a host state in an investment agreement promised to promote CSR standards and completely failed to do so. In consequence, a voluntarily CSR abiding investor suffers loss due to environmental damages such as water pollution or soil contamination affected by other businesses in its host state. In such a situation, mighty lawyers could consider bringing a claim on behalf of the CSR abiding investor on the basis of fair and equitable treatment against its host state for not living up to the commitments taken up in international law.

Be that as it may. Summing up, the examples provided demonstrate, first, how problematic in terms of legitimacy reference to private standards in investment agreements can be. Second, reference to private CSR standards in investment agreements, so far one wanted to see them, seemed to be kind of an experiment and is, thus, burdened with uncertainty.

While governments, the masters of the investment agreements, have started to recognize the problematic role of private arbitration institutions and have moved away from them, the effects of referencing also private CSR standards in investment agreements are yet to be worked out by arbitral tribunals.

Thank you very much for your attention.

Junji Nakagawa
Thank you so much Steffen for your presentation. Although I gave you three minutes but you finished in 30 seconds. Thank you so much for your cooperation for timekeeping. Now let me invite our fourth and final speaker of this panel, Mr. Kazumochi Kometani of METI. He will talk about "Private Standards and WTO/Competition Law". Mr. Kometani now you have the floor.

Kazumochi Kometani
Thank you Professor Nakagawa. It's a great honor to have this opportunity to make a presentation before the great audience and on the topic of private standards. At the outset, I have to make a reservation that I am now working in the government as the General Counsel for the International Legal Affairs. What I am going to say here is solely and exclusively my personal view and not attributable to any organization that I belong to.

Having said that, I start my presentation with the clarification of its scope. I will speak about the two topics today. One is the comparison between the WTO law and competition law disciplines, i.e., those on governmental measures and private standards. And the second topic is the concern relating to the PPM (process and production method) measures, which have been discussed by other speakers as well.

First, I start with clarifying the scope of the discussion. This is private standards. The presentation focused on this topic of course. And in this presentation I mean the private standards by the standards set by private entities including business enterprises or NGOs. The difference in the sectors of the standards is one major difference which distinguishes in terms of disciplines over the governmental measures from the private standards.

Private standards are often classified into regulations and labeling requirements. But in this presentation this distinction will be of no importance because anyway the standards will be required to be complied with for certain purposes. Rather, I think the important distinction is on what aspect of products is concerned by the standards. That is the question of PPMs. Many standards concern a certain quality or characteristic of products such as for the purpose of safety for consumers or nutrition of food or something like that. But other standards concern certain production method or production process of products which are not related to product quality. For example, as discussed in the previous presentations, the private standards for animal welfare may or may not have a bearing on the quality of food subject to the concern.

The concern or subject matter of PPM is outside of the jurisdiction of the home country where the products are used or consumed and therefore consumers who are setters of private standards may not have sufficient knowledge about the problem in the production country. The situation is a bit different from the normal product standards. This may be a concern or a factor which needs to be taken into consideration in considering the disciplines over the private standards.

Having said that, I would like to first talk about what disciplines are imposed on private standards. First, private standards are hardly subject to the WTO disciplines. The WTO agreements or GATT is primarily concerned about governmental measures. For example, the GATT Article XXIII: this set out the kinds of measures which are subject to the GATT. And its paragraph (a) said a failure of a contracting party, that is the country or government, to comply with GATT, and paragraph (b) refers to the application by a contracting party of any measure. Both are governmental measures. Third, paragraph (c) refers to the existence of any situation, which may include actions of private entities. But as you know, concerning this paragraph (c), the jurisprudence has not been developed at all. And in fact dispute settlement has been quite rare and no jurisprudence is there.

It's clear the GATT is almost exclusively concerning governmental measures. And GATS, the General Agreement on Trade in Services has some reference to private actions. Article VIII says that each Member shall ensure that any monopoly supply of services within its territory does not such and such. This is a provision that requires the government of a Member to do something about the action of private entities. Again, this is quite exceptional.

This is also the case with respect to the TBT Agreement. One of the subject measures is technical regulations which must be mandatory. It is stated in the definitional clause of the technical regulations which are subject of the TBT agreement. And in the jurisprudence, mandatory not only means that the measures which force private entities to comply with but also includes the measures which have to be complied with in order to meet with something; for example, to get a subsidy or governmental procurement or that type of thing.

This is a bit different from the notion of normal regulations. But in the jurisprudence, that is included in the term mandatory. But then again, the private standards exclusively set by private standards are not subject to the TBT agreement.

The private standards are rather subject to competition law because private standards are actions or activities by private entities. As you know, that competition law is to protect the competition between the private entities and the restriction of competition is prohibited by the law. The exception of the competition law, a well-known exception is act of state doctrine or other similar theory which is, if private actions are mandated or forced by governmental entities or governmental action itself, they are outside the jurisdiction of the competition law.

In a sense, there is a division of labor between the WTO law and the competition law, of course there is some overlap between them. So, the private standards are subject to competition law, and therefore the question is whether it is justifiable if the two or more competing entities agree on a product standard on a certain matter and thus to restrict products they procure or sell. That's the question. And in this case, it first appears that the private standards, as it means the restriction by private entities on certain aspect of their competition, may be held in violation of competition law.

Then the next question is whether there is any justification available to a private standard if it is intended to promote certain noneconomic objectives. The consumer welfare or animal welfare or consumer safety are nontrade or noneconomic objectives. If the private standards intend to promote these objectives, the question will be whether this element is to be taken into consideration in assessing the consistency of private standards with the competition law.

In this regard there is some jurisprudence in Japan. The Osaka Bus or Airsoft Gun cases, these cases addressed the private standard set by business association to promote allegedly certain policy or public purpose. In these cases, the element of public purpose has been taken into consideration in assessing the legality of private standards. It's briefly said that the court has considered for example some variety of factors including the legitimacy of objectives, rationality of choice of measures, or reasonableness in enforcement. Those facts are taken into consideration whether that the private standards set by the business association are consistent or not.

I would like to briefly speak about this jurisprudence in Japan under the competition law over the private standards, which are acceptable from the global governance viewpoint. The objective of the Japanese competition law is to protect competition and it says that to achieve a healthy and democratic development of the national economy. I mean, the healthy development of competition in the national economy is related to the global governance question or not.

I think one argument is that the optimal use of resources in the global market can be established only on the premise that all national markets functioning well – I mean that the optimal use of resources achieved in any national market. The proper function of national markets is a premise for the global governance or global optimal use of resources. The competition law to ensure that the competition in the national market is functioning properly is the premise for that. Therefore, that proper functioning of competition can be taken into consideration in the jurisprudence in the Japanese competition law will be a good precedent in considering the global governance question on the private standards.

The next question is PPM standards. The private standards – under the WTO agreement, as you know that PPM, some doubts or rather strict judgments have been produced in respect of the WTO consistency of PPM measures such as tuna/dolphin case or shrimp/turtle case or EU seals case.

If we consider why the PPM is considered a bit cautiously, the policy argument has been made in two folds. One is that importing countries, in particular developed countries can enforce or use PPM standards to protect domestic production. The other is that importing countries, in particular developed countries, can force their own standards on the exporting countries, in particular developing countries. The question is whether these concerns are applicable to private standards as well.

The involvement of the foreign governments is no element of private standards, and then the question is whether the private entities in foreign countries are in a proper position to formulate the standards or regulations which are applicable to activities in any foreign country, I mean, a country outside the jurisdiction of the foreign countries. In this instance the consumers may have a similar problem, I mean that the consumers in a country are fully knowledgeable about the situation in their own home market, but they may not be knowledgeable about the economic situation in foreign countries and also do not know what is the best for the foreign country economy. For PPM measures, there may be the problem on informational basis for private entities to set proper regulations. This may or may not be necessary to take into consideration in the discussion or assessment of private standards, in particular, PPM aspects from the competition law viewpoint. I skipped the point – under the competition law the private standards are basically left free because the market competition will select the proper standards from among those set by private entities. Therefore, although it may not be necessary for the government to intervene in the setting by the private entities on private standards but PPM measures, the possible deficiency in the information basis for private entities to set out the private standards may be needed to be taken into consideration. That comparison may be used to formulate the framework for the disciplines over the private standards. Thank you very much.

Junji Nakagawa
Thank you so much Mr. Kometani for your very informative and insightful presentation. Now we have 10 minutes left to wrap up Session 1. As I told you, we have Dr. Tamura as a commentator on this session and he will make comments at the start of Session 2. I am a little bit afraid but I may interfere with the role of Dr. Tamura, but as a moderator let me make a quite brief summary of the four presentations and let me make one general question to all the panelists of Session 1 during the rest of this session.

Frankly, as a legal scholar I learned a lot from your presentations because I am a kind of amateur of private standards. I have been a researcher of international economic law but private standard is a new topic globally and for me personally as well. And I learned a lot that the phenomenon of private standards has been dealt with under WTO law and FTAs, EPAs and even under investment agreements these days. Mr. Kometani presented us an interesting question of domestic law treatment of private standards from the competition law viewpoint. This is a relatively new topic. Also Steffen referred to the German constitutional legal issues on the special private procedural standards of investment arbitration and so forth. This is a phenomenon which has a broad impact on both international law and domestic laws of many countries. I am learning a lot. My simple question

is, to me it seems that you all have one common perspective. I would say that is the perspective of developed countries, consumers or regulators of developed countries. My question is if you are to think this phenomenon from a developing country perspective, especially the small scale suppliers/producers perspective, maybe a bit different picture could be drawn.

And for each of your field of presentation, what type of different picture could be drawn if you deal with this private standards phenomenon from a developing country, small scale supplier/producer perspective? Let me invite answers, reactions to my question in the order of presentation. First Fiona please.

Fiona Smith
I think that's a really interesting point about a developing country perspective. I know there is a report by I think it's one of the German government institutes on this question in agriculture, so it's very timely. I suppose what I would say is from a point of view of developing standards, private standards the developing country farmers could use, this might give them better access to EU markets if those standards are ones that are already recognized or familiar to European consumers and also mandated by the European commission. The costs of implementing those standards may ironically exclude many farmers from EU market as a result. And I take the point of one of my colleagues here that what's good for the European market isn't necessarily good for all overseas markets. Those standards that we might want in Europe may not necessarily be the same. I think it is very important then for developing country farmers to maybe think about what would be an appropriate standard for their produce. That will be a good indicator of quality as a road to thinking about regulatory cooperation rather than adopting a private standard that's already used in Europe. And just one very quick point is we may be overtaken by the whole debate because a lot of the private standards are in very long supply chains into developing countries anyway. So, farmers who want to participate in those chains are already being required to meet these European standards.

Junji Nakagawa
Yes.

Yuka Fukunaga
First, I agree with Fiona that, on one hand, private standards can be a barrier to trade for developing country's producers but that, at the same time, the developing country's producers can add value to their products by meeting private standards requirements. Meeting private standards requirements is a challenge, but also a chance for them to increase the value of their products.

Having said that, I have some mixed feelings about the implications of private standards for developing countries. In this context, I want to point out that many of the private standards related to social issues are rooted in Christianity or maybe the European culture. I think developing countries are hoping that not only developed countries' stakeholders but also developing countries' stakeholders get involved in the development of

private standards and by that way they can be not just a rule taker but also a rule maker in the global trade order. But considering the lack of cultural and religious basis, it might be very difficult for them to be a rule maker in relation to private standards.

Junji Nakagawa
Well, Christianity is an interesting point. Maybe Buddhism also cares for animal welfare but in a different way. Yes, Steffen please.

Steffen Hindelang
We should also consult theologists next time we talk about private standards. Thank you very much also from my side for these presentations here today. I enjoyed them great deal and learned a lot.

Basically – sorry, if I simplify that a bit – I mean standards are instruments of harmonization which allow for economy of scale and reduced transaction costs. And seen over a whole economy, it's great, right. But the cost of harmonization may unequally be distributed. This having been said, I think there is not so much a divide between developing and developed countries, but we have to look at the economic actors themselves. There might be SMEs, in highly developed countries like Japan, which face similar problems, on a different scale perhaps, as producer situated in a less developed country.

It's about the resources of a firm. If we take more a resource-specific view then we might possibly also overcome this divide and "traditional" ideology-driven discussions between developing and developed countries. That was one thought. Another one is adding to "harmonization" maybe "recognition"; mutual recognition as an instrument to allow also for some diversity. That were my two comments on that.

Junji Nakagawa
Thank you, Steffen. And Mr. Kometani, please.

Kazumochi Kometani
I think I agree with my colleague that said diversity, also diversity of standards is also important for the future economic development. If the private standards are chosen by private entities to force or impose unilaterally the value it selects on others, then that may not work. But I understand that private entities do not intend to do that and rather they want to raise a level of industrial development in the exporting country as well and may provide some financial or technical assistance to farmers or producers in the developing countries. Together with this element and also that private standards set by private entities in the developed countries may be in most cases used to provide useful guidance for the producers in the developing countries. Therefore, in that sense and together with the technical cooperation or even the financial assistance or technical transfer, these elements are taken into consideration together then the private standards could be a useful tool.

Junji Nakagawa

Thank you so much for your insightful replies. I am still concerned with the characteristic of one-way traffic of private standards. Of course as a small supplier like Brazil, you have a liberty not to adopt the standard imposed by Marks & Spencer but you lose the chance to enter the big market. And the standards are already there. You have practically no choice but to adopt them. Maybe developed countries or NGOs may give you some technical assistance or financial support to come up with them. But it's always one-way traffic from top down although it's private.

Anyway, I must stop here and let's take 20 minutes break and we will restart Session Two at 3:25. Thank you so much for your presentations. Thank you.

END

Session 2: Private Standards and Global Governance: Challenges for the Diffusion of Private Standards

Junji Nakagawa
Now I would like to start our second session of today's symposium. As I announced to you at the beginning of Session 1, Professor Tamura of the Graduate National Institute for Policy Studies will make brief comments/questions on the four presentations in the first session at the beginning of this session. And then I would like to invite each panelist of the first session to answer the comments/questions posed by Professor Tamura initially. So we will have about 20 minutes for the extension of the first session initially and then I will open Session 2 with two distinguished speakers. Now let me invite Professor Tamura for your comments/questions.

Akihiko Tamura
Thank you very much Professor Nakagawa for having me to be a commentator on this seminar. I was originally requested by Professor Nakagawa to serve as a commentator after this session, means that expected to cover not only the presentations at Session 1 but also presentations at Session 2. Nevertheless, I have to leave this conference right after 4 o'clock for another business, so instead I requested Professor Nakagawa to put me in this place so that I can cover only the presentations by the panelists in Session 1.

The easiest way to serve as a commentator is to put questions to the presentations of the panelists instead of making comment coming out of my own personal view which is a little bit difficult task to deal with such a difficult issue. So therefore, everybody of the panelists, all panelists of the first session are in the room? Okay.

First, just arranging them from Professor Smith, thank you very much for your presentation and thank you very much for coming all the way from Leeds, UK to Tokyo. My understanding of your presentation is as follows: You put a focus on the kind of usefulness of WTO TBT law if limited to address downside of the fragmentation of private standards. My question has to do with the other presentation by Professor Hindelang. My take of Professor Hindelang is to emphasize the legitimacy issues, but on the other hand I didn't hear any express concern from Professor Smith in this respect. I mean, Professor Hindelang is more focused on investment arbitration while Professor Smith is more focused on the WTO-TBT agreement. So in a sense it's not exactly the same law.

My question for Ms. Smith is that I wonder whether you have any concern on legitimacy issue when you discussed on the usefulness of WTO TBT

Agreement in dealing with the downside of fragmentation of TBT private standards. In that process it's inevitable to bring the private kind of rule into the WTO aquis, so therefore maybe some people argue that the way of dealing with this issue has to do with some legitimacy concern. So I would like to know about your position on the legitimacy point on this respect.

And also the other question I would like to ask is I didn't see clear solution suggested by you. So I would like to ask whether your solution is to suggest WTO negotiation to revise any WTO agreement, or do you expect the Appellate Body to exercise more judicial activism to make a new rule-making to address the concern expressed by you.

Second question is for Professor Fukunaga. I was interested in your statement on the usefulness of regulatory cooperation, particularly your emphasizing the usefulness of regulatory cooperation knowing that this process is a long-term and continuous process. So it's quite reserved ambitiousness but still the flip side of this is that it's quite practical. But you refer to two examples – of course this is the only effective vehicle providing the regulatory cooperation. There are only two examples I guess in front of us: CETA and JEEPA. There may not be other more promising examples other than these two. But both of these legal vehicles are amongst, in a sense, like-minded countries. CETA is between Canada and Europe and JEEPA is between Japan and Europe. Both CETA and JEEPA are just kind of legal instrument amongst like-minded countries.

So it's not the real global vehicle. And also I didn't – maybe I could have missed some of your presentation but I didn't get any – I didn't hear any element in your statement in dealing with private aspect of this issue. Because one of the issues facing us is how to deal with private legal instrument which is kind of non-legal and also is short of having full-fledged legitimacy. Therefore, I would like to know how to deal with the kind of unique nature of private standards in the context of use of regulatory cooperation.

And the question for Professor Hindelang is – as I mentioned a little bit in my question for Professor Smith – I was struck by your kind of emphasis, if I am not mistaken, on the legitimacy concern. But maybe partly because – my guess is partly because your topic is not about WTO law but you are talking about investment treaty and also ISDS particularly.

ISDS has kind of a special nature and it has some special uniqueness in terms of legitimacy, and also the fact that the private investors have standings for that dispute settlement. Therefore, maybe it is a little bit different from the WTO law in terms of legitimacy concern. Nevertheless, I was a little bit surprised because some of the legal academics are rather leaning towards a different direction, which is more supportive of legal activism, in a sense, and is supportive of the idea of absorbing soft law and other private type of law in their jurisprudence to address the newly facing issues, because international legislation is in a sluggish mode. In this sense, maybe judicial activism could be warranted to some extent. But I think if we put too much emphasis on the legitimacy concern, who could be the

rule-maker in this respect, that's something I would like to ask you to give me some clue.

And the final panelist, Mr. Kometani, he is a good friend of mine. So, it's a little bit difficult for me to make a comment on his presentation, particularly Mr. Kometani and I both were in the legal team for the Fuji-Kodak case he mentioned. Therefore particularly how to deal with private conduct in the WTO law is not a new issue for us. Building upon our experience he picked up this competition law topic I guess. My question for Mr. Kometani is that I agree that private conduct including private standards is within the purview of competition law naturally. But on the other hand, if we talk only about domestic private standards, may be domestic competition law could be one way to address the issue derived from the private standards. But we are also talking about the international dimension and also international scheme of private standards. Unfortunately, there is only a limited degree of cooperation at international competition field. Unlike trade, which we already have international law, we don't have international competition law at this moment.

In this sense I would like to know how to address international dimension of private standards even if we agree to some extent on the usefulness of competition law. This is the question I wanted to ask. And eventually I tried to serve as a bridge from Session 1 to Session 2, and Professor Nakagawa also wanted me to do that. That's the reason why his question at the end of the previous session is about developing countries because Session 2 is about developing countries' interest. And Session 1 didn't dealt with the perspective of developing countries so much.

And I would like to summarize my own understanding of the theme of this session, which is that we are facing a kind of 3-dimensional conflicts. One is social and economy or, let me put differently, conflict between exporters and consumers maybe. And the second one is public and private. And the third one, which is rather the main theme of the second session – developed and developing. These 3-dimensional conflicts are something we have to deal with. And Session 1 must have dealt with the first conflict and the second conflict to some extent, but there is a third dimension – the conflict between developed and developing is little bit outside of the coverage of the Session 1, and it is the main theme of Session 2.

But I think this is the most difficult topic because I understand that import side or consumer side has definitely their own right to decide what to buy, what to eat, building upon their information, the scientifically sound information. On the other hand, some of the quarters on the globe are going to lose the opportunity to get into the global market. So we have to have a balance. But again, getting back to how to deal with the gap between like- and non-likeminded players. Bridging between like-minded players is relatively easier. But if we talk about the globe, definitely we have different type of players which do not share the idea as to what will be the best environment or human rights or any type of social value, particularly between developed and developing. Unlike economy, social issue has a relatively local nature. Economy tends to have a kind of global nature, that's why they are getting into successfully globalized economy because

economy has its kind of built-in mechanism to be globalized. But the social issue tends to have rather more local nature. If so, if we are moving from the economy focused period towards the period of balance between economy and social values, definitely we are destined to get into the more locally fragmented society in the globe. This is where we are.

So maybe I try to be proud of being the globalist but maybe in the 21st century, it's a little bit difficult to avoid going toward somewhat fragmented society because the value is not only monotonously economy oriented, we are getting to the era where we also have to treasure the social economy which is rather local in nature. That's where we are. But maybe there could be one solution, which is the topic of second session. That is, diffusion of private standards. Many developing countries, even if originally they do not necessarily share the same social value with developed countries, also could or want to learn the idea of what the developed countries' final market wants. So that could be one reasonable solution. That is the topic of the Session 2. So I tried to bridge between Session 1 and Session 2. This is how I tried to connect between these two sessions, and how I tried to understand the meaningfulness of the theme of Session 2.

Junji Nakagawa
Thank you so much Professor Tamura for having summarized and bridged and asked questions. And now I would like to invite each panelist of Session 1 to answer briefly to the questions posed by Professor Tamura. So now, Fiona is the first one.

Fiona Smith
Thank you. So, I would like to thank you for your questions and comments. It's very helpful for me to develop these ideas further. I think what's very interesting about your comment is it's actually revealing a legitimacy gap I would say in the way I see the problem. If WTO rules are going to increasingly look into the world of private standards, from a WTO perspective you have the classic legitimacy issues with the WTO, which is lack of participation by individuals in the WTO process. You have the problem of developed versus developing countries and what it is that makes the whole WTO process legitimate in terms of input legitimacy and then in terms of output legitimacy, in terms of what happens to any dispute settlement outcome.

So that's a public participation problem in the WTO. I think on the other side when you are thinking about the development of private standards themselves, you have a legitimacy problem in terms of the fact that the state is not involved there, but you have also have the additional problem in the fact that to the extent that those private standards are created by say multinational corporations, there is even lack of NGO participation. There only the corporate individuals are in the room that are going to be recreating the standards.

So in actual fact you have a gap there between where does the consumer fit into that picture, there isn't a role for the consumer, I don't think, otherwise then as the final element of the person benefitting from the standard, allegedly benefitting from the standard, they have no direct input

apart from their role in either they buy the product with the standard or no they don't. So that's the pure input from them I think. So I think there is a real issue about how you conceive of the legitimacy problem in private standards when you are thinking about how they might be regulated by the WTO.

I didn't get time to do it but there is a very interesting article by Diane Ryland that's going to come out in the Journal of Environmental Law imminently, in the next edition. And she talks about legitimacy problems in the context of GLOBALGAP and Animal Welfare standards. So she is starting to think about that and I think people are increasingly thinking about legitimacy of the standard setting organizations.

And just in terms of your second question about solution, again not something I thought about but I know we were discussing over lunch the activism within the TBT committee on discussions about private standards. And it may well be that a regulatory solution is not going to be appropriate. So more judicial activism in the appellate body I don't think is going to work particularly at the moment with the US opposition to the appointment of the new appellate body members. So I think greater judicial activism will only add to that problem in the dispute settlement mechanism. I think given the outcome, Buenos Aires in December I think is even less likely will get a new agreement.

So what I would say is that you are probably going to get some form of regulatory cooperation perhaps but with through the committees and that may well be the way of dealing as a kind of soft law.

Junji Nakagawa
Thank you so much. Now I would like to invite Professor Fukunaga and then to Steffen.

Yuka Fukunaga
Thank you very much for the very useful questions and comments. I start with the first question. The first question is about the participation of developing countries in the regulatory cooperation frameworks. And it's true that there are only two FTAs so far which provide in a comprehensive way regulatory cooperation. However, that does not mean that developing countries are excluded from the regulatory cooperation frameworks. If they are interested, they may be able to participate and create a new forum for regulatory cooperation. But I think the question is whether they are interested in getting engaged in regulatory cooperation with developed countries. And unless they are interested, they have no chance to get involved. I have some doubts about whether they have any interest in regulatory cooperation. That said, I want to mention that I found a memorandum between Brazil and the EU on private standards on animal welfare when I was preparing for my presentation in this symposium. I didn't have time to look into it, but if our colleagues from Brazil and the EU have some knowledge about this memorandum, I would be happy to hear how this memorandum is working between the developing and the developed countries.

And the second question is about how to handle private standards under public frameworks. And I think what I was trying to do in my presentation is to question the relevance of the public-private dichotomy. There used to be such a distinction. There used to be a clear distinction between private and public domains and there was a dichotomy between binding and nonbinding frameworks.
At the end of my presentation I briefly mentioned the possibility of envisioning a World Trading System 3.0 as a new model. And perhaps the new model of world trading system implies the increasing importance of public-private partnership and of frameworks of more mixed nature – not just governmental but also private; not just binding but also non-binding. That's it. Thank you.

Junji Nakagawa
Thank you so much, Professor Fukunaga. A World Trading System 3.0 is not necessarily the World Trade Organization.

Yuka Fukunaga
In my view, the World Trading System 2.0 is the World Trade Organization…

Junji Nakagawa
Now, I would like to invite Steffen to answer.

Steffen Hindelang
Thank you very much. Thank you very much Professor Tamura for your very sharp-minded questions really touching the sore points. I greatly appreciate them as they provide me with the opportunity to get into more detail with regard to the legitimacy question of investor-state arbitration.

Maybe, I think, a point to start is to recall the function of this dispute settlement mechanism. These ISDS tribunals, they actually perform a public function, that is a function of a constitutional or administrative court. They balance private property interests with public interests, health, security, etcetera. And we, I think, can ask the question in that regard, what kind of, what degree of legitimacy need such bodies to have in order to make such far-reaching decisions as ruling on the legality of the phase-out of atomic power production in Germany. Is it sufficient that the government only chooses one arbitrator out of three if such questions are at stake? You can, of course, always say, yes, in terms of input legitimacy that might be not a perfect solution, but we live in an international realm so we should focus more on throughput or output legitimacy. This is, of course, possible. Then let us look at output legitimacy. What kind of results do arbitral tribunals produce? I mean, I would suggest that most of these arbitral awards are not beyond doubt in terms of appreciation of the rules of public international law. I mean, take for example the Vienna rules on treaty interpretation. I have not read anything about quasi-precedence in these rules. But what the arbitral tribunals basically do is that they treat all arbitral awards as case law.

I don't want to get into detail but this kind of usage of cases in public international law turns them into the rule-makers. This is worrisome from a constitutional perspective because I have not elected them as a citizen of

Germany. My government has, of course, consented to this. But the question is to what extent the government has consented: To an agreement interpreted in such a way or do they exceed their powers? One could call it judicial activism. One could also call it power grabbing. And I could provide a few more examples of this kind, such as rules on state responsibility, etcetera.

And allow me to make a comment on your interesting point of whether social issues are more of a local nature. I would completely agree from a Japanese perspective because you are lucky, you live on an island. As a citizen of Germany less so; we have just accepted 1 million Syrian refugees. I am not so sure whether such social issues are really local ones – whether they can be kept local. I am sure my government would have loved to keep it local. But there are, I think, also social issues which cannot really be kept within the local community. And with that I should stop. Thank you very much again for your comments on the presentation.
Thank you very much.

Junji Nakagawa
Thank you so much, Steffen. Finally, let me invite Mr. Kometani for answer and/or comment.

Kazumochi Kometani
Thank you very much, Professor Tamura for your comments. In respect of the international law on the competition law, as you know that there is little – I think that the international law on this area is emerging for example in the OECD fora or ICN network or something like that. And I think there is still only a soft law, there is no hard law in this area but these fora provide good opportunities to discuss these issues. And I think using these completion law fora has one positive merit. I think in the internal trade, other fora may provide fragmentation of the issues. I think the private standards touch on a variety of public concerns for example animal welfare, environment protection, labor standards, and there could be maybe the interested parties that may want to produce a set of rules on the different areas. But in using the competition law fora, these areas need to be dealt with horizontally and I think that may provide – it may prohibit the interested parties from picking and choosing the preferable result. And also, this may address the concern of legal fragmentation in the global governance system.

Junji Nakagawa
Thank you so much Mr. Kometani. And I am afraid I must stop the extension of Session 1 here now as time is pressing and Professor Tamura will have to leave here soon.

But I am glad that we will get together tomorrow afternoon for another workshop. I'm sorry to tell you that it will be a closed workshop and an informal free talk. But we will have more time for the continuation of the discussion today. And now let me start Session 2 practically. And I took the liberty of changing the order of presentation suggested by Professor Kawai. Let me invite Rogerio Correa first instead of Professor Kawai

because the topic of Rogerio's presentation has a lot more to do with the issues discussed in Session 1, namely developing countries' perspectives on private standards.

And then I would like to invite the second speaker, Professor Kawai on his presentation on the "Role of Credit Rating Agencies on Private Standards". Now let me invite Dr. Rogerio Correa for his presentation on "The Brazilian Platform of Voluntary Sustainability Standards". Rogerio, you have 20 minutes.

Rogerio Correa
Good afternoon ladies and gentlemen. First of all I would like to thank Professor Junji Nakagawa and the Global Leader Program for Social Design and Management for inviting me as the manager of the Brazilian national platform on VSS to be here. It's a great honor to be here at the University of Tokyo. I also would like to thank the GSDM supporting team and Ms. Akiko Goda for managing all the logistics to bring me from Rio de Janeiro to Tokyo, it is such a long trip. And publicly to reiterate the regards of the Chair of the Brazilian TBT committee, Professor Vera Thorstensen to Professor Nakagawa and his team for inviting us.

To start the discussion, I would like to say some few words and make some comments to the previous presentation. The first one is related to the standard setting system. The technical standards are related with TBT and SPS discussion and this system is like a building constructed over 3 pillars: science, law, and economics. I am here to represent the science differently from the other participants who are lawyers and economists representing law and economy.

The standard setting system is good for global value chains, it is good for competition, for innovation and to improve technology. The international standards setting system was set with these elements: to improve economy, to protect law, to protect consumers, to give transparency. What we are talking here is much more a warning than a menace. The chaotic fragmentation, proliferation, the outbreak of private standards is like a disease that can affect both developed and developing economies. That's the point. We are not in different sides of the discussion. We are in the same boat. We are not willing to create a monotonic environment, this is not the issue, we don´t want to be caught by the disease, the fragmentation. Eventually, private standards could act as a tax, it is a kind of taxation for products which are not good. Or even a disclosure tariff for producers, being appropriated for individuals, not for countries, which is another important point, without promoting gains to everyone, to us, to citizens, to taxpayers. That's why we have to try to find a way to solve the problem on how to restrain their fragmentation. So, as Professor Fukunaga said in her presentation, we are trying to reach some kind of convergence among the fragmented standards.

After this introductory speech, I will present the Brazilian voluntary standards (VSS) platform. It has the objectives of coordinating VSS issues in Brazil and also with other countries that want to cooperate and trade with Brazil.

In my presentation I will show some maps, to help orienting the audience regarding Brazil and facts about Brazil. After that I will introduce my institution, Inmetro – that is a Brazilian government institution. Then, the Brazilian system of metrology, standardization and industrial quality, that is Brazil's system of quality and infrastructure, the voluntary sustainability standards and the understanding of my office of voluntary sustainability standards, the Brazilian platform, Brazilian official schemes on sustainability standards, and finally, the conclusions.

Brazil is a Federative Republic with 27 states located in South America, Its capital is Brasilia, Brazil has 8.5 million square kilometers of extension, and a population of 207 million inhabitants. Its GDP, in the end of 2016 (and 2017), was almost 1.8 trillion dollars. The language of Brazil is Portuguese and its currency is Brazilian Real. Brazil is located in South America. Inmetro is located in the state of Rio de Janeiro, in the surroundings of Guanabara's bay. Inmetro indeed is not located in the city of Rio de Janeiro, it is in a neighboring city called Duque de Caxias, located 50 kilometers far from the city of Rio. City of Rio de Janeiro is the capital of the state with the same name – State of Rio de Janeiro.

Inmetro has 5 objectives in Brazilian quality and infrastructure system. Inmetro is the Brazilian metrology institute. It also acts as a regulatory agency. It's the Brazilian national accreditation body and also the Brazilian WTO/TBT enquiry point. It is in charge of supporting all the Brazilian negotiations related to TBT issues. Now Inmetro hosts also the Brazilian VSS national platform.

The mission of the institution is to provide confidence to the Brazilian society concerning measurements and products, promoting harmonization in consumption relations, innovation and competitiveness through metrology and conformity assessment. So metrology, conformity assessment and standard setting is inside Inmetro's activities.

The system of quality infrastructure in Brazil is coordinated by a council of ministers. There are 10 ministries related with it plus the confederation of industry, trade, and agriculture and consumer's defense agencies, IDEC, and Brazil standardization body, ABNT. Inmetro is the executive body of the Council of Ministers, Conmetro. Inside this council there is six advisory committees. One of them is the Brazilian Committee on Technical Barriers to Trade, under which the national platform is located.

Inmetro is also a body of the Brazilian government in charge of achieving regulatory coherence among other governmental bodies and agencies.

Talking about private standards versus voluntary sustainability standards, are they different? Giving some historic grounds, the discussion on private standards in WTO started in 2007 when Saint Vincent and the Grenadines complained against EUREPG.A.P. That now it's GLOBALG.A.P. Some developed countries like US, European Union, denied that WTO was the forum to deal with this issue. Developing countries like China, India, Brazil and Egypt advocate that WTO was the forum to discuss it. Because of this

confrontation between developing and developed countries' positions regarding private standards the discussion on WTO reached a deadlock.

Now this discussion changed to voluntary sustainability standards and their relation with international trade. Since 2015 after the adoption of the 2030 SDGs (Sustainable Development Goals) agenda, some countries like India, Brazil, China, that complained against private standards in the WTO made an attempt to reboot the discussion, proposing a new strategy to deal with the subject. This new strategy has new shape in the establishment of national platforms; in proposing to discuss the issue in preferential trade agreements - one example of this is the discussion between European Union and Mercosur countries in the negotiation of the PTA, Mercosur-EU. These countries aim to reboot the discussion in WTO in other grounds.

My previous colleagues in Session 1 tried to set a definition of voluntary sustainability standards or private standards. In this slide I will do the same. On the right side of the slide there are the 17 SDGs and in the other side a group of schemes that are under the ISEAL alliance. This is an important conglomerate of standard setters that have the major standard schemes on voluntary sustainability standards.

As I said before, there is no consensus about the definition of voluntary sustainability standards, one possible definition is that: "They are normative documents developed by private entities but not exclusively by private entities. And in some case use sustainability concepts like the sustainable development goals which compliance is attested or verified by a certification scheme or seal and so on." So it's hard for common people to understand what it is really but in resuming it is a standard developed not by an international organization of standardization as claimed in WTO. And in the case where countries have no consensus related to it, it will be hard to frame the discussion and to put some legal transparency and legal prediction to the VSS discussion.

Here are some examples of VSS. One is Forest Stewardship Council seal for the chain of custody of forest products. Another is fairtrade with an example of Ben & Jerry ice-cream that claims when using fairtrade certification the cows that produce the milk of the ice cream are happy cows. This other one is UTZ, that is a standard for coffee and cocoa. And I put this slide here in the presentation because it is an example of constraint of fragmentation of voluntary sustainability standards. UTZ and Rainforest Alliance are merging activities into one new organization and into one new scheme that will be called "Rainforest Alliance". And it's a good example on how to restrain the fragmentation.

Coming to the national platforms, what are the objectives of the national platforms? The concept of national platforms is based on the UNFSS, a forum of UN organizations with the objective to help developing countries to be aware and face the challenge of private standards. Three countries preceded: India was the first, Brazil was the second and China was the third. Mexico, South Africa and Indonesia are trying to mirror the UNFSS, reach internal coordination on VSS and to help small and medium enterprises overcoming problems related to VSS. The task of the national platform is

aiming at: filling governance gaps related to VSS policies; promoting interaction with government and private sector stakeholders; establishing polices related to these; providing companies and consumers awareness on VSS in order to meet the SDGs; improving the quality and competiveness of national product; promoting national certification through negotiations (regulatory cooperation is an important issue here); promoting cooperation with other national platforms and international organizations so as to reach these objectives of mitigating the bad impacts of burdensome certification. As I said before, it is important to emphasize that we don't want to restrain or create a monotonic system. We only want to restrain the chaotic proliferation of this kind of certification. The key challenge for sustainable production and consumption is to find the equilibrium point between many different stakeholders. Governments and business should work together to overcome this chaotic proliferation and duplication of standards. This is the point. The duplication of standard is bad for everyone, causes misunderstanding and miscommunication, causes problems regarding competiveness to companies, regardless of whether they are big companies or small ones.

To talk about our office, we have a coordinator and a supporting analyst. We also have a supporting team in Fundação Getúlio Vargas, a think-tank in Brazil, with Professor Vera Thorstensen as the leader, and also Inmetro's IT supporting team. We are also hiring an expert on information to manage information in the platforms.

We also have a lot of cooperative work and partnerships mainly in Latin America through the MERCOSUR Working Group number 3, through ALADI – ALADI (Asociación Latinoamaricana de Integración) is a cooperation of Latin American countries, broader than MERCOSUR. And other bilateral partnerships and extra regional work with national platforms around the world and with the UNFSS - one important work related to partnerships is the mapping activities of VSS and economic impact assessment studies.

In this slide we have photographs of the launch of the national platform, held in Brasilia and São Paulo. Brasilia is Brazil's capital and São Paulo is, economically speaking, the biggest city of Brazil, in June of last year. This is the home page of the platform – I am sorry, it is only in Portuguese now. Perhaps we can work to translate it into English and eventually in Spanish. So in this internet environment we are storing all the work that we are performing and all the studies we have done.

I'd like to explain some achievements of the Brazilian national platform so far, which include: the launch event; the home page; the establishment of our working group to execute the action plan and a steering committee to propose activities to the Brazilian government. One important achievement is the launch of mapping VSS in Brazil with the impact of these VSS to the major sectors of Brazilian economy. Mapping will also expand sharing experience with partners abroad, who are mainly the group of countries with national platforms. It will also lead to the proposal of mutual recognition of VSS in Brazil and Brazilian trade negotiations, and also regulatory cooperation that Professor Fukunaga said in her presentation. Regulatory cooperation is a very important means to restrain the chaotic

proliferation. We're also engaged in awareness raising activities, and in a pilot project of implementation. This last one will improve the quality of our work, in particular the impact assessment projects.

In this slide, you see the work plan for this year, the work will continue mainly through meetings, inside the meetings of the Brazilian Committee of Technical Barrier to Trade, four meetings during the year, the start of implementation projects, conclude the first mapping work, to continue to take part in the UNFSS activities - there will be a meeting in Delhi this year and we are supposed to write a factsheet that will be published in the flagship document of UNFSS, continue the activities of raising awareness, the exchange of experience, and update the internet website.

In this next slide, it is possible to see Inmetro schemes of sustainable standards. In Brazil, Inmetro is a conformity assessment body setter or a scheme setter. And for example it has four programs that were aimed at trying to mirror external schemes. One is PI Brazil, it's the good agricultural program of the Brazilian government. The program was developed to meet some objectives of G.A.P. program and GLOBALG.A.P. in the very beginning, 10 years ago. The other one is Brazilian certification forest scheme, it is called CERFLOR. This program is mutually recognized by the PEFC, one of the biggest forest certification programs in the world. Another is the Brazilian program in energetic efficiency. That is sometimes voluntary and sometimes compulsory. And the new one – the Brazilian Environment Declaration of Products, this is the program of assessment of lifecycle analysis in Brazil. Here are some products that use those schemes in Brazil. All of them except in the case of energetic efficiency are voluntary. All them use SDGs as a basis.

Conclusions. VSS have a huge implication for business, both production companies and services providers. As they affect mainly SMEs, it is important to assess their impact continuously. We have to continuously assess the impact of VSS in production, in companies, small and big ones. The chaotic fragmentation of VSS is bad for business. So we should communicate SDGs to company clients and correct misunderstandings of consumers. This fragmentation is the disease that we want to control. The cooperative work among countries could fulfill structural gaps through raising awareness, training, quality infrastructure and standards and regulation assessment and promote mutual recognition or merging of certifications mitigating the proliferation of schemes. It will be very important for national platforms in developing countries to reframe the VSS environment, acknowledging the importance of fulfilling SDGs but not creating unnecessary technical barriers to trade. To countries, SMEs, small-holders and consumers it will be of great value if WTO could restart the discussion in new grounds and be the normative organization of this very important and grave trade issue. So to finish my presentation. I thank you all. *Dōmo arigato gozaimashita.*

Junji Nakagawa
Thank you so much Rogerio for your very, very informative presentation on the Brazilian platform of voluntary sustainability standards. Now I would like to invite Professor Kawai, our last panelist of the session and the

symposium. He will talk about "Credit Rating Agencies' Role on Private Standards".

Masahiro Kawai
Okay, thank you very much. Now I would like to focus on credit rating agencies – very different from the kind of private standards for agricultural products or voluntary sustainability standards that are discussed earlier today. But I believe that looking at credit rating agencies we can get some insight into the role of public policy and how to embrace private standards within global governance.

As you know, credit rating agencies, such as Standard & Poor's, Moody's and Fitch, set their own private standards for the issuer of debt instruments or the debt instruments issued. They play a useful role in strengthening capital markets and the banking system. Actually, rating agencies were brought into in the Basel capital adequacy regulation when Basel 2 was introduced. Rating agencies have often been criticized for the lack of transparency and conflicts of interest and this criticism reached its peak when the subprime and global financial crisis of 2007-09 erupted. As a result, they are now subject to increasingly tight oversight. They had been under oversight of capital market regulators before the global financial crisis but now they are under much tighter oversight. I would like to draw public policy implications of private standards set by credit rating agencies for global governance.

Market and regulatory roles of credit rating agencies (CRAs)
What are credit rating agencies (CRAs) anyway? They assess credit risks of debt-instrument issuers (including sovereign issuers and non-sovereign issuers) or debt instruments issued, continuously monitor and analyze the issuers of debt instruments or instruments themselves, and broadly publish and provide such information and analysis to users. Governments issue their own sovereign debts in the domestic and international capital markets and CRAs provide risk assessment by assigning letters like AAA, AA or A. In this sense they play an important role as part of the information infrastructure in financial and capital markets, and as such they are expected to fulfill proper functions.

From an economic point of view, CRAs' roles are very clear. First is to reduce information asymmetry between a debt-instrument issuer and investors. There is always information asymmetry between an entity that issues debt and investors who invest in the debt instrument. Even if the entity is a good, credit-worthy issuer and has no problem in repayment, the market may not think so. Thus the entity is naturally interested in disclosing as much information as possible to the market and convincing potential investors that it is a good issuer. In contrast, a bad entity may want to pretend that it is a good issuer and may give some false or misguided information to the market. Credit rating agencies can provide an objective, neutral and independent assessment of a debt issuer to reduce information asymmetry. Second is to impose some discipline on both issuers and investors. Issuers want to make sure that they comply with various accounting requirements and corporate governance and investors are encouraged to assess and take their own investment risks given the

information provided by CRAs. Third is to help improve market liquidity from both supply and demand sides. Greater availability of information provided by CRAs is expected to attract more issuers and investors to the market. Debt instruments to be rated include bonds, asset-backed securities, mortgage securities, convertible bonds, medium-term note programs, derivatives securities, commercial papers, and so forth.

So there are clearly benefits of CRAs for market participants. Investors can make informed investment decisions and keep track of developments of credit risks of debt instruments and issuers. Issuers can have better access to capital markets at lower costs of borrowing by convincing the investors that they are credit-worthy issuers. Financial supervisors and regulators can use credit ratings provided by CRAs as complementary tools for more efficient prudential supervision and regulation. I will explain this point a bit more in a minute. Other market participants (such as commercial banks) can also have additional information for risk assessments of their clients, say companies and sovereigns, for better risk management.

Financial authorities have been using CRAs for banking sector regulation. The Bank for International Settlements (BIS) introduced its first capital adequacy requirement, called Basel 1, in 1988. In 1999, BIS through its Committee on Banking Supervision proposed rule changes that would provide an explicit role for credit ratings in determining a commercial bank's required regulatory capital. Basel 2, introduced in 2004, allowed banks to calculate required regulatory capital by using the standardized approach based on CRA ratings as well as the internal ratings based approach. Thus, the authorities decided that it would be useful to use private sector information provided by CRAs for their regulation. Essentially, Basel 2 elevated the importance of credit ratings provided by CRAs by linking the required measure of bank regulatory capital to the credit rating of bank loans. And now, Basel 3 has just been agreed on early in 2018 and the practice of relying on CRAs is carried over to Basel 3. In this sense CRAs play an important role in global governance for banking regulation and thus provides international public goods.

Challenges for credit rating agencies (CRAs)

On the other hands, global CRAs often cause a lot of anxieties on the part of issuers, particularly in the case of sovereign ratings; when they downgrade sovereign ratings, often governments in question complain and challenge them. Global CRAs provide sovereign ratings. High ratings allow governments to borrow in international capital markets at low costs, while low ratings lead to high borrowing costs or prevent the government (particularly emerging economy government) from borrowing in the capital market. Low sovereign ratings also harm private companies in emerging economies as the ratings of private corporate issuers in these economies often face the sovereign ceiling, i.e., their ratings cannot exceed that of sovereign even though their credit conditions are considered better than sovereign’s. Even for advanced countries, if the sovereign ratings come down, the international interbank market often would set a high interest rate for the country’s commercial banks even though these commercial banks are excellent commercial banks. As sovereign ratings have huge implications for the countries concerned, sovereign down grading has often

led to hot debates between the down-graded governments which often challenged CRAs' ratings and rating methods and CRAs.

An important challenge for CRAs is how to maintain its credibility. There have been occasions when the credibility of CRAs was doubted and heavily damaged. One of these instances was the failures of Enron (December 2001), an energy trading company, and WorldCom (July 2002), a long-distance telephone company, due to their financial mismanagement and misreporting. Arthur Andersen, Enron's auditing company, was forced to resolve after it was found guilty of charges of obstructing a government investigation on Enron. The problem was that major CRAs had given relatively high ratings to Enron and WorldCom until significant problems were made public for these firms. As a result, there was a strong criticism against the rating agencies.

Another more serious case when CRAs' credibility was damaged was after the subprime and global financial crisis. Because global CRAs gave high ratings to a large portion of securitized instruments of subprime loans such as collateralized debt obligations (CDOs), while their values came down sharply after the Lehman collapse of 2008.

The high ratings of CDOs and others, particularly their AAA tranche, misled investors in their investment decisions. Many investors got burnt. Norwegian pension funds, Belgian dentists and others who invested a lot of money in such seemingly attractive financial products suffered. There are several reasons why the credit ratings misled investors in their investment decisions. First, credit ratings involved conflicts of interest. CRAs obtained (and still obtain) income from companies which or whose debt instruments they rated, involving room for conflicts of interest. Second, sufficient information disclosure was not provided with regard to the rating model. The CRAs took the view that CDOs would be relatively safe if risks were uncorrelated across the instruments. But once the subprime crisis took place, all the instruments got hit at the same time. So risks were highly correlated. Third, some investors did not pay attention to the fact that credit ratings were merely views held by private agents and CRAs were private firms.

Thus the credibility of CRAs was seriously damaged once again. They used unrealistic models based on the assumption of uncorrelated risks and rating methods and models were not quite transparent. And analytical integrity, independence and neutrality were lost due to conflicts of interest.

Global regulatory cooperation on credit rating agencies (CRAs)

It is not surprising to see a lot of reform efforts made following the global financial crisis. The most significant of all is the intensified international cooperation of financial regulators and supervisors with regard to CRAs under the International Organization of Securities Commissions (IOSCO).

In 2008 IOSCO revised the Code of Conduct Fundamentals for Credit Rating Agencies, which had been introduced since 2004 after the failures of Enron, WorldCom, and Arthur Andersen. The 2004 Code of Conduct attempted to help guard against conflicts of interest, ensure the consistent use of credit

rating methodologies by CRA employees, provide investors with sufficient information to judge the quality of the CRA's credit ratings, and generally ensure the integrity of the credit rating process. IOSCO had recommended member country regulators to encourage their CRAs to adopt similar code of conduct in their own jurisdictions.

Following the global financial crisis, IOSCO revised its Code to account for the development of the structured finance market in 2008 by adding the following disclosure provisions to the 2004 Code:

- whether any one issuer, originator, arranger, subscriber or other client and its affiliates make up 10% or more of the CRA's annual revenue
- whether the issuer of a structured finance product has informed the CRA that it is publicly disclosing all relevant information about the rated product so investors and other CRAs can conduct their own analyses of these products independently of the contracted CRA
- the attributes and limitations of each credit opinion, and the extent to which the CRA verifies information provided to it by the issuer or originator of a rated security
- the degree to which the CRA analyzes how sensitive a structured finance product's rating is to changes in the CRA's underlying ratings assumptions
- the principal methodology or methodology version in use when determining a rating
- the CRA's internal code of conduct on its home webpage

IOSCO further revised its 2008 Code in 2015 to take into account the fact that CRAs are now supervised by regional and national authorities. This most recent Code focuses on maintaining quality and integrity of the rating process, preserving CRA independence and avoidance of conflicts of interest (to make sure that analysts and employees have no connection with the companies that are rated), fulfilling CRA responsibilities to the investing public, rated entities, obligors, originators, underwriters and arrangers (in terms of transparency and timeliness of disclosure), improving governance, risk management, and CRA employee training, and disclosing the code of conduct and improving communication with market participants.

Many global CRAs have adopted their own codes in line with the IOSCO Code of Conduct. Major economy authorities have also strengthened their oversight over CRAs. The US which experienced subprime and global financial crisis also introduced the famous Dodd-Frank Financial Regulatory Reform Bill in July 2010 to tighten oversight over CRAs by setting up the Office of Credit Ratings within the Securities and Exchange Commission (SEC). The Office is tasked with ensuring that CRAs improve their accuracy and provide reliable credit ratings of the businesses, municipalities and other entities they rate. The SEC has also defined nationally recognized statistical rating organizations so that the authorities can decide to approve or not to approve once applications are made. The Financial Services Agency of Japan also introduced tighter control over CRAs like prohibition of conflicts of interest and more extensive disclosure requirement on ratings methods and related information.

So, given the undesirable performance of CRAs behind the sub-prime and global financial crisis, the public sector began to intervene and regulate CRAs more heavily. IOSCO revised its Code of Conduct to address the problems of CRAs exposed during the financial crisis. National capital market regulators and supervisors put them under stronger oversight. This is an attempt to embrace CRAs within the national and global governance framework for finance to ensure that they would deliver socially desirable outcomes.

Most SMEs and emerging economy companies are not rated by the global CRAs. As a result, many emerging economies have started to establish their own CRAs and the number of such rating agencies has risen globally and is now very large in Asia. These local CRAs rate their own companies, which the global CRAs would not rate. So this is a good direction but the problem is that these local CRAs use national scale in their ratings. That is, they do not rate their own sovereigns as they take their own sovereigns as AAA, although they rate their own companies which global CRAs would not rate. This means that, for example, an Indonesian company's AA rating is not the same as a Korean company's AA rating as they are not comparable. So it is good that they rate many local companies, but there is a lack of comparability across Asian countries and of global consistency. This suggests that a lot of harmonization is needed across Asia so that Asian local CRAs can provide more consistent and comparable ratings with each other by using similar, good methods.

Public policy implications

I have argued that CRAs have played a useful role for global governance for finance by providing international public goods. In particular they rate sovereigns, large private companies, and debt instruments and monitor such ratings over time, thereby conducting global surveillance from private sector perspectives and complementing the surveillance roles of IMF, BIS, OECD, and other international organizations. In this sense, they are part of an important market infrastructure of capital markets. As long as CRAs play such useful roles, the public sector has no reason to intervene. As their roles turned out to be even more useful and complementary to public policy tools, the authorities were interested in using them for regulatory purposes as in the case of Basel 2.

However, CRAs have not always played a useful role and they indeed failed to meet expectations during the sub-prime and global financial crisis. The failure of CRAs to ensure quality control triggered intervention by national governments and the international organization of regulators, i.e., IOSCO. As a result CRAs have been put under stronger oversight of capital market regulators and supervisors. A starting point for oversight was to set up a Code of Conduct for CRAs by the international standard setting agency (IOSCO) and oversight was tightened through changes in the Code. This has also encouraged national regulators to tighten their oversight over CRAs. So the case of CRAs provides a good example of public and private partnership.

The implication is that as long as private standards play a socially useful role, there is no reason for the public sector to intervene. However, there

are at least two cases for public sector intervention. First, if their roles are very useful for public policy purposes or highly complementary to public policy tools, the authorities may use them for policy purposes as in the case of Basel 2 for CRAs. Second, if private standards do not serve public interests, the public sector may intervene and regulate their businesses to ensure that public interests are preserved. Introducing a code of conduct for private standards is perhaps more practical than embarking on global regulatory cooperation to promote harmonization or convergence of private standards. In the case of private standards for agricultural products or voluntary sustainability standards, the multiplicity and proliferation of standards and the lack of harmonization are often identified as important problems. But for global CRAs this has not been a serious issue. This issue would probably be more important for local CRAs in a regional context, such as the need for greater harmonization among local CRAs in Asia.

Junji Nakagawa
Thank you so much Professor Kawai for very interesting and insightful presentation of credit rating agencies. Now the time is 5:00 p.m. So according to the schedule circulated before the event, the time is up. But let me take the liberty of moderator/organizer of this event to extend a little bit, let's say 15 minutes, to conclude the event. First, I would like to make brief comments on the two distinguished presentations of Session 2 and then let me open the floor for taking probably at most a couple of questions or comments from the floor to the presentations in Session 2 and Session 1 as well.

In Session 2, we had two distinguished presentations: the first was by Dr. Rogerio Correa on Brazilian platform on Voluntary Sustainability Standards. One interesting point is the naming of private standards. Instead of private standards, they used the term "voluntary sustainability standards". This term was diffused by the UN Forum for Sustainable Standards, or UNFSS, or other international organizations which recently strengthened their commitment to the phenomenon of private standards. That's an interesting point. And also, his presentation showed us an interesting aspect of how the national governments of developing countries, or more correctly speaking, emerging economies like Brazil and Indonesia, can support the proliferation or the diffusion of VSS or private standards in emerging markets. Although these countries categorize themselves as developing countries, they are, I would say, the strongest part of developing countries who already have successfully joined the global supply chains, but there are still many small suppliers who have yet to join the global supply chains. So the lessons of Brazil and other national platforms of VSS can teach us a lot, can give us a lot of suggestions for how developing countries, especially LDCs can come up with private standards or VSS. And one of the things I learned a lot from his presentation is that the government or Inmetro are playing diverse roles, other than functioning as VSS platform. They try to educate the local producers and consumers as well, who will ultimately raise the quality of voluntary sustainability standards.

In that sense, they are creating a market for VSS products. That's an important thing. And also, they are trying to coordinate among national or local standards with other emerging economies as well as international

organizations. So they are a kind of coordinator or cooperator. But the cooperation is not necessarily limited to regulatory cooperation in the sense that Professor Fukunaga used in her presentation in Session 1. It is a broader concept. When it comes to regulatory cooperation, Rogerio also referred to the mutual recognition of local Brazilian VSS with international or European or American VSS, and I think that is one of the most promising routes of coordinating fragmented standards globally.

Those were what I learned from Rogerio's presentation. And the presentation by Professor Kawai, whose expertise is international finance as you all know, about the credit rating agencies was much interesting – not only interesting but also very, very informative and instructive for us to consider the possibility of private standards.

Number 1, credit rating is a kind of private standard, and credit rating agencies are standard setters of international creditworthiness of those credits issued by private, public and state institutions in financial market. That's one thing. So, the story of the failure of major credit rating agencies about 10 years ago we still remember. That was much interesting. Failure of credit rating agencies triggered intervention by national governments and international organizations of regulators like IOSCO's code of conduct. This showed us how governments and/or international organizations of regulators can, and should intervene in financial market so as to raise the quality of private standards. The intervention took the form of national certification of international code of conduct. Though it was a voluntary and soft approach rather than traditional regulatory or legally binding approach, it shows us one way of government intervention in private standards. In other words, it's a variation of public-private partnership for the diffusion and quality control of private standards. That's one thing. Even after such governmental intervention, credit rating agencies and private funds, they are still there and they have their own benefits and advantages in comparison with national governments or national financial regulators, because they have a lot of neutral information and they have experiences and they have global coverage. So we should not stop them or we should not kill them, but we should keep contact with them. By "we", I mean the national governments, though I'm not a government official. Finally, quality control is the key to the functioning and the legitimacy of private firms represented by credit rating agencies.

Having said that, let me open the floor for questions or comments; if you have any one, I would like to welcome them. If not, let me just wrap up the session. Let me double check. One from the floor to Rogerio.

Male Participant
Thank you for the presentation. I would like to add one comment. I am Tomohiro Kaneko from Graduate School of Public Policy, second year. My research is about coffee industry. I get the point from developing countries. So when I was in El Salvador, I talked with many coffee producers. I talked about the opinion about the private standards. And they are not interested, they are not totally interested in private standards because already the market is saturated. About 40% of coffee produced worldwide has some kind of certification; however only 10% of the coffee, only 10% of

production can be sold as certification coffee in a retailer or in a consuming market. So, for producers, they have no incentive to start or to use private standards because there is no market for them. And if they can't [ph] sell their coffee as certified coffee, they only have to pay the compliance fee for standards. So for small coffee producers, they are in a very difficult situation right now. That's my comment.

Junji Nakagawa
He is my student and I will examine his research paper on private standards of coffee and the strategy of small-scale farmers in El Salvador to enter the global qualified coffee market. We had an interesting discussion on that, but that's another story. His point is important in the sense that even though you as a small farmer or supplier/producer come up with private standards you may not find sufficient scale of market production. So if the compliance cost is larger than the expected benefit for small scale farmers, coffee producers in small countries, there is a very, very small chance for private standards for coffees like fairtrade or organic or anything to be diffused. We are talking about proliferation of private standards. Yes, the number of standards are increasing but the ratio of adoption is quite another story. So when it comes to the ratio of adoption by the farmers on the ground, still the private standards are a very, very small minority of global market, less than may be 1% of global production of any agricultural product are complying with private standards. That's the reality of the world today. And now let me invite Rogerio as the last commentator.

Male Participant
Some comments on other's presentations…

Junji Nakagawa
Yes, of course. And then Kawai, you will be the last speaker.

Rogerio Correa
Okay, thank you. I think this issue of coffee producers is a very interesting one because there are a lot of small details in your question. For example, these producers are focused in such a market, for example, and what kind of different standards are demanded in that market. This is one point. The other point is for internal use. If all the coffee products in El Salvador are to be consumed internally, perhaps an internal certification should be better for them. But I think it's not the case. They want to export and have a prime price related to the exportation. And what kind of standards to choose – fairtrade, UTZ, and others, how to choose among many ones. The third issue is related to the scale of production. For example, if the products with different kind of production, with different kind of quality, that leads to different kind of certification. They may want to make a cooperative in order to achieve the scale economy, but the variety of products and the blending may still cause difficulty. So, these very small issues leads to different problems to the producers. And that's the point here with the concerns related to proliferation.

So perhaps if we can join UTZ-Rainforest Alliance and merge all these schemes in one scheme, we are not monotonically preparing a scheme. But merging the sustainable issues that are correctly inside the seal and

can match the concerns of the producers and the consumers. That is the point to try to match offer and demand. I would like to stress a good example that was in the presentation of Mr. Kometani. Japan G.A.P., for example, a group of countries like Japan, Canada, Australia decided in a tentative manner, to get recognized to GLOBALG.A.P. firms, the GFSI – inside the GFSI is a Global Food Safety Initiative. That is an initiative of these countries that provides an umbrella recognition for different GAP certification with the same objective. So it is not a trying to constrain the local capacity of producers or local culture and to affect the trade environment, that is important for this one, and not to restrain the innovation capacity of doing business. This is the point we want to say that it is important to have convergence among the different kinds of schemes with the same objectives in order to reach certification objectives and avoid fragmentation and misunderstandings related to them.

Junji Nakagawa
Thanks so much Rogerio. And Professor Kawai, please.

Masahiro Kawai
Okay, thank you. Earlier, the issue of global regulatory cooperation was discussed and I thought Fukunaga-san's presentation was excellent. But looking at the history of credit rating agencies, the urgency of regulatory cooperation or global cooperation in the area of private standards seems to be much less. Has it really created a big problem? Rating agencies did create huge problems at the time of Enron collapse, WorldCom failure, and subprime crisis. So there was a really strong case for the authorities to step in and to make sure that rating agencies would provide accurate and quality assessment. Now, in the area of private standards have we seen a great deal of distortion of global trade or global investment? I do not think so. Without having a significant distortion to international trade or international investment, political push for global coordination would be limited. So researchers may want to be a bit modest, like proposing a more realistic approach like encouraging private standard setters to be more transparent so that anyone can learn how to comply with standards, reducing costs of certification, and lowering barriers rather than embarking on global coordination. That was the impression I got.

And I wanted to ask Fukunaga-san about animal welfare in Japan. I don't know who is promoting animal welfare. No newspaper article would carry such an issue in Japan. Where is the political force? Maybe in Europe some NGOs may push the agenda. Why is it such an important issue in Japan? Is it because Japanese agriculture producers want to sell more products to Europe? Is that the reason or out of ideology?

Junji Nakagawa
At the 2020 Olympic Games in Tokyo, the procurement rule is that you must comply with the GLOBALG.A.P. standards even to serve local foods to Olympians. That could be one motivation.

Masahiro Kawai
Animal welfare aspects?

Junji Nakagawa
I think so but I'm not sure.

Yuka Fukunaga
I must agree that, as Professor Kawai has pointed out, Japanese producers are not so interested in animal welfare. Japanese consumers are not keen on animal welfare and the Japanese government is not an ardent advocate of animal rights either. But because of the Olympics and Paralympics in 2020, they have to have some kind of standards on animal welfare. That's why they have adopted this new guideline on animal welfare.

And about the seriousness of the situation of private standards, I think Professor Kawai is right in pointing out that the "crisis" of private standards is not so serious as the international financial crisis, which Professor Kawai discussed about. Given the limited seriousness, governments and stakeholders may not have a strong incentive to create a new framework on private standards. But I would like to think that, this limited seriousness may make it easier for governments and stakeholders to agree on what framework should be adopted to govern private standards.

Junji Nakagawa
Thank you so much Professor Fukunaga and Kawai. And Professor Kawai's first comment on the difference in the urgency of government intervention in private standards and credit rating agencies is another interesting point for discussion but we don't have any time. But maybe because it was – in the case of credit rating agency it was one of the reasons for the global financial crisis. And seemingly trustworthy credit ratings made a mistake and many private investors put their money, huge money to wrong issuers and that was a trigger of the global financial crisis. Whereas the private standards, even though they abide by them or they are not so trustworthy, they might not trigger any global financial crisis, the crisis of that size or seriousness. In that sense, private standards, especially when it comes to the sustainability or other social value related standards are still not as serious or as important as financial credit rating, which are private standards for the maintenance of the very system of international financial transactions. In that sense many private standards are still a luxury for global economy. But this should be discussed tomorrow in the closed workshop among us, inviting many other private sector individuals.

Thank you so much everyone, audiences and panelists for having joined us to the symposium. I have a news for you. As we did last time in 2016, this seminar was recorded. And based on the recordings, we will make an electronic publication of the workshop toward the end of this March. So, for those who are interested in getting a copy of the PDF format of the symposium, please send me an email, asking for a copy. It will be provided by the end of March. And the cooperation from all the panelists is strongly welcome for the timely publication of the symposium. Thank you so much.

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