

# **Regulatory Aspects of EU-Thai Trade Relations in the Area of Food Safety**

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I, Jaruprapa Rakpong, confirm that the work presented in this thesis is my own. Where information has been derived from the other sources, I confirm that this has been indicated in the thesis.

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## **Abstract**

This thesis identifies the main characteristics of EU food safety regulation and explores its impact on stakeholders in Thailand. It provides an overview of the principles and mechanisms that underpin EU food safety law and presents two detailed case studies in the areas of baby corn and poultry. The account presented is based not only on doctrinal analysis and but also upon in-depth interviews with relevant stakeholders in Thailand.

The case studies highlight the far-reaching cross-border impacts of both official EU food safety regulation and of private standards, such as those put in place by EU supermarket chains. Positive and negative cross-border impacts are identified. The most striking and pervasive negative effects arise in relation to private standards. The thesis argues that this is in part because mechanisms to ensure the external accountability of private standard-setting bodies are absent or deficient in several respects. This stands in contrast to the situation in relation to official EU food safety regulation where the World Trade Organisation and what is described as the ‘Competent Authority Model’ succeed in instantiating effective external accountability relationships between the EU and affected stakeholders abroad.

Using insights gained from stakeholders’ experiences and concerns, this thesis evaluates the principles and mechanisms that underpin EU official food safety regulation and private standards and, crucially, it also puts forward constructive suggestions to help resolve or mitigate the cross-border problems that arise.

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## **CHAPTER 1**

### **INTRODUCTION**

At the beginning of 2011, the Department of Agriculture (DOA) of the Thai Ministry of Agriculture and Cooperatives introduced a self-imposed ban on five categories of vegetable exports to the European Union (EU). This was done voluntarily in order to address a number of compliance problems regarding traces of prohibited chemical and microbial substances found in vegetable consignments from Thailand bound for the EU, and in order to preempt the possibility of an EU-imposed ban.<sup>1</sup>

Although this self-imposed ban caused major disruption to Thai vegetable exporters, it was considered necessary by the DOA in order to demonstrate to the EU authorities that as a ‘competent authority’ (CA) for the purposes of EU law, it was still able to ensure that Thai exports comply with EU food safety law. This ban lasted for more than one month and the resumption of vegetable exports was only permitted by the DOA once the source of the problem had been identified and the problem resolved.<sup>2</sup>

This self-imposed ban is a recent example of the lengths to which Thai governmental entities are willing to go in order to secure continued access to the EU market and to maintain their status as competent authorities.<sup>3</sup> On numerous previous occasions,

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<sup>1</sup> Source: <http://www.thaipost.net/news/180111/33007> (in Thai)

<sup>2</sup> For detailed discussion, see Section 4.1.1.2.2 (infra).

<sup>3</sup> There was another more recent incident in July 2011 where a potential EU ban was threatened on Thai cauliflowers, aubergines and snake beans. As of 5 July 2011, the DOA has been considering the possibility of imposing ban on these vegetable exports to the EU until the source and the cause of the breach are found and until the compliance situation is improved.

various Thai governmental entities went further than the imposition of an export ban and demonstrated a willingness to change their institutional structures, to issue special laws and to introduce additional export control procedures in order to ensure that Thai food exports could be demonstrated to comply with EU food safety law.

This can be seen, for example, in the DOA's introduction of an entirely new export certification system for all fresh fruit and vegetable exports to the EU which commenced in 2008. This scheme required quality control of all farm and food export establishments.<sup>4</sup> In 2003, the Livestock Developments Department (DLD) and the Department of Fisheries (DOF), two other national CAs dealing with products of animal origin and fisheries exports respectively, established on-site export laboratories and control mechanisms to demonstrate that Thai exports to the EU were free from "Nitrofurans", a prohibited substance under EU law.<sup>5</sup>

Similarly, following the Avian Flu outbreak in 2004, the DLD established an entirely new export control unit to address the EU's concerns about Thai poultry products. This involved placing special quarantine stations at all commercial ports to reassure the EU that the risks of Thai poultry exports containing the H5N1 virus were negligible as all export consignments had already been tested for the presence of the virus.<sup>6</sup>

While it is governmental entities in Thailand, often under pressure from the EU, that take the initiative when it comes to securing compliance with EU food safety law,

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<sup>4</sup> See *infra*, Section 3.2.3.2.3.

<sup>5</sup> Discussion in Section 3.3.3.2.3.

<sup>6</sup> See Section 3.3.3.2.3.

Thai producers and exporters also need to adapt their infrastructure and operating procedures in order to comply with the Thai government's demands. As a result, significant costs are imposed on them and they are required to confront significant operational challenges. Needless to say, the compliance costs of securing and protecting access to the EU market can be extremely high.

It is understandable why the EU, which is a regional association of developed states, with a history of high publicised food safety scares, has strict standards for imported food. However, the costs and consequences of these strict standards for governments, producers and exporters in other countries should not, as it often is, be overlooked. As the examples set out above attest, 'internal' EU decisions on food safety frequently generate far-reaching external effects. In many cases, these effects may be positive, but there is no question that negative effects also arise. In the case of Thailand, these external effects occur because of the importance of the EU market for Thai producers and exporters. The EU is a large and expanding market, both in terms of number of customers and in terms of purchasing power.

Such is the importance of the EU agricultural market for Thai producers and importers that the Thai government will go to significant lengths to secure continued access. This is not simply a question of putting new, EU-compliant, laws on Thailand's statute book. New institutions and monitoring procedures need to be established and new principles operationalised. The scale and complexity of the task involved and the crucial EU and Thai interests at stake, create an environment in which cross-border, transnational, co-operation is required. So intense is the resulting cooperation that, ultimately, Thai governmental entities end up serving as agents, or competent

authorities, of the EU. This competent authority model will serve as one of the focal points for discussion in this thesis and it serves at the outset to exemplify that although food safety regulation is highly technical, the study of it has broader global governance implications as well.

Alongside official EU food safety regulation, private entities including standard-setting bodies and supermarkets, increasingly impose their own standards on Thai food exports to the EU. These private standards are frequently stricter and more far-reaching than EU law. Consequently, in the area of food safety, the very concept of 'regulation' needs to be redrawn. It is for this reason that for the purposes of this thesis, the concept of 'EU food safety regulation' is taken to include not only laws which emanate from the institutions of the EU, but also those private standards with which compliance is required by retailers to gain effective market access to the EU.

It is with the effects of EU food safety regulation in Thailand that this thesis is concerned. It highlights both the positive and negative effects and puts forward constructive proposals for reform. It argues, on the basis of interviews and a comparison with official EU food safety law, that the negative effects of private standards are more pronounced. This is due, in part, to the absence or insufficiency of mechanisms to ensure that those adopting private standards are accountable to those whom they effect. Drawing upon experience in relation to official EU regulation, the thesis sets out a number of suggestions about how this accountability gap in private standard-setting could be mitigated or closed.

The thesis is in part doctrinal, setting out the main principles and components of official EU food safety law. It is in part theoretical, exploring the concept of global governance in relation to food safety and the concept of external accountability in the framework of transnational law. The thesis is also empirical in that it is based upon in-depth interviews with stakeholders in Thailand, about which more will be said below.

## **1.1 CHALLENGES**

The study of the external effects of EU food safety regulation in Thailand raises both theoretical and practical challenges. Theoretically, it has often been assumed that regulations, whether imposed by a governmental or private entity, will operate within their own operational domain. That is to say, both regulator and regulatee will occupy the same regulatory space which is bounded by territory or by organizational domain. Decision-making practices frequently reflect this assumption, and make the regulator answerable only to individuals and bodies which operate in the same regulatory space. However, in the area of food safety, regulation emanating from one country or polity is capable of creating external effects which are felt in different countries and organizational domains. This necessitates a re-thinking of the concept of accountability and a shift from one-dimensional accountability thinking to pluralistic accountability. It is with this shift that this thesis is in part concerned.

Furthermore, on a practical level, we are also faced with the challenge of understanding how cross-border regulations are adopted and enforced and with identifying the range and intensity of impacts that they have. This is complicated in

the case of EU/Thai relations in the area of food safety. Both the EU and Thailand operate complex bureaucratic structures, which are relatively dis-aggregated. That is to say, they involve many different governmental entities which are connected in different and sometimes subtle ways. The challenge of understanding the practical operation of EU food safety regulation in Thailand is exacerbated by dint of the wide range of food exports that find their way from Thailand to the EU. Because of this, it is not realistic in the context of a single thesis, to examine the regulatory framework in all agricultural sectors. For the purpose of this thesis, two food product markets are examined, concerning poultry meat and baby corn. The reasons for choosing these case studies are set out in chapter 3.

## **1.2 LITERATURE REVIEW**

So far, existing literature does not offer a clear pathway to meet these practical and theoretical challenges. Firstly, although there are many legal studies which examine the regulatory framework for imported products including food, these studies tend to be conducted from an importing country's perspective. As a result, they often conclude that the introduction of stricter import control mechanisms is required to ensure that imported products are safe. Little if any attention is paid to the implications of these proposals for stakeholders in exporting countries. Examples of such studies include those conducted by Zach and Bier (2009), Alemanno (2010), Kenneth et al (2008).<sup>7</sup>

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<sup>7</sup> The issue of the needs for keeping imports safe will be subject to further discussion in Chapter 3, Part III.

While there are also studies which focus on the impact of food safety regulation from an exporting country's perspective, these studies are not written from a legal perspective and they do not consider the implications of their findings for our understanding of (transnational) law. Nor do these studies seek to integrate empirical findings with theoretical investigation, for example in relation to concepts of accountability or network governance.

Analysis of the *de facto* impacts of EU food safety law on third countries has been offered in a number of studies, including those by Henson and Mitullah (2004) which investigate the cross-border impact of EU food safety law in relation to Kenyan Nile Perch.

There have also been studies about Thailand's compliance with specific EU food safety regulations, for example with the "HACCP" regulation by Suwanrangsi (2002) and Nidhiprabha (2002). There is also a comparative study examining the impact of GlobalGAP, a private certification system, on food exporters in Thailand, Malaysia and Vietnam, which was prepared by various authors on behalf of the United Nations Conference on Trade and Development (UNCTAD). However, while these studies examine the actual external effects of EU food safety regulation, they do not address the theoretical questions to which these external effects give rise. This thesis demonstrates that theoretical analysis of this kind can shed light on the reasons for negative trade effects arising and on the steps that may be taken to resolve or at least mitigate these negative effects.

There is, however, a separate body of literature which focuses on the theoretical dimensions of cross-border regulation. These studies are often written by legal academics and explore concepts such as “global governance”, “external accountability” and “global administrative law”. Many authors have claimed that these concepts can be used to explain and to solve emerging problems in cross-border regulation. Good examples include works by Abbott and Snidal (2009), Shaffer (2009), Schepel (2005), Jansen and Michaels (2008), and Sabel et al (2011)). Specifically in relation to external accountability, there are studies by Keohane et al; and on global administrative law, there are works by Kingsbury, Krisch and Stewart (2005) and Cassese (2005) among others. This theoretical literature is quite new but already it has been used to explain complex institutional structures including those created by the WTO.<sup>8</sup> However, so far there are no studies which seek to integrate the practical/empirical dimension with the theoretical dimension and which examine EU food safety regulation from this perspective; let alone specifically in relation to Thailand. Furthermore, while some attention has recently been paid to the WTO as an agent of external accountability,<sup>9</sup> the role of the competent authority model has been entirely neglected to date.

### **1.3 RESEARCH QUESTIONS**

This synthesis between theory and practice is reflected in the research questions that this thesis addresses. These are set out briefly below:

- 1) What are the main characteristics of EU food safety regulation?

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<sup>8</sup> These include those performed by Stewart and Badin (2009), and Lang and Scott (2009), p. 601-610.

<sup>9</sup> Ibid.

- 2) What is the scope of the cross-border application of EU food safety regulation in Thailand? What legal mechanisms and institutional frameworks are put in place to effectuate and sustain this cross-border application?
- 3) What positive and negative impacts have emerged from the operation of EU food safety regulation in Thailand? To what extent does this differ as between official EU food safety regulation and private standards imposed by other entities in the EU?
- 4) What theoretical frameworks can be used to understand and evaluate the cross-border effects of EU food safety regulation in Thailand, including in relation to the institutional innovations to which this gives rise?
- 5) To what extent are these theoretical frameworks suggestive of avenues for reform?

#### **1.4 SCOPE**

This thesis examines the impact of EU food safety regulation in Thailand. It is concerned with Thai food exports to the EU which are regulated by the Ministry of Agriculture and Cooperatives (MOAC), the constituent departments of which, act as competent authorities for the purposes of attesting to compliance with food safety regulation under EU law.

The term “food product” in this thesis is used to refer to a specific section of “agricultural” exports which falls under the oversight of MOAC. This captures a large volume of food exports to the EU, including (i) fresh fruit and vegetables; (ii) raw, cooked, and frozen animal products; and (iii) fisheries products. However, some

specific products such as canned vegetables and dried snacks are excluded from the scope of this thesis as their control framework falls under the oversight of the Ministry of Industry (MOI) and the Ministry of Health (MOH). These products are categorised as manufactured rather than agricultural products and they are subject to different control schemes prior to export. However, in most cases the control schemes run by the MOI and MOH are similar to those run by the MOAC as the manufacturers still need to obtain export certificates prior to exportation, and their factories and manufacturing processes still require MOI approval and are subject to inspection on a regular basis. However, the schemes run by different departments of the MOAC are subject to significantly more frequent and strenuous inspections by EU authorities.<sup>10</sup>

It should also be noted that the term “food safety regulation” in this thesis primarily refers to sanitary and phytosanitary (SPS) measures which aim to protect human, animal and plant life and health from exposure to various risks as specified under Annex A(1) of the WTO SPS Agreement.<sup>11</sup> Most other regulations fall outside the scope of this thesis. However, some regulations are tangentially related to food safety and are included in the scope of what the EU regards as food safety law.<sup>12</sup> These have been labelled by the EU as relating to ‘other legitimate concerns’ and include issues such as animal welfare and worker well-being. To the extent that the regulation of ‘other legitimate concerns’ forms part of the EU food safety package and is included in the activities of private standard-setting bodies which operate in the area of food

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<sup>10</sup> In most cases, these bodies are the Food and Veterinary Office (FVO).

<sup>11</sup> This includes the risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; from the entry, establishment or spread of pests; or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

<sup>12</sup> See Section 2.5 *infra* (introduction).

safety, discussion of these will also be included in the thesis. We see as a result that the line between food safety and non-food safety concerns is fluid and is at times difficult to draw.<sup>13</sup>

## **1.5 METHODOLOGY AND SOURCES**

The starting point for this thesis was the conduct of empirical research in Thailand. Two detailed case studies were undertaken to ascertain the impact of EU food safety regulation, including private standards, in Thailand. This empirical research did not only examine the economic and practical consequences of EU food safety regulation for Thai producers and exporters, but also the implications of EU food safety regulation for governmental structures and practices in Thailand, as well as for Thai law.

These case studies investigating the regulatory framework, and the application and impact of EU food safety regulation on Thailand, were conducted in relation to two selected exports, namely: (i) fresh/chilled baby corn; (ii) cooked poultry meat. The results of this research were obtained during field trips to Thailand during the summer of 2008 and in January 2010. The research findings were gathered in the main from personal and group interviews with stakeholders. It should be noted that the term “Thai stakeholders” used in this thesis refers to Thai governmental and private entities who involve in food exporting industry and have been regularly affected by EU food safety regulation. These interviews were conducted in order to gain insights into the daily, direct

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<sup>13</sup> See Section 2.5.1 *infra*.

experiences of these stakeholders in complying with EU food safety regulation, including private standards. The insights and examples gained as a result of these interviews were then used to assess the effects of EU food safety regulation in Thailand.

Among the interviewees were representatives of governmental entities and private organisations. They ranged from high-and-low ranking government personnel, exporting company executives, food exporting business owners, representatives of exporters' associations, individual producers/exporters as well as independent researchers.<sup>14</sup> Although the interview questions were mostly concerned with the products included in the two case studies, where relevant and appropriate additional questions were also directed to enhance understanding of the impact of EU food safety regulation on other Thai food exports. These additional questions were posed in order to compare and verify the results of the case studies with other food export sectors.<sup>15</sup> In addition, the results of interviews were compared in order to confirm the reliability of a given individual source.

In total, 39 separate interviews were carried out; 35 personal and telephone interviews with 32 individuals, and a further 4 groups interviews with representatives from companies and producers/exporters' associations.<sup>16</sup> All the interviews were undertaken in Thai and were either written in shorthand on the spot or, where permitted by the interviewee, were taped. The interviews were subsequently minuted

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<sup>14</sup> Appointments were made prior to each interview. These were mostly arranged by the author but for some appointments with company directors and high ranking governmental staff, these were made by senior governmental officials acting on the author's behalf.

<sup>15</sup> For example, the interviews were also made with stakeholders in the shrimp and fresh fruit industries regarding the impact of EU food safety regulation in these sectors.

<sup>16</sup> The full list of the interviews can be found in the Appendix at the end of this thesis.

on the same day. These interviews were supplemented by further e-mail and telephone correspondence with the interviewees to clarify remaining issues or questions.

In addition to the interviews, minutes and data obtained from three exporters' meetings prior the EU FVO's visits were also used to supplement and verify the results. Furthermore, primary and secondary sources were also used to supplement, compare and confirm the results obtained in interviews.

In addition to the empirical research, this thesis is also based on doctrinal research and analysis. The core components and characteristics of EU food safety law are set out in Chapter 2 and are analysed further in Chapters 4, 5 and 6. A thorough understanding of EU food safety law was essential in order to understand the results of the empirical research, to verify the validity of the findings and to ensure proper attention to the legal dimension of this study.

This doctrinal analysis was conducted on the basis of both primary and secondary sources. Where relevant, reference has been made to primary and secondary legislation, reports, working papers, and standards adopted by national and regional governments, international organisations as well as by private entities.<sup>17</sup> In addition, numerous academic articles and books, were also been used as sources for the theoretical discussion and to conduct detailed evaluation of the case study results.

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<sup>17</sup> For example, entities involved include the WTO, Codex, UNCTAD, EU, UK, Thailand, and the USA. The full list of legislation can also be found in the Appendix at the end of this thesis.

The thesis uses the concept of external accountability as the basis for analysis and deploys the theoretical model put in place by scholars of Global Administrative Law (GAL). The appropriateness of this concept and model became apparent during the course of the empirical research. As will be discussed in considerably more detail below, Thai stakeholders expressed particular concern about the lack of transparency of EU food safety regulation and about the absence of opportunities for them to influence or contest the standards adopted. These concerns were especially pronounced in relation to private standards. Though stakeholders did not use the term accountability during the interviews, in essence they expressed again and again pressing accountability concerns.

## **1.6 STRUCTURE**

The thesis proceeds in three main parts. The first part identifies the core concepts and characteristics of EU food safety regulation. The second part presents two case studies on fresh/chilled baby corn and cooked poultry exports. In each case study, observations are made on how EU food safety regulations, including private standards, have been applied in Thailand. The cross-border effects which have emerged from EU food safety regulation are also identified.<sup>18</sup> The third and final part of the thesis includes a more theoretical analysis of the operation of EU food safety regulation in Thailand. The aim here is to build a theoretical platform to explain the EU-Thai food safety regulatory framework in order to put forward proposals for accountability-enhancing reform. A summary of each chapter is provided below.

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<sup>18</sup> The cross-border effects of EU food safety regulation which are derived from governmental regulations are discussed in Chapter 3 whereas those concerning private standards are discussed separately in Chapter 6.

## **Chapter 2: Core Concepts of EU food Safety Regulation**

This Chapter identifies the main concepts underpinning the operation of EU food safety regulation. It charts the evolution of EU food safety law since the adoption of the White Paper on Food Safety in 2000 and the shift to a management-based style of regulation that this entailed. The concepts of traceability, and Hazard Analysis and Critical Control Points (HACCP) are central this, as is the risk assessment function played by the European Food Safety Authority (EFSA). This Chapter also introduces the concept of ‘other legitimate concerns’.

## **Chapter 3: The External Effects of EU Food Safety Regulation on Thailand**

The long chapter presents the empirical findings in relation to the two case studies highlighted above. As such, it provides a detailed account of the impact of EU food safety regulation in Thailand, both in relation to official EU food safety law and private standards. Given its length, and to assist the reader, this chapter is clearly divided into three parts.

Parts I and II present the results of the two case studies on fresh/chilled baby corn and cooked poultry exports. Each case study includes information on historical background, production process and export environment in relation to the product concerned. Each case study also identifies the EU food safety regulation that is imposed as a condition for EU market access and the control mechanisms put in place to ensure that these EU requirements can be met.

In Part III, the results of the two case studies will be used to describe in greater detail the operation of the “Competent Authority (CA) Model”, the institutional framework put in place by the EU and Thai governments to underpin the application of EU food safety law in Thailand. No detailed analysis of this has been made available before. Analysis will also be made of how regulation by way of the CA model has created positive and negative effects in Thailand. The CA model is crucial to the theoretical discussion which follows as it is a key instrument of external accountability. It is for this reason that it is important to understand its operation in some depth.

#### **Chapter 4: Solving Operational and Trade Problems through External Accountability and Global Administrative Law**

This chapter presents a theoretical analysis of EU food safety regulation in Thailand. Theories of global governance and theories of accountability and global administrative law are used to explore and conceptualise the current stage of EU food safety regulation in Thailand.

This Chapter argues that EU food safety regulation in Thailand fits neatly into a ‘global governance’ framework and that this shift from government to governance is important to understanding the accountability deficits that arise. The chapter explores the concept of accountability and argues that in a global governance setting, a shift from one-dimensional to pluralistic or external accountability is required. It is only in the light of this shift that the existence of accountability gaps between Thai

stakeholders and EU regulators can be understood. The concept of Global Administrative Law is then introduced with a view to using this as a framework to evaluate accountability relationships and to put forward proposals for accountability-enhancing reform.

## **Chapter 5: Closing External Accountability Gaps for Official EU Food Safety Regulation in Thailand**

This chapter explores the mechanisms in place to secure external accountability as between Thai stakeholders and EU regulators and does so in relation to *official* EU food safety regulation. Discussion of private standards is left to the Chapter that follows. Two sets of mechanism are discussed in detail; those put in place as a result of WTO law and governance and those which result from the operation of the CA model. Building on the previous chapter, these mechanisms are appraised from the perspective of external accountability and Global Administrative Law.

## **Chapter 6: Private Standards and External Accountability: A Critique and Recommendations for a Way Forward**

This chapter returns to the theme of private standards. Building on the empirical findings in Chapter 2, this chapter looks in detail at the external effects of EU private standards in Thailand. It argues that private standards create serious problems for Thai stakeholders and that sometimes they are not suitable or necessary to achieve their objectives. The chapter argues that external accountability gaps arise in relation to private standards and that these contribute to the operational problems that arise.

Drawing on the material in the previous chapter in relation to official EU food safety regulation, and upon the theoretical analysis in Chapter 4, this chapter concludes by putting forward concrete suggestions as to how external accountability could be enhanced in relation to private standards in the area of food safety.

## **CHAPTER 2**

### **CORE CONCEPTS OF EU FOOD SAFETY REGULATION**

#### **2.1 INTRODUCTION**

The core concepts underlying any system of food safety regulation are both unique and dynamic; they are modified according to changes in the regulatory aims of a particular country, its cultural perceptions of what is regarded as “safe food”, and in response to its direct experience of food safety scares and outbreaks. EU food safety regulation is no exception. At the time of the EU’s establishment, the main focus of food safety regulation in the EU was to achieve harmonisation of food safety norms in order to promote a single market. However, over the past decade or so the EU’s regulatory aims have broadened and the focus has shifted towards ensuring a high level of health protection for EU consumers.<sup>19</sup> As a result EU food safety laws have developed rapidly during this period.

EU food safety standards have long been criticised as being amongst the most stringent in the world and they have frequently provoked expressions of concern by trading partners. However, the high level of health protection demanded by the EU is understandable as it can be seen, predominantly, as a direct result of its learning curve through the history of highly publicised and costly food safety scares and outbreaks since the mid-1980s.

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<sup>19</sup> Article 114 (3), Treaty on the Functioning of the European Union (TFEU) (ex Article 95 (3), Treaty Establishing the European Community (TEC)). See Cardwell (2004), Chapter 1 and Vos (2000), p. 9.

This chain of events can be said to have started with several outbreaks involving the presence of microbial substances, notably Salmonella and *E. coli* from the late 1980s to 2003, and the major Foot and Mouth outbreak in 2001. However, the watershed event that provoked the realisation of a pressing need for a major change in the EU's approach to food safety came in the aftermath of the BSE crisis (from the late 1980s-2003) which was the catalyst for major reform of the food safety system in the EU.

An important step that defined EU food safety reform after the BSE crisis can be said to be the introduction of the White Paper on Food Safety of 12 January 2000,<sup>20</sup> which set out the basic principles of EU food safety law. The White Paper laid out objectives upon which subsequent EU food safety legislation would build. It set high standards of food safety and consumer health protection as its goals.<sup>21</sup> This was to be achieved through a fundamental change to the EU's approach to food safety through a move to a "comprehensive and integrated approach",<sup>22</sup> making the activities of food business operators involved in the food supply chain "from farm to table" subject to EU food safety control.<sup>23</sup>

The principles laid down in the White Paper on Food Safety were subsequently affirmed in Regulation EC/178/2002,<sup>24</sup> which later came to be referred to as the "general food safety regulation" or "general food law".<sup>25</sup> Through the application of

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<sup>20</sup> This followed the Green Paper on the General Principles of Food Law 1997. For a full discussion of the history of EU food safety reform see Cardwell (2004) Chapters 1-3.

<sup>21</sup> This is goal in addition to that of the need to promote a single market (The White Paper on Food Safety, p. 3).

<sup>22</sup> Ibid, Chapter 1.4, p. 6.

<sup>23</sup> Ibid, p. 8.

<sup>24</sup> Regulation EC/178/2002/, Recital 11.

<sup>25</sup> The Regulation is referred to as "The General Food Law" by Vos and Wendler, (2006), p. 72 or "General Food Safety Regulation", by for example, the UK Food Standards Agency

the equivalence concept, as set out in Article 11, competent authorities of third countries which export food products to the EU must ensure that their export food safety control systems are of an equivalent level, that is, capable of bringing about the same results as those being sought by the EU.

This chapter sets out to highlight some of the key features and core concepts underlying EU food safety law in the aftermath of the BSE crisis. The core concepts introduced in this chapter are applicable to food products originating within the EU and also to imported food, including food products originating in Thailand. These concepts generate significant cross-border effects, the impact of which is clearly evident in Thailand. Detailed discussion of the nature of these cross-border effects will be included in Chapter 3. First though I will introduce main characteristics of contemporary EU food safety law, namely reliance on the hazard analysis and critical control point (HACCP) principle, traceability, the risk assessment role of the European Food Safety Authority (EFSA) and the incorporation of ‘other legitimate concerns’ within the scope of the EU food safety framework.

## **2.2 TOWARDS HAZARD PREVENTION AND MANAGEMENT-BASED REGULATION: THE APPLICATION OF “HACCP” PRINCIPLES**

Prior to its reform in 2000,<sup>26</sup> EU food safety law relied mainly on “performance-based regulations”.<sup>27</sup> The law adopted a “fire-fighting approach” to prevent harmful or

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(see: <http://www.food.gov.uk/scotland/regsscotland/regulations/scotlandfoodlawguide/sflg200501/>).

<sup>26</sup> Marked by the beginning of the White Paper on Food Safety.

<sup>27</sup> This is also known as the “poke-and-sniff” method (Sabel and Zeitlin (2011), p.7).

inferior products from entering the food-chain.<sup>28</sup> This top-down regulatory approach focused on testing whether end-products were capable of meeting certain legal criteria or specifications before being allowed into the market. Examples include, *inter alia*, laws specifying “maximum residue limits” (MRL) of pesticides and the presence of microbiological organisms found in food.

Whilst performance-based regulations continue to exist, and do still play a crucial role in preventing unsafe food products reaching consumers, the EU and its Member States have realised that performance-based regulation is not in itself capable of achieving a sufficiently high level of health protection. This is because the success of performance-based regulation is highly dependent upon appropriate sampling processes being in place. The target for food safety performance can be set at the highest level when the MRL of an unwanted harmful substance found in food is set as close as possible to zero (for example at 0.0001 ppm). Nevertheless, where a suitable sampling process is not in place, laboratory tests on unsuitable samples can still fail to detect a minuscule amount of the harmful substance which, if consumed, could turn out to be harmful to consumers’ health. An example of an event where an unsuitable sampling process failed to detect accurately a health risk in a food product can be seen in the Cadbury’s chocolate Salmonella outbreak of 2006. At that time the heterogeneous sampling process used by the company was found to underestimate the actual presence of Salmonella in ready-to-eat chocolate.<sup>29</sup>

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<sup>28</sup> Coglianese and Lazer (2003).

<sup>29</sup> The sampling process used in this case involved the clumping of bacteria to estimate the most probable number of bacteria. This was considered inadequate and could not be relied upon to estimate the risk associated with ready-to-eat foods such as chocolate. Source: the Food Standards Agency report; following the meeting with independent Advisory Committee on the Microbiological Safety of Food on the 30 June 2006 stated that in fact the acceptable level of Salmonella in a ready-to-eat food

Even with the most advanced sampling processes in place, some potentially unsafe products may still enter the market under a performance-based approach. As a result this system also relies upon the need to recall products once a hazard has been detected. This can be extremely costly. In the Cadbury incident the cost of product recalls was estimated to be £5 million and the loss of sales due to erosion of consumer confidence to be £20 million. However, in 2007 the loss of sales estimate was raised to £50 million.<sup>30</sup> In a case involving an outbreak of the Avian Influenza it was suggested that Bernard Matthews, the poultry company identified as being the source and which had formerly been associated with wholesome family food, suffered a significant unquantifiable loss of reputation.<sup>31</sup>

As a result of the shortcomings inherent in performance-based regulation there has been a shift towards “management-based” regulation.<sup>32</sup> Here the regulatory focus is upon managing emerging food safety risks at various stages throughout the food supply chain, from preparation and production processes to packaging and distribution. This new approach is reflected in EU food safety law by the application of HACCP principles.<sup>33</sup> HACCP became legally binding throughout the EU, and applicable also to imports, on 1 January 2006 following the implementation of Regulation EC/852/2004.<sup>34</sup>

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product such as chocolate is zero. For further information on this outbreak refer to: <http://www.food.gov.uk/news/newsarchive/2006/aug/cadbury>.

<sup>30</sup> Shortly after the outbreak occurred, JP Morgan, the consultant company for Cadbury initially estimated the costs resulting from the incident. Elamin (2006).

<sup>31</sup> Elliott, Money (2007).

<sup>32</sup> Also known as total quality approach, Nicolaidis (2000), p.1.

<sup>33</sup> The concept was one of the key reforms in the White Paper on Food Safety, in the aftermath of the BSE crisis (White Paper on Food Safety, p. 38-39).

<sup>34</sup> Article 10, Regulation EC/852/2004.

The concept of HACCP is not new; its origin can be traced back to the space era of the 1960s when NASA began to adopt this approach to ensure the safest possible food for astronauts in space. HACCP principles were already used in the food industry as part of private standards' requirements prior to their endorsement by the EU regulation.<sup>35</sup> Compliance with these principles was endorsed by the USDA, Codex Alimentarius, as well as the WHO well before it became binding in the EU.<sup>36</sup>

In the EU context, HACCP became binding as a result of Regulation EC/852/2004 which imposes responsibility on food business operators to “put in place, implement and maintain a permanent procedure based on HACCP principles”.<sup>37</sup> Article 5.2 lays down the seven stages of HACCP which comprise:

- (i) identifying possible hazards by evaluating the possibility of their occurrence, both quantitatively and qualitatively;

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<sup>35</sup> Indeed, in the poultry case study in Chapter 3, Thai producers and exporters stated that HACCP principles were incorporated into private standards prior to their becoming binding under EU Regulation EC/852/2004 (See *infra* Section 3.3.4.1).

<sup>36</sup> For example, Codex Alimentarius has recommended the application of HACCP in the production of processed meat since 1985, (Recommended International Code of Hygienic Practice for Processed Meat and Poultry Products, Codex, CAC/RCP 13-1976, rev. 1 (1985)) and to be applied by the food industry and regulatory authorities generally in 1995 (following Codex Alimentarius's Guidelines for the Application of the Hazard Analysis Critical Control Point (HACCP) System (CAC/GL 18-1993). In the US, the programme endorsing the application of HACCP principles as an effective system for food safety was published by the National Advisory Committee on Microbiological Criteria for Foods in 1992 and was first used by the FDA in relation to the seafood industry in 1997 (Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Product). HACCP was also applied to the meat and poultry industry in 1996 following the establishment of the “HACCP regulation” (Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems of 25 July 1996).

<sup>37</sup> Food business operators include producers from primary production onwards. Primary production concerns the products of the soil, stock farming (i.e. including farmers and growers), hunting and fishing (Article 2 and Annex I of Regulation EC/852/2004). In general, most of post-harvesting activities (for example transport storage and handling of products at the place of production) and some of pre-harvest activities (for example transport of live animals, seeding and rearing of plants) will be caught under this Regulation (Annex (I) Part I)). There is only small number of exceptions to this, for example primary production for domestic or private use, direct supply by producers of small quantities to final consumers (for example farm shops) and the handling of raw materials for the production of gelatine or collagen (Article 1(2), *ibid*).

- (ii) determining the critical control points (CCPs) where each hazard might occur;
- (iii) establishing critical limits at each CCP by testing various product characteristics such as temperature, pH balance, moisture content and additives;
- (iv) establishing a system to monitor the control of the CCPs by designating responsible persons and identifying the monitoring intervals and methods used;
- (v) establishing corrective actions when a CCP is out of control;
- (vi) establishing procedures to verify the effectiveness of the entire HACCP system, especially where there is a change in product composition, consumer use or the emergence of new hazards, and
- (vii) establishing suitable documentation and record-keeping systems for these procedures and applications that are appropriate to the size and nature of the food business in question.<sup>38</sup>

The use of management-based regulation through the adoption of HACCP has been adopted by the EU to complement performance-based regulation. While performance-based regulation can still be useful to detect harmful products at the end of the supply chain, HACCP aims to identify the hazards associated with a particular food product and the health risks that each hazard can generate. It develops a preventive approach to deal with the hazards identified at various stages throughout the food supply chain,

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<sup>38</sup> For more information see, to DG-SANGO Guidance Documents: Implementation of Procedures based on the HACCP Principles and Facilitation of the Implementation of the HACCP Principles in Certain Food Businesses (also found at: [http://ec.europa.eu/food/food/biosafety/hygienelegislation/guidance\\_doc\\_haccp\\_en.pdf](http://ec.europa.eu/food/food/biosafety/hygienelegislation/guidance_doc_haccp_en.pdf)).

and it aims to ensure that the risks associated with these hazards are kept at acceptable levels. In other words, management-based regulation aims to prevent food safety risks at source.

HACCP presents some advantages from the perspective of food business operators. Food safety risks are often low in probability but significant in consequence. Where food safety outbreaks do occur the resulting costs are often high, not only due to the cost of product recalls but also because of the costs involved in regaining consumer confidence. By adopting a management-based system, food business operators can detect food safety risks at an early stage and can then take timely and appropriate action to control them. This management-based approach can thus serve to mitigate potential losses for food business operators.

In the Cadbury example above, the company did not apply a HACCP monitoring process despite this having already being legally binding throughout the EU.<sup>39</sup> If the company had applied HACCP it would have been more likely to ascertain accurately the high level of Salmonella risk, and would have been in a position to take appropriate action to control this risk and to detect the affected products before they reached end-consumers. In this incident, the likely cause of product contamination was a waste water pipe leaking into the production process area. If appropriate HACCP principles had been applied, the actual risk of Salmonella contamination could have been detected during the hazard analysis stage. By testing product characteristics at one of the designated CCPs, Cadbury could have identified the

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<sup>39</sup> Following Regulation EC/852/2004 EC and under the Food Hygiene (England) Regulation 2006.

unacceptable risk of *Salmonella* contamination then and could have suspended production until appropriate corrective measures were put in place.<sup>40</sup>

Another interesting feature of management-based regulation in the form of HACCP is that food business operators are required to play a proactive role in managing the risks associated with their products. The Regulation grants them considerable flexibility to undertake their own analyses, to plan their management strategies and to improve and adjust their systems according to their commercial needs.<sup>41</sup> To allow flexibility in HACCP application, terminologies such as “where necessary”, “where appropriate”, “adequate” and “sufficient” is included throughout the Regulation, enabling food business operators to decide for themselves what might be considered “appropriate” or “adequate” according to their particular situation.<sup>42</sup> For example, with regard to record-keeping there are no precise formulations as to what type of records are to be kept or for what duration they must be stored. Annex I (7) provides only that food business operators must retain records concerning their HACCP plan “in an appropriate manner and for an appropriate period, commensurate with the nature and size of their business”. The variation in the form of HACCP records can, for example,

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<sup>40</sup> Similarly, in the recent *E. coli* outbreak in German bean sprouts during May-June 2011, it was estimated that there could have been a failure in applying the HACCP principle by German farmers. A detailed investigation of this incident by the German authority and EFSA is currently underway and the cause of this outbreak has not yet been determined. Nevertheless, there is a possibility that had the proper establishment of the CCPs during the cultivation process of the bean sprout seeds been put in place, the outbreak could have been prevented. One report pointed out the high temperature (38°C), which could have been reached during the cultivation processes in the farmers’ establishment. This would have been ideal for *E. coli* bacteria to grow. Consequently, the authorities may well investigate whether the farmers maintained appropriate greenhouse temperature limits and demand answers from them if this was not the case. See further, Kennedy and Hughes (2011).

<sup>41</sup> HACCP presumes that those involved in day-to-day operations are well-placed to understand the nature of their own products and are well informed concerning the possible food safety hazards and risks.

<sup>42</sup> These terms are used in the Regulation Annexes. See also the Guidance document on the Implementation of certain provisions of Regulation 853/2004 on the hygiene of foodstuffs. (Can be found at: [http://ec.europa.eu/food/international/trade/interpretation\\_imports.pdf](http://ec.europa.eu/food/international/trade/interpretation_imports.pdf)).

range from paper-based files to computerised documents for small operators and to a specialised HACCP system for large producers. Moreover, the length of time that the records are kept can be less for products which have shorter shelf-life and *vice versa*.<sup>43</sup>

This flexibility leads to another benefit in reducing the expense required to monitor application of the law. Instead of laying down the exact CCPs for all food production, which could be time consuming and difficult to monitor, the Regulation allows food business operators to take their local conditions and specific needs into account, and urges them to use existing GAP or GMP practices which are known to the industry, or are in use in their country, as guidelines in developing their own tailor-made HACCP plans.<sup>44</sup>

Despite the benefit of creating an improved food safety regime for consumers and allowing flexible application, it is undeniable that HACCP does come with additional costs for food business operators, including those located abroad. These costs include staff training and improvements to factory infrastructure. For large-scale enterprises, including large exporters, a number of studies have indicated that the application of HACCP principles has not been problematic since their businesses can absorb the implementation costs through their economies of scale.<sup>45</sup> However, this is not

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<sup>43</sup> It has been suggested that by allowing food business operators to make their own decisions, they are more likely to view the rules as being reasonable and therefore more inclined to comply (Coglianese and Lazer (2003), p.695).

<sup>44</sup> As of December 2010, there were over 200 national guides to good hygiene practices to be used as guidelines and with further guides being developed at national and EU levels under Article 7-9 of Regulation EC/852/2004.

(At: [http://ec.europa.eu/food/food/biosafety/hygienelegislation/register\\_national\\_guides\\_en.pdf](http://ec.europa.eu/food/food/biosafety/hygienelegislation/register_national_guides_en.pdf)).

Most of these good practices have details of hygiene measures that can be applied as part of HACCP. For example, these may include the number of hand wash-basins, workers' equipment, the use of chemical disinfectants, or pest control procedures.

<sup>45</sup> See for example a study by Nidhiprabha, (2002) p. 13-14 on HACCP implementation by Thai exporters of processed food. Large companies such as Dole Thailand Ltd., which exports canned

necessarily the case for small and medium sized exporters who are likely to face considerable financial challenges, at least in the short term.<sup>46</sup>

Another remarkable feature of HACCP is that it places direct responsibility on food business operators. Cadbury's Salmonella incident, cited above, demonstrates how management-based regulation can be used as a powerful tool to protect EU consumers. Ultimately, in July 2007 Cadbury was held by Birmingham Crown Court to be responsible for the Salmonella outbreak caused by their failure to fully observe the HACCP Regulation.<sup>47</sup> Although the Company was fined only £1 million, the ruling acted as a good reminder that HACCP obligations are taken seriously in the EU, and that a large established food business operator could be held responsible for failing to implement HACCP requirements.<sup>48</sup>

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pineapples to the EU, were able to adopt an HACCP system in 2002, even well before the Regulation came into force. Similar successful implementation of HACCP is also found in the case of the Kenyan horticulture industry which is run by large exporters. (See a report on Poverty Reduction and Economic Management, Agriculture and Rural Development, World Bank (2005), p. 6-7.). Similar results have also been seen in both case studies selected included in thesis (See *infra*, Chapter 3, Part I and II)

<sup>46</sup> Small and medium-sized holders are likely to face short-term problems but are capable of complying in the longer term. (See, for example, the studies by Brown and van Midwoud (2006) and Ellis *et al* (2005) in relation to food producers' adjustments in the UK and the Netherlands). This is also the case in relation to Thai producers' adjustments, for example in the shrimp industry, where small producers were faced with short-term financial and operational constraints but who, after receiving assistance from the Thai governmental entities, were able to adjust to the HACCP regulations in time (Suwanrangsri (2002)). However, not all third country producers exporting to EU markets were able to adjust to this change. The attempts of the Bangladeshi shrimp industry, for example, to comply with the EU HACCP standard changed the industry's entire structure and its people's livelihood (Khatun (2004), p. 11). In this case, when HACCP became an EU import requirement, only large factories in urban areas could comply; the majority of small shrimp factories in rural areas were unable to comply and had to be closed down.

<sup>47</sup> The charge was brought by Birmingham City Council. The case was held on 16 of July 2007. Cadbury admitted to having failed to identify hazards from ready-to-eat chocolate products contaminated with Salmonella and to identify CCPs and corrective actions in line with HACCP principles, a charge under the Food Hygiene (England) Regulation 2006, implemented to fulfil the UK's HACCP obligations under Regulation EC/852/2004.

<sup>48</sup> The statement was made David Jukes, a Senior Lecturer in Food Regulation at the University of Reading (El Amin (2007)). Similarly, Sallie Booth, a solicitor at Irwin Mitchell, stated that "the sentence...sent a clear message to companies ... (that they) cannot afford to ignore a potentially dangerous situation and cannot take risks with the public's health" (McCathie (2007)). In the more recent *E. coli* outbreak it is up to the German authorities to investigate further whether its domestic law

With the introduction of HACCP it can be said that EU law has moved away from a purely performance-based “fire-fighting” approach toward a proactive approach based on hazard prevention and management-based regulation. Nevertheless it should be noted, as mentioned earlier, that this shift toward HACCP principles does not completely displace performance-based regulation. Rather it complements performance-based hygiene laws so as to ensure a high level of health protection for those living in the EU.

### **2.3 TRACEABILITY: MONITORING FOOD SAFETY FROM FARM TO TABLE**

The concept of traceability was also introduced in the EU White Paper on food safety. The concept later became legally binding upon the entry into force of Regulation EC/178/2002 on 21 February 2002.<sup>49</sup> It is defined under Article 3 (15) of the Regulation as “the ability to trace and follow a food, feed, food producing animal or substance intended to be or expected to be incorporated into food or feed through all stages of production, processing and distribution process”. In other words, food business operators are now obliged to keep a systematic record of their supply chain information so that in the event of any food safety incident, harmful products can be swiftly located, isolated and removed from the supply-chain.

Traceability systems were originally used in other industries, including the automobile and pharmaceutical industries, to ensure rapid identification of defective products.

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regarding the application of HACCP principles has been followed or breached by the food business operators linked to this incident.

<sup>49</sup> Applicable from 1 January 2005.

More recently they have gained world-wide recognition and have become a prerequisite for attaining international manufacturing standards, including ISO certification.<sup>50</sup> The concept was introduced into the food industry over the past two decades.<sup>51</sup>

Traceability is a key tool for managing and dealing with food safety outbreaks. As more food ingredients are obtained from different sources, with some being imported from third countries, gaining information on product origins and their destinations has become increasingly complex. Without a traceability system it would be almost impossible to perform fast and effective product recalls in the event of food safety incidents. As more high profile food safety incidents have occurred the application of the traceability concept has become widespread and is now generally accepted as a legal requirement by many developed countries including the United States, Japan, Australia and New Zealand.<sup>52</sup>

Traceability comprises three main elements:

- (i) identification of units/batches of all ingredients present in the products, and of the products themselves,

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<sup>50</sup> Traceability requirements are present throughout the ISO series, including ISO 9001 (2000), ISO 8402:1994 and ISO 22000. The concept is defined under ISO 9001 (2000) as being the ability to trace history, application or location of whatever is under consideration. ISO 8402:1994 defines it as the ability to retrieve the history and use or location of an article or an activity through registered identification. In ISO 22000, Clause 7.5.3, it is defined as the identification of product lots and their relation with batches of raw materials, processing and distribution records.

<sup>51</sup> Even before Regulation EC/178/2002 came into force, the traceability concept was applied by many food manufacturers.

<sup>52</sup> In the US, this is mainly applied with different objectives in order to deal with bio-terrorism (Section 306 of the Bio-Terrorism Act 2002). In Japan, traceability law has been applicable to particular products since the early 2000s. For example, a pilot traceability system for beef products was applied in 2003 and a full traceability system begun in 2007.

- (ii) information on how, where and when these batches/units have been moved or transported,
- (iii) a record-keeping procedure, such as a bar code or radio frequency system, to show the path of batches/units from the suppliers, through all the intermediate steps in food production and in some cases to the ultimate consumers.<sup>53</sup>

Combined with the HACCP concept discussed above, traceability forms part of a dynamic supply chain management system that aims to protect consumers. It should be noted that although traceability and HACCP remain distinct concepts, they are closely related and are both key in the formation of an effective risk management system. HACCP principles are used to identify hazards and to prevent the emergence of risks, and are applied prior to any food safety outbreak. Traceability, on the other hand, provides a back-up methodology to create systematic records of supply chain information so as to enable a prompt response to food safety outbreaks that have already occurred. Moreover, as traceability is used to identify the source of an unacceptable level of food safety risk, it can also contribute towards improving the application of HACCP principles, as it can highlight where the current CCP is at fault or where additional CCP should be incorporated into the food production line in order to prevent similar future recurrences. The combined system of traceability and HACCP principles offers some elements of the “root-cause” analysis put forward by Simon (2006) to tackle production line faults at source. The system required by the EU involves an application of the traceability data to analyse the cause of the problems

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<sup>53</sup> Source: A Preliminary Study “Traceability in the Food Chain”, Food Chain Strategy Division, Food Standard Agency (2002), p. 2.

at source, and subsequently to consider how these can be overcome through an improved application of HACCP principles. This root-cause analysis should be made following every food safety outbreak and after the source and the cause of the outbreaks have both been established.<sup>54</sup>

From the business perspective a traceability system can be considered as beneficial for all food producers in the relevant product sector. Since traceability can be used to trace back and identify the source of a food safety problem, and to pinpoint exactly where a fault has occurred, it can protect other producers and retailers by ensuring that responsibility and liability are correctly assigned. This can be seen from the Sudan I dye incident in 2005, where the source of the health risk was a red dye used in “Oriental Spices” which were subsequently used as ingredients by a manufacturer of Worcester Sauce. The sauce was in turn used as an ingredient in many food products, including snacks and ready meals.<sup>55</sup> The use of a traceability system to track the source of harmful substances in this case not only allowed appropriate and correct product recalls to be performed, but also enabled a number of food manufacturers to

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<sup>54</sup> For example with a food safety risk associated with the presence of dangerous Sudan 1 red dye found in many ready meals, traceability systems offered the answer that the root cause of the problem was imported spice used in the production of the Worcester sauce which is one of the common ingredients in many ready meals. Here, the cause of the problem was it not being subject to an appropriate control. Following this incident, all subsequent spice imports to the EU had to be tested for any presence of the dangerous dye (See further discussion on the following page). In a more recent *E. coli* outbreak, during May-June 2011, according to EFSA’s report published on 5 July 2011, the likely source of the problem was believed to be contaminated bean sprout seeds (“fenugreek seeds”) imported from Egypt used in a farm in Lower Saxony, Germany. The cause of the problem was widely suspected to be (although this is yet to be confirmed) the inadequate microbial testing of imported seeds. To prevent a similar outbreak in future, more rigorous checks on imported seeds for the presence of *E. coli* may need to be imposed at the EU border.

<sup>55</sup> See further: Rapid Alert for Food and Feed Meeting of 22 February 2005 “Contamination of Worcester sauce by the unauthorised colour Sudan I” ( Found at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/62&format=HTML&aged=1&language=EN&guiLanguage=en>) and the National Archives for Sudan I contaminated Products as of 21-22 February 2005 (Also found at <http://tna.europarchive.org/20110405190838/http://tna.europarchive.org/20110116113217/http://www.food.gov.uk/news/newsarchive/2005/feb/update>).

establish legal claims against the manufacturer of the Worcester Sauce to recover the costs of these product recalls.<sup>56</sup>

Furthermore, as traceability systems enable food business operators to keep information concerning product distribution and current product locations, they can be useful in targetting the withdrawal of faulty products before they progress along the food production chain. Consequently traceability systems can be beneficial even for food business operators who create a risk. The disruption due to the recall of their products can be mitigated by accurately locating where the potentially harmful products are and by allowing for their targeted withdrawal.<sup>57</sup> Without the presence of a traceability system there could be a need for food business operators to incur the substantial expense of withdrawing an entire product range.<sup>58</sup>

Moreover, a traceability system can be beneficial for the competent authorities when dealing with the emergence of a food safety risk. The information maintained in the system by food business operators can be passed on directly to the relevant competent authority so that sufficiently prompt and widespread action can be taken throughout an entire country or region. In an emergency, traceability information can even be passed or exchanged with consumer and other relevant bodies. This methodology has been used frequently in the EU through the triggering of the Rapid Alert System for Food and Feed (RASFF) where information regarding food safety risks can be passed on to a national or third country competent authority, to other EU entities or in some

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<sup>56</sup> See for example, Watson “Supermarkets hold suppliers to ransom over Sudan 1 recall” (2005) Article found at <http://www.foodmanufacture.co.uk/Business-News/Supermarkets-hold-suppliers-to-ransom-over-Sudan-1-recall>.

<sup>57</sup> This aim is laid down under Recital 28 of Regulation EC/178/2002.

<sup>58</sup> Ibid.

cases to end-consumers. After the notification of an occurrence of a food safety incident is distributed, it will be the responsibility of the competent authorities in each member state and third country to perform the traceability task in order to locate the products at risk in its territory and to try to find the source and cause of the incident. In the next chapter I will observe the circumstances and manner in which EU traceability information has been passed on to food safety authorities in Thailand.

In the EU, traceability gives rise to an horizontal obligation that bites throughout the food supply chain. Article 18 of Regulation EC/178/2002 imposes a direct obligation on food business operators at every stage of production, processing and distribution,<sup>59</sup> with the exception of retailers selling to final consumers, to trace a history of their food products and ingredients “one step back and one step forward”. This requires the keeping and maintainance of proper records of the physical flow of each product. In order to fulfil this obligation, each company must be able to identify immediately the names and addresses of suppliers and buyers of their products and keep records of which items/batches have been bought or sold, as well as transaction records for supply and delivery dates.<sup>60</sup> This information must also be readily accessible to the

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<sup>59</sup> Food business operator is “a natural or legal person, including companies and wholesale suppliers” (in the case studies, these include EU importers) who must ensure that “the requirements of food law are met within the food business under their control” (Article 3.3). The concept is applied as a general food law, covering a wide range of undertakings, including those carrying out any of the activities related to any stage of production, processing and distribution of food and feed (Article 3.2). These cover those engaged in transportation of food, storage of food, brokers, agents and importers where the products come from a third countries since they are involved in distribution of food (Guideline to the Regulation EC/178/2002, p. 12). Thus it covers all food business operators, including primary producers and transporters, and apples from producer to retailer (except in the case of imports, where it applies from importer to retailers - Article 11)

<sup>60</sup> In addition, the Guidelines relating to Regulation EC/178/2002 also state that other types of information that, although not compulsory, are highly recommended for retention by food business operators including volumes, batch numbers and a detailed description of products.

national competent authority.<sup>61</sup> Although the Regulation does not specify precisely the duration that records must be kept, as a general rule laid down by the Commission's guidance, traceability records for food products with a shelf-life or use-by date, should be kept for the duration of the entire shelf-life plus 6 months.<sup>62</sup> Alternatively, for perishable products which have a use-by date of less than 3 months, records are required to be kept for 6 months.<sup>63</sup> As all food business operators have their own traceability systems in place at each stage of production, both nation-wide and EU-wide systematic records have been established and they are accessible upon demand to facilitate effective product recall, or to support emergency action should a food safety outbreak occur.<sup>64</sup>

Since their launch traceability systems have succeeded in preventing potentially harmful products reaching consumers on numerous occasions. For example, in the Cadbury Salmonella incident mentioned previously, despite the company's failure to comply with HACCP requirements the traceability system was used to recall the potentially harmful products and to mitigate the risk of a major Salmonella outbreak.

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<sup>61</sup> Ibid. Article 18.2 and 18.3. The current practice is to make traceability information clearly visible on products sold in the market. Nevertheless, this is often known to the food business operators and entities in the food supply chain but not to consumers. Such traceability information is often printed in the form of simple labels, bar codes or, for large consignments, RFID tags.

<sup>62</sup> Can also be found at: [http://ec.europa.eu/food/food/foodlaw/guidance/guidance\\_rev\\_7\\_en.pdf](http://ec.europa.eu/food/food/foodlaw/guidance/guidance_rev_7_en.pdf). This obligation applies to the cooked poultry products from Thailand as discussed in Chapter 3.

<sup>63</sup> This applies to fresh/chilled baby corn products. It should be noted that for food products that do not have expiry date or shelf-life, the records must be kept for 5 years. In other words, depending on the product types, the traceability records must be kept for a minimum of 6 months (for perishable goods) and for a maximum of 5 years. Source: Commission's Guidance on the Implementation of Article 11,12,14,17, 18, 19 and 20 of Regulation EC/178/2002 (Also found at: [http://ec.europa.eu/food/food/foodlaw/guidance/guidance\\_rev\\_8\\_en.pdf](http://ec.europa.eu/food/food/foodlaw/guidance/guidance_rev_8_en.pdf)).

<sup>64</sup> As a general rule food business operators must take preliminary action to recall or withdraw products they consider to be unsafe and to notify the competent authority accordingly (Regulation EC/178/2002, Article 19(1)). Such an obligation would be rendered impossible without having a traceability system. When a food business operator finds that its product may be unsafe, traceability will help it to trigger risk communication down the supply chain and to perform an effective product recall.

Also, even in a complex food safety incident when high levels of dioxin in milk were discovered on a farm in the Netherlands in 2004, the traceability system allowed the competent authority to trace the origin of the dioxin contamination back to the clay used in processing potato peel that had been used as animal feed. The traceability information also enabled the identification of the exact locations to which the contaminated potato peel had been delivered. This resulted in 200 farms in the Netherlands, France, Belgium and Germany being prohibited from trading. Although the consequence of this event was severe for those producers affected, it would have been more serious if contaminated products had reached the consumer and caused actual harm.<sup>65</sup>

However, in a more recent *E. coli* outbreak during May-June 2011 in German beansprout seeds imported from Egypt, even the strict EU traceability system has been subject to criticism. In particular, it has been criticised as being too slow to identify and to react to this severe public health risk.<sup>66</sup> There was a relatively long period<sup>67</sup> before the likely source of the outbreak was pinpointed,<sup>68</sup> sparking widespread consumer fears, both within and outside the EU. Similar to the outcomes in previous EU food safety crises, the sale of fresh vegetables in many EU member states fell

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<sup>65</sup> This has been confirmed in Food Traceability Factsheet June 2007, p. 2.

<sup>66</sup> Addy (2011), Alemanno (2011).

<sup>67</sup> It was taken approximately 6 weeks before the official source of the incident was confirmed by EFSA. See further EFSA's report on this issue. This can be found at <http://www.efsa.europa.eu/en/supporting/pub/176e.htm>

<sup>68</sup> The source was eventually identified to be bean sprouts farmed in Lower Saxony, Germany.

dramatically. In addition some non-EU countries decided to ban fresh produce from the EU.<sup>69</sup>

Some voices from the food industry and consumers have demanded that an even more stringent and detailed traceability system be imposed on all EU food business operators, for example, by having a “serialised identification” system, similar to those used in pharmaceutical industry. Under this system, not only the source and destination of the each product would be traced back and forwards, but all information regarding each products’ ingredient and its packaging, or the “data trail”, would also be carried forward along the food supply chain. It is claimed that this kind of system could have helped the authorities to more swiftly identify the source of contamination in the beensprout case.<sup>70</sup> However, such a rigid and detailed system would impose an extremely high financial burden on food business operators. Moreover it might not be practical to be applied to wholesalers and to smaller businesses.

Against this backdrop of calls for a more stringent EU traceability system, it can equally be argued that the traceability problems highlighted by the *E. coli* outbreak did not invalidate the effectiveness of the current EU system since ultimately the source and cause of the incident were found. The problem was the improper application of the system by the German authorities in hastily identifying the incorrect source of the outbreak before carrying out a thorough investigation.<sup>71</sup> At the beginning of the outbreak many erroneous claims were made linking the outbreak with different

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<sup>69</sup> Some countries notably Russia decided to ban all the EU vegetable produce - a ban which was criticised by the EU Commission as disproportionate. (See for example Gutterman (2011).

<sup>70</sup> In other words, if the barcode or RFID is scanned, it will present the full data trail of the product, its history and packaging. (See Addy (2011)) The article is found at:  
<http://www.foodmanufacture.co.uk/Supply-Chain/E.coli-reveals-traceability-poor-in-many-categories>

<sup>71</sup> And also before EFSA’s confirmation was published.

sources both within and outside Germany. These included lettuce from Bavaria and organic cucumbers from Spain. By the time the initial allegations were withdrawn severe trade repercussions had already been felt.<sup>72</sup> One important lesson that can be learnt from this incident regarding the traceability system is that a thorough traceability investigation takes time and the proper identification and publication of the source of food safety outbreaks by the relevant authority is crucial. Instead of applying a stricter traceability system in the EU, resources could be targeted at improving application of the current system. One suggested improvement has been put forward by Alemanno. He proposes that when faced with an emergency or with a serious food safety outbreak, the EU could consider assign a central role to the “European Food Safety Authority” (EFSA) in carrying out the traceability investigation instead of Member States’ authorities.<sup>73</sup>

With regard to imports, Article 11 of Regulation EC/178/2002 states that for products originating in third countries, the traceability obligation commences only once the product enters EU territory. Indeed the Directorate General for Health and Consumers (DG-SANCO) has confirmed on several occasions that the traceability obligation ends at the EU’s border and that it is not the intention for EU law to impose responsibilities

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<sup>72</sup> For example, the declaration by the German authorities, linking the outbreak with organic cucumbers from Spain made Spanish vegetable unsellable. After this accusation was retracted, Spain considered demanding compensation from the German authorities (Mallet (2011)).

<sup>73</sup> This argument is about the Commission’s use of EFSA for crisis management and this issue will be explained further in the following section on EFSA’s duties. This would have several benefits: firstly EFSA has more resources at its disposal, and secondly it can be considered as being less susceptible to political pressure. In fact EFSA has been entrusted with the power to establish a crisis management unit in cases of emergency (Article 56, EC 178/2002). However, so far the crisis management unit has not been established by the Commission (Alemanno (2011)).

on overseas food business operators.<sup>74</sup> Thus, in theory, the EU obligation is imposed on importers of food products, while exporters in third countries are not legally bound to fulfil traceability requirements.<sup>75</sup>

It is questionable whether the traceability chain in such cases can provide adequate protection to EU consumers, and whether it constitutes a comprehensive and integrated approach to food safety which is one of the main aims of the EU food safety reform. This is significant in that many food-borne diseases originate in third countries.<sup>76</sup> In practice, however, these concerns have been significantly allayed by regulation in the form of private standards. Major EU food importers impose a contractual obligation on exporters in third countries to provide them with traceability information in relation to their products. For example, private standards such as those adopted by GlobalGAP are required as part of the supply contract by many EU supermarkets and have played a crucial role in creating a market incentive for food producers in third countries to comply with EU traceability requirements.

As most EU supermarkets now require their suppliers to comply with these private standards, companies in developing countries have installed their own traceability systems so that they can continue to supply EU supermarkets. In addition the governmental entities of many third countries may decide to impose traceability requirements on their own domestic producers and exporters. This has occurred in Thailand, and will be discussed in relation to the case studies in the next chapter.

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<sup>74</sup> Guidance on Implementation of Articles 11, 12, 16, 17, 18, 19 and 20 of Regulation EC/178/2002 on general food law: Conclusions of the Standing Committee on the Food Chain and Animal Health, p. 27. (Also found at: [http://ec.europa.eu/food/food/foodlaw/guidance/guidance\\_rev\\_7\\_en.pdf](http://ec.europa.eu/food/food/foodlaw/guidance/guidance_rev_7_en.pdf))

<sup>75</sup> This is the case except in the event of bilateral agreements concerning particular sensitive sectors or where there are specific legal requirements, for example in veterinary sectors .

<sup>76</sup> A clear example of this is Avian Influenza.

## **2.4 THE ESTABLISHMENT OF EUROPEAN FOOD SAFETY AUTHORITY (EFSA) AS THE CENTRAL RISK ASSESSMENT BODY**

Risk assessment is a core concept in the regulation of food safety.<sup>77</sup> It involves a process of identifying the probability and consequences of a food safety hazard arising and is based on a review of scientific data and studies.<sup>78</sup> Under Article 3 (11) of Regulation EC/178/2002 EC, risk assessment consists of four steps: hazard identification, hazard characterisation, exposure assessment and risk characterisation.<sup>79</sup> The principal aim of risk assessment is to lay down in a scientific manner the level and nature of the risks associated with a particular food (or feeds). The intent is to assist risk managers in making rational and reasoned decisions that are based upon scientific evidence rather than being driven purely by political or economic considerations. This is particularly important in fulfilling the EU's obligations as a WTO member, as the SPS Agreement requires that any food safety measure must rest upon a sound scientific basis.<sup>80</sup>

Implementation of the concept of risk assessment originally began in the EU with the regulatory comitology process whereby the Commission (DG-SANCO) relied upon

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<sup>77</sup> Risk is different from hazard. A hazard is something that can cause harm, whereas a risk is the likelihood of actual harm to human health caused by such a hazard. Food safety regulation is sometimes referred as risk regulation (Vogel (2001)).

<sup>78</sup> In the *Pfizer Animal Health SA v Council of the European Union* (2002), para.154-156, the definition of risk assessment was also laid down. It stated that risk assessments made by the EU institution shall include information on the possibility of hazard, the exposure to such hazard and the kind of risk the hazard may pose to human health. The concept of risk assessment can be juxtaposed with that of risk management, which relates to taking decisions that will reduce or eliminate the risk, taking into account other legitimate interests in society (See also Vos (2000) p. 229).

<sup>79</sup> This definition is identical to the definition under the General Principles of Codex which were set out during its 1211 Paris session, on 25 - 29 November 1996.

<sup>80</sup> The EU's obligations under WTO's SPS Agreement will later be discussed in Chapter 5.

risk assessment reports from various committees to assist it in exercising its executive powers.<sup>81</sup> In 1974 the Scientific Committee on Food was established as the first formal and permanent risk assessment body in the field of food safety and was charged with providing expert advice to the Commission.<sup>82</sup> Since then further permanent committees have been founded in specific areas of food safety. As the comitology committees grew in number, problems emerged as the system became too complex with various committees having overlapping responsibilities. In 1997 this resulted in the re-organisation of the comitology committees into nine risk assessment bodies. Six of these dealt with food safety issues, namely the Scientific Steering Committee,<sup>83</sup> the Scientific Committees on Food, Animal Nutrition, Animal Health and Animal Welfare, Veterinary Measures relating to Public Health, and Plants.<sup>84</sup>

For many years it was considered appropriate and adequate for these six committees to undertake the risk assessment function in relation to food safety. Moreover it was thought that this system was in keeping with the unique character of the EU, as an entity that combines elements of inter-governmentalism and supra-nationalism.<sup>85</sup> The concept of regulatory committees in which the Member States could participate via

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<sup>81</sup> Article 207 TEC (now 240 TFEU) and Council Decision 1999/468/EC as amended by the Council Decision 2006/512/EC. However, following the “new comitology regulation” (Regulation EU/182/2011, which came in to force on 1 March 2011), this procedure is now called “the examination procedure”.

<sup>82</sup> Article 2 of Commission Decision 74/234/EEC as later amended by Commission Decision 95/273/EC. This committee comprised expert scientists and was one of the earliest risk assessment bodies.

<sup>83</sup> Commission Decision 97/404/EC.

<sup>84</sup> Commission Decision 97/579/EC. The other three Scientific Committees address consumer health and include Scientific Committees on Cosmetic Products and Non-Food Products Intended for Consumers, and Medicinal Products and Medical Devices.

<sup>85</sup> Decisions at EU level are made by both Member States as well as delegated regional entities. See: Craig and De Búrca (2007), p. 8-12, Craig and De Búrca (1999), Chapter 1 on The Nature of the Community: Integration, Democracy and Legitimacy, p. 1-50, especially p. 30-35.

their national representatives was also credited with maintaining a fine balance between scientific justification and the right of Member States to participate in this politically sensitive area of law.<sup>86</sup> However this view changed following the BSE crisis when the deficiencies of this system were widely realised. This led to severe criticism and to calls for fundamental reform. One of the strongest criticisms was that risk assessment and risk management functions had become dangerously entangled.<sup>87</sup>

The report by the Temporary Committee of Inquiry into the BSE crisis revealed that British officials of the Scientific Veterinary Committee, which is supposed to be an independent risk assessment body, might have influenced the views of other committee members in a way that led to a neglect of the dangerous link between BSE and Creutzfeldt - Jakob disease. This brought about a realisation of the need to reform food risk regulation so as to emphasise a clear-cut functional separation between risk assessment and risk management.<sup>88</sup> In theory, risk assessment tasks should be assigned to a body of expert scientists who focus exclusively on the task of scientific evaluation without being subject to political pressure. Conversely, risk management tasks should be undertaken by the legislature or executive, since it is directly or

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<sup>86</sup> Vos and Wendler (2006), p. 67.

<sup>87</sup> This criticism continues, even after the establishment of the EFSA. Some critics, including Kanska (2004) p. 727, criticised EFSA as not being entirely free of the Commission's and member states' influence as it has been overwhelmed with the questions posted to it by these bodies rather than being able to conduct risk assessments on its own initiative. However, it should be noted that it is difficult for a body such as EFSA to be entirely free from any influence by other risk management bodies. This is because the very essence of EFSA's role is to deliver its opinion so as to assist risk managers. (See further Alemanno 2006, p. 12).

<sup>88</sup> Alemanno (2007) p. 7. The approach of having this clear separation between risk assessment and risk management originated in the US National Research Council (NRC) with the publication of "Risk Assessment in the Federal Government: Management" in 1983. This concept later became influential in US risk regulatory regimes, especially in environmental & food safety issues and in some international organisations including Codex Alimentarius, Agricultural Organisation of the United Nations (FAO) and the World Health Organisation (WHO).

indirectly accountable to the public and is better placed to balance the results of scientific risk assessment with other legitimate interests.

As a consequence of this line of thought, EFSA was established, by Regulation EC/178/2002, as the EU's central and independent scientific risk assessment and risk communication body.<sup>89</sup> It is to provide independent "scientific advice and scientific and technical support for the Community's legislation and policies in all fields which have a direct or indirect impact on food safety",<sup>90</sup> and to serve "as a point of reference", acting in close cooperation with the risk assessment bodies of Member States and other EU institutions.<sup>91</sup> It has taken over from the original six permanent comitology food safety risk assessment committees that existed prior to its formation in May 2003.<sup>92</sup> In turn, nine specific scientific panels have been established, each comprising independent experts on particular issues, covering; (i) Food Additives, Flavouring, Processing Aids and Materials in Contact with Food, (ii) Biological Hazards, (iii) Contaminants in the Food Chain, (iv) Genetically Modified Organisms, (v) Additives and Products or Substances Used in Animal Feed, (vi) Dietetic Products, Nutrition and Allergies, (vii) Plant Health, (viii) Animal Health and Welfare, and (ix) Plant Protecting Products and Their Residues.

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<sup>89</sup> The intent for this had been indicated in the wording of the White Paper on Food Safety, in which EFSA's goal is clearly set out in Paragraph 35.

<sup>90</sup> Article 22 (2) of Regulation EC/178/2002.

<sup>91</sup> Ibid, Article 22 (7).

<sup>92</sup> Under Article 62 (ibid), all references in the EU legislation to the six committees must now refer to EFSA.

### 2.4.1 Risk Assessment Roles

Article 23 of Regulation EC/178/2002 provides that EFSA is to perform three different roles. First, EFSA performs an advisory role involving the provision of scientific advice and technical support to the EU institutions in their decisions regarding food safety measures.<sup>93</sup> It can do this upon request by one or more of the institutions or upon its own initiative.<sup>94</sup> Moreover it can also be requested by the Commission to interpret and consider scientific opinions of other risk assessment bodies,<sup>95</sup> and to provide scientific and technical assistance in crisis management situations.<sup>96</sup> Although EU risk managers are not obliged to follow EFSA's advice and can choose to use scientific evidence from other sources, the scientific advice provided by EFSA is still significant.<sup>97</sup> Under Article 6 (3) the risk managers are obliged to pay particular attention to EFSA's opinions, alongside other legitimate factors, in the adoption of food safety decisions.<sup>98</sup>

Secondly, EFSA is to facilitate the creation of a framework for scientific cooperation with itself at the centre of the scientific network. According to Article 36 of Regulation EC/178/2002, this is to be achieved by co-ordinating activities, exchanging

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<sup>93</sup> Article 23 (a), Regulation EC/178/2002. The term "institutions" here refers to the European Commission, Parliament and Member States. However the Commission makes most of the requests.

<sup>94</sup> Article 23 (a), *ibid.* EU institutions and Member States can request EFSA opinions under the procedure laid down by Regulation EC/1304/2003. It should be noted that to date EFSA has not fully used these powers to initiate the tasks on its own initiative. The main reason for this is likely to be that it has been overwhelmed by the Commission's questions on risk assessments.

<sup>95</sup> Article 23 (c ), *ibid.*

<sup>96</sup> Article 23 (h), *ibid.*

<sup>97</sup> For example, in relation to GMOs (Section 2.5.2) or health claim authorisation.) See further Chalmers (2005) in relation to EFSA's scientific influence in GMO authorisation.

<sup>98</sup> The legitimate factors here can include the need to use the precautionary principle. However, if they decide not to adopt EFSA's opinion, the risk managers must provide "a statement of reason" explaining their decision. In so doing, the statement of reason must be "of a scientific level at least commensurate with that of EFSA" (*Pfizer Animal Health SA v Council of the European Union* (2002), para.197-199).

information, expertise and best practices, and by developing and implementing joint actions among its network of institutions.<sup>99</sup> Consequently EFSA must develop uniform methodologies,<sup>100</sup> data collection,<sup>101</sup> commissioning of scientific research<sup>102</sup> and must perform its duties with a view to improved co-operation between the Member States, international organisations and third countries.<sup>103</sup> There are currently more than 200 institutions within EFSA's risk assessment network.<sup>104</sup> These comprise national risk assessment bodies, scientific research centres, governmental departments, local authorities and leading universities. Since most of the institutions are well-equipped with laboratory facilities, whereas EFSA is not, this collaborative network enables EFSA to access and share scientific information with pan-EU resources whilst performing its risk assessment tasks. This central network responsibility further cements EFSA's position at the heart of the EU risk assessment system. Furthermore, institutions in the network can express their emerging concerns to EFSA thus leading EFSA to investigate the issues further, often by urging a wider EU investigation.

Thirdly, EFSA participates in the operation of the EU's RASFF, laid down under Articles 50-52 of Regulation EC/178/2002. The RASFF itself is a food safety information network that allows for a quick and effective exchange of information

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<sup>99</sup> Article 36, *ibid.*

<sup>100</sup> Article 23 (b), *ibid.*

<sup>101</sup> Article 23 (e), *ibid.*

<sup>102</sup> Article 23 (d), *ibid.*

<sup>103</sup> Article 23 (i), *ibid.*

<sup>104</sup> Including 30 from the UK. The list can be found at :  
<http://www.efsa.europa.eu/en/art36grants/docs/art36listg.pdf>

among its members, namely the Commission and national competent authorities,<sup>105</sup> EFSA and other relevant parties in the food supply chain.<sup>106</sup> Once a food safety incident is notified to the Commission by a Member State's national competent authority it will be validated and analysed by EFSA before a report is distributed to the other members in the network. In this way the information regarding a food safety incident can be quickly circulated and can speedily be used in reacting to the incident.<sup>107</sup>

Under this system, EFSA acts as a central source of scientific reference in the EU's food safety information network. Article 35 of Regulation EC/178/2002 provides that EFSA shall receive all the information passed through this system from the Commission so that it can analyse, assess the risk, and return its comments to assist other members of the network in fulfilling their risk management tasks.<sup>108</sup> An example of this can be seen from concerns about high levels of potentially genotoxic and carcinogenic Polycyclic Aromatic Hydrocarbons in fisheries products. Here the Commission recommended that the Member States collect data through the RASFF and send these to EFSA for further investigation.<sup>109</sup>

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<sup>105</sup> The information in the RASFF can be passed on to the competent authorities of EFTA countries, Norway, Liechtenstein and Iceland. If appropriate the information can also be passed on to the CAs of third countries.

<sup>106</sup> Other relevant parties in the food supply chain include manufacturers, consumers and the general public (who can sign up to obtain both on-line and telephone text alerts). In addition all the notifications triggered by the use of this system are published weekly on the DG-SANCO website.

<sup>107</sup> For discussion of how Thai entities have dealt with the notifications via the RASFF concerning Thai food products, see the baby corn case study in Chapter 3 regarding notification of the *Shigella* incident in Denmark (see *infra* Section 3.4.2.2). Also see Alemanno (2009) for a detailed discussion on the operation of this system.

<sup>108</sup> It can also supplement the information received with additional technical and scientific information that it considers to be appropriate.

<sup>109</sup> Commission Recommendation 2005/108/EC.

In the more recent “Melamine Dairy Scandal” DG-SANCO frequently re-assessed the level of risk posed by a number of food products containing contaminated milk from China following Member States’ reports and EFSA’s advice.<sup>110</sup> Also in the recent “*E. coli* outbreak in Germany in May-June 2011, EFSA shared information and cooperated with DG-SANCO and other institutions of the EU and Member States to frequently monitor the event and reassess the risks to human health.<sup>111</sup>

EFSA is also responsible for gathering information in a crisis management unit set up by the Commission.<sup>112</sup> The operation of this crisis management unit, which comprises EFSA, the Commission and the Member States’ institutions, is different from the RASFF.<sup>113</sup> The crisis management can be triggered when there is an imminent food safety risk with the potential to create widespread and serious adverse effects to human or animal health or the environment, and is considered by the Commission to be so complex that it cannot be adequately managed by other risk managers. This would cover an exceptional situation, similar to the BSE crisis, or an uncontrollable outbreak of an epidemic such as foot and mouth disease, Avian Influenza or *E. coli*.<sup>114</sup> To date, the Commission has not established a crisis management unit and it has been criticised for this, especially following the recent *E. coli* outbreak, by Alemanno who has suggested that this should have been done.<sup>115</sup> Had such a unit been established, EFSA would have been entrusted with a more proactive role in risk assessment and

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<sup>110</sup> See the analysis of this incident in Alemanno (2010), p. 212-5.

<sup>111</sup> Source: <http://www.efsa.europa.eu/en/press/news/110527.htm>.

<sup>112</sup> This is governed under Article 56-57, Regulation EC/178/2002 and the Commission Decision 2004/478/EC.

<sup>113</sup> Both are based on similar procedures to establish networks of information and warning throughout the EU but the crisis unit will also be able to adopt emergency measures to manage the risk at hand.

<sup>114</sup> A recent EFSA’s report on the *E. coli* outbreak can be found at : <http://www.efsa.europa.eu/en/supporting/doc/176e.pdf>.

<sup>115</sup> See Alemanno (2011). See also discussion on this issue in the previous section.

associated tasks. For example, it would not only have been responsible for verifying the validity of the Member State's risk information, as requested by the Commission, but also would have played a leading role in supervising the Member States' traceability investigations to establish the source and the cause of incidents.

#### **2.4.2 Risk Assessment and Authorisation**

Certain food safety regulations have further entrusted EFSA with fulfilling a comprehensive risk assessment function whereby it is called upon to advise the Commission on the authorisation of certain food products. One notable piece of legislation that grants EFSA broad and significant risk assessment powers in product authorisation is Regulation EC/1829/2003 on Genetically Modified Food and Feed. Here EFSA is responsible for conducting risk assessment reviews to provide scientific opinions on whether to grant market access to Genetically Modified Organism (GMO) products.<sup>116</sup> The Commission is responsible for final product authorisation after taking EFSA's opinion into account and after consulting with Member State representatives in the Standing Committee on Food Chain and Animal Health under the examination procedure.<sup>117</sup> The Commission is under an obligation to pay particular attention to EFSA's opinions and must provide an explanation if its final conclusion differs from that of EFSA.

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<sup>116</sup> Article 6, Regulation EC/1829/2003.

<sup>117</sup> Under the GMO Food and Feed Regulation in Article 7(3) for food and Article 19 (3) for feed, the reference is made to the regulatory committee process mentioned in Article 35(2) of the same Regulation. Under Article 35(2) the regulatory committee procedure is conducted in accordance with Articles 5 and 7 of Council Decision 1999/468/EC as amended by Council Decision of 17 July 2006. However, following the new comitology regulation (Regulation EU/182/2011), this process has been replaced by the so-called examination procedure which grants more power to the Commission. Even if the relevant committee (here the Standing Committee on Food Chain and Animal Health) delivers a negative opinion, the Commission may adopt the measure if non-adoption would pose a risk to the safety of humans among other things. In this case, the Commission must send the measure back to the committee and if a negative opinion is still delivered, the measure must be repealed.

### **2.4.3 Risk Communication Roles**

In addition to its risk assessment function EFSA is entrusted with the task of communicating its scientific opinions and conclusions on food safety risks to the general public and interested parties, so as to ensure that these groups receive “rapid, reliable, objective and comprehensible information”.<sup>118</sup>

EFSA communicates its risk assessments to the public by making most of its documents publication available and by allowing enhanced public involvement in its scientific forums. To achieve this it uses its website where the majority of its documents and webcasts of its meetings are made available.

## **2.5 OTHER LEGITIMATE CONCERNS IN THE AREA OF FOOD SAFETY**

The concept of risk management in EU food safety regulation is broader than might generally be anticipated. As previously discussed, the risk assessment function is performed by EFSA and is based upon scientific analysis of whether a food product is safe. On the other hand the risk management role, as performed by the political entities of the EU, namely the Commission, Council and Parliament, can also involve consideration of a range of additional issues that go beyond food safety. These are known as ‘other legitimate concerns’.

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<sup>118</sup> Ibid, Article 23 (j). EFSA has also established a specific Advisory Group on Risk Communication to provide advice to its Executive Director regarding best practice and communications strategies.

The EU's willingness to incorporate 'other legitimate concerns' in its food safety regulatory framework and processes can be seen from the White Paper on Food Safety which establishes that the EU shall take a comprehensive and integrated approach to food safety regulation from farm to table and shall consider "other legitimate factors pertaining to food safety".<sup>119</sup> A precise definition of "legitimate factors" was not laid down. However, the White Paper provides a non-exhaustive list of the kind of factors that may be taken into account by the risk managers during the risk management stage. These include "environmental considerations, animal welfare, sustainable agriculture, consumers' expectation regarding product quality, fair information and definition of the essential characteristics of products and their process and product methods".<sup>120</sup> A similar approach was also adopted in Regulation EC/178/2002, where Recital 19 makes similar reference to 'other legitimate concerns' that are deemed as important and may be considered by risk managers along with EFSA's risk assessment and the possibility of using the precautionary principle.<sup>121</sup>

The EU has used different mechanisms to regulate these broad ranging legitimate concerns. Some and especially those that are strongly associated with food safety, such as animal welfare, are dealt with as part of the EU food safety regulatory framework itself and are given expression as minimum conditions for EU market access. Others, deemed to be related less directly to food safety, including issues of

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<sup>119</sup> The White Paper on Food Safety, p. 9.

<sup>120</sup> Although it is accepted by the Codex that countries have a right to consider other legitimate factors in reaching their risk management decisions, the scope and exact issues that might be regarded as legitimate concerns are, as yet, not agreed internationally. There has been an ongoing debate between the US and the EU on the precise scope and definition of other legitimate factors. Some critics and countries have argued against the expansive scope of legitimate concerns taken by the EU (See, for example, the Criteria of Consideration of the Other Factors Referred to in the Second Statement of Principles: The 24<sup>th</sup> Sessions of Committee session in 2001).

<sup>121</sup> Here, these include issues of "societal, economic, traditional, ethical, environmental factors and the feasibility of controls". Also Ibid, Article 13 (2).

environmental production and worker welfare, are governed through different labelling schemes, so as to ensure that consumers are well informed.<sup>122</sup> The discussions in the following sub-sections exemplify how various legal mechanisms have been used to address these different types of legitimate concerns.

### **2.5.1 Using Animal Welfare as a General Market Access Condition**

Animal welfare is a long-standing concern in the EU.<sup>123</sup> It is considered to be directly linked to food safety because improper animal welfare conditions can cause harm to human or animal health.<sup>124</sup> However, there is also a moral dimension to animal welfare.<sup>125</sup>

Since the 1970s the EU has imposed many specific laws that lay down minimum standards for the protection of animal welfare.<sup>126</sup> More recently the importance of animal welfare protection has been affirmed by the Treaty of Lisbon which inserted a Protocol on the Protection and Welfare of Animals (1997) into the final text of the Treaty on the Functioning of the European Union. It officially recognises that animals

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<sup>122</sup> These labelling schemes are operated by either public or private entities.

<sup>123</sup> The scope and concept of animal welfare remain unsettled. See for examples, discussions in the Communication from the Commission to the Council and the European Parliament on Animal Welfare Legislation on farmed animals in Third Countries and the Implication for the EU.

<sup>124</sup> Notably poor animal welfare conditions for cattle kept for meat production were said to contribute to the outbreak of BSE. The British inquiry into BSE chaired by Lord Phillips of Worth Matravers and published in October 2000 confirmed that the spread of the disease was caused by cattle being fed remnants from other cattle in the form of meat and bone meal. Also in the more recent Avian Influenza outbreak the high density of farmed poultry was seen as a contributing factor. (Levitt (2011), Berg (2009)).

<sup>125</sup> Following the 1978 European Convention for the Protection of Animals Kept for Farming Purposes, EU legislation stressed that, *inter alia*, farmed animals should be subject to humane treatment and allowed to express their natural behaviour.

<sup>126</sup> These include the Directive 93/119/EC, the European Convention for the Protection of Animals Kept for Farming Purpose and Council Decision 78/923/EEC. The latter establishes as a framework document of animal welfare, especially those in intensive production. Under the Convention five freedoms of animals were laid down, including freedom from; (i) hunger and thirst, (ii) discomfort, (iii) pain injury and disease, (iv) to express normal behaviour, and (v) fear and distress.

are sentient beings and that the EU institutions as well as Member States are obliged to pay full respect to animal welfare requirements in the formulation and implementation of various EU common policies.<sup>127</sup> Currently EU extensive animal welfare laws cover animal conditions on farms,<sup>128</sup> during transport<sup>129</sup> and at the time of slaughter.<sup>130</sup> There are also detailed rules concerning species-specific animal welfare including egg-laying hens,<sup>131</sup> pigs,<sup>132</sup> calves<sup>133</sup> and chickens raised for meat production.<sup>134</sup>

In general, for imported animal products only animal welfare rules relating to slaughter and transportation are regarded as conditions for EU market access. However, following the introduction of Directive 2007/43/EC there is an exception for poultry production with additional animal welfare requirements being imposed for high-density farms including those situated outside of the EU. This will further be discussed as part of the poultry case study in the following chapter.

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<sup>127</sup> Article 13 TFEU provides that “in formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage”.

<sup>128</sup> The general legal document on this is the Council Directive 98/58/EC concerning the protection of animals kept for farming purposes.

<sup>129</sup> For example, Council Directive 91/628/EEC.

<sup>130</sup> Directive 93/119/EC.

<sup>131</sup> Directive 1999/74/EC.

<sup>132</sup> Directive 91/630/EEC.

<sup>133</sup> Directive 97/2/EC.

<sup>134</sup> Directive 2007/43/EC.

### **2.5.2 Labelling Schemes: Mandatory Labelling for Genetically Modified Food and Feed**

‘Other legitimate concerns’ that are less directly related to food safety are governed through various food labelling schemes.<sup>135</sup> The regulatory aim of these is to ensure that EU consumers receive adequate and accurate information about products, including information reflecting those legitimate concerns that find expression in EU law. There are many examples of EU interventions in food labelling to protect ‘other legitimate concerns’. By way of illustration, Genetically Modified Organism (GMO) labelling is highlighted briefly below, and the hybrid public-private organic labelling scheme is discussed towards the end of this chapter.

Currently GMOs in food and feed are subject to a strict authorisation and labelling scheme. GMO food or feed which has been authorised by the Commission under consultation with EFSA is deemed not to have an adverse effect on human health, animal health and the environment.<sup>136</sup> Nonetheless, genetically modified (GM) food products are still required to be labelled. To date there are 38 authorised GM food products allowed in the EU market and the number of authorised products is gradually increasing.<sup>137</sup>

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<sup>135</sup> These are issues that are not linked to the causes of harm to human or animal life or health but rather relate to moral and social values and to consumer preferences, et cetera.

<sup>136</sup> Article 4(1) (a), Regulation EC/1829/2003. In addition it must not mislead the consumer, and must not differ from the food which is intended to replace so that normal consumption would be nutritionally disadvantageous to consumer.

<sup>137</sup> As of April 2011, an update of information can be found at: [http://ec.europa.eu/food/dyna/gm\\_register/index\\_en.cfm](http://ec.europa.eu/food/dyna/gm_register/index_en.cfm).

Under Regulation EC/1829/2003 on Genetically Modified Food and Feed, all food and animal feed products containing or produced from GMOs must state that they contain GMOs. Additional labelling information must also be provided on the packaging if the GMOs concerned differ from their conventional counterpart in nutritional value, composition, intended use, health implications, or may give rise to ethical or religious concerns.<sup>138</sup> Furthermore, if the product is not labelled as containing GMOs, the food producers must be able to show that appropriate steps have been taken to avoid the presence of GMO contamination in their products.

This requirement for GM food to be labelled is indicative of prevailing consumer concerns. GM food has long been a cause of considerable concern for EU consumers, especially in the early years of its introduction.<sup>139</sup> Even today EU consumers continue to be sensitive about the use of GM technology in food production, and have on numerous occasions voiced their concerns regarding the possible long-term health impacts of GM food as well as the potential negative effects that GM technology could have on the environment.<sup>140</sup> Hence the labelling of GM food is intended to empower consumers by allowing them to decide whether and when to reject the technology concerned.

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<sup>138</sup> Article 25 (c), (d), Regulation EC/1829/2003.

<sup>139</sup> Such concerns have been expressed by risk managers. In the early years, it resulted in lengthy delays for GM product approval that adversely affected exporting countries. It was estimated that the US has lost over \$1 billion since producers in the EU and other countries switched to non-GM soya in animal feeds in order to secure access to the lucrative EU market; a consignment of canned Thai tuna was also rejected from Dutch and Greek ports because of suspicion that it might have contained oil produced from GM soya. This led to Thai manufacturers switching to vegetable oil that was guaranteed to be GM free. Source: <http://archive.greenpeace.org/geneng/reports/food/lostmarkets2.htm>.

<sup>140</sup> In the Euro-barometer survey in 2005, although about half of the citizens surveyed recognised the benefits of biotechnology, especially in the fields of medicine and industry, most of them expressed concern when the technology is used for food production. The average support for GMO in the EU was only 27 percent. Only 42 percent considered GM foods as acceptable. However, this was an improvement on the survey conducted in 2001 when the dislike of GMOs was at its peak. That survey found that over 94 percent wanted to have the right to choose whether or not to buy GM products.

### **2.5.3 Private Regulatory Mechanisms: the Main Controlling Body of Legitimate Concerns**

‘Other legitimate concerns’ are also heavily governed by private mechanisms, whereby private EU importers and retailers require that imported food products must be certified or registered as complying with certain private standards. These standards are applied separately and in addition to EU food safety laws. In this thesis, the concept of EU food safety regulation covers official EU legislation and private standards of the kind introduced here.<sup>141</sup> Private standards can exert considerable influence in the food sector and can act as “tickets to trade” in the EU market.<sup>142</sup> The influence of private standards upon Thai exporters will be highlighted in detail in relation to the selected case studies in Chapters 3 and 6. This chapter merely provides an introduction to private standards, specifically in relation to issues of ‘other legitimate concerns’. It is important to note at this point that the more traditional concerns on food safety are also regulated through private standards. This became apparent in the discussion of HACCP and traceability earlier in this chapter and will be confirmed also in the following discussion.<sup>143</sup>

The concept of private standards covers all quality assurance certification schemes that are primarily created or managed by private rather than governmental bodies.<sup>144</sup> A requirement to comply with private standards is generally imposed by contract law.<sup>145</sup>

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<sup>141</sup> Private regulation means regulatory programmes that are not created or managed primarily by governmental entities (see *supra*, Havinga, (2006), p. 520 and Meidinger (2009), p. 2)

<sup>142</sup> Lee (2006).

<sup>143</sup> See *infra* Chapter 6.

<sup>144</sup> A similarly broad definition has also been used by other academics. Many commentators have taken the view that private standards are different from governmental standards although occasionally it is

Since the BSE crisis many standard schemes have been introduced by EU private entities. It is estimated that there are currently at least 400 of these in operation in the EU.<sup>146</sup> These consist of what can be described as “universal standards” which are widely, or in some cases “universally”, accepted by different retailers within particular food sectors. Examples of these include GlobalGAP standards which are widely recognised in the fruit and vegetable retail sector throughout the EU, the British Retail Consortium (BRC) and International Food Standard (IFS) which are accepted as standards for manufacturing and packaged food in the UK and continental Europe respectively.<sup>147</sup>

In addition private standards also include “supermarket-own standards” which are introduced under “bespoke” certification schemes put in place by individual EU supermarkets. Examples of these include, Albert Heijn supermarket standard in the Netherlands or Tesco’s “Nature’s Choice”, Marks and Spencer’s “Field to Fork” and “Plan A” in the UK. Compliance with supermarket standards can be required alongside compliance with more universally recognised private standards.

This section will highlight those aspects of EU private standards that have been used to deal with ‘other legitimate concerns’. Examples include GlobalGAP and two sets of standards put in place by particular supermarkets: “Nature’s Choice” and “From

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difficult to separate private and governmental elements in the standards. (See further, Schepel (2005), Havinga (2006), p. 517 and Meidinger (2009, p. 139-142). It should be noted that in reality it is difficult for private standards to be entirely free from governmental intervention as there are many ways that governments can exert their influence over the operation of standards. This ranges from giving direct funding, publishing guidelines or giving indirect government loans or advice to farmers wishing to join such standards. However, so long as the dominant actors are private bodies, the regulatory schemes requested by the EU supermarkets should be considered as falling within this definition of private standards.

<sup>145</sup> This will be further discussed in Chapter 6.

<sup>146</sup> Lee (2006), p. 9.

<sup>147</sup> See further discussion in Chapter 3.

Field to Fork”. A full discussion of private standards, their impact and examples of their adoption in Thailand is presented in Chapters 3 and 6.

### **2.5.3.1 GlobalGAP**

Previously known as EurepGAP,<sup>148</sup> GlobalGAP was established in 1997 by the Euro-Retailer Produce Working Group that comprises large retailers and supermarkets in the EU that control over 80 percent of the EU retail food market.<sup>149</sup> It was established to provide a quality assurance scheme to enhance consumer confidence in food safety and ‘other legitimate concerns’ following several food safety outbreaks. Although established as a voluntary standard, it has been criticised as acting as the *de facto* requirement for access into the EU retail market.<sup>150</sup> GlobalGAP members and some other retailers<sup>151</sup> set GlobalGAP as the minimum standard to be met by producers supplying agricultural products to the EU. Consequently there is a significant incentive for producers in third countries to comply with GlobalGAP so as to be able to supply the EU retail market.

The current auditing system of GlobalGAP it is conducted by using a checklist of over 200 major and minor points as well as compliance with recommendations relating to food safety and ‘other legitimate concerns’. At present these checklists and

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<sup>148</sup> On 7 September 2007 during its annual conference in Thailand EurepGAP changed its name to GlobalGAP so as to reflect its true global scope.

<sup>149</sup> Muaz (2004), p. 14. The members of GlobalGAP include large supermarket chain such as Ahold, Carrefour and Auchan. In the UK members include SPAR, TESCO, Waitrose, Sainsbury and Morrisons.

<sup>150</sup> See UNCTAD’s country case studies on GlobalGAP (also found at: [http://www.unctad.org/trade\\_env/test1/meetings/eurepgap/Draft%20Final%20Report%20GAP%20vs%20EGAP.pdf](http://www.unctad.org/trade_env/test1/meetings/eurepgap/Draft%20Final%20Report%20GAP%20vs%20EGAP.pdf)), and the baby corn case study results (see Chapter 3 and 6).

<sup>151</sup> The German fresh fruit market has only accepted GlobalGAP-certified products from 2006 onwards (Lee, 2006 p. 17).

certifications are renewed every four years.<sup>152</sup> Currently the Integrated Farm Assurance Standard, to which producers must be certified, is at Version 4 which becomes binding in 2011. To be compliant with GlobalGAP producers must achieve all major points and 95 percent of the minor points.

The regulatory scope of GlobalGAP covers food safety issues including HACCP, traceability, allowable chemical usage as well as ‘other legitimate concerns’. The ‘other legitimate concerns’ covered by GlobalGAP are stated in the Terms of Reference and cover a wide range, including issues which are well beyond the scope of EU food safety regulation. Such issues include the occupational health, safety and welfare of farm workers, and plans for environmental protection, site history and land management, waste management and wildlife protection.<sup>153</sup>

#### **2.5.3.2 Supermarkets’ Own Standards**

In addition to the universal standards of GlobalGAP, ‘other legitimate concerns’ are also regulated under supermarkets’ own standards. These standards are imposed on those who supply the supermarkets in question, including suppliers based abroad. Some of the requirements in place are wide in scope and contain stringent and detailed conditions. For example, Tesco’s Nature’s Choice standard requires that suppliers comply with a set of “best agricultural practices” that relate to food safety and include requirements on HACCP, traceability, chemical usage as well as ‘other legitimate

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<sup>152</sup> Major changes to the standard took place every three years prior to Version 4.

<sup>153</sup> For example, when producers in third countries apply for certification they have to comply with at least 95 percent of the “minor must” points. Examples of these requirements are that workers are provided with adequate safety equipment, habitable living quarters and workers’ rest areas on the plantation sites, and wildlife conservation (including having to write farm and conservation plans, having to use cultivation technique to avoid soil erosion). Source: GlobalGAP. See also (Lee (2006), p. 51 onwards).

concerns' associated with sustainable farming. Among the latter are standards concerning the adoption of management plans for crops, waste, the environment and plant protection. These are said to be imposed so that consumers can be assured that Tesco products are "safe" as well as "environmentally friendly".<sup>154</sup>

Similarly Marks & Spencer's "From Field to Fork" scheme, introduced in 2002, covers issues of food safety as well as 'other legitimate concerns' relating to labour welfare and environmental protection. It is applicable to all fruit and vegetable products supplied to M&S.<sup>155</sup> The extent to which these supermarket standards are applicable to Thai producers will be further discussed in Chapter 3.

#### **2.5.4 Organic Labelling: Public-Private Regulation**

While organic labelling is subject to private regulation, this private regulation is also subject to minimum standards set out in EU law. Consequently the area of organic labelling offers an example of a regulatory hybrid that crosses the public/private divide.<sup>156</sup>

The promotion of organic farming was originally established as part of the EU's agricultural and rural policy in the context of Common Agricultural Policy (CAP)

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<sup>154</sup> Source: <http://www.tesco.com/talkingtesco/response/?page=article21>

<sup>155</sup> From 1 June 2007, additional and more detailed standards regarding environmental protection have been introduced and farmers supplying food products to M&S must also follow the M&S Farm Environmental Standard.

(Source: [http://www.agrifoodstandards.net/es/news/global/m\\_s\\_revises\\_field\\_to\\_fork\\_assurance.html](http://www.agrifoodstandards.net/es/news/global/m_s_revises_field_to_fork_assurance.html)).

<sup>156</sup> See further the work by Meidinger (2006) for a discussion of the different ways in which public and private entities can interact in the context of private regulation.

reform.<sup>157</sup> However, organic farming touches upon many ‘other legitimate concerns’. These include the sustainable use of resources, high standards of animal and worker welfare, environmental protection and land management.

In recent years the regulatory objective of organic labelling in the EU has moved towards consumer protection so as to allow consumers to make an informed choice about the type of food they choose to consume. In the wake of multiple food scares and concerns about the negative effects of intensive farming on health and the environment, it has been suggested that EU consumers have come to associate organic products with food safety as they generally consider organic produce as being safer.<sup>158</sup> This is due to the fact that, *inter alia*, it is subjected to limited chemical usage and does not include GMOs. As a result, the demand for organic foods has consistently grown at a high rate in the EU over the last decade. This has resulted in a premium market price for food bearing organic logos.

Different organic labelling schemes have been set by various private standardising bodies. Nevertheless, there is also EU regulation that lays down a minimum standard for organic products. The first EU organic regulation was Regulation EEC/2092/91 that lays down a legal framework, covering inspection requirements for organic certifying bodies, farm conversion to the use of organic status, and organic labelling. The second “organic” regulation is EC/1804/1999 that lays down a comprehensive

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<sup>157</sup> Which was originally promoted in order to reduce the EU’s agricultural produce surpluses. Agenda 2000, see: [http://europa.eu/legislation\\_summaries/agriculture/general\\_framework/160002\\_en.htm](http://europa.eu/legislation_summaries/agriculture/general_framework/160002_en.htm). See further, Cardwell (2004), p. 38-39.

<sup>158</sup> It has been stated that the food market in the EU has reached, or at least is very close to, the “hybrid level” where consumers draw a strong connection between food safety and the environment in which the food is produced; they tend to believe that the closer the food is to nature the safer it is (Echols (2001)). In 2006 the EU organic food market was reported to have exceeded the £2 billion threshold and has, on average, grown by £7 million every week.

baseline standard for organic production<sup>159</sup> and includes standards relating to particular animal species.<sup>160</sup> The legislative framework for organic food is now governed under Regulation EC/834/2007,<sup>161</sup> Regulation EC/889/2008 and Regulation EC/1235/2008.

As a general rule only food products satisfying the minimum criteria for organic food under EU law and containing more than 95 percent organic ingredients can be labelled as organic.<sup>162</sup> Supervision of the use of organic labels is conducted by the competent authorities of the Member States.<sup>163</sup> EU Regulations have also established an authorisation scheme for imports. To be able to be labelled as organic in the EU imports must comply with the EU organic criteria and be certified by an authorised organic certification body.<sup>164</sup>

In practice EU requirements for organic food simply constitute a baseline, with private standards often imposing additional and more stringent demands. Many of these additional demands relate to ‘other legitimate concerns’. For instance the animal welfare standards of the Soil Association (SA), a widely recognised and well-respected UK body, have gone significantly beyond those imposed by EU law. Although EU law imposes animal welfare conditions that should be observed when raising poultry in high-density establishments,<sup>165</sup> and whilst EU law establishes a maximum flock density for free range birds, the SA standard has gone further to

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<sup>159</sup> Such as disease prevention, veterinary treatment, animal welfare and farm management.

<sup>160</sup> The scope of this includes, for example, cattle, sheep, goats, horses and poultry.

<sup>161</sup> This Regulation superseded the previous organic Regulation EEC/2092/91.

<sup>162</sup> Regulation EC/834/2007, Article 23 (4).

<sup>163</sup> Ibid, Article 27.

<sup>164</sup> Ibid, Article 33.

<sup>165</sup> Directive 2007/43/EC.

include limits on the number of birds in a flock. Similarly, with regard to the presence of GMOs, the SA standards only allow for 0.1 percent in their final products, compared to the EU's organic limit of 0.9 percent. As a result there are numerous different standards applicable to organic food and numerous different logos available for use by producers who comply with these standards. Some of these logos are set out below.<sup>166</sup>



**Figure 1 EU Organic Logo**



Czech Republic



France



Germany



Denmark

**Figure 2 Examples of National Organic Logos**

Source: <http://www.organic-europe.net>

<sup>166</sup> To display the EU's organic logo (see Figure 1), the ingredients and the product origin on the product labels are necessary, though producers have a choice whether to display their national logos (see Figure 2) or private logos (see Table 1) (Article 24, Regulation EC/834/2007).

Organisation	Country	Logo
Soil Association	UK	
Organic Farmers and Growers	UK	
Bioland	Germany	
Skal's 'eko'	Netherlands	
The Irish Organic Farmers and Growers Association	Ireland	
EcoCert	France	

**Table 1: Examples of Organic Certification Bodies**

Source: <http://www.naturalcollection.com/organic/organic-certification.aspx>

## 2.6 CONCLUDING REMARKS

The EU's approach to food safety regulation has evolved rapidly as a result of its experience in handling serious and less serious food safety incidents and scares. It is both likely and necessary that its food safety regulation will continue to evolve. The recent *E. coli* outbreak in Germany was a poignant reminder that despite having a system with stringent food safety requirements based on performance and management-based regulations, the EU system is far from infallible. Consequently it must be further developed so as to be able to adapt to and handle existing and new multifarious risks to which the production and consumption of food products may give rise.

This chapter has provided an overview of the core concepts underpinning EU food safety regulation, both in official EU legislation as well as in private standards. It gives a taste of the complexity of the regulatory environment that Thai stakeholders involved in exporting food products to the EU have to face.<sup>167</sup> It is vital that Thai stakeholders come to grips with this complex regulatory environment so that they are able to respond rapidly to the challenges that it presents and intervene in its evolution so that due consideration may be given to their interests and concerns. Only then will they be able to safeguard and expand Thailand's share in the EU food market.

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<sup>167</sup> The term "Thai stakeholders" in this thesis refers to Thai governmental entities, and producers and exporters to the EU.

After presenting two detailed case studies relating to fresh and chilled baby corn and cooked poultry meat, the next chapter will examine the impact of EU food safety regulation in Thailand and the nature of the interactions between the Thai and EU competent authorities and other actors in the food export industry. Further on in this thesis, it will also demonstrate that trade between the EU and Thailand has served as a powerful driver for regulatory change, not only in Thailand but also in the EU itself.

## **CHAPTER 3**

# **THE EXTERNAL EFFECTS OF EU FOOD SAFETY REGULATION ON THAILAND**

### **3.1 INTRODUCTION**

The EU is a well established and expanding food market for Thai food producers and exporters. With significant income generated from food products exported to the EU, Thailand has begun to entrench the EU's food safety concepts to ensure compliance with demanding EU requirements and to maintain its reputation as one of the leading food-exporting countries in the world. Thai stakeholders, both governmental and private entities, have put great effort into achieving compliance with EU food safety standards. These efforts have, to a significant degree, been carried out by the three departments of the Thai Ministry of Agriculture and Cooperatives (MOAC) acting as competent authorities (CA) for the purposes of EU law. The Department of Agriculture (DOA) is charged with overseeing vegetable and fruit exports; the Department of Livestock Development (DLD) is responsible for products of animal origin and the Department of Fisheries (DOF) for aquatic products. In general Thai CAs are required to ensure that their export control procedures are equivalent to those of the EU.<sup>168</sup>

There have been many initiatives taken by Thai governmental entities in efforts to fulfill their roles as CAs for the EU. To ensure that Thai food exports comply with the relevant EU food safety law, Thai CAs have introduced new mechanisms to enhance export quality and institutionalise additional food safety checks before the food products

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<sup>168</sup> Article 2 (14) of Regulation EC/882/2004 states that 'equivalence' means the capability of different systems or measures to meet the same objectives.

can be given the “all clear” for shipping to the EU. These mechanisms include both voluntary and mandatory programmes, some of which have also been applied to products destined for consumption on the domestic market or in other export markets. However, there are many mechanisms that are applied specifically to food products exported to the EU.<sup>169</sup> In recent years Thai food producers and exporters have encountered a daunting new challenge, that of achieving compliance with private standards as well as with EU law. As a result, as noted previously, the concept of EU food safety regulation is defined here as comprising both legal requirements imposed by EU law and private standards that form the basis for access to the EU market.

In light of the diversity of Thai agricultural exports, this chapter examines in detail the cross-border effects of EU food safety regulation in the two selected food export industries in Thailand, namely fresh or chilled baby corn and cooked poultry meat. It is a lengthy chapter that covers the majority of my empirical work; and is divided into three parts:

Part I comprising a detailed case study on fresh and chilled baby corn;

Part II comprising a case study on cooked poultry meat;

Part III in which I will draw upon the results from the two case studies to describe the operation of the “Competent Authority (CA) model” which is the regulatory structure set up by EU and Thai entities to underpin the cross-border regulation of EU food safety law in Thailand.

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<sup>169</sup> Clear examples include the traceability programmes for EU markets which have been established to support the EU RASFF or the special DOA-GAP which is now pre-requisite for all fresh fruit and vegetable exports bound for the EU market (See *infra*, Section 3.2.3.2.3).

It should be noted that the focus of the two case studies in Parts I and II is upon issues of market access and the nature of the adjustments made by Thai stakeholders, including governmental entities, producers and exporters so as to ensure compliance with EU food safety standards.<sup>170</sup> The specific products featured in the case studies have been selected because of their high EU export growth rates. These two examples cover products of non-animal origin and products of animal origin respectively, and the two categories are subject to different sets of EU food safety requirements. Given the significance to Thai exporters of the EU market for these products, the two case studies will clearly demonstrate the nature and extent of the cross-border impact of EU food safety regulation.<sup>171</sup> Moreover, since substantial proportions of the selected products are bound for the retail and consumer market, they can be found on supermarket shelves across the EU<sup>172</sup> and are good examples of Thai food exports which are subject to EU supermarket controls. By ascertaining and analysing the experiences of Thai stakeholders, it will be possible to identify the positive and negative cross-border effects

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<sup>170</sup> It should also be recalled that the term stakeholders is used to refer to those Thai entities, be they governmental or private, that are potentially affected by EU food safety regulation.

<sup>171</sup> The EU market comprises approximately 80 percent of the total Thai export volume of fresh/chilled baby corn and 45 percent for poultry products. Both of these products are also export-oriented; approximately 80 percent of baby corn and 40 percent of poultry products produced in Thailand are for export. The importance of EU markets for these selected products is significant when compared with other food products. For example the EU market accounted for approximately 5 percent of total Thai rice exports by volume in 2010 (Source: <http://www.thairiceexporters.or.th/>) and for 10 percent of Thai frozen shrimp (Source: <http://www.thai-frozen.or.th>). More detailed discussion of the significance of the selected products is given as part of the case study introduction below. Given the significance of exports to the EU market for these two selected products, it is possible that the extent of cross border effects of EU food safety regulation found in the two case studies is likely to be greater than for exports of food produce that have less EU or export significance. Nonetheless, similar overarching effects of EU food safety regulation are expected to be found, although their extents may vary. In fact, during interviews with staff from the Department of Fishery, in relation to frozen shrimp (which has not been selected as a case study for this thesis), similar accounts were given regarding the regulatory pattern of EU food safety regulation. This is quite surprising given that only 10 percent of Thai frozen shrimp are exported to the EU market. Further discussion of the general models of EU food safety regulations in Thailand is presented in Part III below.

<sup>172</sup> Fresh baby corn products are packed and flown to be sold in the EU. In contrast Thai poultry exports are packed and sold by the supermarkets themselves, or are included in the supermarkets' ready meals.

of EU food safety regulation in Thailand. Ultimately it will be possible in the light of this to put forward constructive proposals to mitigate the adverse effects that occur.

## **3.2 PART I- BABY CORN CASE STUDY**

### **3.2.1 Introduction: Fresh/Chilled Baby Corn from Thailand**

Baby corn<sup>173</sup> was introduced to Thailand by the MOAC in the 1970s. When originally introduced it was intended to be an off-season crop for Thai rice farmers. However, since 1990 it has gained increasing significance and has quickly become one of Thailand's main vegetable exports in its own right. Thailand has also quickly established itself as the world's top baby corn exporting country with a global market share of approximately 70-85 percent.<sup>174</sup> Compared with other exports in the fruit and vegetable category baby corn has generated a high annual income amounting to US \$ 7.5 million in 2008.<sup>175</sup> It is an export-oriented product with over 80 percent of the production being bound for export markets.<sup>176</sup> Thailand has exported three types of baby corn products; fresh or chilled, canned and frozen baby corn. In this case study the focus is on the first fresh or chilled category.<sup>177</sup> It should be noted that although a smaller proportion of baby corn is exported fresh or chilled under customs category HS

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<sup>173</sup> Zea mays L. Family: Gramineae, Genus: Zea.

<sup>174</sup> The market share varies each year. For example in the year 2004 it held more than 80% of the world market share with the highest annual growth (9 percent) in the period 1997-2003 (UNCTAD). Other main exporting countries for baby corn include Sri Lanka, Taiwan, China, Zimbabwe, Zambia, Indonesia, South Africa, Nicaragua, Costa Rica, Guatemala and Honduras. May 1995,

<sup>175</sup> 223,888,620 Baht (source: The Custom Department, Thailand [www.custom.go.th](http://www.custom.go.th)) US \$ 1 = 30 Thai Baht.

<sup>176</sup> Source: [http://cm.nesdb.go.th/cluster\\_baseinfo.asp?ClusterID=c0023](http://cm.nesdb.go.th/cluster_baseinfo.asp?ClusterID=c0023) (in Thai).

<sup>177</sup> In the customs category HS 07099090 (Other vegetables, fresh or chilled, young corn) Source: [http://exporthelp.europa.eu/index\\_en.html](http://exporthelp.europa.eu/index_en.html).

0709.90.90, and that the majority of baby corn is exported as canned product,<sup>178</sup> the fresh or chilled baby corn has become increasingly popular in the EU with the result that demand for Thai fresh or chilled baby corn from major EU supermarket chains has increased rapidly over the past few years. It has now become a regular vegetable on supermarket shelves and has gained in popularity among EU consumers.<sup>179</sup> As a result, fresh baby corn now generates around 70 percent of the total income from Thai exports of fresh fruit and vegetables to the EU.<sup>180</sup>

The EU has always been the main market for Thai fresh or chilled baby corn, accounting for a market share of around 80 per cent.<sup>181</sup> In 2007-8 over 70 percent of all fresh or chilled baby corn destined for the EU was for the retail market.<sup>182</sup> Within the EU, the UK is the leading importing country, accounting for approximately 60 percent of the EU demand.<sup>183</sup> (See Table 2 below)

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<sup>178</sup> This is under the customs category HS 0710.80.00. Canned baby corn exports account for 80 percent of total export volume whereas fresh or chilled baby corn accounts for 15% of export volume and the frozen category 5% of total export volume.

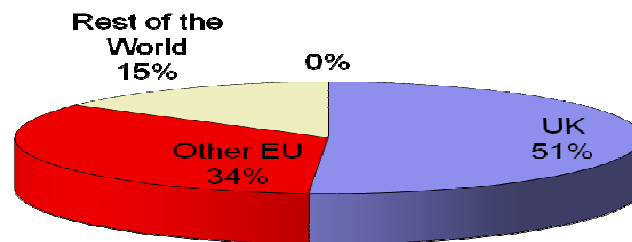
<sup>179</sup> Rakpong J., personal interview held during meeting with the Thai Fruit and Vegetable Producer Association, Nakhon Pathom, Thailand, 9/07/2008).

<sup>180</sup> This is in the category “other vegetables, fresh and chilled” (HS 070990) originating in Thailand.

<sup>181</sup> There has also been an increasing growth in export volumes. In 2006 the EU imported more than 1,700 tonnes of fresh baby corn from Thailand, worth around US\$5m. This was a 50 percent increase over imports in 2005. Source: Data obtained from Office of Agricultural Economic Thailand.

<sup>182</sup> The remaining exports are destined for wholesale markets as manufacturing ingredients, or for ethnic markets (such as stalls located in “Chinatowns”).

<sup>183</sup> The second and third importers are Denmark and Germany.



**Table 2: Thai Baby Corn Exports 2007-8**

Fresh or chilled baby corn is a good example of an export product of “non-animal origin”. Being fresh produce it has a short shelf-life and thus carries higher food safety risks than the other two categories of baby corn products.<sup>184</sup> As such it has been subject to strenuous governmental and industry control. Further, small farmers in Thailand are significantly involved in the production of fresh baby corn, and hence this case study can serve as a means of exploring the impact of EU food safety upon small farmers as well as upon large agricultural undertakings.<sup>185</sup>

Fresh or chilled baby corn is currently available in the EU in a variety of forms. It may be freshly packed in plastic packaging, offered as a ready-to-eat vegetable in

<sup>184</sup> They are susceptible to microbial contaminants and residues of chemical substances from the production and distribution processes. (Source: Interviews with Associate Professor Vicha Sardsud, Director of Post-harvest Institution, Chiang-Mai University, field trip to Wieng-gan, Chiang-Rai, Thailand, 1/07/2008 and with Thai Fruit and Vegetable Producer Associations’ representative, Mr. Pratom Tankum, Nakhon Pathom, Thailand, 10/07/2008.

<sup>185</sup> Due to the nature of the plantation procedure, baby corn is planted in rice fields as an off-season crop, the majority being run by small-scale rice farmers. However, in recent years larger scale producers have set up their own plantations in order to keep up with the export opportunities. Source: interview with Associate Professor Vicha Sardsud, Director of Post-harvest Institution, Chiang-Mai University, field trip to Wieng-gan, Chiang-Rai, Thailand, 1/07/2008. Vicha Sardsud is a leading academic at the Post-harvest Institute at Chiangmai University and is an expert on private standards.

microwavable packaging, mixed with other vegetables for freshly-prepared products for stir-fry, or as a side-vegetable. Examples of baby corn products found in the fresh produce sections of EU supermarkets are depicted below.



**Picture 1: Different Types of Fresh or Chilled Baby Corn Products**

Source: [www.ocado.com](http://www.ocado.com), [www.sainsburys.com](http://www.sainsburys.com), [www.tesco.com](http://www.tesco.com)

## Baby Corn Production in Thailand

Baby corn plantations produce a high yield and are suited to many rural areas across Thailand. The baby corn is generally planted in local rice fields as small-scale plantations.<sup>186</sup> Depending on the region, it can be planted from October to May as a post-rice harvest crop. However, there is increasingly large-scale cultivation of baby corn and in these circumstances it tends to be planted as the main crop rather than as a complement to rice. It is a short-life crop with a plantation period of around 50 days. In a calendar year, a farmer can grow up to three crops of baby corn per plantation.<sup>187</sup>

Although baby corn can be planted throughout Thailand, the highest density of crop plantations is in the western and central parts of the country, and especially in Kanchanaburi and Nakhon Pathom provinces where there are large plantations owned and run by exporters, most of the output of which is destined for the EU market.<sup>188</sup> Substantial quantities are also grown in the valleys of Northern Thailand, especially in Chiangmai<sup>189</sup> and its surrounding provinces. The plantations in Northern Thailand tend to be smaller than those in the western and central parts and are generally owned by clusters of individual small-scale farmers. As of 2008 the total estimated plantation area in Thailand had increased to in excess of 300,000 hectares.<sup>190</sup>

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<sup>186</sup> Between 0.24-0.32 hectare. UNCTAD (2007), p. 55.

<sup>187</sup> Rakpong J., personal interview held during meeting with Mr. Namjan the leader of Mae Ta cooperative, Mae-on sub-district 21/07/2008).

<sup>188</sup> These provinces are located approximately 30-60 miles from Bangkok. The western area of Thailand is one of the country's main areas for fruit and vegetable exports. The DOA's survey conducted in 2005 reveals that the plantation area in Kanchanaburi was 122,934 hectares with produce yields of 1,409.29 kilograms per hectare. This is significant as compared with the second largest baby corn province, Rajchaburi, which has 16,457 hectares under cultivation and produces 1,071 kilograms per hectare (source: Department of Agriculture, Ministry of Agriculture and Cooperatives).

<sup>189</sup> Which is the second largest city in Thailand

<sup>190</sup> Interview with Associate Professor Vicha Sardud, The Director of Post-harvest Institution, Chiang-Mai University, field trip to Wieng-gan, Chiang-Rai, Thailand, 1/07/2008.



**Picture 2, 3, 4: Baby Corn Plantation Chiang Mai, Thailand**

Source: Author's own camera

### **3.2.2 Distribution Channels for Fresh/Chilled Baby Corn**

#### **3.2.2.1 International Distribution Channels**

In the early years supply was through a system of brokers. However, with more demanding export regulation and with the need for exporters to conduct thorough quality control in order to win supply contracts with EU importers, the distribution channels have changed. They are now largely controlled and run by exporters, either through contract farming with small farmers or through their own large scale plantations.<sup>191</sup> In the latter case the move towards exporters' own plantations has only recently occurred in an endeavour to keep up with export demand and in order for exporters to have some control of their supply volume. This proportion has been growing, but still represents a small portion of baby corn export production.

With respect to contract farming, which is the principal distribution channel for baby corn exports, exporters will provide the small-scale contract farmers with essential raw materials for their baby corn plantation including seeds, fertilizers and chemical substances permitted under EU law. They will also guarantee a minimum price to be paid. The minimum price is conditional upon specified product quantity and quality.<sup>192</sup> Failure to meet these specifications can result in an exporter rejecting a farmer's produce, or in the farmer's produce being bought at a much lower price.<sup>193</sup> This type of

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<sup>191</sup> Source: Rakpong J, personal interview with Mr. and Mrs. Nikorn (fruit and vegetable brokers), Lanna Frozen Co., Chiangmai, Thailand, 23/06/08.

<sup>192</sup> In September 2008, the guaranteed price per kilogram for baby corn exports was around 15 Baht (around 30 pence, £1= 50 Baht) whereas the retail price in the UK is approximately £ 8 for ordinary baby corn and £ 12 for organic baby corn. Rakpong J., group interview with baby corn farmers, Mae Ta, Mae-On sub-district Chiangmai 27/07/2008.

<sup>193</sup> Around 7 Baht (Around 14 pence) per kilogram, source: data provided during a group interview with baby corn farmers, at Mae Ta, Mae-On sub-district Chiangmai 27/07/2008.

contract arrangement, without the intervention of a broker, involves direct contact between an exporter and a farmer.<sup>194</sup> This system gives large exporters considerable control over the production process and over product quality.<sup>195</sup> Since they provide the farmers with the main materials for production they also have better records of product history in relation, for example, to seeds, chemical and fertilizer use, and harvesting and packaging. Where a quality condition is placed upon final products, exporters and occasionally DOA staff are allowed to make regular visits to the plantations to comment upon farmers' production processes and to suggest any corrective methods required to ensure compliance with EU food safety regulation.

As for small farmers, securing contract farming arrangements with large exporters is a significant achievement. It can provide them with access to the international market and guarantee a reliable income in a given season. It can also offer them some access to training and knowledge transfer from the exporters, including in relation to specific food safety issues and in up-to-date EU food safety requirements. This is especially important in relation to chemical pesticide residue levels and to the "critical control points" for HACCP, procedures which needed to be established during the packaging stage. However the farmers must accept that they can be subject to rigorous exporters' controls and if they cannot meet the qualitative or quantitative standards set by the exporters they may need to repay the cost of seeds and other raw materials to the exporters. As noted above, exporters may also reject sub-standard products or buy them at a significantly reduced price. This is especially serious in the baby corn sector where

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<sup>194</sup> Rakpong J., personal interviews with Mr. Rattanasirimontri, Chatchawan Import Export and Packaging, Nakhon Pathom, Thailand, 8/07/2008.

<sup>195</sup> Examples of such exporters include Swift Co, River Kwai and KC Fresh.

there is limited domestic demand in Thailand where the home market is already over-supplied.

This system, despite creating a higher standard of quality control, leaves small farmers in a position where they can be exploited by exporters who may reject produce using the pretext that it is of low quality. In recent years rural farmers have had to follow ever more strict and rigid sets of rules imposed upon them by exporters in their endeavours to ensure that the products comply with demanding private standards – for example GlobalGAP standard – as well as with the demands imposed by EU law.

It has been argued by many domestic non-governmental organisations (NGOs)<sup>196</sup> and by academics<sup>197</sup> that this process of contract farming has also created negative effects on the livelihood and lifestyle of small farmers. Planting baby corn requires considerable attention and manual work, especially towards the harvesting period when the “masculine buds” have to be manually removed daily. This is in order to prevent cross-pollination which would otherwise result in low productivity and uneven “odd-shape” corn which would be also unsuitable for the EU retail market.<sup>198</sup> Thus for about one month from the date that the masculine buds start to appear, baby corn farmers have to stay constantly at the plantation to tend the crop day and night to ensure that the

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<sup>196</sup> Including the FTA Watch Group, the Green World Foundation, People Democratic Society and Prachatai Group. Sources consecutively (all in Thai): [www.ftawatch.org](http://www.ftawatch.org), [http://www.greenworld.or.th/1\\_news\\_sakop\\_10.htm](http://www.greenworld.or.th/1_news_sakop_10.htm), <http://www.prachatai.com/journal/2005/05/4127>.

<sup>197</sup> See for example, Delfroge (2007), Sukhpal (2005)

<sup>198</sup> Usually these masculine buds start to appear from clusters of young leaves at the tip of the stem when the trees reach the age of 38 days. Usually they can harvest the corns 5-10 days after removing the masculine buds. The farmers are required to try to remove these masculine buds by hand and must do this in the early morning every day until the end of the harvesting period (which lasts for approximately a month). Source: information provided during a group interview with baby corn farmers, at Mae Ta, Mae-On sub-district Chiangmai 27/07/2008.

masculine buds are removed early in the morning and that their baby corn is harvested before becoming too large or overripe. This is the reason that baby corn has been dubbed by NGOs and local villagers as an “anti-social plant” – one which prevents farmers from joining village fairs or social gatherings.<sup>199</sup>

EU supermarkets require that baby corn is between 4-9 centimetres in length with the radius of a corn between of 1-1.5 cm. The shape of the cob must be perfect. As noted, it must be light yellow colour and have straight lines of small seeds. It should be stressed that these specific requirements regarding the size, colour and shape of baby corn are imposed by the supermarkets themselves and are passed up the supply chain by exporters to farmers.<sup>200</sup>



**Picture 5: Perfect Baby Corn Fit for the EU Market**

Source: Author's own camera

Location: A farmers' house, Mae Ta, Chiang Mai

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<sup>199</sup> Source: Thai articles e.g. <http://advisor.anamai.moph.go.th/tamra/decen/mitre08.html>, Rakpong J., Personal interviews with Mr. Apaimool, Mae Ta, Mae-On sub-district Chiangmai 27/07/2008.

<sup>200</sup> Baby corn is not included in the “Carrots or Apples Legislation” where EU governmental Regulation requests 26 fruits and vegetable products to be of certain size, colour or shapes. e.g. Regulation EC/730/1999 laying down the marketing standard for carrots and Regulation EC/85/2004 for apples or European Union Commission Regulation EC/86/2004 ,for pears.

Once the products have been harvested and brought to the packaging house by farmers or exporters they will be cleaned and graded.<sup>201</sup> Only those of the highest grade will be sold as fresh baby corn to the export retail market. Products of a lesser quality but of the correct size will be passed on to manufacturers of canned or frozen baby corn.<sup>202</sup> Products which do not meet these specifications will be sold on the domestic market or used as animal feed. Thereafter fresh baby corn will be packed and branded. Most fresh baby corn is placed in perforated plastic clamshells or in plastic trays wrapped with cling-film, punnets or thick plastic bags to be sold on the EU retail and wholesale markets. The individual package size sold by the EU supermarkets is between 120-250 grams (See Picture 1 above). After packaging processes the baby corn will be sent to be stored in a cold packaging house ready for transportation. The transportation means for fresh/chilled baby corn from Thailand to the EU is by air. Altogether the process from harvesting to export takes just 36-48 hours.

From a number of interviews conducted with groups of baby corn producers it is clear that producers are not primarily concerned about the demanding requirements imposed by EU food safety regulation. On the contrary, the farmers accept that quality requirements are a pre-condition to achieve a constant and augmented income. Over the years the farmers have become familiar with the demands imposed by official EU food safety regulation, and they have a good knowledge of what they have to do in order to comply with it. For example, they are cautious in respect of chemical usage prior to the

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<sup>201</sup> Here, the HACCP process would start to be applied.

<sup>202</sup> In most cases this still belongs to large exporting companies such as Swift, River Kwai or KC Fresh.

harvesting period, are aware of the need to establish a HACCP programme after primary production,<sup>203</sup> and are attuned to the need to maintain traceability records.<sup>204</sup>

However, farmers and baby corn exporters did express concerns about additional requests by EU supermarkets to obtain certification of compliance with private standards. Certification of this kind involves meeting even stricter food safety requirements. For example, with regard to traceability the GlobalGAP and SA standards require the recording of considerable additional information. They also impose requirements in respect of ‘other legitimate concerns’ such as environmental and wildlife protection. These requirements are constantly evolving and compliance involves significantly higher production costs, more manual labour and they can be impractical to implement locally, especially in rural areas of Thailand.<sup>205</sup> This is a point to which I will return in Chapter 6.

### **3.2.2.2 Domestic Distribution Channels**

There are different distribution channels for domestically consumed and exported baby corn. There are two types of domestic distribution channel: the more lucrative giant supermarket chains on one hand and local markets on the other. Domestically consumed products are not subjected to the same level of food safety control as products bound for the EU. However, the products destined for large domestic

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<sup>203</sup> Upon visiting packaging factories during the field-trips, some HACCP practices could be observed, for instance workers had to wear gloves and use sterilised hand gel, the designated packaging areas were sealed-off, and the knives used to cut baby corns and the baskets used to pack the corns were sterilised.

<sup>204</sup> Although in theory a traceability requirement does not apply across the border, (see *supra*, Section 2.3, the DOA has, on its own initiative, introduced traceability schemes for baby corn and other important fruits and vegetable exports (see further discussion in Section 3.2.3.2.3)

<sup>205</sup> Rakpong J. Personal interviews with Mr. Apaimool, Mae Ta, Mae-On sub-district Chiangmai 27/07/2008. This will be discussed later in Section 3.2.5.

supermarkets are likely to be of higher quality and to achieve a higher food safety level than those sold at local markets. The baby corn available in Thai supermarkets is increasingly supplied by the same large exporters that supply the EU market. In addition, a number of giant supermarket chains in Thailand such as Top Supermarket, Tesco Lotus and Carrefour increasingly demand that fresh baby corn products meet defined standards. At a minimum they require fresh baby corn to be certified by DOA-GAP, a governmental food safety certification introduced by the DOA.<sup>206</sup> Some domestic supermarkets, including Top supermarkets and the Mall, also prefer fresh baby corn products to be certified with the “Q” mark, another good agricultural practice certification which is granted by the National Bureau of Agricultural Commodity and Food standards (ACFS) of the MOAC.<sup>207</sup>

On the other hand products supplied to local markets are still provided through the broker system whereby local brokers collect fresh produce from a number of small farmers.<sup>208</sup> These can be the “left over” supply of low-quality graded products which have been rejected for supply to export markets or those which are not subject to rigorous food safety controls. The prices at local markets are therefore lower. (See picture 6 and 7 below)

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<sup>206</sup> This is a first step towards obtaining official export certification for the EU.

<sup>207</sup> Q mark is generally considered to be a more rigorous standard than DOA-GAP certifications.

<sup>208</sup> Almost 99 percent of small growers rely on brokers to collect their products and deliver them to packinghouses (UNCTAD 2007).



**Picture 6: Vegetable Stall in a Local Market**

Source: Author's own camera

Location: Chiang Mai



**Picture 7: Vegetable Section in Thai Supermarket**

Source: Author's own camera

Location: Chiang Mai

### **3.2.3 Regulatory Environment for Exports to the EU market**

#### **3.2.3.1 Control Mechanisms and Import Checks in the EU**

Once the products reach EU ports, compliance with these requirements will be checked by the border inspection post (BIP) officers and/or by customs officers in the Member States. Records of non-compliance by specific categories of products, producers and countries will also be generated. In practice, however, it is impossible for the BIP to carry out full compliance checks for every consignment entering EU territory. Thus systematic random checks are carried out by them; these rely on (I) the export certificate issued by the Thai DOA, (II) the compliance history of a particular country, a particular product or a particular exporter. Once baby corn products pass these border checks they are treated as if they are EU products and may be traded throughout the EU.

#### **3.2.3.2 Control Mechanisms in Thailand**

##### **3.2.3.2.1 DOA as a Competent Authority for Baby Corn Exports to the EU**

In the case of fresh fruit and vegetables, including fresh or chilled baby corn, the main responsibility for conducting the CA's work is vested in the DOA. Under the MOAC's framework, the DOA is responsible for "the control of marketing and use of plant protection products and the controls of pesticides used in foodstuff of plant origin intended for export". It has also been regarded as being the main national plant protection organisation. In other words the DOA is responsible under national law for all sanitary and phytosanitary controls of fruit and vegetable products bound for high

value markets, including the EU. The DOA holds regular meetings with exporters to present them with up-to-date information on importing countries' requirements<sup>209</sup> and to address any pressing compliance issues.<sup>210</sup>

Within the DOA there are two sub-departments responsible for export controls: 1) Office of Agricultural Regulation – which performs inspections of vegetable exports, and 2) Plant Protection Research and Development – which provides scientific support, diagnostics and accreditation facilities.<sup>211</sup> With regards to baby corn exported to the EU, the CA's work is directed towards guaranteeing that exported products destined for the EU comply with relevant EU food safety regulations.<sup>212</sup> The DOA can issue export and plant certificates attesting that Thai exports comply with relevant EU food safety law. In turn, Thai baby corn producers are able to enjoy presumed equivalency status and are only occasionally subject to full checks by the BIPs at EU borders.<sup>213</sup>

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<sup>209</sup> During these meetings the DOA will also be able to answer questions posed by exporters. In cases where the Department is unable to provide answers, further efforts can be made either by the DOA itself or by Thai Embassy in Brussels to seek an answer from EU entities. This issue is discussed further as part of network communication in Chapter 4 and 5 (see *infra*, Section 4.1.1.2.2 and Section 5.2).

<sup>210</sup> These are conducted under the DOA's own initiatives for important vegetable exports, including baby corn. The meetings are scheduled for every 6-8 weeks. However, special meetings can take place when emergencies arise. For example, during the periods pre- and post-FVO's visits, or when the DOA has been notified through the RASFF of food safety incidents concerning Thai vegetable exports. This has occurred, for example, in the case of Shigella incident and the recent microbial contamination (late 2010-early 2011).

<sup>211</sup> However it is not directly responsible for establishing conditions for export products. This responsibility belongs to the DFT of the MOC. This fragmentation of responsibility has created problems for the CA in conducting its duties.

<sup>212</sup> As required under Article 11, Regulation EC/178/2002, food imported into the EU must comply with the relevant requirements of food law or with conditions recognised by the EU to be at least equivalent to the EU standards.

<sup>213</sup> Complete checks at EU border are performed routinely through a sampling process, depending on which areas of food safety are likely to be in breach and the compliance history of the export country and producers. This is considered advantageous as in normal circumstances the products bearing export certification from the Thai CA will only be subjected to partial checks, for instance appearance and phytosanitary checks at the EU borders. In some importing countries with which the Thai government does not have such arrangements, products could be subject to comprehensive and thorough border checks.

Likewise, producers and exporters in Thailand who wish to export their food products to the EU must comply at the outset with specific sets of regulations issued by the DOA.

As a third country CA, the DOA is subject to inspections by the EU's Food and Veterinary Office (FVO) to ensure that effective SPS control mechanisms have been put in place.<sup>214</sup> The frequency of these FVO inspections and the issues raised will vary depending on the FVO's planned inspection programmes, which are reviewed every 6 months, according to the FVO's food safety priorities and the compliance record of the country concerned. So far, the FVO has carried out six specific missions to assess the DOA's competence on issues relating to the control of pesticides<sup>215</sup> and plant health.<sup>216</sup>

During each FVO inspection DOA staff arrange for FVO inspectors to visit an exporter's plantations and processing establishment and will accompany them throughout such visits. During and after the visits FVO and DOA staff are able to exchange information and concerns on the issues unearthed during the mission. Such communication may be conducted verbally, on-the-spot, during the course of the inspection, or the DOA may be requested to submit written reports to the FVO. During FVO visits, farmers or exporters can also be called upon to explain their practices. A number of planned visits are usually organised by the DOA prior to the arrival of the inspectors. However, FVO inspectors are able to make additional requests for

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<sup>214</sup> FVO inspections are conducted under the framework laid down under Article 46 of Regulation EC/882/2004 and in agreement with the Ministry of Commerce, Thailand.

<sup>215</sup> The missions were carried out in January 2006 and March 2008 and most recently in March 2010.

<sup>216</sup> These missions took place in November 2006 and September 2008 addressing certification of plant health, and more recently in September 2010 on general export controls.

spontaneous visits to inspect other premises not included in the planned inspection programmes.

After the inspection visit a draft FVO report is written by FVO staff and is presented to the DOA. This report contains FVO conclusions on specific issues raised during the visit. It often specifies the exact control points that need to be addressed by the DOA and also contains detailed recommendations on specific actions which should be taken by the DOA in order to fully comply with EU food safety law. The DOA will have opportunity to provide information and explanations and to comment on the draft FVO report prior to the final report being compiled and subsequently published on the FVO website. Meetings between the DOA and Thai exporters are usually conducted before the DOA's response is sent to the FVO so that the exporters will have an opportunity to explain their compliance record to the DOA. The final FVO report evaluates the DOA's ability to control export product quality in accordance with relevant EU food safety standards. The content of these can vary widely, depending upon the severity of non-compliance. They may contain subtle recommendations for behavioural change, request the establishment of additional action plans, impose a temporary import ban or even bring about a temporary or permanent revocation of CA status. EU recommendations relevant to Thai exporters' compliance are presented and explained to producers and exporters during the regular meetings which take place subsequent to the

inspections. To date no temporary import ban or revocation of CA status has occurred in relation to the Thai DOA in respect of baby corn exports to the EU.<sup>217</sup>

### **3.2.3.2.2 Legal Mechanisms and Export Procedures:**

All Thai baby corn exported to the EU is subject to three tiers of regulation (See Table 3, below). Firstly, all Thai baby corn is subject to general domestic food laws which are applicable to all food products produced or marketed in Thailand regardless of their destination or origin.<sup>218</sup> This includes legislation which regulates production processes, namely the Plant Seed Act B.E. 2518 (1975),<sup>219</sup> the Fertilizer Act B.E. 2518 (1975) and the Dangerous Substance Act B.E. 2535 (1992)<sup>220</sup> as well as domestic post-harvest legislation including the National Food Act B.E. 2522 (1979), the Agricultural Standards Act B.E. 2551 (2008)<sup>221</sup> and Consumer Protection Act B.E. 2522 (1979) plus

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<sup>217</sup> Despite this, there have been cases where FVO reports have led to temporary imports bans covering the entire agricultural industry from other countries. For example, this occurred in respect of Pakistani marine products in April 2007 (Source: <http://www.financialexpress.com/news/eu-ban-on-pakistan-marine-products-to-benefit-india/194842/>). The temporary suspension of CA status was recently threatened for the DOA in December 2010, upon the occurrence of high levels of chemicals found in Thai vegetables in 2010-2011. However, this did not actually occur since the DOA took steps to demonstrate to DG-SANCO that it was still able to control the quality of exports to the EU, even though this did involve a voluntary ban being imposed. See further discussion in Chapter 6.1.2 infra.

<sup>218</sup> These domestic laws have been proposed by the Department of Agriculture and approved by the Parliament through the normal legislative procedure. Source: [http://www.doa.go.th/th/index.php?option=com\\_content&view=article&id=51&Itemid=74](http://www.doa.go.th/th/index.php?option=com_content&view=article&id=51&Itemid=74) (“Knowing the Department” (in Thai),

<sup>219</sup> B.E. is the abbreviation for Buddhist Era, the system of year numbering used in Thailand. The corresponding B.E. year is mostly 543 greater than the equivalent A.D. year. This Act prohibits the importation of GM seeds for commercial purposes. Source: common knowledge in Thailand.

<sup>220</sup> The 1992 Act was directed towards controlling the use of dangerous chemical fertilizers, pesticides and herbicides. Source: [www.ratchakitcha.soc.go.th](http://www.ratchakitcha.soc.go.th) (in Thai). English translation of the Act is available at: <http://www.diw.go.th/law/hazae.html>.

<sup>221</sup> This requires that some food producers, exporters and importers must obtain certification from the ACFS or the certifying bodies which are approved by the ACFS. Source: [www.ratchakitcha.soc.go.th](http://www.ratchakitcha.soc.go.th) (in Thai). English translation of the Act is available at: [http://www.acfs.go.th/km/download/AGRICULTURAL\\_STANDARDS\\_ACT.pdf](http://www.acfs.go.th/km/download/AGRICULTURAL_STANDARDS_ACT.pdf).

other relevant ministries' announcements.<sup>222</sup> This domestic legislation lays down, as a first tier of regulation, basic standards on food safety hygiene for all food products commercially produced or sold in Thailand. Compared with the rigorous food safety laws applicable in the EU, this Thai legislation falls far short of delivering the food safety standards required by the EU. As a consequence fresh or chilled baby corn exported to the EU market is subject to further requirements. These additional requirements can be seen as a second tier of regulation applicable to Thai exports. They have been mainly implemented by the DOA, and to a lesser extent by other sub-departments of the MOAC and other ministries.

Compared to other fresh fruits and vegetables baby corn is regarded by the DOA as an important export crop and is subject to particularly rigorous controls. The control processes for exports are divided into phytosanitary and sanitary controls.

For phytosanitary controls the consignment must be accompanied by a Phytosanitary Certificate (PC) issued by the DOA. The PC will be given if the DOA is satisfied that the exported products do not show any signs of plant diseases or pests. In general exporters must send samples of baby corn to be exported to the phytosanitary control department of the DOA a few days prior to exportation so that appropriate checks for insects and any plant diseases can be carried out.

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<sup>222</sup> These include, for example, the Ministry of Health's Announcement No. 288, B.E. 2548 concerning dangerous substances in food. The Annexes to the Act provide a list of maximum residue limits of some dangerous chemical substances, including Carbaryl Methomyl and Cypermethrin that can be found in fresh baby corn. Source: [www.ratchakitcha.soc.go.th](http://www.ratchakitcha.soc.go.th), <http://www.fda.moph.go.th/fda-net/html/product/food/ntfmoph/ntf288.pdf> (in Thai).

With regard to sanitary checks, baby corn products destined for the EU market will be subject to various checks by the DOA and other governmental agencies. The requirements on sanitary issues are quite extensive considering that products sold domestically or to many other export markets such as the USA do not have to pass the same level of pre-export inspections.<sup>223</sup> Nonetheless, in such cases these products are still subject to Thai general domestic food law, some domestic law applicable to exports to all countries and will be subject to even more rigorous checks at importing countries' borders.

Firstly the sanitary checks concern maximum residue limits (MRL) of chemical substances.<sup>224</sup> Specific Thai laws have been passed to enable the DOA to carry out these tasks, including the Plant Quarantine Act 1964 (amended 1 March 2008) and the Ministry of Commerce Announcements (of 11 April 2003, 23 February 2009 and 4 August 2009) specifying commodities that need to obtain a health certificate prior to

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<sup>223</sup> For example US-bound baby corn exports are not subject to a similar level of DOA checks mainly because there is no CA system in place between the US and Thai authorities. Thai baby corn exports are still subject to food safety inspection at the borders. US import controls for non-meat, poultry and egg products are not based on the presumed equivalency status of third countries CA and food safety systems, unlike the CA model. Instead the import food safety inspections are performed by the Food and Drug Agency (FDA) at the border rather than through external inspection "missions" in third countries which is the case with the EU FVO. However, US controls of food safety for imports are different and more rigorous for poultry, meat and egg products where the system is under the responsibility of the USDA (United States Department of Agriculture). In such cases import controls are, by and large, similar to the CA model. The inspections are carried out both in third countries, based upon their ability to ensure satisfactory food safety levels for exports to the US, and at the US border (called the re-inspection). (See Zach and Bier (2009), p. 153).

<sup>224</sup> The checks are for 30 groups of pesticides within the Organochlorines groups (13 chemical types), Cypermethrin group (6 types), Carbamates group (4 types) and Dithiocarbamates groups (4 types) and Benzimidazoles group (3 types) and 4 other types of herbicides.

exportation.<sup>225</sup> Up to two weeks prior to exportation exporters must submit samples to one of the three DOA-owned laboratories<sup>226</sup> or to another DOA-certified laboratory so that checks can be carried out on the level of controlled chemical and microbial substances. If the samples pass this test they will be issued with the DOA's MRL approval form.<sup>227</sup> Once this form has been granted exporters must present it to the Department of Foreign Trade (DFT) of the Ministry of Commerce in order to obtain a health certification. This process is, to a significant extent, merely procedural. As long as the products are approved by the DOA export certificates are generally issued.

Additional checks will also be carried out by a DOA-approved laboratory to ensure that the product is free from microbial contamination, especially from *E. coli* and *Salmonella* which are commonly found in fresh produce from tropical and sub-tropical countries. This is especially important given Thailand's poor record in respect of microbial contamination of vegetable products.<sup>228</sup> Only products which show no trace of the microbial substances in question will be issued with the DOA's Certificate of

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<sup>225</sup> The new process supplements Ministry of Commerce Announcement B.E. 2546 (2003). Under this process fresh and chilled baby corn exported to the EU and six other countries (Singapore, Malaysia, Japan, China, Hong Kong and the US) must obtain export certificates before it can leave Thailand for the destination countries. This legal arrangement between the DOA and DFT has been conducted in an unusual manner to grant the DOA power quickly so that they could use their expertise and CA status to control issues regarding chemical MRL "though the back door". Following several breaches of EU rules on MRL of chemical and biological substances, the DOA needed to be able to establish appropriate systems promptly to comply with the request of the FVO. It would have taken a long time for new legislation to confirm that the power of regulating MRL of chemical substances was vested with the DOA. Hence it made an official request to the DFT which, at that time, had discretion to impose additional qualifications for export.

<sup>226</sup> This is called the Agricultural Production Sciences Research and Development Office of the DOA.

<sup>227</sup> This is issued by the Plant Standard Certification Office of the DOA.

<sup>228</sup> Department of Agriculture Notification on 18 August 2005 requires that 9 types of vegetable exported to the EU must bear a certificate of *E. coli* and *Salmonella* Analysis.

Approval.<sup>229</sup> This is required to be presented to the customs staff along with the PC and DFT's export certifications.

At the ports and prior to the consignments leaving the country baby corn is randomly re-checked by Thai customs officers. This on-the-spot custom check is conducted to detect any visible insects, plant diseases or unauthorised consignments. However, it does not involve additional laboratory checks.<sup>230</sup> Once the products reach the port of arrival in the EU, they will be randomly checks by the BIP. Here the checks can be carried out for both phytosanitary and sanitary purposes and to verify that the proper paperwork has been completed.

The third tier of regulation is in relation to private standards and will be discussed in Section 3.2.4 below.

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<sup>229</sup> Issued by the Plant Standard Certification Office of the DOA.

<sup>230</sup> The check will be conducted at least 3 hours before the product departure. Since October 2007 the DOA has introduced a strict blacklist procedure for those who breach the PC requirements. In severe cases where Thai customs staff find unregistered products in a consignment, the unregistered products will be removed. In the case of a recurrence the PC will be revoked for the whole consignment and future consignments from breaching exporters will be subject to 100% checks. If the recurrence takes place three times, the PC will be revoked and a PC will not be issued for the applicable exporter for at least 30 days. This results in the exporter's total inability to export products to the EU. If the breach is found at EU ports and is notified to the DOA, the PC to the notified country will not be issued for the breached exporters for 30 days, meaning they are suspended from exporting.

### **3.2.3.2.3 Compliance with EU Regulations**

The main EU management-based regulations as discussed in the previous chapter, namely those regarding HACCP and traceability must also be complied with by all exporters to the EU.

The DOA has made HACCP compliance part of the DOA-GAP and GMP programmes which were established in 2008. The programmes are based on management-based food safety principles and include compulsory compliance with HACCP.

Since 1<sup>st</sup> January 2008 Thai baby corn exporters have been required to obtain products only from DOA-GAP certified farms and if their products are sold as ready-packed products their factories must also be certified under a DOA-approved GMP programme.<sup>231</sup> To a large extent the DOA-GAP is drawn from the main GAP and GMP principles which are similar to those featured in many private standards including GlobalGAP. These DOA-GAP and GMP requirements are imposed in addition to the requirements that they must be registered with the DOA, must obtain a PC, an export certificate and also satisfy the required MRL limits of chemical and microbial substances. Failure to comply would result in their products being refused export certification, to the exporter being placed on a negative list and if repeated infractions are recorded exporters may be subject to a long-term ban.<sup>232</sup>

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<sup>231</sup> As well as 32 other fresh fruits and vegetable products to the EU. Currently there are about 60 approved exporters. Most of these supply fresh or chilled baby corn to the EU. About 10 of these companies export in large quantities.

<sup>232</sup> This abrupt change can be problematic for small and medium –sized producers, at least in the short term (see further Section 3.5, *infra*). Nevertheless, it was claimed by the DOA’s staff at the time of the interviews in 2008 that such changes were necessary to limit compliance problems at EU border. It was

Regarding traceability, the EU claims that the traceability regulation does not apply externally as part of the EU's food safety import regime.<sup>233</sup> In practice, however, traceability has been applied by the DOA to all baby corn exports to the EU as a condition to obtain its GAP and GMP certifications. This traceability requirement is imposed on Thai producers and exporters on the DOA's own initiative despite the fact that they are, in theory, not obliged to comply since traceability obligations only commence once imports enter EU border.<sup>234</sup>

To supplement the traceability obligation required under the DOA-GAP and GMP scheme the DOA has also established its own traceability database to keep records for all important fruit and vegetable exports, including fresh and chilled baby corn, exported to the EU market.<sup>235</sup> This DOA's database is aimed at enhancing the DOA's CA role. As a result of this development prompt detection of the source of food safety deficiencies concerning Thai exports has been possible. At present, fresh or chilled baby corn exporters and their contracted farmers are expected to have effective traceability systems in place.<sup>236</sup> Most of these systems are paper-based, but larger exporters tend to use specialised traceability software.

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claimed that as a result of the Department's Announcement, Thailand had not received any Rapid Alerts on Salmonella or *E. coli* in vegetables in 2008 up to mid-year, and that the use of management-based regulations had reduced food safety incidents in Thailand's exports. However, this claim is questionable as there have been recent frequent incidents at the during 2010 which have led the Thai CA to impose an export ban during January – February 2011 on the majority of its fresh vegetable exports to the EU. (See *infra* Section 3.4.2.2).

<sup>233</sup> See *supra*, Chapter 2 (Section 2.3) Traceability obligations theoretically start once imports reach the EU, i.e. in the supply chain it is imposed first on EU importers. In practice, however, traceability has also been applied to Thai baby corn producers and exporters through private standards and through voluntary efforts of the Thai CA in establishing its own system.

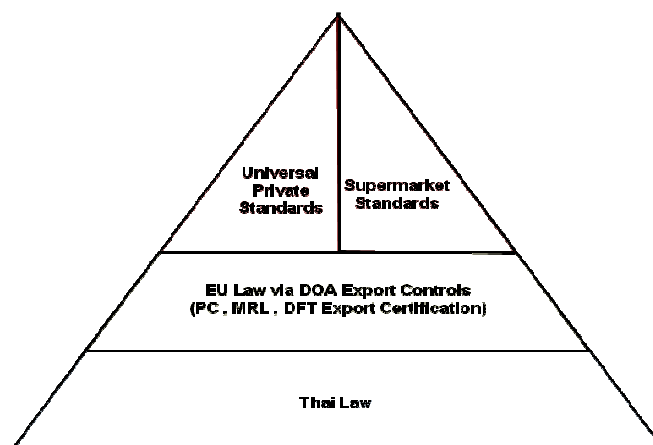
<sup>234</sup> Source: *supra*, fn 74. In addition traceability records have also been required by EU importers as part of private contractual obligation since the regulation came into force in 2003. This will be discussed in relation to private standards in Section 3.2 below

<sup>235</sup> Namely, for the PC and export approval.

<sup>236</sup> Although these are not officially required to secure EU market access.

### 3.2.4 Private Regulation

This is a third tier of regulation mentioned earlier. As has already been made clear, Thai baby corn producers and exporters also have to comply with various private standards imposed upon them by EU importers. These act as a third tier of regulation. The three tiers of regulation are captured by Table 3 below.



**Table 3: Three tiers of food safety regulation applicable to Thai baby corn exports to the EU**

Private standards are considered to fall outside the scope of either EU governmental food safety regulation or the CA model, and are considered by the EU and the Thai government to be private dealings since they are established, managed, certified and mutually accepted by private parties.<sup>237</sup> With this type of regulation, producers and exporters agree with their EU business counterparts, as part of their contractual

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<sup>237</sup> DG SANCO has distanced itself from private standards, stating that it is “part of a commercial agreement between two voluntary parties in a free market, and as such is not subject to regulatory intervention”. Evidence can be seen in many of its documents on this issue, for example on its website [http://ec.europa.eu/food/international/organisations/sps/otherissues\\_en.print.htm](http://ec.europa.eu/food/international/organisations/sps/otherissues_en.print.htm) (See also Lee (2006)). In relation to Thai governmental entities’ views on private regulation, sources are the interviews with a number of Thai officials.

obligations, that they will obtain relevant private certification prior to supplying their goods to EU importers.

Private regulation has recently come to attention since its influence upon Thai producers and exporters has grown tremendously. This can clearly be seen in the case of fresh or chilled baby corn. It can be said that nowadays almost all EU importers of baby corn require that Thai exports be certified in accordance with a variety of private standards. As such these standards have become *de facto* conditions for access to the EU market.

In this chapter the main private standards applicable to Thai baby corn exporters to EU markets will be set out. However, because of various important issues that have arisen through the application of private standards, the impact that these standards have had on Thai producers and exporters will be subsequently presented in Chapter 6.

#### **3.2.4.1 GlobalGAP: A New Condition for EU Market Access**

Two main types of private standards operate as EU market access conditions for Thai baby corn. As a minimum the majority of fresh or chilled baby corn destined for the EU market has to be certified in accordance with the ‘GlobalGAP’ standard.<sup>238</sup>

GlobalGAP standards cover two types of requirements, SPS and non-SPS issues. SPS requirements concentrate on HACCP, traceability and MRLs of microbial and chemical substances. In other words it incorporates most food safety issues that have already been covered by EU food safety law. However, the requirements under GlobalGAP are stricter and are often laid down in more specific terms. For example, GlobalGAP

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<sup>238</sup> For description of GlobalGAP see *supra*, Section 2.5.3.1.

specifies the exact CCPs and procedures for producers to comply with at each CCP. It also requests additional traceability information and requires that this be kept for a longer period.<sup>239</sup>

Moreover it encompasses many additional requirements on non-SPS issues in relation to ‘other legitimate concerns’, including the protection of the environment and wildlife, improvement of workers’ health conditions and welfare. Many GlobalGAP requirements are beyond the scope of official EU food safety regulation under the CA model. However, they are treated as integral requirements in order to obtain GlobalGAP certification.

GlobalGAP standards were originally requested by large supermarket retailers in the Eurep Group which are the main importers of Thai fresh or chilled baby corn.<sup>240</sup> However, it has recently begun to be requested by other wholesalers and smaller importers which are not members of the Eurep Group, including supermarket importers which specialise in ethical products.<sup>241</sup> Thai producers and exporters must therefore strive to obtain GlobalGAP certification in the event that they wish to export to the EU. Failure to do so is likely to mean that EU importers will turn to other suppliers who can readily provide them with GlobalGAP-certified products at a similar, or in some cases

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<sup>239</sup> Under the traceability regulation, only the name, address and date of the products, “one step up, one step down” are required along the supply chain. Source: GlobalGAP, integrated farm Assurance Version 4 for Fruits and Vegetable Certification (checklists, control points and compliance criteria).

<sup>240</sup> To which all the main UK supermarkets are party, including Asda, Cooperatives, Marks and Spencer, Tesco, Sainsbury, Waitrose, Morrison and some large continental EU supermarkets such as Migros, Carrefour, Wegmans. (For full list of GlobalGAP retailers see [http://www.globalgap.org/cms/front\\_content.php?idcat=23](http://www.globalgap.org/cms/front_content.php?idcat=23)).

<sup>241</sup> For example oriental supermarkets. Evidence of this is from interviews. Rakpong J., personal interview held during meeting with the Thai Fruit and Vegetable Producer Associations’ representative, Mr. Pratom Tankum, Nakhon Pathom, Thailand, 10/07/2008 and with Mr. Suppakit Rattanasirimontri, 09/07/2008.

lower, price. For example, it is often the case that baby corn producers in other developing countries, including Kenya and China, are able to do so and recently EU importers have started to obtain some of their supplies from these countries.<sup>242</sup>

#### **3.2.4.2 A Variety of Supermarkets' Own Standards**

In addition to obtaining GlobalGAP certification, Thai baby corn producers and exporters are usually required to obtain further quality assurance certifications belonging to individual supermarket chains. These assurance schemes are based on good agricultural practice principles similar to those that underpin GlobalGAP, but still there are variations between them. In general they are usually stricter, more specific and cover divergent issues pertaining to 'other legitimate concerns'. Although in theory the supermarkets' own requirements are voluntary, in practice they have become another mandatory regulatory tier for market access to the EU. Again, this is a theme to which I return in Chapter 6 below.

### **Conclusion**

The baby corn case study illustrates the manner in which EU food safety requirements can be imposed upon an important Thai food export of non-animal origin. Attempts by the CA in Thailand to comply with EU food safety regulations have created new market conditions for Thai baby corn exports to the EU. These attempts by the DOA to fulfil its CA role have played a part in altering the industrial structure, promoting a suitable

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<sup>242</sup> Source: stakeholders' experience mentioned during the interviews. Rakpong J., personal interview held during meeting with the Thai Fruit and Vegetable Producer Associations' representative, Mr. Pratom Tankum, Nakhon Pathom, Thailand, 10/07/2008 and with Mr. Suppakit Rattanasirimontri, 09/07/2008.

structure for contract farming and bringing to an end the broker system for export distribution. Further, the dynamic development of private regulation has been extensive and has opened the door to a wider range of issues than governmental regulation. These are the issues that have caused most concern among Thai producers and exporters, and they will be discussed in more detail in the next chapter.

### **3.3 PART II - POULTRY CASE STUDY**

#### **3.3.1 Introduction: Poultry in Thailand**

In this case study, the term “poultry” is used to cover chicken meat (raw and cooked) and excludes other poultry products such as duck meat, which represents only 5 percent of Thailand total poultry production.<sup>243</sup> Poultry has been a primary agricultural export for Thailand for the past three decades. Since the commencement of poultry meat exports in the early 1970s, Thailand has rapidly established itself as one of the top poultry-exporting countries, and one with a widely-recognised competitive advantage in producing both raw and cooked poultry meat. Poultry generates a significant proportion (about 10 percent) of the export income in Thailand’s food sector.<sup>244</sup>

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<sup>243</sup> Source: data from the Thai Poultry Association and also in the FVO report (DG-SANCO 2009-8061). The term “raw poultry meat” refers to products within in customs category 0207.110-140 (meat and edible offal of poultry of heading 01.05, fresh chilled or frozen fowl of the species *Gallus Domsticus*), disregarding other poultry products including turkey (HS 0207.240-270), duck (HS 0207.320 -350) and other fowl (HS 0207.360). The term “cooked poultry meat” refers to meat within the 1602 customs category (other prepared or preserved meat, meat offal or blood – of poultry under heading 01.05).

<sup>244</sup> It is within the top ten list of the most important agricultural exports (including food and non-food products such as wood, rubber and paper) and within top six of food agricultural exports from Thailand (after rice, fish, shrimp, tapioca, sugar and fruits). In 2008 it generated an export income of US \$ 1.1 billion or about 10 percent of all food products.

(Source: <http://www.phtnet.org/news51/view-news.asp?nID=336>).

From the outset, the Thai poultry industry has been export-oriented with 40 percent of total domestic production bound for export markets.<sup>245</sup> At the peak of the export boom in 2003,<sup>246</sup> Thai poultry exports reached 500,000 tonnes. At that time Thailand was ranked as the fourth largest poultry exporter, after the USA, Brazil and the EU. Poultry ranked as Thailand's fourth highest income-generating agricultural export,<sup>247</sup> generating revenues of more than US\$ 1.2 billion and with an annual growth rate of 15 percent.<sup>248</sup> Even at this present time, poultry exports continue to make a significant contribution to the country's economy. Thailand still ranks as the seventh largest poultry producer and the third largest exporter.

The EU has always been an important market for Thai poultry exports. It continued to be the largest export market in 2010,<sup>249</sup> - accounting for around 45 percent of total exports. This means that any change to EU food safety regulation is extremely important for Thai poultry exporters. Amongst EU member states the UK is the leading Thai poultry importer, accounting for around 70 percent of EU imports by volume. The second and third largest importers are the Netherlands and Germany, which account for 15 and 9 percent of imports by volume respectively.<sup>250</sup> The size of the UK import market has contributed to the significance of some private standards, including those laid down by the British Retail Consortium (BRC) and the Assured Chicken Production (ACP) standards.

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<sup>245</sup> Source: [www.usdatahailand.org](http://www.usdatahailand.org) and [www.thaipoultry.org](http://www.thaipoultry.org).

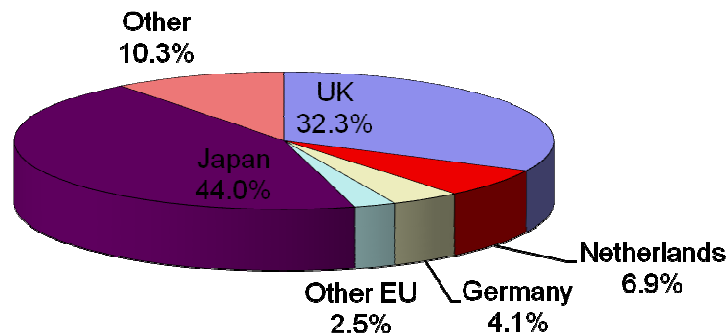
<sup>246</sup> This was just prior to the first national outbreak of Avian Influenza.

<sup>247</sup> After rubber products, rice and shrimp (source: <http://www.depthai.go.th/>).

<sup>248</sup> Source: <http://www.thaipoultry.org>.

<sup>249</sup> The second is Japan which accounted for around 44% of exports in 2010. Source *ibid*.

<sup>250</sup> Prior to the Avian Influenza incident in 2003, the UK accounted for 41 percent, Germany for 25 percent and the Netherlands for 23 percent respectively. It should be noted that exports to the latter two countries continue to fall whilst exports to the UK have generally increased.



**Table 4: Thai Poultry Export Destination 2010**

Source: [www.thaipoultry.org](http://www.thaipoultry.org)

Thai poultry exports have, as for baby corn, been chosen as a case study for specific reasons. Firstly, the EU has always been an important market for Thailand's poultry industry. Consequently the case study can reveal the significance of any changes in EU market access conditions for Thai exporters. In addition, with the long-term problems regarding the ban on Thai raw poultry meat as a result of the occurrence of Avian Influenza, the case study can demonstrate how these issues have been addressed by the Thai government and by poultry exporters. It is interesting to note that despite several disruptions caused by food safety incidents, including the major Nitrofurans crisis and more notably the Avian Influenza crisis, Thailand's poultry industry has recovered its EU market share and has maintained its position as one of the world's leading poultry exporters.

## **Poultry Production in Thailand**

Thailand began to export poultry products in 1973, with the first batch of merely 163 tonnes containing frozen raw poultry meat being exported to Japan. The exportation of processed poultry meat began later in 1991, with an initial volume of 4,000 tonnes. Thereafter, export volumes and revenues increased significantly, mainly in response to the increasing global demand for poultry meat. Improvements in large-scale production and manufacturing processes, integrated contract farming arrangements and in government support all contributed towards making poultry farming and manufacturing attractive to Thai farmers and exporters.

However after the first case of Avian Influenza, which was confirmed on 23 January 2004, growth of Thailand's poultry industry halted due to the introduction of total import bans on fresh meat both by the EU and other markets. The term "Avian Influenza"<sup>251</sup> used here refers to "highly pathogenic avian influenza" (HPAI), a serious illness caused by "A/H5N1" virus strain which normally infects birds but occasionally other species, including humans who may have been in close contact with birds. After the first human infection in 1997 in Hong Kong, the disease quickly spread through the East Asia region during 2003/2004, reaching Europe in 2005 followed by Africa and the Middle East in 2006.<sup>252</sup> Since the 2003 outbreaks, the disease has raised health alarms worldwide,<sup>253</sup> particularly in light of the possibility that it can mutate into a new, deadly

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<sup>251</sup> Also known as "Bird Flu", "Avian Flu" Source:

[http://www.who.int/csr/disease/avian\\_influenza/H5N1\\_avian\\_influenza\\_update.pdf](http://www.who.int/csr/disease/avian_influenza/H5N1_avian_influenza_update.pdf)

<sup>252</sup> Source:

[http://ecdc.europa.eu/en/healthtopics/avian\\_influenza/basic\\_facts/Pages/QA\\_avian\\_influenza.aspx](http://ecdc.europa.eu/en/healthtopics/avian_influenza/basic_facts/Pages/QA_avian_influenza.aspx)

<sup>253</sup> The disease is covered by the Global Alert and Response scheme, under the auspices of the World Health Organisation (WHO). This means that any outbreaks have to be reported to the WHO which will

strain of human influenza that could be easily passed on from human to human causing a widespread influenza pandemic.<sup>254</sup> Many countries have imposed preventive measures to curb national outbreaks, including import bans from countries where the epidemic has been found.<sup>255</sup> At the pandemic's peak Thailand was one of the countries at the centre of the early outbreaks. When the total of human infections reached a reported 25 cases the EU and other countries imposed bans on poultry products from Thailand.<sup>256</sup>

Today, the rate of Avian Influenza outbreaks in Thailand has passed its peak and the overall global occurrence of new outbreaks has somewhat subsided.<sup>257</sup> The last recorded outbreak of Avian Influenza in Thai chicken occurred in 2008. Despite a reduced rate of occurrence, the risk that Avian Influenza can reach a "pandemic" level continues to be high. In addition, numerous new outbreaks have continued to occur in the East Asian region including in the countries neighbouring Thailand,<sup>258</sup> In consequence, the EU considers that countries in the east Asian region, including Thailand, still present a high risk of Avian Influenza recurrence and that export bans on these countries should continue.<sup>259</sup>

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subsequently notify other member states. For further information on this point, see:  
<http://www.who.int/csr/en/>.

<sup>254</sup> The disease itself has a high mortality rate in human, resulting in death in 50 per cent of cases in Asia. However, at present it cannot be transferred between human and the main cause of the infection in human occurs when a person is in close contact with birds or poultry. Source: Ibid.

<sup>255</sup> This includes the EU's ban on Thai poultry meat and feathers.

<sup>256</sup> The last case of human infection occurred in September 2006. Source:  
[http://www.who.int/influenza/human\\_animal\\_interface/avian\\_influenza/H5N1\\_avian\\_influenza\\_update.pdf](http://www.who.int/influenza/human_animal_interface/avian_influenza/H5N1_avian_influenza_update.pdf).

<sup>257</sup> The last large scale outbreak happening in Europe was in found 2006. This occurred in Bulgaria, Italy and Slovenia. The last single case occurred in wild bird in Bulgaria in 2010

<sup>258</sup> For example, in Indonesia and Vietnam. The last cases in these countries occurred in 2011.

<sup>259</sup> Commission Decision of 30 November 2010 extended the ban until the end of 2011.

The occurrence of Avian Influenza was considered the most serious food safety incident ever to have hit Thai poultry exports, and indeed Thai food exports in general. Previous food safety incidents concerning Thai poultry exports related to an excess of MRL of arsenic contaminants found in products exported to Czech Republic in 1998, the discovery of Salmonella and Cholera contamination and the Nitrofurans crisis which occurred in 2002-3. These incidents resulted in 100 percent checks at EU borders regardless of the DLD's export certificates.<sup>260</sup> However, none of these incidents resulted in a widespread, long-term import ban as was the case with Thai raw poultry products following the Avian Influenza incident. As a result of this crisis, which started in December 2003, Thai raw poultry exports are still banned in all major importing countries, including the USA, Japan, the Middle East, South Korea, Singapore, Hong Kong, Canada, South Africa, and of course the EU. Only those poultry exports from Thailand that have been cooked are allowed, and even then only by some of these countries.<sup>261</sup>

The outbreak was also widely publicised in the EU as it occurred just after the DLD pronounced Thailand as an Avian-Influenza-free country, and after Thailand's food safety system had been praised by the EU Commissioner during his visit to Thailand.<sup>262</sup> Upon learning of the Avian Influenza outbreak, DG-SANCO took immediate action to ban all raw poultry meat products as well as all untreated feather products from

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<sup>260</sup> This can be viewed as a temporary suspension of the DLD CA status as it does not guarantee that products are subject to reduced food safety checks at EU borders. For example, in relation to the Nitrofurans crisis the 100 percent check began in March 2002 and continued throughout that year and subsequently caused considerable delays and significant difficulties for Thai exporters.

<sup>261</sup> Some countries, including Malaysia, Taiwan and Turkey, also still ban both cooked and raw poultry products from Thailand. Currently some countries in the Middle East are the only ones to allow importation of raw poultry meat from Thailand under compartmentalisation arrangements.

<sup>262</sup> David Byrne made a 6 day visit in late 2003. He stated that there was no evidence of Avian Influenza in Thailand.

Thailand; this ban continues to be enforced today.<sup>263</sup> In 2004, shortly after the outbreak, annual poultry export volumes dropped by nearly 60 percent from around 550,000 tonnes to 200,000 tonnes, with a 40 percent reduction in export volume to the EU. Export revenues fell by 47 percent as a result of this interruption.<sup>264</sup>



<sup>263</sup> Commission Decision 2005/692/EC which states that poultry meat products from Thailand must be heat treated according to Point 4 of the Decision. The latest extension to this legislation is Commission Decision of 30 November 2010 amending Decisions 2005/692/EC, 2005/734/EC, 2006/415/EC, 2007/25/EC and 2009/494/EC as regards Avian Influenza where the ban on raw poultry meat from Thailand and other South-east Asian countries is extended to the end of 2011.

<sup>264</sup> Source : <http://www.thaipoultry.org/>.



**Table 5: Changes in Thai Poultry Export: Pre and Post Avian Influenza**

Source: [www.poultry.org](http://www.poultry.org)

Despite this disruption, poultry farming has continued to be popular in Thailand, with currently around 15,000 registered poultry farms and 3,000 abattoirs nationwide.<sup>265</sup> Poultry production is concentrated in central Thailand in the provinces around Bangkok, the country's capital including Lop-Buri, Suphan-Buri, Chai-Nat, Chon-Buri and also some provinces in the North East. Approximately 40 percent of farm production is still aimed at the export market. However, despite the high number of farms and abattoirs there is only a small number of establishments certified to process poultry for export. Currently there are 23 certified abattoirs and 79 meat-processing plants that meet the DLD's export standards. Most of these belong to five poultry conglomerates including Charoen Pokphand (CP), Saha Farms, GFPT, Chaweewan Farm and Betagro. All

<sup>265</sup> Source: Thai DLD.

export farms must operate under a closed system and be registered with and certified by the DLD.

As with baby corn, there are two sources of poultry for export; through contract farmers and from exporters' own farms. A significant proportion of exports still come from contract farming. However, following the Avian Influenza crisis there has been an increase in the proportion from exporters' own farms due to exporters concerns over their ability to fully control food safety and animal movements for the purpose of disease prevention.<sup>266</sup> Both sources are still used by most Thai exporters to the EU market, although their proportion varies. For example, CP raises about 30 percent of its production from contract farming whereas the proportion is 50 percent for Saha Farms. Conversely, all products from GFPT and Chaweewan Farms come from their own farms.<sup>267</sup> Poultry exporters nonetheless do operate their own abattoirs and processing factories so that they can oversee the entire curing and processing phases and can control the supply to their customers.

Altogether around 30 percent of certified farms are under contract farming arrangements whereby an exporter, often a large conglomerate, imposes strict quality control on its contracted farmers. The exporter supplies the contract farmers with everything they need for raising chicken, including chicks, feed and medicines, and appoints a team of on-site managers. The large poultry conglomerates, including as Saha Farms, Betagro and CP, also have integrated facilities to cover the entire

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<sup>266</sup> Rakpong J., personal interview held during meeting with the Thai Broiler Processing Exporters Association and staff from GFPT, Bangkok, Thailand 7/08/2008. Rakpong J., personal interview held during meeting with Mr. Nathsak Pattanachaikul (Chief Operating Officer of Saha Farms) and Mr. Kasem Trakoonlerswilai (Deputy Director Saha Farms) See also: <http://www.food-resources.org/news/20/09/07/8203>.

<sup>267</sup> Source: interviews.

production line including their own “parent” and in some cases “grandparent” stock farms, hatcheries, feed factories, processing plants and animal medicine facilities as well as the broiler farms themselves.

Most of the broiler farms are of medium to large size with a capacity to raise 5,000 to 10,000 birds for a medium-sized farm and over 300,000 birds for a large farm.<sup>268</sup> Chickens are fed for up to 50-60 days before being taken to the abattoir. After slaughter the poultry meat will be packed, chilled or frozen and supplied as raw meat products, or alternatively sent to a processing plant to be processed and exported. Broiler farms for export markets are equipped with DLD and EU approved automated raising systems for ventilation, humidity and temperature control. At the farms DLD staff observe the production process on-site. At each farm there is also a team of on-site managers who are made responsible as the first point of contact with DLD staff. They provide 24 hour surveillance and are responsible for ensuring strict access procedures and sterilised conditions for purposes of disease control.<sup>269</sup> Farm conditions are cross-inspected daily by the on-site DLD staff.

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<sup>268</sup> A large farm belonging to a conglomerate poultry company such as Saha Farms can house around 340,000 chickens. The total daily production of a conglomerate firm with several large poultry farms can be over 120,000 birds. (Source: Saha Farms Introduction to the company video, also available at [www.sahafarm.com](http://www.sahafarm.com)). Intensive “farming” has also brought about additional export conditions by way of animal and poultry welfare that must be complied with by the poultry exporters.

<sup>269</sup> Such as the wearing of protective gear and the introduction of new flocks.

### **3.3.2 Distribution Channels**

#### **3.3.2.1 International Distribution Channels**

In contrast to fresh baby corn the production of cooked poultry exports requires large production and integrated manufacturing operations that exist only in conglomerate firms. This involves not only poultry farms and abattoirs but also large-scale processing plants, packing factories and cold-chain management. Moreover, importing countries' rules on animal products are generally more numerous, complex and demanding than for non-animal products since they are considered to carry higher food safety risks to both humans and animals. The EU is no exception.<sup>270</sup> As a minimum the meat must come from certified countries and Thailand is included on the EU list of certified countries under Part 2 Annex II of the Commission Decision 2007/777/EC. In addition, exporters to the EU market must be registered with the CA – i.e. the DLD, must have satisfied all the relevant regulations and certification requirements and, unlike products of non-animal origin, they must also be on an official list of approved establishments published by the DG-SANCO under EU Commission Decision 97/4/EC.

The industry is oligopolistic as there is only a small number of companies that export the bulk of poultry meat. In the export sector poultry production is carried out in an intensive 'closed' system. Amongst the exporters, the Thai Broiler Processing Exporters Association, which comprises around 10 large exporters, is the central point of contact for information. Even though not all top exporters have joined the

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<sup>270</sup> Recital 2 to Regulation EC/853/2004. The existence of higher risks is due to the nature of the products; apart from being prone to microbial and chemical contaminants they can be susceptible to life-threatening pandemic diseases (to both human and animal) such as Avian Influenza or Foot and Mouth disease, BSE (the mad-cow disease). (See also Alemanno (2009), p. 13).

association (for example, Chaweewan Farm and Saha Farms, which is the second largest poultry exporter after CP) those who are not members do have strong links with the Association and are often present at exporters' meetings.

Since the Avian Influenza outbreaks overall around 70 percent of total meat production for export originates from exporters' own farms rather than through contracted farms, whereas prior to the outbreaks the proportion was around 50 percent.<sup>271</sup> CP Group which previously obtained most of its raw poultry meat from its contracted farms has changed its practice since the Avian Influenza crisis to source the majority of its supplies from its own farms.

Similar to the international distribution channel of baby corn, there used to be a broker system whereby the broker collected live chickens from local farms and sold them to exporters at the exporter's abattoirs. However, after the occurrence of major food safety outbreaks, including the 2003 Nitrofurans the 2004 Avian Influenza crises, the broker system came to an end for poultry exports.

Concentration in the industry has become especially acute since the EU now only allows the importation of cooked poultry products from Thailand. Any producers wishing to export to the EU must have links with the processing plants, all of which belong to large exporters. Hence small and medium-sized farms, which could not make the significant investments required to have their own processing factory, have had

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<sup>271</sup> As previously stated, the proportion of this varies amongst different exporters.

either to enter into contracts with larger exporters in order to survive, or to divert their products to the local market or to less lucrative markets of neighboring countries.



**Picture 8: Poultry farms**

Source: Nation Multimedia [www.oknation.net](http://www.oknation.net)

### **Production-Line**

Once chickens have been brought to the abattoir, they are electrically stunned and then slaughtered.<sup>272</sup> Thereafter the chicken will be plucked, cleaned, divided into different cuts, graded, packed and stored – chilled or frozen. Some meat will be sold in the domestic market and some will be used as raw material for cooked or semi-cooked food

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<sup>272</sup> This technique is also known as “electric bath” whereby live chicken will be hung up side down with a moving rod and are moved through water kept at a high electric voltage. The animal is stunned for about 10 seconds, long enough for the slaughtering process. Although this process is allowed under EU law (Directive 93/119/EEC) the issue of animal welfare has been raised by many non-profit organisations including People for the Ethical Treatment of Animals (PETA) and UK importers (including Morrisons and Sainsbury). There have been discussions and requests by EU supermarkets whether the slaughtering process should be restricted to Controlled Atmosphere Stunning (CAS). At the time of my interviews the issue had not been resolved. However it has created great concern amongst Thai exporters as switching to the CAS technology would involve major investment.

products for export markets. Once the products are cooked or processed they will be packed chilled or frozen in the exporters' cold storage.



Source: Reuters



Source: Business Development Service Network

**Picture 9, 10: Poultry Production Line**

Since the import ban introduced after the Avian Influenza outbreaks EU-bound products must all be in a cooked or processed form. It is noteworthy that Thai exporters took only 6 months to expand the capacity of their processing plants, to divert their raw poultry meat into processed products and were quickly able to export new batches of cooked poultry meat to the EU. The top Thai exporters have also benefited from economies of scale in producing processed meat and have been able to win long-term supply contracts with leading EU supermarkets. For instance there is a business partnership between the CP Group and Tesco that CP chicken would be used in most of Tesco's own line ready-meals.<sup>273</sup>

Thai exporters have created a wide variety of processed cooked products from raw poultry meat, ranging from steamed meat to more sophisticated value-added products such as fried chicken steaks, sausages, ready-to-eat chicken tikka or nuggets.

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<sup>273</sup> CP even has a distribution centre in the UK.

Source: <http://www.mfa.go.th/web/852.php?id=24362> (in Thai), <http://www.cambridge-news.co.uk/Business/An-appetising-prospect-in-the-food-industry.htm>.



**Picture 11: Various Poultry Products**

Source: Saha Farms

### **3.3.2.2 Domestic Distribution Channels**

As with baby corn, the two domestic distribution channels are top-end supermarket chains and local markets. There is a significant quality gap between these two markets. The former is produced and supplied mostly by large poultry conglomerates<sup>274</sup> who also supply the international market. It is therefore considered to have better food safety quality than the latter.<sup>275</sup> Meat sold in supermarkets is often checked by the DLD as well as by district municipality staff.

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<sup>274</sup> The reason for this is that large conglomerates, such as CP and Saha Farms, have a significant shareholding in large domestic supermarkets. For example CP owns 51% of Tesco Lotus, one of the top supermarket chains in Thailand (the remaining 49% being owned by Tesco UK).

<sup>275</sup> This will be discussed as part of positive spill-over effects derived from the CA model in part III of this chapter.

However, quality controls are considerably lower for products sold in local markets. The supplies are mostly provided by local small or medium-sized farms that use an open farming system. The regulation of local markets is run by sub-district municipalities and falls under the supervision of the Ministry of the Interior as well as the DLD. There have been attempts by the DLD to run a voluntary Hygienic Meat Scheme for meat sold locally but the scheme has not been widely recognised. In recent years there has been an expansion by large conglomerates, such as CP and Saha Farms, in the supply of products to local markets. However, these supplies are not always reliable in terms of their availability and are only provided when there is a surplus to their export requirements.



**Picture 12: Poultry stall in a local market**

Source: Author's own camera

Location: Chiangmai



**Picture 13: Meat Section in Thai Supermarket**

Source: Author's own camera

Location: Chiangmai

### **3.3.3 Regulatory Environment for Exports to the EU Market**

#### **3.3.3.1 Control Mechanisms and Import Checks in the EU**

Being a product of animal origin, poultry is regulated differently and more strictly than products of non-animal origin on the basis that it is considered to be susceptible to a broader range of risks to human and animal health.<sup>276</sup> In consequence the EU only allows poultry imports from certified establishments and countries. To obtain certified country status, a third country must take steps to show to DG-SANCO that its poultry products are subject to the same or equivalent food safety standards as those applied in the EU. Upon applying for certifying country status, official requests will be made by the EU to exchange information, for consultations and for on-site checks by a team of

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<sup>276</sup> See supra Section 3.3.2.1 (International Distribution Channels).

FVO staff. The following issues will be considered; the third country's animal health situation;<sup>277</sup> the capacity and reliability of the competent veterinary authority; compliance with relevant EU animal health conditions; residual monitoring and microbial contaminant control programmes; and, animal welfare provisions at the time of transportation, slaughter and at farms so as to determine whether they are equivalent to, and capable of delivering the same food safety standards, as those in the EU.<sup>278</sup> Once the authority is satisfied with the third country's food safety conditions an official announcement will be made by DG-SANCO adding the country to its approved list. Thereafter an animal health certificate form for the approved country to export will be drawn up and an initial list of approved establishments will be created.

Thailand has been on the list of certified countries under Annex I of Commission Decision 94/85/EC since 1994. Despite the Avian Influenza outbreaks Thailand remains on the list of certified countries. The DLD has been declared as the national CA. It can issue health certificates to guarantee that exported products comply with relevant EU food safety and animal welfare requirements.<sup>279</sup> Certification is made by way of an official attestation by DLD veterinary staff that the details stated on the certificate are correct, that the products satisfy EU requirements, and that they are free from Avian Influenza and Newcastle Disease.<sup>280</sup>

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<sup>277</sup> This must pass the requirements under Regulation EC/854/2004 and be free from Newcastle Disease and Avian Influenza.

<sup>278</sup> See for example DG-SANCO document: General guidance on EU import and transit rules for live animal and animal products from third countries. This is available at [http://ec.europa.eu/food/international/trade/guide\\_thirdcountries2006\\_en.pdf](http://ec.europa.eu/food/international/trade/guide_thirdcountries2006_en.pdf).

<sup>279</sup> According to Model B of Decision 94/85/EC.

<sup>280</sup> Under Annex II of Decision 94/984/EC, specific details to be included on the certificates are, for example, the name and Health Certification Number of the consignors, product origin and region, CA (both central and local), address, place of loading, slaughterhouse, cold storage and cutting plant, transportation details, weight and packaging, consignment identification details (these are essential for products to be traced back). The animal health attestation by the official veterinarian on behalf of the CA

As with the DOA's approval certificates and PC, the DLD has flexibility to grant export certificates and can propose that new establishments be included on the DG-SANCO list. At the outset only 70 certified establishments were listed as approved establishment in Commission Decision 97/4/EC whereas the number currently exceeds 100. As with the DOA in the case of baby corn, the benefit of "presumed equivalency status" can pass down from the DLD to Thai poultry exporters. Achievement of this status in most cases results in products from certified establishments being subject to fewer (i.e. random) checks at EU borders. However, this presumption of equivalence can be rebutted and a full check on product consignments can be performed if the BIP or a member state's CA suspects that the products do not comply with certain EU regulations.

### **Importation Processes at EU Borders for Products of Animal Origin**

Special export procedures apply for products of animal origin. Prior to the arrival of a product consignment at an EU border the exporter or his agent must notify the approved a border inspection post inspector (BIP) 24 hours in advance. Upon arrival the product is subject to a systematic official check covering documentation, product identity and the product's physical characteristics. Further sampling checks can also be carried out. However, the frequency of this will depend on the record of a particular exporter, the country of origin and the risk associated with the particular product. After these checks, the exporter must fill in the veterinary entry document, the details of which will be

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that the meat is free from Avian Influenza and Newcastle Disease and includes attestations that the surrounding areas where the animal was raised are sufficiently free from Avian Influenza outbreak, with no diseases present in 10 km radius in the last 30 days, did not come into contact with infected poultry during the transportation or whilst at the slaughtering house.

stored in the EU's main electronic traceability system (called the Trade Control and Export System), before the consignment can be released. If the consignment does not comply with any aspect of EU law it will either be sent back to the country of origin<sup>281</sup> or, if it poses a risk to animal or human health, it may be destroyed.<sup>282</sup> Once the product has passed the checks at the port of entry it is free to be transported throughout the European Union. Nevertheless, if breaches of food safety law are later found or if the product subsequently presents a risk to human or animal health, the CA in the member state must trigger a RASFF and recall the product through the EU's traceability system. Information regarding such food safety incidents will then be reported back to the CA in the third country which will be able to inform the producer/exporter through its records contained in the official health certification and the DLD traceability system.

### **3.3.3.2 Control Mechanisms Used in Thailand and their Effects on Poultry Farmers and Exporters**

#### **3.3.3.2.1 The Role Played by the DLD as a Competent Authority for Thai Poultry Exports to the EU**

The DLD is the principal CA to control food safety in respect of poultry exports. It is responsible for issuing export certificates to accompany export consignments to the EU.<sup>283</sup> It is also responsible for establishing regulatory controls so as to ensure that Thai exporters comply with relevant EU food safety law. However, if the DLD were to

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<sup>281</sup> In such an event the Thai exporter will be liable to pay for transportation costs.

<sup>282</sup> P. 15, General Guidance on EU Imports and transit rules for live animals and animal products from third countries. Also available at: [http://ec.europa.eu/food/international/trade/guide\\_thirdcountries2006\\_en.pdf](http://ec.europa.eu/food/international/trade/guide_thirdcountries2006_en.pdf).

<sup>283</sup> Annex I of Commission Decision 94/85 EC, applicable since 1994.

fail to demonstrate to the EU authority that it is capable of putting in place an equivalent food safety system for exports, Thailand could, in principle, be removed from the certified country list. In practice this has never happened, though less stringent actions have taken place including: an import suspension in relation to particular certified establishment; product recalls; 100 percent checks at EU borders; and import suspensions in relation to certain poultry products. The most recent occurrence was when the importation of raw poultry meat was banned as a result of Avian Influenza. As with the DOA, the DLD runs regular meetings with exporters in order to give them opportunities to exchange information, to produce more up-to-date accounts of export and compliance conditions, and to communicate with them urgent issues that need to be addressed.<sup>284</sup>

The FVO is responsible for checking DLD's competency in this respect. The DLD must send reports to DG-SANCO. However, it is the FVO that carries out its mission through on-the-spot checks in Thailand.<sup>285</sup> The frequency and agendas of the FVO missions vary according to Thailand's ability at any given time to control food safety and animal health conditions for poultry exports. As with the case of baby corn, the FVO's reports following its missions often serve to identify areas of EU concern that the DLD should address. To date there have been five FVO missions specifically carried out in relation to poultry exports to the EU. These took place in 1999 and 2001 for poultry meat production,<sup>286</sup> in 2005 for cooked poultry meat export and Avian

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<sup>284</sup> The meetings run every 4-6 weeks.

<sup>285</sup> The on-the-spot-check is governed by the Commission Decision 98/140/EC laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by Commission experts in third countries.

<sup>286</sup> DG-SANCO 1999-1214 and 2001-3310.

Influenza control,<sup>287</sup> and there were two missions in 2009 for poultry meat and poultry meat products<sup>288</sup> and animal health conditions.<sup>289</sup> The FVO's recommendations are considered as detailed guidance for the Thai DLD, indicating to it what exactly has to be done in order to maintain CA status.<sup>290</sup> These recommendations are generally given serious consideration by the DLD, with most of them being promptly adopted.<sup>291</sup> Most of the recommendations applicable to Thai producers will be passed on to them during the meetings of the DLD with exporters.

Some FVO recommendations have led to major reforms of the DLD. For example, following the first FVO mission, and in light of the FVO's many comments on epidemic control, the DLD established the National Institute of Animal Health as a stand-alone central laboratory body for checking animal diseases including Newcastle Disease and Avian Influenza.<sup>292</sup> Similarly, following the FVO's comments on stunning equipment in 2009 the DLD later launched an additional national plan to improve animal health and welfare.<sup>293</sup> Indeed, following the FVO's comments made in 1999 on the further steps the DLD needed to take to comply with EU legislation on laboratory processes for detecting Newcastle Disease, the DLD appears to have followed virtually every FVO published recommendation.<sup>294</sup>

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<sup>287</sup> DG-SANCO 2005-7554.

<sup>288</sup> DG-SANCO 2009-8061.

<sup>289</sup> DG-SANCO 2009-8266.

<sup>290</sup> For example in the recent 2009 mission on poultry meat inspection, the recommendation on the collection of sampling methods for detecting Salmonella was to change from the collection from "carcase rinse" to "neck skin", (DG-SANCO 2009-8061, p. 6) and has been followed by the DLD.

<sup>291</sup> For those where compliance is not complete, steps towards compliance have already been initiated by the DLD. See the FVO reports above.

<sup>292</sup> Reference: interviews with various stakeholders 2008

<sup>293</sup> DG-SANCO 2009-8061.

<sup>294</sup> For example, it followed the FVO's recommendation that samples should be taken at farms and not at the abattoir.

The DLD can use this FVO mission process to communicate back to the EU, to attest to its willingness to comply with the recommendations and issues raised during the FVO inspections, and to raise any concerns regarding the impracticality of the recommendations or the time frame for compliance. This is because after the draft FVO mission is released, DLD is able to comment on the reports, to give explanations or to propose suitable amendments with regard to FVO's statement of facts.

During interviews, a commonly expressed view amongst the Thai CA and exporters is that they share the objective of maintaining EU confidence in Thai poultry products. They therefore strive to accommodate EU demands despite the additional costs of compliance. These additional costs are considered by exporters to be a long-term investment.

#### **3.3.3.2.2 Legal Mechanisms and Export Procedures**

As with baby corn, poultry exports are subject to a number of Thai food laws including the National Food Act B.E. 2522 (1979) and the Consumer Protection Act B.E. 2522 (1979). There is also a further extensive list of government legislation that governs products of animal origin.<sup>295</sup>

For products exported to the EU, additional measures set out in EU law must be complied with. The DLD has been granted administrative powers under national law to

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<sup>295</sup> These include the Animal Epidemics Act B.E. 2499 (1956), amended in B.E. 2542 (1999), the Food Act B.E. 2522 (1979), the Slaughtering and Meat Market Control Act B.E. 2535 (1992), the Drugs Act B.E. 2510(1967), the Feed Quality Control Act B.E. 2525 (1999) and the Poultry Meat and Poultry Meat Product Inspection Regulations B.E. 2548 (2005).

lay down export conditions and quality control procedures in order to ensure that EU conditions are met for all poultry exports.<sup>296</sup>

In general DLD activities can be divided into three categories; (i) quality control and inspection, (ii) accreditation, and (iii) animal disease control. These are dealt with by separate departments and sub-departments of the DLD. The Bureau of Livestock Standards and Certification is responsible for approving export establishments for quality control and inspection proposes. *Inter alia*, it observes that proper compliance with HACCP principles is achieved in these establishments. The Bureau of Quality Control of Livestock Products is responsible for laboratory tests and accreditation work. The Bureau of Disease Control and Veterinary Service is responsible for disease control issues and for conducting pre-export checks for animal diseases.

With regard to export procedures, the first stage involves the acquisition of an export certificate issued by the DLD.<sup>297</sup> This certificate operates in a manner similar to that for the PC granted by the DOA. There are two stages of food safety and animal health checks before cooked poultry products can be exported to the EU; (i) on-site checks by the DLD veterinaries for animal health and food establishments' records and (ii) laboratory checks for MRL of microbial and chemical substances.

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<sup>296</sup> This arrangement differs from the DOA which oversees Thai fruit and vegetable exports, including baby corn, where the responsibility for control of fruit and vegetable exports is vested in different government entities, the DOA and the DFT of the Ministry of Commerce. However, in both cases customs-related issues are under the control of Customs Department, Ministry of Finance. Issues on factory standards are governed by the Ministry of Industry.

<sup>297</sup> This is governed by Decision 94/85/EC.

Whereas farms and other establishments have to be GAP and GMP-approved in order to obtain a PC from the DOA, the DLD has a team of on-site staff to oversee the whole production process at the exporters' establishments.<sup>298</sup> As such the DLD can exert direct and continuous checks on quality control in relation to food safety and animal welfare issues regarding poultry exports as and when needed. It can also advise on, and assist in addressing, any compliance points that have been overlooked by exporters. The checks are carried out by DLD staff at least once a week and weekly reports are sent directly to the central DLD office in Bangkok. In addition the on-site team is also responsible for approving samples sent to the central DLD laboratories. This introduction of on-site DLD staff allows a better and quicker exchange of information since direct communication between the DLD, site managers/workers and owners of the approved establishments can take place on a daily basis. Any compliance issue that arises can thus be dealt with promptly. This is unlike the DOA control procedures which are carried out only through exporter meetings, official announcements or when inspections for the DOA's GAP or GMP schemes are required.

In addition to the checks by on-site DLD staff, the ante- and post-mortem inspections of poultry are also carried out by different units of a local/municipal team according to Thai domestic law.<sup>299</sup> Farm owners must notify the local provincial veterinary office at least 5 days prior to any intended slaughter date so that the DLD's local staff can visit farms, check the condition of animals and, if satisfied, grant approval for slaughtering.

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<sup>298</sup> This is usually a team of three personnel, employed by the Bureau of Livestock Standards and Certification, to work alongside private veterinarians employed by the exporters.

<sup>299</sup> This procedure is governed by the Slaughtering and Meat Market Control Act B.E. 2535 (1992), Animal Epidemic Act B.E. 2499 (1956) and B.E. 2542 (1999) The Ministry of Agriculture and Cooperative's Regulation No.29 (B.E. 2534 (1991)), No. 35 (B.E. 2537 (1994) and Poultry Meat and Poultry Meat Products Inspection Regulation B.E. 2535 (1992).

The health conditions of the animals will be checked by the local staff once they arrive at the abattoir and again pre- and post-slaughtering.

With regards to the second stage for obtaining export certification, poultry products are subject to the CA's laboratory checks for MRL of chemical and microbial substances to ensure compliance with EU regulations. This is carried out by the DLD's own "Veterinary Public Health Laboratory", belonging to the Bureau of Quality Control and Livestock Products. Satisfactory laboratory results are also necessary in order to obtain export certification. Instead of a single check prior to the date of exportation, the checks are carried out regularly by the DLD's own or DLD-approved laboratories. Samples from animals, products and food establishments are tested throughout the different stages of poultry raising until 10 days before slaughter in order to determine the animal health and establishment's hygiene conditions.<sup>300</sup> These tests aim to detect the presence of, *inter alia*, Newcastle Disease, Avian Influenza and residues for pesticides, anti-biotic and microbial substances. The documentation and samples must be approved by the on-site DLD staff before being sent to the laboratories. If the laboratory results are satisfactory, an approval document will be issued to support the application for an export certificate. As stated above, this certificate is granted by another department of the DLD, namely the Livestock Certification Division of the Bureau of Livestock's and Standard Certification.

Once the export certificated is grated, additional checks for disease control purposes will be also carried out at quarantine stations before any consignment leaves the port.

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<sup>300</sup> Samples include swabs from the factory surface and ice and water used in the processing of poultry meat.

This process will be explained as part of compliance with EU regulations as set out below.

### **3.3.3.2.3 Compliance with EU Regulations**

Compliance with the main EU management-based regulations, as identified in Chapter 2, is a pre-condition for export to the EU. HACCP is imposed upon manufacturers and exporters as part of the DLD's approval of food establishments.<sup>301</sup> The accreditation of compliance with HACCP can be made by the DLD or by another approved external accreditation body and must be conducted every three years. Once accreditation is achieved, a report indicating exporters' HACCP compliance will be issued by the Bureau of Livestock Standards and Certification.<sup>302</sup> Daily compliance with HACCP principles is also monitored by the DLD's on-site staff. In addition, the processing plants of exported products must obtain additional the Ministry of Health's GMP standard.<sup>303</sup> However these only cover basic GMP principles and thus poultry manufacturers who export their product to the EU will be subject to a more rigorous HACCP approval scheme.

As for baby corn, traceability has now become compulsory for all poultry exports to the EU. This is as a result of an additional scheme voluntarily run by the DLD, despite the fact that traceability is not yet a requirement for meat products sold domestically, and

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<sup>301</sup> As a matter of fact, HACCP had been incorporated as part of compliance with other private standard schemes including Standard Operating Procedures (SOP), ISO9000, ISO 14000, and Standard Sanitising Operating Procedures (SSOP) long before HACCP became an EU legal requirement in 2006 under Regulation EC/852/2004). References: Interviews with various producers/exporters conducted in 2008.

<sup>302</sup> By its Livestock Certification Division Unit.

<sup>303</sup> This applies to export processing plants to all countries and not just to the EU (Ministry of Health Announcement No. 193, B.E. 2543 (2000)).

that EU law states that the traceability obligation for imports begins once a product enters the EU. There are at least three traceability systems that operate as part of the DLD's programme.

Firstly, the DLD devised its own trace-back system back in 2003 following the Nitrofurantoin crisis.<sup>304</sup> The traceability information is stored at DLD headquarters and is integrated with the system put in place by major exporters to the EU. The information stored at DLD's trace-back system includes bar codes or Radio Frequency Identification (RFID) codes with digital references back to export consignments. This allows the DLD to track export consignments back to the farm level. Taken together with the traceability systems put in place by exporters, it is possible to trace-back products to individual flocks.

Secondly, following the Avian Influenza outbreaks additional traceability requirements on animal movements were imposed by the DLD. These were designed to facilitate a rapid response in the event of an Avian Influenza alert by allowing the source of the disease to be identified more promptly. As a result, all movements of live birds and poultry meat intended for export must be recorded. Additionally public health movement certificates must be obtained for movements of live birds and consignments of poultry meat from farm to abattoir and from abattoir to processing plant.

Thirdly, and especially for products bound for the EU market, there is a further check for animal health and disease conditions (especially for the Avian Influenza and

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<sup>304</sup> DLD's Regulation B.E. 2546 (2003).

Newcastle Disease) at quarantine stations located at Bangkok and Chon-Buri, near Thailand's main ports.

Exporters and the DLD consider that the DLD integrated traceability system, first introduced following the Nitrofurantoin crisis in 2003, has helped to ensure prompt and precise product recalls during the later Influenza crisis. This traceability system has helped to enhance the reputation of the Thai poultry industry among EU authorities and importers, and is considered to have been a major factor in re-establishing Thailand as a supplier to the EU market after the Avian Influenza crisis, albeit only in relation to cooked poultry meat. It is also hoped that the use of such an advanced traceability system would bring the poultry industry into line with the EU's compartmentalisation scheme, bringing with it the realistic prospect of Thailand being the previously Avian Influenza-affected country to resume exports of raw poultry products to the EU.<sup>305</sup>

In addition to food safety requirements, controls on animal welfare have also been imposed on poultry destined for the EU market. According to EU legislation, poultry welfare must be observed at three main different stages: at the time of transportation,<sup>306</sup> at the time of slaughter<sup>307</sup> and in respect of 'broiler welfare' at farms.<sup>308</sup>

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<sup>305</sup> Source: ACFS news (in Thai: [http://www.acfs.go.th/news\\_detail.php?ntype=09&id=3145](http://www.acfs.go.th/news_detail.php?ntype=09&id=3145))

<sup>306</sup> Regulation EC/1/2005.

<sup>307</sup> Directive 93/119/EC, which mainly concerns proper stunning of animals.

<sup>308</sup> Directive 98/58/EC, concerning the protection of animals kept for farming purposes and Directive 2007/43/EC, which requires special provisions to ensure the proper welfare of poultry in high density establishments (where the stock density exceeds 33 kg per square metre). Stocking density refers to total live weight of chickens which are present in house at the same time per square metre of useable area (Article 2(1) (i)). In practice Thai producers have claimed that their animal welfare treatment is better recorded than in many EU countries. These claims have been matched with other media reports (see for example <http://www.dailymail.co.uk/news/article-1326657/RSPCA-say-chickens-better-lives-Thailand-Brazil-Britain.html>).

Following the FVO missions in 1999 and 2001, the DLD launched a comprehensive action plan to further improve poultry welfare conditions. It drew up detailed animal welfare guidelines to be complied with by exporters and trained exporters' personnel to use information provided by the FVO. It should be noted that DLD animal welfare requirements are applied despite most exporters having already complied with the stricter animal welfare policies required by private standards.

Animal welfare conditions are first checked by exporters' own veterinarian staff with cross-checks being made by on-site DLD staff. These checks are carried out seven days before slaughter and are recorded in the ante-mortem inspection forms. In addition, another inspection is made by the DLD's official veterinary staff working at the abattoir immediately prior to the commencement of slaughtering.<sup>309</sup> If animal welfare conditions are found to be inadequate the on-site DLD staff can inform the plant managers and report this to the DLD. In theory the DLD can refuse export certificates to establishments that fail to meet animal welfare standards. Cross-checks of the DLD's ability to monitor animal welfare conditions are, of course, conducted by the FVO during its visits to Thailand.

#### **3.3.4 Private Regulation**

Similar to the case of baby corn, the proliferation of private standards, especially in the form of supermarket standards, has become a major concern for Thai exporters. In addition to national food law and EU food safety regulations operated via the CA model, Thai exporters must comply with several sets of private standards as the third

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<sup>309</sup> Usually samples of 300 birds will be inspected.

tier of regulation if they are to meet all of the demands of EU importers. It has also become a common business practice for different types of private standards to be imposed upon exporters as parts of their contractual obligations with EU supermarket importers. Different private certifications are required, depending on the importers' preferences. These include, *inter alia*, ACP, BRC, International Food Standard (IFS) as well as supermarkets' own standards. It is also interesting to observe that the DLD has completely excluded private standards from the scope of its work, as was the case for the Thai CA in relation to baby corn, although significant parts of private standards duplicate existing EU regulatory requirements for food safety and animal welfare.<sup>310</sup>

#### **3.3.4.1 Variety in private standards**

Similar to the case of baby corn, private standards applicable to Thai poultry exports can also be sub-divided into two categories; 1) universal standards which have received some shared recognition amongst groups of EU importers, and 2) supermarkets' own standards. Compliance with a variety of private standards may be requested by EU importers. These tend to vary among importers in different countries. In contrast to the situation in relation to baby corn, where GlobalGAP operates as an EU-wide standard, there is no single universal private standard for Thai poultry exports to the EU. In the UK, where the majority of Thai poultry products are destined, most supermarkets use the BRC standard. In France and continental Europe most importers prefer IFS

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<sup>310</sup> Rakpong J., personal interview with Director Cherdchai Thiratinnarat, Director of Bureau of Disease Control and Veterinary Service Bangkok, Thailand 20/08/2008.

standards. Nonetheless, BRC has occasionally been requested by Dutch supermarkets. The ACP standard is often requested by German and UK importers.<sup>311</sup>

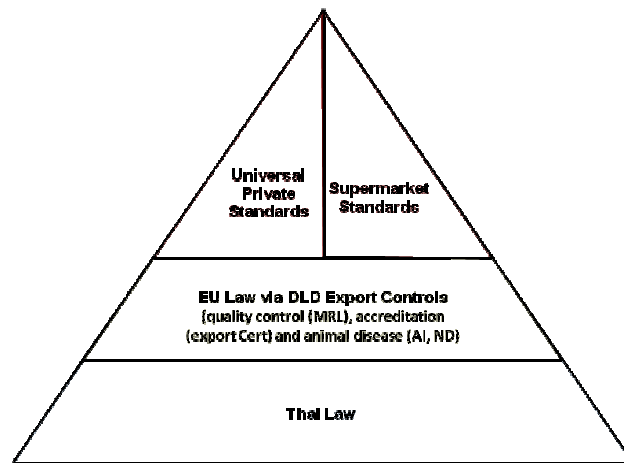
Many private standards for poultry address food safety and ‘other legitimate concerns’. Initially Thai exporters were only required to be certified for standards addressing food safety concerns.<sup>312</sup> Prominent among these were BRC and IFS standards that mainly target the application of good hygiene practices and the application of HACCP principles and traceability throughout the supply-chain. However, in recent years EU manufacturers have required exporters to comply with standards targeting animal welfare and factory workers’ living conditions. Examples include the ACP, Freedom Food and supermarkets’ own standards.<sup>313</sup> In addition to animal and workers’ welfare there is an increasing tendency for other issues of legitimate concern to be addressed including sustainable agriculture, environmental and wildlife protection, recycling and waste management. As with baby corn, these standards are prone to constant change by the standard-setting bodies.

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<sup>311</sup> Rakpong J., personal interview held during meeting with the Thai Broiler Processing Exporters Association, Bangkok, Thailand 7/08/2008.

<sup>312</sup> Namely, back in 2001-2003.

<sup>313</sup> For instance, the standards belonging to TESCO, Marks & Spencer and the Co-op.



**Table 6: Three Tiers of Regulation Imposed on Thai Poultry Exports to the EU**

Similar to the case of baby corn, and as a result of special regulatory control imposed by the DLD and by private standard entities, there are three levels of EU food safety regulation applicable to Thai poultry exports to the EU (Table 6). First, Thai national laws are applicable to both domestic and exported products. Second, for exports to the EU market, Thai poultry exporters have to comply with EU governmental regulations. Compliance with these is largely overseen by the DLD, subject to the EU's approval. Third, private standards are also applied for exports to the EU. These private standards can be divided into either universal or supermarkets' own standards.

### **3.4 Part III - Operation of the Competent Authority Model**

The case studies on fresh and chilled baby corn and cooked poultry products in Parts I and II of this chapter illustrate how significant the cross-border effects of EU food safety regulation in Thailand have been. In both case studies these cross-border effects were initially brought about through the arrangements between Thai and EU governmental entities. Here, I call these arrangements the “Competent Authority (CA) model”. However, in recent years cross-border effects have also been brought about by the operation of private standards.

In Part III of this chapter I will highlight the structure of the CA model and the advantages to both Thai and EU entities that this regulatory model has brought. I will discuss private standards separately, returning to this issue in Chapter 6.

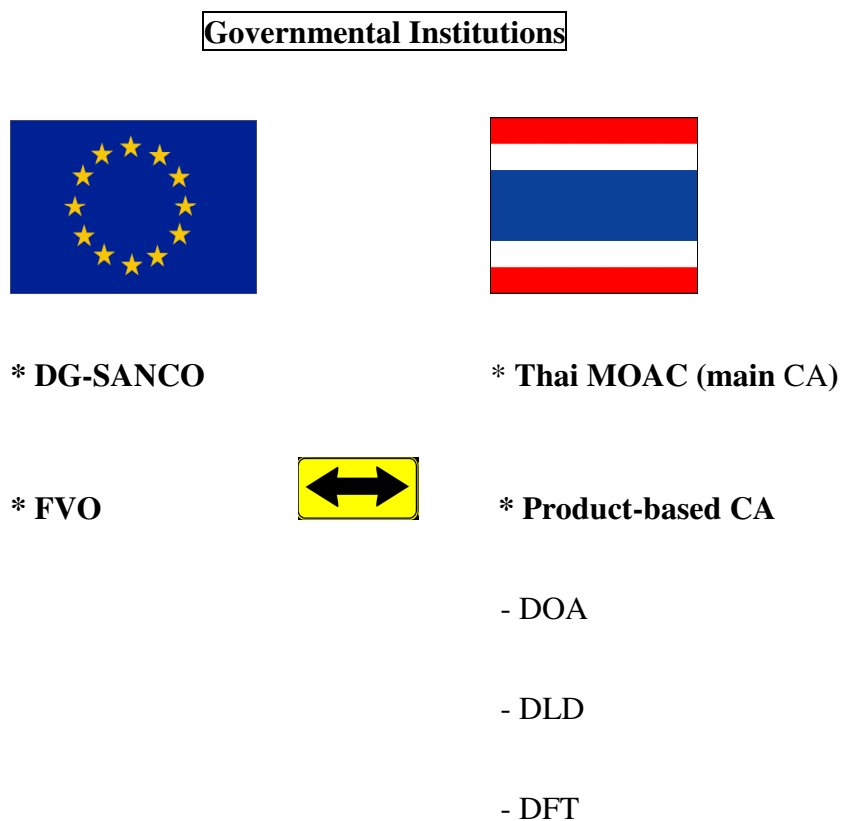
#### **3.4.1 Structure of the Competent Authority Model**

This regulatory model involves an official arrangement between EU and Thailand whereby Thai governmental entities act as competent authorities for the EU in issuing export certificates to attest that particular Thai exports comply with relevant EU food safety laws. As explained in the introductory part of this chapter, this CA role for food exports is carried out by three main departments, each of which is under MOAC, depending upon the type of product being exported.<sup>314</sup> From time to time the competence of the Thai CA is checked by the FVO, which undertakes ‘missions’ to

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<sup>314</sup> See *supra*, Section 3.1.

Thailand to monitor particular food safety issues relating to products where there may be EU concerns. The EU and Thai governmental entities involved in this regulatory arrangement are illustrated in Table 7 below.



**Table 7: Illustrating the Government Institutions under the CA Model**

### **3.4.2 Quid-Pro-Quo Benefits to the EU and Thailand**

#### **3.4.2.1 Benefits to the EU**

Under the CA model a transnational “*quid pro quo*” relationship is created between the EU and Thailand. For EU authorities, compliance with its food safety regulation is assured by the Thai authorities even before exports leave Thailand for the EU. Since

the model seeks to ensure the equivalence of the CA's export monitoring and quality control systems, the EU authority carries out additional monitoring checks in Thailand both before and after equivalence status has been granted.<sup>315</sup> "On-the-spot" checks, conducted by the FVO during its various "missions" to Thailand, are performed at CAs' units, the working departments of the DOA, DLD and DOF, and at farms and food establishments. The frequency of inspections and any issues arising from inspections are published in the FVO inspection programmes which are dependent upon the performance of the CAs, the product records and prevailing food safety concerns. Following each inspection the FVO drafts a report containing its opinions on the issues addressed in the inspection. Thereafter the CAs have an opportunity to comment on the draft prior to the publication of the final report which sets out the inspection results and recommendations to be followed by the CA.

Through this CA model, and particularly as a result of FVO inspection programmes, Thai authorities have to be able to ensure that exports comply with EU food safety law prior to products leaving Thailand. In addition, as a result of the FVO's ability to comment upon the overall effectiveness of the Thai CAs' export controlling systems and to make recommendations on matters of concern, the EU is able to exert considerable influence over Thai food safety policies and Thai administrative arrangements. It is clear that Thai CAs are compliance-oriented and that they have earnestly endeavoured to follow the FVO's advice in order to maintain their CA status with the EU. In practice the CAs in Thailand can be said to act as "*de facto*" agents of the EU in ensuring respect for EU food safety regulation.

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<sup>315</sup> Regulation EC/882/2004, particularly Article 23 for Approval of pre-export checks by third countries and Article 46 for EU Control in third countries.

Thai CAs have, on many occasions, used their legislative powers and resources to amend domestic laws and to put in place new institutional arrangements in order to bring compliance with EU food safety regulation. An example of the lengths to which a CA is willing to go in this respect is seen in the poultry case study.<sup>316</sup> Here, a significant upgrading of laboratory infrastructure and a re-organisation of the DLD's working departments took place following the FVO's poultry export inspection in 1999.<sup>317</sup> This led to the establishment of the National Institute of Animal Health Unit, a new stand-alone department with its own independent laboratory that was established to deal with animal health issues, and specifically charged with checking for Newcastle and other animal diseases for all animal products exported to the EU.<sup>318</sup>

The DLD has sought to follow every FVO recommendation regarding sampling processes for pre-export disease inspection, including the recommendation that regular samples should be taken at the farm and not solely during a single inspection at abattoirs. In keeping with this compliance-orientation, the DLD has assigned responsibility for approving all laboratory samples to its on-site staff. This is a major endeavour given the training that has to be given to DLD on-site staff who are located in every export establishment.<sup>319</sup>

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<sup>316</sup> See *supra*, Section 3.3.3.2.2.

<sup>317</sup> The comment was on the DLD's lack of sufficient epidemic-controlling facilities.

<sup>318</sup> Subsequently the work on this animal health unit was extended to cover products bound for other markets and occasionally those sold domestically.

<sup>319</sup> Substantial time and financial resources were devoted to train workers in approximately 100 export establishments. Source: interviews.

Another significant change stemming from EU recommendations can be seen in the management quality systems relating to the adoption of DOA's GAP and GMP certification schemes, which are now essential conditions for fruit and vegetable exports to the EU markets.<sup>320</sup> These schemes were adopted by the DOA in a bid to maintain its CA status and as a direct result of a number of official "serious warnings" from the FVO following the occurrence of several food safety incidents in the period 2005-2007.<sup>321</sup> Under these schemes management-based practices similar to HACCP and traceability must be put in place in order to obtain export certification. This led to major reforms, taking place over a period of several years, to procedures for certifying Thai fresh fruit and vegetable exports to the EU.

As a result of these measures being put into place, food safety conditions of Thai exports to the EU were gradually improved. Although occasional food safety outbreaks do occur, these CA arrangements have been working effectively in ensuring that Thai exports comply with EU food safety law in a clear majority of cases. Under the operation of the CA model, Thai food exports have progressed greatly since the period when they regularly failed to pass basic EU sanitary requirements, and indeed when product quarantine was significantly more commonplace.

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<sup>320</sup> The DOA has issued an announcement that most of fruits and vegetables exports (158 types) to the EU must only come from DOA-approved GAP DOA (Announcement on Food Safety, No. 125/71, of 11 April 2008). This can be found at: <http://www.ratchakitcha.soc.go.th/DATA/PDF/2551/E/071/9.PDF> (in Thai). For the updated list of vegetables and fruits that are subject to this announcement see [http://gap.doa.go.th/gap/cer\\_crop.html](http://gap.doa.go.th/gap/cer_crop.html) (in Thai).

<sup>321</sup> In the interviews with MOAC staff, it was said on numerous occasions that the particular warnings by the FVO in relation to the DOA's breaching of "equivalence" can be said to have been the main driving force to make the DOA introduce its GAP scheme. The FVO issued an annual report in 2005 that there was an unacceptably high number of RASFF concerning Salmonella and *E. coli* found in fresh vegetables from Thailand (52 out of 87 cases) resulting in the DOA being requested to issue an official guarantee to the FVO that appropriate measures would be taken in order to reduce this type of incident. The 2007 FVO report also expressed similar concerns regarding the 8 cases between July-December 2007. These led the DOA to change its approach for controlling export products to the EU market so as to rely on management-based systems as well as the regulatory-based systems of quality control checks for MRL of chemical and microbial substances.

Since the CA model has been mostly effective in bringing about a day-to-day compliance with EU food safety regulation, it reveals one significant regulatory dimension that has often been neglected by many academics, but which deserves further attention. It is often believed that mechanisms to ensure exports' compliance with importing country's food safety law commence once the exports reach the importing countries' borders. However, as the case studies have shown with regards to Thai food exports to the EU, a significant level of compliance has already been achieved in Thailand, and assured by the Thai CA, even before products leave Thai ports to countries of destination.<sup>322</sup>

Many recent studies by different academics have focussed on identifying lapses in import quality and have put forward proposals to "keep imports safe".<sup>323</sup> For example, an interesting proposal has been put forward by Bamberger and Guzman, who argue in favour of strict liability for importers as an alternative method to be deployed by the US government to ensure that imports comply with relevant domestic laws.<sup>324</sup> Although they are aware that such a radical measure is likely to be challenged as breaching various WTO obligations,<sup>325</sup> they have insisted that such measures are necessary for compliance with national laws and that there are no alternative measures available to secure a similar level of compliance.<sup>326</sup> However, the case studies presented here

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<sup>322</sup> In addition, significant levels of compliance have also been achieved by private entities' regulations as will later be discussed in Chapter 6.

<sup>323</sup> This is the term used by Bamberger and Guzman (2008)

<sup>324</sup> They argue that this strict liability is necessary to correct market externalities as importers often obtain economic benefit without considering the potential social costs of risks to human health that imported products may pose (Ibid, p. 1433).

<sup>325</sup> For example under Article III GATT (Ibid, p. 1440).

<sup>326</sup> Ibid, p. 1142-43

suggest the contrary. They demonstrate that a less trade-restrictive alternative is actually available through the application of a regulatory scheme similar to the CA model arrangement between the EU and Thailand. As a result, the possibility of establishing this kind of regulatory arrangement should also be explored by importing countries in a bid to ensure recourse to the least trade restrictive means.<sup>327</sup> This CA arrangement could be applied between other importing and exporting countries not just by the EU.

In addition to the idea of imposing strict liability on importers, other academics have suggested various stringent import safety requirements. Examples include a proposal by Zach and Bier for a risk-based approach which introduces different levels of import safety control according to the risk that attaches to different types of imports.<sup>328</sup> Alemanno argues in favour of stricter traceability obligations for importers and distributors.<sup>329</sup> Whilst it may be useful to consider such proposals in that they address compliance problems from the perspective of importing countries, they do not acknowledge the significant degree of compliance that exporting countries have hitherto achieved. Nor do they mention that their proposals may themselves be difficult or impractical to apply. For example, with regard to applying a risk-based approach for different imports, the variety of food imports entering a particular country, and given that the same type of produce originating in different countries or regions can pose

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<sup>327</sup> In fact Bamberger and Guzman have considered the possibility that import compliance may derive from the regulation by foreign governments. However they reject this option on the grounds that different governments are pursuing different regulatory goals and there are no, or very limited, ways in which the US government can compel exporting countries' governments to participate in ensuring that their exports comply with US law. However, from the case study results it can be seen that this is in fact possible by having a CA model arrangement.

<sup>328</sup> Zach and Bier (2009). This involves a quantitative assessment of the import life cycle and the design of import control mechanisms according to the risk of a particular import.

<sup>329</sup> Alemanno (2009).

different level of risks, it can be anticipated that this proposal would be difficult to implement in practice. Moreover, it is also possible that by the time the overall risk of a particular import is calculated on a life cycle basis, a new risk may have emerged or the old one may have subsided, resulting in the possibility that whole risk assessment process will have to be constantly updated. Similarly, the proposal for stricter traceability obligations has to be approached with caution as it could potentially impose an excessive financial burden on food business operators.<sup>330</sup> Regulatory practicality and costs are factors that need to be kept in mind.

Against this backdrop, the case studies provide another dimension of import safety – they present the issue from an exporting country’s perspective. They demonstrate how the governmental entities of exporting countries such as Thailand, through the operation of the CA model, have played a crucial role in securing export compliance with EU food safety law. In addition, they also show the levels to which Thai entities are willing to go to maintain their CA status and to ensure that Thai exports continue to gain EU market access.

Thus, instead of importing countries rushing to develop entirely new control mechanisms, alternatives should perhaps be considered first. In particular, importing countries should consider the option of developing and improving a model based on a CA approach.<sup>331</sup>

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<sup>330</sup> See supra, section 2.3 in the traceability –*E. coli* discussion whether stricter “serialisation” process should be deployed in the EU.

<sup>331</sup> This has to be done on a case-by-case basis. In addition, this is not to suggest that the current CA model is perfect. In fact, the system should be further improved. However, the results of the case studies provide a platform for introducing improvements.

### 3.4.2.2 Benefits to Thailand

Despite the intrusive inspections associated with it, the CA model provides tangible benefits to Thailand. As demonstrated earlier in the two case studies, the DOA and DLD, which operate as Thai CAs for fruit and vegetable and for animal product exports, enjoy “presumed equivalency status” and are allowed to issue phytosanitary and export certificates attesting to the fact that Thai exports comply with relevant EU food safety laws. Furthermore, this is also the case for the DOF, in respect of fisheries products.<sup>332</sup> This benefit of presumed equivalency status is significant for Thailand since once certificates are issued by one of the Thai CAs, there is generally no need for a full sanitary and phytosanitary check at the EU border.<sup>333</sup> The frequency and intensity of inspection procedures at EU borders are greatly reduced allowing accelerated access to the EU market.<sup>334</sup> By contrast to some agricultural exports to other countries, where no arrangement of this kind is in place, the complexity and duration of import procedures at EU borders are reduced and Thai exporters benefit accordingly.<sup>335</sup>

In addition to the presumed equivalency status granted to Thai exports, the CA model also provides benefits to other Thai stakeholders. Firstly, the CA model has served as a due-diligence defence and, as such, has assisted Thai entities in putting forward claims

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<sup>332</sup> The EU market share has been less for fisheries products compared with the products in the two case studies (personal interviews with Dr. Jirawan Yamorayoon, Deputy Director of the Ministry of Fisheries, Bangkok, Thailand, 09/09/2008).

<sup>333</sup> However, there may be a need to perform full sanitary and phytosanitary checks at the EU border at the discretion of the Border Inspection staff should, for example, they suspect a breach of EU food safety law.

<sup>334</sup> Unless there are concerns regarding the compliance of a particular Thai export at a particular time. In such a case the product will be subject to more rigorous inspections at the border.

<sup>335</sup> For example, fisheries exports to the US do not have to pass third country approval by the FDA and hence there is no presumed equivalency status. Instead, more rigorous inspections of the consignments are performed at the US border.

to limit the scope of EU import bans. Although occasional food safety outbreaks continue to occur, Thai stakeholders, and in particular the CAs, know how to react, and how to ascertain the source of the outbreak and what corrective measures to take. In this way, they are able to enjoy the continued confidence of the EU food safety authorities.

In both case studies it was stressed by exporters and CAs that the measures put in place by the CAs have provided significant support to producers and exporters when food safety incidents emerge. This was demonstrated in the following incidents: (i) the 2007 “Shigella outbreaks” in baby corn; (ii) the 2010-2011 case of pesticide residue excesses, Salmonella and *E. coli* found in Thai vegetables; and (iii) the 2004 Avian Influenza outbreak highlighted earlier in the poultry case study.<sup>336</sup>

The first case concerning the “Shigella outbreaks” in Thai fresh baby corn products took place in August 2007. The Danish authorities reported the incident and triggered the Rapid Alert System for Food and Feed (RASFF) as a result of outbreaks of food poisoning, allegedly caused by Shigella Sonnei infections in 45 patients who had consumed fresh baby corn from Thailand.<sup>337</sup> Once the DOA was notified of this incident the products were traced back through the DOA traceability system. The source of the infected products was eventually found to be a particular packing house that belonged to one exporter. This occurrence of Shigella in Thailand was of a particular concern to both the DOA and to Thai baby corn exporters since the strain of Shigellosis allegedly found was rare in Thailand. However, following the DOA’s

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<sup>336</sup> See supra, Section 3.3.1.

<sup>337</sup> On 21/08/2007.

laboratory tests carried out at the source of the incident, it was revealed that the cause was not, as feared, the Shigellosis bacteria but instead strains of Salmonella and *E. coli* which are more common in Thailand. Indeed, the DOA's test results matched the subsequent findings of the Danish laboratory.<sup>338</sup>

In explaining to DG-SANCO<sup>339</sup> and to the FVO, the DOA and staff at the Thai embassy in Brussels used this accurate traceability information as a defence in insisting that the source and cause of the incident were now known and that such incidents were preventable. In light of the fact that the ban had already been imposed on the specific establishment that caused the incident, and that corrective measures had been put in place for fresh baby corn exports, the DOA convinced the EU that the overall food safety level of Thai baby corn exports was still under control. This, together with the DOA's proposed prevention plans to control microbial contaminants and to subject a large number of baby corn exporters to HACCP audits,<sup>340</sup> led the EU to decide to take a more lenient approach and to refrain from imposing an outright ban on all fresh or chilled baby corn from Thailand.

More recently, rigorous mechanisms implemented by the DOA also protected the majority of the vegetable export industry from an outright EU ban following discoveries

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<sup>338</sup> Later laboratory tests in Denmark also confirmed that the contamination was Salmonella instead of Shigella as initially suggested. However, the link between the food poisoning and the microbial contaminants from Thai baby corn could not be disputed (Lewis et al. 2007).

<sup>339</sup> Directorate General for Health & Consumers.

<sup>340</sup> The laboratory tests revealed that there were some contaminants found in stool samples taken from the factory workers. There was a counter-claim by the exporter that although the cooking instruction clearly stated that the product should be washed and cooked prior to consumption, consumers could have ignored such advice. In the DOA and Ministry of Commerce's official visits after the incidents to the problematic packing house, the DOA ordered the owner to introduce a stricter hygiene procedure and to provide specific instructions to be followed by the owners. The packing house was later checked by the DOA prior to allowing it to resume its export business. (Rakpong J., personal interview with Mrs. Tippawan at the Ministry of Commerce, Department of Foreign Trade, Nontaburi, Thailand (21/08/2008). See also the official investigation reports from the Ministry of Health and MOAC (Tikhamram et. al 2007).

of pesticide residue excesses, *Salmonella* and *E. coli* in Thai vegetables. Following several “warnings” from DG-SANCO<sup>341</sup> the triggering of many RASFFs and the fact that half of Thai vegetable exports to the EU were already subject to additional MRL checks at EU borders in December 2010, the Thai CA implemented a self-imposed ban on most vegetable exports to the EU from January 2011. The ban was kept in place until the source and causes of the incident were identified and a review of vegetable export controls had been undertaken.<sup>342</sup> Using the traceability systems put in place as part of the CA procedures, the source of the incident was identified as a particular group of herb and spice producers. The cause of high MRL of pesticides, *Salmonella* and *E. coli* was thought to be the result of mixing non-DOA-GAP certified products with certified products. Consequently a ban on plant certification was imposed upon the sources. Thereafter the DOA continued to carry out on its own initiative 100 percent checks on EU vegetable consignments.<sup>343</sup> In this incident, while the EU initially issued warnings to the Thai CA, no ban has yet been imposed by the EU. Because Thailand proffered explanations for the source and causes of the problems and introduced its own strict control procedures, keeping the EU fully informed at all times, the EU was persuaded not to issue a ban.<sup>344</sup>

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<sup>341</sup> For example, clear warnings had been presented in the FVO mission reports on the systems for controlling pesticides in food of plant origin and the prevention contamination in fresh herbs and spices (DG SANCO 2010 8575), p. 3 where the FVO asserted in its record that Thailand had the highest number of RASFF concerning microbial contaminations of product from third countries in 2008, and second highest with regard to pesticide residue in 2008-9 and that some of pesticides found were not authorised to be used in the EU.

<sup>342</sup> The ban was imposed until mid February 2011. Over 20 types of vegetable were subject to this ban. This caused great disruption to the entire vegetable export industry. ([www.krobkruakao.com](http://www.krobkruakao.com), the new reports from the Ministry of Agriculture dated 6/1/2011. See also <http://thairecent.com/Business/2011/813630/>, news report stating that the EU accepts the Thai CA’s 100 percent checks in place of an import ban.

<sup>343</sup> As of April 2011, this 100 percent check was still on-going.

<sup>344</sup> The reports made by Thai DOA to the EU related to the cause and the source of the incident. In addition, the detailed explanation on the 100 percent check framework was also included. Information regarding this incident can also be found at [www.matichon.co.th](http://www.matichon.co.th) (in Thai) (report dated 6/1/2010 and 28/1/2010).

Similarly in the poultry case study, following the Avian Influenza incident the DLD's decision to impose exacting pre-export checks for the H5N1 virus in all export consignments to the EU and to put in place rigorous traceability demands ensured that cooked poultry exports to the EU have remained Avian Flu-free. The poultry export ban in this case continues to be limited to fresh poultry, because the EU continues to feel that a risk of Avian Influenza outbreaks is still present in the south-east Asian region. However, as explained in the previous chapter, Thailand has been able to both retain and regain EU markets in relation to cooked poultry meat subsequent to the Avian Influenza outbreaks. It was stressed by the DLD staff, poultry producers and exporters that the existence of the rigorous measures put in place by the DLD will be beneficial in supporting Thai exporters' forthcoming application to attempt to resume the export of fresh poultry products to the EU under the compartmentalisation scheme.<sup>345</sup>

Another benefit that this CA model has brought to Thailand is its contribution to the expansion of good EU food safety practices in Thailand. As was illustrated in the two case studies,<sup>346</sup> many exporters supply not only the EU but the domestic and other export markets as well. It is therefore expedient for these companies to comply with the most stringent food safety standards, as set by the EU, throughout their entire supply

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<sup>345</sup> Under Regulation EC/411/2009, which sets out a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the EU; it also specifies the veterinary certification requirements.

<sup>346</sup> See *supra*, Section 3.2.2.2 and 3.3.2.2 (domestic distribution channels)

chain.<sup>347</sup> Claims have been made by the Thai CAs, producers and exporters that EU food safety regulation has operated to improve the quality of food products sold on the Thai market and exported throughout the world.

One positive spillover effect of complying with EU food safety laws can be seen in the application of HACCP principles and traceability systems across the supply chain regardless of product destination. Despite their widespread international acceptance,<sup>348</sup> these two food safety practices are not a legal requirement for food products sold in Thailand. However, they are applied and inspected by the Thai CAs as an export condition to the EU market.<sup>349</sup>

To a lesser extent there have been positive spillover effects concerning the regulation of MRL of chemical and microbial substances. In such cases, exporters' products are subject to similar treatment, regardless of product destination. However, only those "batches" to be exported to the EU are subject to rigorous laboratory checks. This is not necessarily the case for products bound for other destinations. In interviews with poultry exporters, for example, it was stressed that the application of best EU practice, including

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<sup>347</sup> In the case of baby corn, producers state that it "makes sense" for them to apply "best EU practice" because most products they produce are for export markets, mainly for the EU. Rakpong J., personal interview held during meeting with the Thai Fruit and Vegetable Producer Association, Nakhon Pathom, Thailand, 9/07/2008 and the owners of two exporting companies (9-10/07/2008, Nakhon Pathom and Bangkok, Thailand). Also, in a manner which is similar to the baby corn example, poultry exporters claim that it is simpler for them to apply EU "best practices" in their establishments Rakpong J., personal interview held during meeting with the Thai Broiler Processing Exporters Association, and the staff from GFPT, Bangkok, Thailand 7/08/2008.

<sup>348</sup> They are being used as basic food safety requirements for many importing countries including the EU, the US and Japan, and have been recommended for use by international organisations such as Codex and WHO (See *supra*, Chapter 2).

<sup>349</sup> In the case of baby corn, HACCP principles have been applied as part of the DOA's GAP and GMP programmes. Traceability is applied both at the supplier level as part of the GAP and GMP programmes and as part of the DOA's own traceability system for high-value fruit and vegetable exports. For poultry, HACCP and traceability are required for approval of the export establishment. The DLD also operates various traceability systems for all consignments to the EU (see *infra* discussions in Chapter 3)

chemical control and good hygiene practices, are pursued in the poultry export industry regardless of product end-destination. This was because it was possible for different parts of the same chicken to be destined for different parts of the world depending upon consumer preferences.<sup>350</sup>

In certain situations the changes brought about by the need to comply with EU law have led to a change in Thai national law. This can be seen from the adoption by the DLD of steps to control Nitrofurantoin following the Nitrofurantoin crisis of 2002-3.<sup>351</sup> Previously the substance was commonly used as a growth promoter for chickens. However, since Directive 2004/62/EC prescribes maximum levels for Nitrofurantoin in poultry meat due to its possible carcinogenic and anti-biotic resistance properties, in 2003 the DLD banned the use of Nitrofurantoin in poultry feeds and established a comprehensive monitoring system.<sup>352</sup> This Nitrofurantoin ban was then issued as Thai national law and still applies to all domestic poultry raised, produced or sold in Thailand.

### **3.5 CONCLUDING REMARKS**

This chapter has set out in detail the nature and operation of EU food safety regulation in the baby corn and poultry sectors. In both case studies, EU food safety law has created profound cross-border effects in the relevant export industries. Initially such cross-border effects were brought about through EU arrangements with Thai CAs - such

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<sup>350</sup> Ibid. For instance consumers in Japan are said to prefer processed products in smaller cooked pieces such as drumsticks or wing parts, whereas the EU consumer prefers chicken breasts). Thus the source of the products is the same regardless of product destination.

<sup>351</sup> The exporters considered it to be a second major crisis.

<sup>352</sup> Including the introduction of the DLD's Veterinary Public Health Laboratory, as discussed earlier in Part II.

arrangements having been termed “the Competent Authority model” as explained in Part III of this Chapter.

In recent years, exporters have also seen a significant proliferation of private standards. These constitute another tier of regulation with which Thai producers and exporters must comply. Although meeting such standards is nominally voluntary, the case studies reveal that these standards have come to operate as *de facto* conditions for EU market access. The rise of private standards presents a new challenge for Thai stakeholders. Their introduction also represents a major development in transnational food safety governance - an important theme addressed in detail in Chapters 4 and 6.

With the extra-territorial application of EU food safety laws and private standards, spill-over effects are inevitably generated in Thailand. From the point of view of Thai stakeholders, some of these cross-border effects are positive, serving to strengthen Thailand’s position in the global economic environment. It has been demonstrated in this Chapter that the CA arrangement has created benefits for both the EU and for Thailand. This arrangement has been largely responsible for ensuring Thailand’s compliance with EU food safety requirements and for improvements in the overall Thai food safety system. It has also had concomitant benefits for consumers in Thailand and in third countries, and has served to assist Thailand when faced with accusations regarding food safety outbreaks.

Conversely, some cross-border effects have been viewed as being negative. Compliance with EU food safety regulation through the CA arrangement is invariably costly and sometimes difficult for small and medium-sized producers and exporters to

adjust to in the short-term. Problems often arise during the CAs' quests to secure rapid compliance with EU food safety standards. For example, compliance problems arose following the DOA's introduction of compulsory GAP and GMP schemes for all fruit and vegetable exports to the EU, the details of which were explained in Section 3.2.3.2.3. The introduction of these measures was problematic for small-scale producers as they were unable to upgrade their facilities immediately in order to secure the necessary export certification. Similarly, some exporters and product distributors experienced interruptions as they were unable to secure sufficient supply following the introduction of the necessary export schemes because sources of certified products were initially limited. Similarly, in the poultry case study, the imposition of stricter export requirements by the DLD in order to secure EU market access following the major Avian Influenza outbreak in 2003,<sup>353</sup> created short-term compliance problems for small-scale contract poultry farmers as they found it difficult to adjust to these abrupt regulatory changes.<sup>354</sup> However, in the longer term efforts to adjust to the regulatory changes in both industries were overall successful. While some small producers and exporters had to stop supplying the EU market temporarily, many small producers and exporters were able to adjust to the regulatory changes and to continue exporting to the EU.<sup>355</sup>

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<sup>353</sup> In less than a year following the main outbreak in 2003, the DLD had introduced its pilot traceability system incorporating the producers' and exporters' traceability systems at farms and processing plants into the DLD's database, additional facilities were also required to enable on-site DLD staff to execute their increased responsibilities (See *supra* Section 3.3.3.2.2 and 3.3.3.2.3).

<sup>354</sup> This, together with the exporters' preference to obtain the meat supply from their own farm were considered the main factors that led to a temporary decline in a number of contracted poultry farms in the aftermath of the 2003 Avian Influenza outbreak. However, the information provided by Saha-Farm in 2008 demonstrated that the number of contracted farms has gradually resumed (Rakpong J., personal interview with Mr. Nathsak Pattanachaikul, Chief Operating Officer of Saha Farms, Bangkok, Thailand, 02/09/2008). See previous discussion in *supra* Section 3.3.1 "Poultry Production in Thailand".

<sup>355</sup> For example, even after the rigorous changes brought about by both DOA's schemes, small producers in Mae-Ta Co-operative and "pomelo growers" in Wieng-gan District were able to adjust to these changes and continue supplying their fresh produce to the EU. From the interviews, it also emerged that in order

When compliance problems emerge between Thai stakeholders and EU regulators there are a number of mechanisms which have been used by Thai entities to mitigate these. I will examine these mechanisms in detail in subsequent chapters and will appraise these in relation to official EU food safety regulation and private standards in turn.

Before so doing, however, I will introduce the concept of accountability, as this will form the theoretical basis for my evaluation of current circumstances and of my proposals for reform. I will situate the discussion of accountability in the context of academic literature on global governance and global administrative law. While the next chapter is theoretical in its orientation and scope, Chapter 5 begins the task of integrating theory and practice in putting forward proposals for reform.

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to adjust to regulatory changes, it is often crucial for small producers to quickly obtain low-interest loans from the government-run “Bank for Agriculture and Agricultural Cooperatives” (BAAC) to update their facilities (Source: interviews).

## **CHAPTER 4**

### **SOLVING OPERATIONAL AND TRADE PROBLEMS THROUGH EXTERNAL ACCOUNTABILITY AND GLOBAL ADMINISTRATIVE LAW**

#### **4.1 INTRODUCTION**

Using examples drawn from the two case studies, the previous chapter illustrated the operation of EU food safety regulation in Thailand, looking at the CA model and private standards. EU food safety regulation creates external effects and these have been a major cause of concern for Thai entities.<sup>356</sup> This is particularly the case with regard to private standards introduced by EU supermarkets and standard-setting bodies. Over time, rules set up by private entities have grown in number and significance, completely changing the regulatory landscape in terms of the food safety requirements to be met by Thai exports to the EU. Many complaints have emerged from Thai stakeholders, particularly in relation to the application of various private standards in Thailand, and questions arise as to how the trade and operational problems experienced by Thai stakeholders may be mitigated or resolved.

In order to answer these questions, it is important to introduce and to explore two fundamental theoretical issues. The first concerns the conceptualisation of contemporary EU food safety law and its cross-border operations in Thailand. Exploration of this issue is important in order to understand better the origins of the

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<sup>356</sup> Part III of the previous chapter discussed external impacts of the CA model. Detailed discussion of the impact of EU private standards in Thailand will be presented in Chapter 6.

problems highlighted in the case studies so that appropriate solutions to these problems can be proposed. The second issue concerns the concept of accountability as between Thai stakeholders and EU regulators, both governmental and private. It is important to address this issue in order to explain why the activities of EU standard setting bodies should be subject to control.

This chapter is divided into three parts as follows:

Part I examines the character of EU food safety law, demonstrating that its current operation constitutes a clear example of global governance.

Part II introduces and examines the concept of accountability. Using Keohane's concept of external accountability and the theoretical perspective provided by Global Administrative Law (GAL), this explains how an understanding of EU food safety regulation as global governance can help us to overcome the accountability problems highlighted in the case studies. Drawing upon GAL, this part will also explain why EU regulators should be accountable for their actions and decisions where these impact significantly upon entities outside the EU, including in Thailand.

Finally, Part III will make recourse to GAL as an external accountability standard with a view to evaluating EU food safety regulation. The purpose here is to identify the existence of external accountability gaps between EU regulators and affected entities in Thailand. In this part, the concept of GAL will be disaggregated and the individual criteria that underpin the concept of external accountability will be set out. This part

will also consider how the external accountability gaps that are identified may be mitigated or overcome.

Before proceeding it is appropriate to explain why GAL was selected as the dominant theoretical perspective to frame the discussion that follows. Other theoretical perspectives, including global legal pluralism and network governance, were considered as alternatives for addressing the accountability issues that arise in the context of global governance. As such, it is not only important to explain why GAL was selected as the main theoretical framework but also why these alternatives were dismissed along the way.

There are many theories that could help us to understand global governance better. Legal pluralism, for example, may provide an explanation as to why private standards can be viewed as ‘law’ and why private standards exist, and operate alongside, governmental regulation.<sup>357</sup> Network governance, as will be further explained in Section 4.2.3 below, can provide an explanation for the increase in multi-level and transnational interactions between different global governance actors. Although useful, these theoretical perspectives tend to deal only with the descriptive aspects of global governance. Their role is to help us form a better understanding of how global

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<sup>357</sup> Under this legal pluralism concept, the co-existence of public and private regulators does not imply a competition between them. Although in theory private regulation may be subordinate to state regulation, in practice it can be said to have co-existed and interacted with state regulation and can be regarded as law. Both types of regulation can be viewed as operating in their own arena but pluralism recognises that in some instances, there can be communication and interaction between them. For theoretical works in relation to co-existence of public and private regulation, see further: Twining’s explanation on pluralism (2002) also Jansen and Michaels (2008) p. 527, Meidinger (2009), Schepel (2005), especially Chapter 1. Also see Cafaggi (2006) in relation to the role of private regulation in the EU. With regard to the co-existence of public-private entities, he points out that the involvement of private entities does not necessarily lead to a lower degree of governmental regulation.

governance operates and how the different actors interact with one other. However, these theoretical perspectives do not provide us with a normative viewpoint that is capable of identifying and responding to the problems that arise. There are three primary reasons why GAL may be considered to be a more suitable theoretical framework for the purpose of the discussion that follows.

First of all, the main focus of GAL is upon external accountability relationships between different global governance actors, including multi-level and transnational relationships and hybrid relationships between public and private bodies. As will be explained later in Parts II and III, it is precisely external accountability relationships of this kind that are at issue in the Thai case studies presented in the chapter above.

Second, and perhaps most crucially, GAL comprises both a descriptive *and* a normative dimension. GAL is descriptive in that it provides a language that permits us to describe whether external accountability relationships are present, and if so in what ways and to what extent. However, GAL is also normative in that it provides a benchmark for evaluating the adequacy of these external accountability relationships and, crucially, for proposing future reform.

The third reason that GAL provides an appropriate theoretical perspective is that the methodology for identifying GAL criteria is defined by a ‘bottom-up’ approach that is based upon ascertaining the *de facto* experiences of international institutions and of distributed administrations in global governance settings. The criteria that underpin the operation of GAL are formulated by observing institutional practice across a wide range

of diverse global governance settings. This ‘bottom-up’ approach ensures that the criteria endorsed by GAL are capable of being operationalised in practice and that the normative benchmarks that they form are realistically capable of being achieved. A more complete explanation of the origin and the establishment of GAL is given in Section 4.4.1, Part III below.

It should be stressed that my aim here is to use GAL as an accountability measuring ‘tool’ rather than to develop a new theory of GAL as such. However, by exploring and analysing the external accountability relationships between EU regulators and affected Thai entities through the lens of GAL, I will be able to contribute to the elaboration of the GAL criteria which, in the existing literature, remain somewhat vague. I am also able to identify and to evaluate concrete mechanisms to promote compliance with GAL. Thus, while my study does not develop GAL theory as such, it does have the potential to deepen our understanding of the individual components that make up the concept of GAL.

## **4.2 Part I: GLOBAL GOVERNANCE ASPECTS OF EU FOOD SAFETY LAW**

In this section I will explain that EU food safety law is an example of global governance. This is because it is imbued with three characteristics closely associated with global governance, namely: (i) increased participation by private actors, (ii) intensive interactions between public and private actors, and (iii) multi-level and transnational interactions between various actors.

#### **4.2.1 From Government to Governance: Increased Participation by Private Actors**

The concept of global governance is considered a departure from conventional understanding of administration which associates regulators with states and the governments of those states.<sup>358</sup> According to this conventional understanding the term “governance” is used as a synonym for “governing by government”. In other words, state governmental bodies are deemed to enjoy a monopoly in performing regulatory functions and to exercise these functions in a top-down, hierarchical way.<sup>359</sup> However, this original association between regulation and states/governments has changed as non-state regulators have begun to assume regulatory functions. Consequently a new understanding of “governance” has emerged, according to which, non-governmental bodies can also perform regulatory roles.<sup>360</sup>

Although private entities have a long history of participating in the regulatory process together with governmental entities,<sup>361</sup> the shift from “government” to “governance” is relatively recent. It first emerged with the privatisation boom and the deregulation of public infrastructure in the 1960s and 70s; a phenomenon which started in Western

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<sup>358</sup> This is also referred to as the “old governance” theory by Abbott and Snidal (2009).

<sup>359</sup> Mayntz (2006), p. 1. This governmental regulation is often conducted through legal rules backed by sanctions, usually by means of legislation. See further Black, Julia (2002), p. 20 and Havinga (2006), p. 516.

<sup>360</sup> Rhodes (1997), in by Mayntz (2006), p. 1.

<sup>361</sup> The early form of private bodies’ involvement in taking on regulatory roles can be seen in their indirect involvement in the exertion of influence upon governmental entities during various regulatory and decision-making processes through lobbying, collaborating and participating with governmental entities. The full extent of private bodies’ influence is beyond the scope of this thesis and on its own would require thorough study of the dynamic interactions between public and private entities in various situations. For further reference see Shaffer (2009) p. 147.

Europe and then expanded worldwide.<sup>362</sup> There has been a fragmentation of state power as governmental entities have delegated their regulatory powers to designated private entities.<sup>363</sup> However, over time other mechanisms have been introduced by private entities in their assumption of regulatory roles. Private bodies can also assume regulatory powers for themselves by becoming directly involved in creating and running their own regulatory systems and standards.<sup>364</sup> In addition, they can continue to perform indirect regulatory functions by influencing governmental entities that make and apply the law.<sup>365</sup> The various features of this shift from “government” to “governance” will be explored below, making use of examples drawn from the case studies presented earlier in this work.

We can see examples of the direct involvement of private bodies in regulation as a result of the emergence of private standards of the kind discussed in the previous chapter. This type of private body involvement is similar to privatisation, except that here regulatory power is neither handed-over by governmental entities to private actors, nor is it directly controlled by them.<sup>366</sup> The initiative for this kind of private regulation often originates from within the private bodies themselves in circumstances where they wish to address specific issues that they perceive to be inadequately covered by governmental regulation. Private regulation is especially prevalent in respect of highly

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<sup>362</sup> As society began to realise the advantages of non-state body regulators in processing information more quickly through more flexible and adaptable processes, See further, Mayntz (2006), Schepel, (2005), p. 13), Kingsbury, Krisch and Stewart (2005).

<sup>363</sup> Here governmental regulators usually make private entities subject to certain criteria. In such situations, private bodies are considered to be organs of the state and are subject to strict controls under administrative law. See further, Picciotto (2008), p. 315-318.

<sup>364</sup> *Lex mercatoria* and the establishment of private arbitral bodies can be considered as early forms of this. However, in the recent past, it has significantly evolved through the establishment of private standards.

<sup>365</sup> See further Shaffer (2009), p.147.

<sup>366</sup> It can be said that here, the regulatory power claimed by private entities is “devolved” from governmental entities to be performed by private regulators. As a result there are no direct controls exerted by governmental entities on private bodies’ regulatory systems.

technical issues because governmental entities are often not equipped with the knowledge, time and resources required to issue detailed rules covering all specific subjects for all industries.<sup>367</sup> On the contrary, private entities operating in the sector concerned are often more familiar with the industry's own needs, and thus are better-placed to regulate themselves and their counterparts. Not only do they have greater expertise, they also have more information and knowledge, lower monitoring costs and generally demonstrate greater flexibility.

Evidence of the increased direct involvement of private bodies in performing regulatory roles can be seen from both the universal and bespoke supermarket standards in the case studies presented earlier in this work. As these case studies suggest, Thai government competent authorities are no longer the only bodies to regulate Thai producers and Thai exports to the EU market. The case studies show that the requirements imposed by private standard have been just as effective in altering the behaviour of Thai producers/exporters as the requirements imposed via the competent authority model. Consequently the regulatory scope of EU food safety regulation in Thailand is no longer limited to rules drawn up by the EU and Thai governments but also incorporates private standards.<sup>368</sup> This phenomenon can be considered as an example of private regulation taking the form of rules which are established and applied by “a network of

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<sup>367</sup> Schepel (2005), p. 13.

<sup>368</sup> It should be noted that an increase in private bodies' involvement is also apparent within EU food safety regulation. Tim Lang has suggested that there are now three kinds of regulatory body in the EU: first states through EU and national food safety law; second firms and supply chain associations through company regulations; and third civil society through their demands and campaigns. The latter two prongs are regulation by private entities (Lang, Tim (2006), p. 30-31). Originally, food safety regulation by the state may have been at the top of the hierarchy. However, at the present the roles of these three prongs of regulation are equally important and they should be considered as co-existing in an horizontal manner rather than in a hierarchical form.

homogenous community of likeminded merchants”.<sup>369</sup> The increasing regulatory role of private bodies in issuing, and demanding compliance with, various standards can be said to have moved EU food safety regulation in Thailand away from pure “government” under the CA model towards “governance”.

#### **4.2.2 Intensive Interactions between Public and Private Actors**

With the increase in self-regulation by private entities, the regulatory landscape has also changed, as we see public and private entities interacting more intensely, and beginning to influence one another’s decisions. For example, private entities are able to support or resist governmental law by “expanding” or “curtailing” the reach of the law.<sup>370</sup> They can, for instance, pick and choose between various governmental requirements and include some as part of their self-regulation schemes. As such, the operation of private entities is clearly influenced by governmental law. Similarly, private regulation can also operate to support the application of governmental law. When private entities demand compliance with such law by suppliers who are located beyond the reach of governmental regulation, they serve to expand the reach of the law and in turn to influence the application of governmental rules and policies.

This can be seen from the two case studies in which EU supermarkets use EU regulation of non-food safety ‘other legitimate concerns’ as the basis for their standards. For example in relation to labour law some private standard schemes, including GlobalGAP,

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<sup>369</sup> See Jansen and Michaels (2008), p. 531 referring to Riles (2008).

<sup>370</sup> Shaffer (2009), p. 165-8.

Co-Operatives and Tesco's Nature Choice, have adopted EU health-and-safety laws as their standardised criteria to be applied by their suppliers at home as well as in Thailand.<sup>371</sup> Further examples include numerous additional requirements regarding environmental and wildlife protection, where standards such as those adopted by GlobalGAP already have provisions on waste management and on wildlife conservation. This represents an expansion in the EU standards applicable to Thai products as there is no equivalent Thai law, and compliance with these criteria is not required by the EU itself to secure market access under the CA model.<sup>372</sup>

On the other hand it has been pointed out by other commentators that private entities can also influence governmental law by curtailing the reach of the law through their self-regulation, for example by pre-empting judicial processes through the provision of complaint and arbitral procedures which are required to be applied to resolve disputes before the counterparty can go to court. Examples of curtailment are often seen in employment disputes and in contract law.<sup>373</sup> Although the extent of the curtailment may vary, the courts will generally defer to an organisation's internal procedures and be ready to dismiss any claims which have not been referred first to available alternative dispute settlement systems that have been established in-house.<sup>374</sup> It is noteworthy that while the case studies show clear evidence of private regulation operating to extend the reach of the law, no significant evidence has emerged of private standards serving to curtail the reach of the law.

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<sup>371</sup> Examples can be seen from the baby corn case study with regards to GlobalGAP requirements. (see *supra*, Chapter 3, Section 3.2.4.1)

<sup>372</sup> See *supra*, Chapter 3, Part I (baby corn case study).

<sup>373</sup> See further Resnik & Curtis (2011), Chapter 14.

<sup>374</sup> Shaffer (2009), p. 171.

In addition to private entities' role in expanding or curtailing the application of governmental law, they are also increasingly involved in the making of decisions by governments and legislatures. As governmental bodies have begun to appreciate the expertise of private bodies they have invited these entities to participate in various regulatory processes. This is conspicuously the case in those areas in which the regulatory issues demand specific expertise and information from the pool of knowledge across technical fields. The participation of private entities commonly occurs during the drafting stages of new legislation where the representatives of the relevant industries submit their opinions and share information and expert practices with government agencies. In some cases the private entities may even lobby for the recognition of existing industrial practices as law. Over time communication and information networks between public and private entities can emerge from this kind of interaction. Such networks can be established on a permanent or *ad hoc* basis and serve in the establishment of forums for discussion, information and reference-sharing during professional conferences, workshops and similar such events. Shaffer has stated that through the emergence of networks of shared expertise (epistemic communities), staff in private and public organisations often share references, a common pool of knowledge, including texts and journals, and they often attend the same conferences and workshops. Over time private entities can also influence and put forward what is considered to be a normal, reasonable or rational practice in a particular field.<sup>375</sup> This discussion of networks of private and public entities will be revisited below in examining transnational interactions in global governance (Section 4.2.3).

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<sup>375</sup> Ibid.

We have seen evidence of private entities influencing governmental decisions in the case studies presented earlier in this work. Thai and EU private bodies have often been consulted by governmental bodies during the various stages of the regulatory process. For instance, in the DOA-GAP example set out in the baby corn case study in Chapter 3, Thai CAs specifically referred to the concept of good agricultural practices and to information used by the standard-setting bodies, including GlobalGAP and indeed have adopted some of these concepts as forming the basis for their own regulations.<sup>376</sup> In addition we have seen the adoption of ISO standards by the Bureau of Quality Control of Livestock Products of the DLD to monitor laboratory establishments in checking for animal diseases.<sup>377</sup> Similar phenomena have also occurred in the EU where, during the drafting stages of legislation, EU and member state governmental bodies have often consulted and drawn upon information from industry. Occasionally EU governmental entities have even used existing industrial practice as a framework for implementing legislation. For example, Article 7-8 of Regulation EC/852/2004 permits various industries in different member states to play a significant role in establishing national guidelines for the adoption of HACCP principles. Once food business operators in the country concerned comply with the relevant guidelines they are presumed to have

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<sup>376</sup> Supra, Section 3.2.3.2.3, this can be illustrated from the close affinity of DOA's GAP compulsory requirements for good agricultural practices of high value fruits and vegetable exports and GlobalGAP standards. From interviews with DOA staff it has also been noted that the Thai competent authority often refers to several good agricultural practices featured in GlobalGAP and other private standard standards as a guideline in developing the DOA-GAP. In addition it has also been discovered from interviews in both case studies that private entities, including the main exporters, are involved and are able to assert their opinions during the drafting stage of new Thai legislation that is applicable to Thai exporters. They are often invited to comments on new Thai food safety regulations. The CAs often refer to common practices, including those under GlobalGAP standards, as being reasonable and common practices for Thai exporters (see also supra, Chapter 3)

<sup>377</sup> Supra, Section 3.3.3.2.2

complied with EU Regulation EC/852/2004 (although this presumption can be rebutted).<sup>378</sup>

#### **4.2.3 Multi-level and Transnational Interactions between Various Actors**

The term “global” in global governance has been specifically chosen by academics rather than “international” in order to reflect the complex, fluid and non-territorially bounded nature of new forms of regulatory interaction.<sup>379</sup> Rules and standards governing particular issues and entities may emanate not only from public and/or private bodies, but can also originate from anywhere in the world as a domestic public or private body may refer to international or foreign rules, *vice versa*. As a consequence the ‘global’ feature highlighted here refers to situations in which global governance entities engage not only in “multi-level” interaction (i.e. those in which domestic entities refer to international standards or *vice versa*) but also in “transnational” interactions where public and private entities co-operate, refer and adapt to regulations and practices prevalent in other countries.

In terms of multi-level interaction, we often see interactions between entities operating domestically and at the international level. Consequently domestic regulators sometimes adopt international standards as their own and global and international regulators sometimes look to domestic regulation to frame the development of their own

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<sup>378</sup> Examples of national guidelines in the UK can be found at: <http://www.food.gov.uk/foodindustry/guidancenotes/>. See further supra Chapter 2, Section 2.2.1 Towards Hazard Prevention: the application of HACCP principles.

<sup>379</sup> The term “international” is used to juxtapose domestic and international law division in the classical model of regulation. In the classical model there is relatively clear separation of the “domestic” and “international” regulatory spheres. However, in global governance situations there is no such clear-cut separation. Domestic law can be interwoven with international regulations by various entities and in various forms and *vice versa*. See further, Krisch and Kingsbury (2006), p 2, also Jansen and Michaels (2008), Mayntz (2006).

standards. Evidence of this can be seen from many food safety regulations in the EU and Thailand where EU and Thai government entities, as members of international organisations, have adopted numerous international food standards as their own; at the very least they often refer to international standards in order to constitute their own minimum requirements and use international standards as reference points for their own legal developments. Evidence of this can be seen in the references to international standards contained in the preambles to various EU and Thai legislation, and in the consultation papers that precede the adoption of this legislation. For example, the Thai Ministry of Health Announcement on food labelling B.E. 2541 (1998) refers to Codex Alimentarius's guidelines in setting out details of its own food labelling requirements.<sup>380</sup> Similarly in the revision of EU Directive 90/496/EEC on Nutrition Labelling for Foodstuffs, the Commission also looked to the most recent Codex guidelines as a source of reference in relation to certain technical issues.<sup>381</sup>

Similarly, over time the domestic laws of large economies, including the EU, can also influence the development of international standards in certain areas. For example, the EU's endorsements of the traceability principle and emphasis upon animal welfare protection have both greatly influenced the development of corresponding international standards.<sup>382</sup>

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<sup>380</sup> Source: <http://www.fda.moph.go.th/fda-net/html/product/food/ntfmoph/ntf182.htm>- in Thai.

<sup>381</sup> Source: [http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/discussion\\_paper\\_rev\\_tech\\_issues.pdf](http://ec.europa.eu/food/food/labellingnutrition/nutritionlabel/discussion_paper_rev_tech_issues.pdf).

<sup>382</sup> See, for examples, the exchange of letters between the EU Commission and the OIE 2004/c 215/03 & 04 (at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:215:0003:0004:EN:PDF> ).

As for transnational interactions in global governance, a domestic regulatory framework originating in one state can be applied transnationally to regulate activities outside its original territorial domain. As the case studies in the previous chapter have shown, this has occurred in respect of the cross-border application of EU food safety law and private standards in Thailand.

This multi-level and transnational application of rules operates as a catalyst for increased interactions between various entities across borders. Consequently, public and private entities at different levels of governance which may also be located in different countries begin to exchange information, refer to the norms and practices of one another, and to be influenced by one another through “networks” of information, co-operation and shared-practices.<sup>383</sup> The term “network” in this context is used to capture the notion of governmental networks<sup>384</sup> comprising “disaggregated”, or sub-

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<sup>383</sup> One recent example of the transnational application of law through a network of public-private entities’ interactions, in addition to those emerging in the case studies, is the transnational application of the EU’s REACH Regulation (Regulation EC/1907/2006). Although REACH is intended to be applied to chemical substances produced in, or imported into the EU, it has transnational significance in relation to import/export restrictions and also has influence in the development of other countries’ regulations and industrial practices. Studies in relation to the transnational application of REACH have been conducted by various prominent academics, including work on the impact of REACH in the US by Joanne Scott and in Japan by Yoshiko Naiki. See Scott, (2009) and Naiki, (2010).

<sup>384</sup> This concept has been introduced in Anne Marie Slaughter’s 2004 work on global government networks where she attempts to establish this as an alternative to solve the globalisation paradox whereby, on one hand, there are pressing needs for collective action and collaboration on the global scale, but on the other hand there is a need to retain the state’s sovereignty and freedom. This has been presented as an alternative doctrine to liberal internationalism (collective action by states through treaties and international institutions to promote a liberal world order) and new medievalist (where globalisation has brought an erosion of state sovereignty as its political authority are exercised by many non-territorial and overlapping agents – See further Hedley Bull’s work (2002)). In her work, Slaughter rejects the concept of global governance as a theoretical solution for these problems as it is inconsistent with state sovereignty and democratic accountability. However, this will depend upon how one defines sovereignty and even in her definition of sovereignty, Slaughter has been criticised as drawing a narrow, “de-fanged” sovereignty definition (Slaughter (1997), p. 267. See also the book review by Anderson (2005), p. 1267). In this context, however, the concept of global governmental networks is relevant in demonstrating the global feature of global governance where different sub-agencies of central government in different countries interact with one another.

governmental agencies, regulators and officials from different states, as well as transnational public/private networks.<sup>385</sup>

In each type of network, interactions occur as state agencies and non-state entities engage in informal, flexible and dynamic interactions with one another. The existence of these networks creates forums for discussion, information exchange and reference sharing, and co-ordinated activities to address pressing global problems. More importantly they often lead to technical assistance, technology transfer and experience-sharing that flows from developed to developing countries.<sup>386</sup> These activities usually take place through informal forums, during conferences, joint research activities, workshops, exchange visits, et cetera. Over time the transnational interactions between network entities also tend to increase as entities in the networks gain trust and establish long-term co-operative relationships with each another.<sup>387</sup>

Several networks have emerged as a result of transnational and multi-level interactions between global governance entities. First, during multi-level interactions, various governmental networks, comprising domestic and international entities, began to exchange information and interact with one another. They do so in an attempt to address global problems by ascertaining what other international or governmental entities regard as good practice or rules. This can be seen, for example, in the co-

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<sup>385</sup> Ibid. The emergence of networks also confirms the move from government to governance as explained in the previous section. Not only is the central government important in taking on regulatory roles and interacting with other central governments to combat regulatory problems, but these roles are also shared by “disaggregated” agencies and private entities. In such cases, Slaughter suggested that it does not mean that the sovereignty of the state is either diminished or decentred. This is because the state is not a unitary but is disaggregated in the first place.

<sup>386</sup> With this co-operation and information exchange, network entities can be said to have helped to further expand regulatory reach and to close regulatory gaps between jurisdictions. Ibid, p. 3-4.

<sup>387</sup> Examples of these transnational networks are wide-ranging; from cross-border law enforcement (e.g. Interpol), networks of finance ministers and central bankers (e.g. finance ministers in G8) to technical environmental agencies.

operation between various domestic and international entities, headed by the OIE, which was designed to combat the spread of Avian Influenza.<sup>388</sup> Further examples of networks arising from multi-level interactions between governmental entities and international communities can also be seen in relation to WTO SPS Committee's complaints procedure which is discussed later in Chapter 5.<sup>389</sup>

Secondly, transnational operation of EU food safety law via the CA model has created trans-governmental networks comprising various EU and Thai governmental agencies. Within these networks Thai CA and EU FVO staff exchange information on food safety and other related issues in both formal and informal ways. Formal information exchange can be illustrated by the practice of written communications between the Thai CA, FVO and the Commission. This usually occurs when the Thai CA provides written explanations in the event that food safety concerns are raised in FVO draft reports. To a large extent, however, interactions in governmental networks of this kind have occurred informally through day-to-day communications between the staff of Thai and EU entities. Such informal transnational interactions are not officially reported. Nonetheless, some illustrations can be seen from the case study interview records.

Thai CA staffs serving at posts in both Bangkok and in Brussels acknowledge that through their acquaintance and interactions with EU personnel they can contact the EU authorities directly and seek clarification of new EU food safety regulations, or conversely provide first-hand explanations of emerging food safety issues affecting Thai

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<sup>388</sup> International entities involved in this network include the OIE, WHO and other international health organs as well as relevant governmental entities in a number of countries. By organising conferences and receiving information put forward by entities in this network, OIE is able to publish Avian Flu reports and recommendations on a regular basis. See further: <http://www.oie.int/animal-health-in-the-world/update-on-avian-influenza/2011/>.

<sup>389</sup> See below, Section 5.1.2.3.

exports. This type of informal interaction between different sub-governmental entities in the network has been very valuable on numerous occasions in enhancing mutual understanding between the EU FVO and Thai governmental entities, especially where food safety incidents have occurred. This was demonstrated in the case studies concerning the Thai government's handling of the Shigella and the Avian Influenza incidents, where both formal and informal governmental networks facilitated the emergence of consensual and mutually satisfactory solutions. The discussion regarding the significance of the EU-Thai network interactions will be revisited in Chapter 5.<sup>390</sup>

Thirdly, transnational interactions between the FVO, the CA and private entities in Thailand via the CA model have also created another form of transnational networks comprising public and private entities on both sides. Although the occurrence of these networks has been of an even lower profile than the governmental networks discussed above, the transnational networks between the Thai CA and producers/exporters have been formed out of their day-to-day interactions and in the performance of the CA role. As stated in the previous chapter, DOA and DLD staff run regular and *ad hoc* meetings with those producers and exporters supplying the EU market.<sup>391</sup> As a result, Thai CA is able to pass on to the producers and exporters useful information received via their governmental networks interactions with EU staff and entities. This can result in a useful exchange of information between the parties and lead to technical assistance being provided in an effort to solve pressing problems, as was the case for example in

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<sup>390</sup> See *infra*, Chapter 5.2.

<sup>391</sup> The frequency of the meetings varied. Regular meetings are held monthly between the DLD and poultry exporters. For baby corn exporters, meetings between the DOA and fruit and vegetable exporters are held every 6-8 weeks. In both cases additional "special" meetings take place between the Thai CA, producers and exporters pre- and post-FVO inspections.

relation to the efforts to combat the Shigella incident and the Nitrofurantoin and Avian Influenza crises discussed earlier in Chapter 3.<sup>392</sup> The significance of these network activities in addressing the operational problems which emerge from the application of EU food safety regulation in Thailand will be further explained in Chapter 5.<sup>393</sup>

#### **4.3 Part II: THE CONCEPT OF ACCOUNTABILITY**

Having established that EU-Thai food safety regulation fits the global governance framework, I will now turn to the issue of accountability. The main question arising here is whether EU public and private regulators are accountable to Thai stakeholders and, if so, how this accountability relationship is or may be instantiated. This will be difficult because the EU regulators and Thai stakeholders are situated in different countries and there is no direct political or even sometimes organisational, relationship between them. The concept of accountability is crucial, as are mechanisms for giving it effect, if EU regulators are to consider the needs of Thai stakeholders and if solutions are to be found to attenuate negative external effects.

The main difficulty in establishing an accountability relationship between EU and Thai stakeholders is the extra-territorial nature of EU food safety law. When problems

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<sup>392</sup> See supra Chapter 3 Reference interviews: Rakpong J. personal interview held during meeting with Mr. Nathsak Pattanachaikul (Chief Operating Officer of Sahafarm) and Mr. Kasem Trakoonlerswilai (Deputy Director Sahafarm building, Bangkok, Thailand).

<sup>392</sup> See supra Section 3.4.2.2. However, this type of interaction in transnational networks is rarely present in the case of private standards. To some extent there have been domestic network interactions between the Thai CA and Thai producers/exporters. This occurs during their meetings. Here, further training and technical assistance are both provided by the Thai CA. To a lesser extent further technical assistance, training and exchanges of information can be conducted by the main exporters with their contract farmers (see the case of baby corn, Chapter 3).

<sup>393</sup> Section 5.2. This concerns the role of networks as “accountability fora” which can support communication between EU and Thai entities and contribute to closing the “external accountability gaps” that emerge from cross-border regulation.

emerge inside the EU there are established mechanisms for EU stakeholders to raise their concerns and to hold regulators to account. However, although EU regulation is often binding on Thai stakeholders and has significant consequences for them, because of the geographical disjuncture between regulators and regulated, it is often not obvious where Thai stakeholders should turn.<sup>394</sup>

The widespread presence of trans-boundary external or “spill-over” effects creates a disjuncture between the locus of decision-making and the place where the impact of the decisions is felt. Where disjunctures of this kind arise it is frequently the case that those experiencing the effects of external regulation enjoy no opportunity to shape or influence the content of the regulations in question, and nor are they able to ensure that those adopting the regulations have taken their interests or concerns into account. It has been suggested that the existence of a disjuncture of this kind gives rise to a serious and pressing normative problem; a problem that a prominent academic, Robert Keohane and his colleagues have sought to capture through recourse to the concept of an ‘external accountability gap’.<sup>395</sup> While this key concept is introduced here, I will turn to it in more detail below.

It is clear that an external accountability gap has emerged in the case studies and that it has contributed to the various operational problems described therein. While the language of external accountability was not used by the Thai stakeholders when they referred to the cross-border effects of EU food safety regulation, it was clear that they

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<sup>394</sup> This disjuncture may also be organisational rather than geographic. For example, a company regulation can create effects outside of the company adoption the regulation.

<sup>395</sup> Grant and Keohane (2005). In other words an external accountability gap exists where there is a disjuncture of regulators’ and regulatees’ localities and when the regulators, being power-wielders, are not accountable to the regulatees (who are remote from their locality) despite them being bound by the regulators’ rules and decisions.

were worried about this accountability deficit, perhaps even more than they were about the economic and social effects of EU regulations.<sup>396</sup> They voiced strongly-felt concerns about their exclusion from EU regulatory processes, and about the absence of opportunities for them to shape or contest the contents of regulation which, although enacted elsewhere, exerted significant effects upon them.

Keohane's concept of external accountability provides a useful framework to evaluate the operation and impact of EU food safety regulation in Thailand. In the discussion which follows this concept of external accountability will be explained and will be fleshed out through recourse to the concept of "Global Administrative Law". Before arriving at that stage, however, it is necessary first to introduce the concept of accountability so as to explain and justify the application of Keohane's approach.

#### **4.3.1 Definition**

Before exploring the external accountability gaps arising from the case studies, it is appropriate to explore the concept of accountability in a more general way. This concept must first be carefully defined because the term is contestable in that it is capable of carrying different meanings within different settings, for example in politics, ethics/morality, law or governance.<sup>397</sup> The word originates from the Latin '*accomptare*'

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<sup>396</sup> See Infra Chapter 6 (especially Section 6.1.4). From interviews with Thai stakeholders it is evident that the real essence of their concerns is not in the main the negative economic and social effects that they have experienced, but rather their inability to engage EU private regulators in some form of communication and to hold them accountable for the negative effects their actions have had in Thailand.

<sup>397</sup> The need to define the term has also been observed up by other academics. For instance Bovens (2007), p. 105 refers to the different usage of the term in different EU documents.

which means to ‘account’.<sup>398</sup> It has been widely used as a synonym and umbrella term to cover other equally contestable concepts; transparency, participation, trustworthiness, responsibility, answerability, liability, and so on. However, in this context it is a narrow definition of accountability, familiar from administrative law, which is most relevant. Here the definition of accountability is closer to ‘responsibility’.<sup>399</sup> It can be defined as being a relationship between power-wielders and affected entities,<sup>400</sup> whereby the affected entities have a right to hold power-wielders to account by reference to a set of standards, to contest their claims that these standards have been met, and to see sanctions imposed when they have not.<sup>401</sup>

In essence therefore, accountability consists of three elements.<sup>402</sup> First, there must be minimum standards of conduct that the power-wielders are expected to fulfil.<sup>403</sup> Second, information must be made available regarding the conduct of those exercising power, in order to facilitate the evaluation and contestation of this conduct in the light of these standards. Consequently, there must also be a forum for discussion or a communication channel which permits the power-wielders and affected entities to exchange information, to raise questions and initiate debates. Third, affected entities must be able to initiate proceedings which can result in the imposition of sanctions when established standards of behaviour are not fulfilled.<sup>404</sup> It is important to note that

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<sup>398</sup> ‘*Accomptare*’ has the origin from the word ‘*computare*’ which mean to calculate and which in turn has an origin from the word ‘*putare*’, which means to reckon. (Oxford Dictionary (1981)).

<sup>399</sup> Buchanan and Keohane (2006), p. 426.

<sup>400</sup> These can be individuals, groups, or other entities (Keohane (2002), p.12. However, in his 2005 article Keohane refers to the term actors instead of entities. See for example, Grant and Keohane (2005).

<sup>401</sup> Grant and Keohane (2005), p. 29.

<sup>402</sup> Buchanan and Keohane (2006), p. 426.

<sup>403</sup> These minimum standards will differ depending upon the relationships between power-wielders and affected entities. This is a point explored below.

<sup>404</sup> The need for sanctions has been confirmed by other academic studies in relation to non-electoral democratic accountability (for example, Macdonald and Macdonald (2006), p. 89-110).

accountability operates as a two-way concept. Power-wielders must accept the obligation to fulfill standards and to provide information; likewise the affected entities must be aware of the existence and scope of their own rights, and be willing and able to exercise them.<sup>405</sup>

### **4.3.2 One-Dimensional Accountability Concept**

The traditional concept of accountability is one-dimensional in that it applies within a nation state or organisation and has a strong link to what is known as the principal-agent model.<sup>406</sup> “Principals” possess power but choose to delegate it to “agents”, or “power-wielders”. These power-wielders exercise power on the principal’s behalf and are accountable to them. Here the role of the agent is to deliver on the principal’s will and to operate within the scope of its delegated powers. Where the agent fails to do so, sanctions can be imposed upon it by the principal.<sup>407</sup> This type of relationship is often linked to direct democracy where the actions of representatives (as agents) are required to reflect the interest, beliefs and wishes of their constituents (principal).<sup>408</sup>

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<sup>405</sup> Keohane (2002), p. 12.

<sup>406</sup> Ibid, p.4 and Grant and Keohane (2005), p.30. The realisation of the principal-agent model in giving rise to an accountability obligation has also been applied by other academics, for example by Vandenberg (2007) who explains that citizens are the principal accountability holders of different agents including governmental entities and non-governmental organisations. See also Macdonald and Macdonald (2006), p. 93-95 in relation to democratic accountability.

<sup>407</sup> Keohane (2002), p. 13-14 referring to Hobbes and Held (2002).

<sup>408</sup> Alternatively, the populist idea would hold that the traditional accountability concept can be based on a “trustee relationship” through the delegation model. Here the affected entities are considered to be delegating their powers to be assumed by the power-wielder “trustees” with the aim of achieving certain goals. The “trustees” in this case are treated as “discretionary authorities” that can, with discretion, exercise actions within the scope of their delegated powers. Consequently the trustees’ actions are legitimate as long as they exercise their discretion within the delegated power, even though this may be against the power-holders’ wishes. An accountability standard for this model is thus based upon whether or not the trustees exercise their discretion within the scope of their duties in reaching the goal.

This principal-agent model of accountability is “one-dimensional” because the party exercising power is accountable only to one set of affected entities - those who have granted it the power. Typically both the principal and agent will operate in the same political or organisational domain, and nearly always within the same state. Consequently procedural arrangements and sanctions will operate in a manner internal to that political domain.

Arrangements for achieving accountability based on a principal-agent relationship in EU food safety regulation are relatively straightforward. Under the CA model, EU governmental regulators may be viewed as agents who are accountable to principals operating within the EU political domain. These principals include Member States, other EU institutions and EU citizens.

Similarly, depending on whether private standards are universal or are “bespoke” supermarket standards, the standard-setting bodies or supermarkets may be viewed as agents accountable to their own principals - which in this case are members of the company’s board and/or their shareholders. In both situations, the principal can revoke the delegated powers and/or withdraw their support from the agent. In both cases various internal procedural arrangements will be put in place to ensure that the agent’s accountability obligations are secured, although the strength and formality of these arrangements may vary. Within the EU there are various institutional arrangements which allow principals to hold agents to account. These include courts of law, ombudsmen at different levels, and electoral processes. For private entities there are company rules, voting procedures and guidelines to ensure that internal accountability can be secured.

However, a one-dimensional concept of accountability based on the principal-agent model is not suited to complex global governance situations. This is because it cannot capture all of the parties' relationships and interactions. In global governance, the exercise of power within one political or organisational domain may spill-over in significant ways to a different domain. However, in a principal-agent model, the principal and agent operate within the same domain. This then generates a bias in favour of 'internal' as opposed to 'external' accountability. To give an illustration from the case studies: A multi-national company such as a large EU supermarket can issue its own standards laying down import requirements to be met by their Thai suppliers. Thai suppliers will in turn demand that these requirements are met by small farmers in Thailand. In this situation the lives and working conditions of the Thai farmers will be greatly influenced by the EU supermarket's demands. However, the lack of a direct link between the EU supermarkets and the Thai farmers means that there is, in effect, no principal-agent relationship between them that could give rise to an accountability relationship according to the one-dimensional model. EU supermarkets exercising power in such cases cannot be deemed as "agents" of the Thai farmers; likewise Thai farmers cannot be deemed to be "principals" of the EU supermarkets.

#### **4.3.3 Pluralistic System of Accountability**

Since a one-dimensional concept of accountability is not capable of achieving external accountability and is thus not appropriate for application in a global governance setting, an alternative approach to accountability has to be pursued. Keohane has proposed a new concept which has been said by other academics to give rise to a "pluralistic

concept of accountability”.<sup>409</sup> According to this understanding, accountability has two dimensions, internal and external, the applicability of which depends upon the identity of the party holding the power-wielder to account. Internal accountability is considered to apply where the power-wielder is required to account to affected entities within the same political or organisational domain. This accountability dimension tends to be given expression through a principal-agent model. However, the focus here is upon external accountability since it is this concept that can serve to ground accountability relationships even when the parties operate within different political or organisational domains, and crucially even when they operate in different states.

The relationships which give rise to external accountability obligations are not based on a principal-agent model. On the contrary, external accountability relationships arise whenever a decision by one party generates effects for another party. Minimal or remote effects will not suffice and external accountability obligations will depend upon there being evidence of ‘significant’ effects.<sup>410</sup> Of course, ambiguity remains regarding the extent of the effects required, and indeed the nature of these effects will depend upon the nature of the relationship between the parties concerned.

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<sup>409</sup> Keohane’s separation of internal and external accountability has been referred to by Lang and Scott (2009) and other academics including Benner, Reinicke and Witte (2004) who have named it “the pluralistic system of accountability”. It should be noted that, in addition to Keohane, other academics also prefer a more pluralistic approach to accountability and have used this to clarify other normative issues in global governance, in particular with regard to its relationship with Global Administrative Laws which will be revisited in Section 4.4. For example, in the context of WTO governance, various prominent academics, including Lang & Scott and Stewart, have adopted this pluralistic accountability model and have argued that powerful WTO member states should also be externally accountable to those operating in other political domains, including in other states. (See further, Lang and Scott in their work relating to WTO Services Council and SPS Committee (2009) p. 606 also p. 1073) and Stewart and Badin (2009).

<sup>410</sup> For Keohane, the affected entities are not “any random outsiders who are minimally or remotely affected” but are “sufficiently affected” by rules, decisions or actions taken by the power-wielders. Here, “sufficiently affected” includes being subject “to a rule or regulation promulgated by a transnational organisation” or another state. (Grant and Keohane (2005), p. 34).

For example, it would be relatively easy for affected “outsiders” to be viewed as being in an accountability relationship and to hold those exercising power to account where their relationship is clearly defined. This will be the case, for example, where there are pre-existing contractual agreements which confirm the presence of an accountability relationship, or where the accountability relationship is laid down by law. On the other hand, short of legal acknowledgment and clear procedural arrangements, affected outsiders are likely to face questions about the basis of their external accountability claims.

In the context of the case studies described in this thesis, and building on Keohane’s analysis, Thai stakeholders should be able to hold EU regulators to account when they are bound by their decisions, or when they are significantly affected by them. On this basis it will be relatively more simple to establish an accountability relationship under the operation of the CA model because EU law clearly states that exports from third countries to the EU market must comply with EU food safety rules, and that specific departments of the Thai Ministry of Agriculture and Cooperatives must act as national CAs.<sup>411</sup> Furthermore, it should be relatively easy for large exporters/producers to show that they incur contractual obligations with EU supermarkets in order to comply with their private standards.

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<sup>411</sup> For example under Article 11, Regulation EC/178/2002, food imported into the EU must comply with the relevant requirements of food law or conditions recognised by the EU and must at least be equivalent to the EU standards. Commission Decision 94/85/EC establishes Thailand as a certified country. Moreover, Article 46 of Regulation EC/882/2004 lays down that the FVO inspectors, subject to the agreement with the Thai CA, can inspect the premises of the Thai CA and the food export establishments. Moreover, for products of animal origins, specific procedures are laid down under the Commission Decision 97/134/EC, laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by the Commission Experts in third countries.

However, it is likely to be more difficult for smaller Thai producers or contract farmers, who have no direct contractual obligations with EU supermarkets, to demonstrate that they are significantly affected by EU food safety law. Nevertheless, small Thai producers and farmers can use other factual evidence, similar to that presented earlier in the case studies, to demonstrate that the EU rules and decisions in question exert significant effect upon them.

It should be noted that the concept of external accountability is highly pertinent to the situations occurring in the case studies. As will later be seen in Chapter 6, more pressing external accountability gaps arise in respect of the operation of EU private standards than in respect of the CA model. These gaps contribute to unresolved operational and proliferation problems experienced by significantly affected entities in Thailand who have no or few means to hold EU private regulators to account. They are unable to require private standard setters to make information regarding their decisions available to them, or to require them identify and mitigate negative external effects. However, when it comes to external accountability in relation to EU regulation via the CA model, significantly fewer external accountability gaps occur. This is as a result of concrete attempts to introduce procedural mechanisms that instantiate the external accountability obligations of EU power-wielders, both under the CA model itself and as a result of the WTO. The existence of these mechanisms will be discussed in detail in the next Chapter.

It should be noted that an endorsement of Keohane's pluralistic approach to accountability does not of course imply a negation of the importance of internal accountability. Rather, it suggests that internal accountability is capable only of capturing one dimension of the accountability paradigm. There is also an external accountability dimension that has gained increasing importance as the shift from government to (global) governance has intensified.

#### **4.3.4 New Mechanisms and Standards for External Accountability**

Having established the new type of accountability relationship required for external accountability, it is important to turn now to the other elements of accountability. New standards to underpin the accountability relationship will need to reflect the shift from a one-dimensional to a pluralistic conception of accountability. Similarly, new accountability mechanisms and sanctions will have to be considered as we move away from a top-down, principal-agent approach.<sup>412</sup>

#### **4.3.5 Seven Accountability Mechanisms**

Keohane has already proposed new accountability mechanisms, identifying seven types, the applicability of which will depend upon the nature of the accountability relationship in question. These he labels as: hierarchical accountability, supervisory accountability, fiscal accountability, legal accountability, market-based accountability, peer accountability and reputational accountability. Depending on the circumstances of each case, these mechanisms may operate on an *ex ante* basis, to make the power-wielders

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<sup>412</sup> Or otherwise, trustee.

adhere to existing standards of conduct prior to or in the course of decision-making or, *ex post*, to evaluate the power-wielders' compliance with existing standards after their decisions have been made.

Although Keohane is vague about the specific procedural arrangements which could be put in place in order to enhance external accountability, he has suggested that these seven accountability "mechanisms" are capable of generating the influential force necessary to hold power-wielders accountable.<sup>413</sup> Of his seven accountability mechanisms, three are particularly suitable for securing external accountability. Market, peer and reputational accountability mechanisms can be applied even where affected entities do not operate in the same political or organisational domain as the power-wielders.<sup>414</sup> These three are set out in more detail below.

- (i) Market-based accountability mechanisms: These arise when consumers and investors are empowered to hold those exercising power to account. They may do so by exercising market power to stop, or to threaten to stop, buying from, or investing in the activities of those power-wielders who fall short of meeting the relevant standards. The sanction for failure to comply with accountability standards here is a loss of revenue.<sup>415</sup> In this instance the accountability holders who evaluate the power-wielders' actions may be located outside the political or organisational domain of the power-wielder, but still they may be significantly affected by the power-wielders' actions and decisions.

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<sup>413</sup> Grant and Keohane (2005), p. 35.

<sup>414</sup> Benner et al. (2004) See further also Grant and Keohane (2005), p. 36.

<sup>415</sup> Similar to legal mechanisms explained below, market mechanisms can be imposed *ex post* or in the case of threat to market sanction, the threat can operate *ex ante*.

- (ii) Peer accountability mechanisms: These often exist within global governance networks where the behaviour of those exercising power is judged by their counterparts, including by other firms, organisations or governments, against established and mutually recognised accountability standards. These mechanisms or the standards to which they give rise may be self-imposed, for example through professional codes, or they may be imposed by law. This mechanism is driven by peer pressure and the *ex post* sanctions that the power-wielders face are discredit, condemnation, loss of support from their peers or ultimately expulsion from peer networks. In sectors where peer pressure is strong, peer accountability can also operate *ex ante* to deter power-wielders from departing from accepted accountability standards.
- (iii) Public reputational accountability mechanisms: These mechanisms supplement and exist alongside the other accountability mechanisms. If power-wielders fail to comply with the standards underpinning the relevant accountability relationship, they may suffer a loss of reputation and credibility among the public, consumers or peers. This type of mechanism works well when power-wielders operate in reputationally sensitive markets, including the food business, where “naming and shaming” can create long-term damage to companies or governments. Similar to the peer accountability mechanism, the threat to public reputation can act as an *ex ante* mechanism to deter power-wielders from departing from accepted accountability standards.

Another accountability mechanism identified by Keohane which is applicable to the EU-Thai situation is legal accountability. This arises when power-wielders are bound by formal rules to justify their actions according to standards laid down in law. Courts or tribunals are established to hold the power-wielders to account. Depending on how this mechanism is established, it may operate to re-enforce internal and/or external accountability.<sup>416</sup> In respect of the latter, national and international law can set standards to govern the exercise of power by state entities with regard to their operations abroad. Governmental regulators are often subject to specific standards, including those existing under international law.

In the context of this thesis; peer, market, reputational and legal accountability mechanisms constitute the relevant tools available to mitigate the external accountability gap which emerges from the application of EU food safety regulation in Thailand. The next section will discuss the standards of conduct that underpin the functioning of these accountability mechanisms. I will argue that the doctrine of Global Administrative Law (GAL) can be applied to provide appropriate substantive and procedural standards.

#### **4.4 Part III: GLOBAL ADMINISTRATIVE LAW AND EXTERNAL ACCOUNTABILITY**

The previous sections laid out several findings as regards the nature of the accountability relationship between Thai and EU entities. By adopting Keohane's

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<sup>416</sup> A further difference between legal mechanisms and peer, reputational and market mechanisms is that in the case of the former, sanctions are imposed by courts/tribunals whereas for the latter, affected entities can directly impose sanctions upon the power-wielders.

approach it has been suggested that a pluralistic understanding of accountability should be applied in situations of global governance, including in respect of EU food safety regulation in Thailand. The previous section also clarified that there are different accountability mechanisms which could be used by affected Thai entities to bring EU power-wielders “externally” to account. Moving on, this section will explore the question of which standards should underpin an accountability relationship of this kind.

Keohane has suggested that accountability standards can be derived from norms which command widespread acceptance in transnational civil society.<sup>417</sup> He suggests that these could include human rights norms, the principles inherent in democracy and the principle that extreme economic inequality should be avoided.<sup>418</sup> He suggests also that this is a non-exhaustive list. However this list of possible norms to underpin an external accountability relationship seems to be both vague and broad, and Keohane stops short of specifying concretely how the norms in question could be applied. In the search for standards to underpin the external accountability relationship it is arguably more productive to turn to the concept of global administrative law (GAL). Many academics have previously looked to this source for the same reasons.<sup>419</sup> GAL can yield accountability standards that will then serve as a procedural and substantive benchmark to narrow the external accountability gap.

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<sup>417</sup> Grant and Keohane (2005), p. 35.

<sup>418</sup> Ibid.

<sup>419</sup> Other prominent academics have also made recourse via GAL to examine the accountability and other theoretical problems that feature in global governance situations. These include Lang and Scott (2009) and Stewart and Badin (2009) who looks into the GAL concept in relation to WTO governance and Meidinger (2006) who considers the application of GAL in relation to International Forestry Management. Also see other case studies in Kingsbury, Krisch and Stewart (2005).

#### 4.4.1 GAL : Origins, Definition and Sources

The concept of GAL was developed during the current century in order to capture the reality of new regulatory developments associated with the shift from government to global governance. Working from the bottom-up, scholars of GAL observed that similar norms and mechanisms to secure accountability were being deployed across many different international institutions, operating in an extraordinarily broad range of policy spheres.<sup>420</sup> Often these norms and mechanisms mimicked those used in domestic administrative law. These scholars argued that this reality of a shared “synthesis of practices” has come to constitute a new and specific field of law, which they labelled GAL.<sup>421</sup>

Various definitions of GAL have been put forward by prominent academics,<sup>422</sup> including Lorenz von Stein,<sup>423</sup> Bogdandy et al.<sup>424</sup> and Cassese<sup>425</sup>. Here though, I will

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<sup>420</sup> This can range from financial security and banking, environmental protection, natural resources management, criminal law enforcement and international trade (see for example, Kingsbury, Krisch and Stewart (2005)).

<sup>421</sup> Some academics have used other terms to label this new legal field. For example, Cassese has referred to this as “global public administration” (Cassese 2005), p. 663.

<sup>422</sup> And for some academics, the use of the GAL concept as a separate legal doctrine is still questionable. Some have argued that the existence of global administrative space could perhaps be explained as an exceptional case in existing national or international administrations and hence there is no requirement to establish a separate field of legal practice to explain it. See discussions in Kingsbury, Krisch and Stewart (2005), p. 18.

<sup>423</sup> Lorenz von Stein (1882), referred to in Kingsbury (2009), p. 24, expresses the doctrine as an ensemble of legal rules based on international and domestic sources to deal with administrative activities in the international field.

<sup>424</sup> Bogdandy, Dann and Goldman, (2008), p. 1390. The authors propose a “public law approach” based on “constitutionalisation, administrative law perspective and international institutional law” in order to analyse and create discipline in global governance regulatory regimes.

<sup>425</sup> Cassese (2005), expresses this as the influence of global norms of regulatory due-process upon domestic administration.

refer to one of the most widely accepted definitions as laid down by Kingsbury, Krisch and Stewart. This definition is accepted as seminal by many prominent academics.<sup>426</sup>

Kingsbury, Krisch and Stewart explain that global governance regulation can often be categorised as being administrative in nature, and that as such it can be disciplined and shaped by various principles of administrative law.<sup>427</sup> GAL comprises administrative-type mechanisms, principles and practices which have been lifted from the administrative law of advanced democratic countries and from the universally accepted practices of the international community.<sup>428</sup> The main sources of GAL are the administrative law of the US and/or the EU, and to some extent, *ius cogens* or general principles of international law.<sup>429</sup>

From the outset, the main objective of GAL, as identified by Kingsbury, Krisch and Stewart, was to serve as an “accountability tool” – that is to promote fulfillment of the accountability obligations of global administrative bodies.<sup>430</sup> Because GAL standards do not rely upon there being a principal-agent relationship in place, GAL can be used to

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<sup>426</sup> For example, Lang and Scott (2009), Stewart and Badin (2009) and Meidinger (2006). In addition this definition has also recently been developed and appears to have captured the shared elements across the different definitions.

<sup>427</sup> Kingsbury, Krisch and Stewart (2005), p. 15.

<sup>428</sup> Ibid p. 30-32, See further Stewart (2009). Hence this is also the cause of critics’ objections and criticisms of GAL – that GAL is largely based on the practices of advanced democratic countries, including those in the Western and Northern world. The procedural models which derived much from American and EU origins can be politically biased if applied in developing countries. (For further discussion, see Kingsbury Krisch and Stewart (2006) p. 13).

<sup>429</sup> Recently there have been debates as to whether private practices could also be a source of GAL. See the discussions in Krisch and Kingsbury (2006) on this point with reference to the global forestry certification regime (Meidinger (2006)) and garment industry (MacDonald and Macdonald (2006)).

<sup>430</sup> Kingsbury, Krisch and Stewart, (2006), p. 17.

provide standards for external as well as internal accountability.<sup>431</sup> There are slight differences of opinion between various academics as to the administrative principles that constitute GAL and hence in the definition of the resulting accountability standards.<sup>432</sup> Consequently, the concept of GAL is still considered to be fluid and in the process of development. As such, it is difficult to pinpoint definitively all of the doctrinal elements of GAL. However, there is some general agreement regarding the substantive and procedural norms which form the essence of GAL.<sup>433</sup> To a large extent these norms are captured in Kingsbury, Krisch and Stewart's article, when they identify transparency, participation, reasoned decision-making, proportionality and rationality as being the key principles of GAL. Nevertheless, variation remains regarding the mechanisms through which these GAL norms should be applied in any given situation.<sup>434</sup>

The term "global administrative bodies" referred to in the paragraph above is intended to capture a broad range of public, private and hybrid or public-private entities operating in global governance situations. These entities are all capable of assuming regulatory

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<sup>431</sup> The accountability obligation referred to here is based on the ability of global administrative bodies to adhere to certain standards of conduct. There is no specific reference to the principal-agent model, but only to the status of global administrative bodies as power-wielders.

<sup>432</sup> For example Cassese (2005) introduced similar, although not identical, GAL criteria as those posed by Kingsbury, Krisch and Stewart, including transparency, harmonisation, equivalence and the need for notification.

<sup>433</sup> This point has been made by Kingsbury, Krisch and Stewart (2005), p. 37.

<sup>434</sup> In other words, there is a shared general agreement regarding the "main" GAL criteria and that GAL can be used as an accountability tool. However, variations remain regarding the degree to which each concept and the actual mechanisms can be applied in any particular global governance situation. It is likely that these will have to be decided on a case-by-case basis and will vary depending on, *inter alia*, the extent that each affected entity is bound/affected by the power-wielder's rules/decisions as well as the interplay of bargaining powers between the different entities in a particular regime, and the unique character of each global administrative body. For example, participation in WTO framework is limited for NGOs and individuals. It is unlikely that they will be given a direct involvement (i.e. can vote) in WTO meetings, although they may have observer status or be invited to present their arguments (See Benvenisti (2005), p. 21.

roles, of making decisions on issues of global concern and, of creating rules and decisions which may bind entities outside of their political or organisational domains. In reality, however, their regulatory activities will often overlap.<sup>435</sup>

The list of global administrative bodies as suggested by Kingsbury, Krisch and Stewart includes;<sup>436</sup>

- (i) **Administration by international organisations:** Administrative actions are undertaken by intergovernmental regulatory bodies, established by international agreement between states including the UN Security Council and High Commissioner for Refugees, the WHO, the IMF and the WTO;
- (ii) **Transnational networks:** These comprise co-ordination arrangements between actors operating at different levels or in different countries and are similar to those which characterise global governance explained above.<sup>437</sup> The networks may be informal but are sometimes formed as a result of treaties, as in the case of the Basel Committees and the WTO's SPS and TBT committees.
- (iii) **Distributed administration conducted by national regulators under treaties, networks, or other co-operative regimes:** The concept of distributed administration captures the exercise of power by national governments or agencies when their actions spill-over, generating significant effects beyond their own national sphere. When a national government acts as a so-called "distributed administration" it generates external effects outside

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<sup>435</sup> For example in the issue of food safety, the WTO shares authority with the Codex and OIE and frequently co-operate with the FAO.

<sup>436</sup> Kingsbury, Krisch and Stewart (2005), p. 20.

<sup>437</sup> Supra, Section 4.1.1.2.2.

of its own political domain. It is for this reason that external accountability obligations may arise.

- (iv) **Hybrid public-private administration:** This arises where the administrative bodies are composed of public and private actors. Codex Alimentarius (Codex) is a relevant example of a global governance body of this kind. In the case of Codex, members include domestic public entities from 180 countries.<sup>438</sup> However, other international organisations and NGOs can also participate as observers.<sup>439</sup>
- (v) **Private regulatory bodies exercising transnational governance functions:** This would include private standard regimes where the activities of the standards in question spill-over beyond the standard-setting bodies' internal organisational domains.

EU governmental regulators, including DG-SANCO and the FVO, are distributed administrations falling within point (iii) above. As will be discussed later, WTO frameworks impose administrative-law type rules, procedures and practices to control the external effects of the activities of this kind of body. Consequently these apparent 'domestic' bodies can be considered to be global administrative bodies of the kind that are disciplined by GAL.

Private regulators, such as EU supermarkets, that impose requirements on Thai stakeholders, fall within point (v) above. However, here the application of GAL is less

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<sup>438</sup> This includes the EU acting as a member organisation.

<sup>439</sup> See further: Codex's Principles concerning the Participation of International NGOs (available at : [http://www.codexalimentarius.net/web/ngo\\_participation.jsp](http://www.codexalimentarius.net/web/ngo_participation.jsp)). As of July 2011, 138 NGOs have observer status at Codex meetings. The lists of NGOs and international organisations that can assume observer status can be found at: <http://www.codexalimentarius.net/web/organizations.jsp>.

settled and may be more controversial.<sup>440</sup> It might be argued that private standards are not “law” as they are accepted voluntarily by affected entities. In principle Thai stakeholders may decide to adopt or reject the standards in question. According to this argument, recourse to GAL is not appropriate in this setting as it would impede the enforcement of private contract between power-wielders and the affected entities.

The issue of the legal status of private standards has long been debated by academics and could merit a thesis in itself.<sup>441</sup> For the purposes of this discussion it will be argued that given the increasingly prominent role of private bodies in global governance, they should be considered to be global administrative bodies for the purpose of GAL. This is a proposition widely accepted by many academics writing on this theme.<sup>442</sup>

The argument in favour of conceiving private regulators in this way is two-fold. The first aspect concerns the equivalence in impact of decisions adopted by public and

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<sup>440</sup> This question has been raised by various academics, including Kingsbury himself. See further Kingsbury (2009).

<sup>441</sup> For example, there have been debates on whether private regulation should be counted as “law” and subject to the same accountability and legitimacy controls given its democratic deficiencies. It can be deemed that there are two main schools of thought on this. On one hand, there is a doctrine of “legal pluralism” which is more liberal and inclined to accept the existence of ‘private ordering’ as an independent source of law. Under this doctrine it is thought that there can be multiple legal systems in one territory and this readily accepts private standards as law (for further discussion, see, Berman (2007), Twining (2002), Benner, Reinicke and Witte (2004)). On the other hand there is a school of thought requiring certain elements of “publicness” from “private ordering” before it can be counted as “law” within the scope of GAL. This concept was introduced by Kingsbury in his later work. For him, private standards would be considered as falling within the scope of GAL only when they interact with public institutions (Kingsbury (2009)), for example through hybrid public-private partnership activities.

<sup>442</sup> A reply to Kingsbury by Kuo (2010) argues that Kingsbury’s demand for publicness in law would not help us to resolve the current challenges facing global administrative law. In fact, contrary to Kingsbury’s insistence on publicness there have been studies whereby academics highlight the significant regulatory functions of private entities in other areas of regulations, EU - Thai food safety being just only one of many examples. Some of these examples have been subject to long-term studies by prominent academics, including for example product specification and product process standards (the ISO series), environmental protection and natural resources management (See Meidinger 2006 and 2009), Labour Associations (governed by Fair labour Association), sports (International Olympic Committee, World Anti-Doping Agencies) et cetera. In some of these studies GAL has been applied to purely private entities (for example Meidinger (2009) in relation to forest certification programmes). For overall discussions on the importance of private entities’ regulations vis-à-vis governmental regulation, see, for example, Freeman (2000).

private bodies. We can see this clearly from the case studies presented earlier, where private bodies have unequivocally been exercising regulatory functions and producing rules and decisions that have a *de facto* binding effect on Thai producers and exporters. For example, in relation to HACCP principles and traceability, the impact of EU private regulations has been as significant, if not more significant, than the rules adopted by EU governmental entities. Private standards imposed by EU supermarkets have, in the two case studies, been treated as being mandatory by those seeking to enter or to remain in the EU market.<sup>443</sup> Consequently, despite their original *de jure* voluntary status, private entities have now come to be perceived by affected entities in Thailand as *de facto* sources of law. The degree of regulatory significance of private standards certainly varies, but in the case of EU private regulators it is enhanced by the very magnitude of the EU market.<sup>444</sup>

The second argument in favour of treating private regulators as global administrative bodies for the purposes of GAL stems from the fact that many of the private bodies concerned already acknowledge that it is incumbent upon them to put in place accountability-enhancing measures and mechanisms of the kind associated with GAL. These are mainly introduced as institutional or organisational norms and practices by either the private bodies themselves or by their business counterparts. Typical examples include requirements for expanded transparency and participation<sup>445</sup> and the incorporation of proportionality and other substantive norms into the decision-making framework of these bodies. One example of specific regulatory frameworks that inject GAL criteria into private regulatory schemes in the area of food safety is the

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<sup>443</sup> See *supra*, Chapter 3, Section 3.2.4 and 3.3.4.

<sup>444</sup> See *supra* Chapter 3.

<sup>445</sup> See Meidinger (2009), p. 6.

International Social and Environmental Accreditation and Labelling Alliance (or ISEAL), which applies to environmental certification regime.<sup>446</sup> This private regulatory scheme has put in place elaborate consultation procedures with selected groups of affected entities. We see this also in relation to GlobalGAP which has included participants from the African Task Force, and in relation to the Soil Association which requires the board to consult farmers and retailers before any substantial amendments to the relevant standards are made. We will return to issues surrounding the role of GAL in relation to private regulators in Chapter 6.

#### **4.4.2 GAL Criteria as Accountability Standards: Achieving Accountability through the GAL Criteria**

As suggested by Kingsbury, Krisch and Stewart, the application of GAL in global governance situations requires respect for certain core administrative principles, including transparency, participation, reasoned decision-making, proportionality, and opportunity for appeal or review. This chapter will conclude with a brief overview of the concepts that make up this account of GAL.<sup>447</sup> It is important to stress that each of these concepts is open to being understood in very different ways, and that they may be operationalised in a wide variety of ways. The aim here is to distill the essence of these concepts. As will become clear, although the different elements will be presented individually they are in fact inter-linked.

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<sup>446</sup> See Meidinger (2006).

<sup>447</sup> It should be noted that the meaning of the term “administrative principles”, categorised here as GAL criteria, has varied amongst academics although to a large extent the central themes have been adequately captured by Kingsbury, Krisch and Stewart’s version. For example, Benvenisti talked about provisions for “transparency, voice to affected groups, review mechanisms and judicial review” (Benvenisti (2005), p. 2), whereas Cassese’s list includes “transparency, participation, reasoned decision, and reasonableness”. Cassese (2005), p. 691.

#### **4.4.2.1 Transparency**

Occasionally referred to as “publicity” or “openness”, transparency is derived from a principle of administrative law that is widely accepted in advanced democracies and in international law.<sup>448</sup> Transparency is a crucial first step towards accountability. Only when an adequate degree of transparency is secured, or when the right kind of information is made available at the right time and to the right person, will affected entities be able to take further action to hold power-wielders to account, either by participating in the power-wielder’s decision-making processes or by challenging the decision concerned.<sup>449</sup>

Transparency can be said to consist of two main elements; i) the availability of information and, ii) the quality & accessibility of information.<sup>450</sup> Each is explored briefly below.

##### **4.4.2.1.1 Availability of Information**

The first issue that arises concerns the question of to whom the information should be made available. In keeping with the earlier analysis, in an external accountability

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<sup>448</sup> See Craig (2008), p. 350, 352 and 359 in relation to the EU. See also Sabel and Zeitlin (2010) p. 18. In her recent piece, however, Fisher (2010) warns against the acceptance of transparency as an unqualified good for public administration (ibid, part 3).

<sup>449</sup> In other words it is a pre-condition for participation and for appeal/review. However, transparency is insufficient on its own to ensure an adequate degree of accountability. To do so it must also be accompanied by other GAL criteria (Kant (1795), p. 175 in p. 49 Kingsbury (2009)).

<sup>450</sup> Transparency itself is a complex administrative ideology. Here I have reduced the concept to its main features that are relevant in serving external accountability. For further discussion see, for example Fisher (2010) who lists seven questions for administrative lawyers to ask when dealing with transparency (ibid, part 2- part 3) .

setting information must be available to those significantly affected by the decision at hand. This remains the case even where those so affected operate in a different political or organisational domain.

The second issue arising concerns the type of information that should be made available and rendered accessible to affected entities. As a minimum, the following information should be made available.

- (i) The content of the actual law/decision: Least controversial is the claim that information regarding existing laws, decisions and rules must be made publicly available. This is essential for the effectiveness of law as it is a pre-condition for securing widespread compliance.

However, in order for transparency to fulfil its accountability function, the following three additional types of information will also be needed, in order to allow affected entities to call power-wielders to account.

- (ii) Proposals for changes to existing rules: The information required here includes proposed rule changes, their rationale<sup>451</sup> and their potential impact.<sup>452</sup> This information will assist significantly affected entities in evaluating whether they are likely to be adversely affected by proposals and in constructing reasoned arguments to influence or oppose these.<sup>453</sup>

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<sup>451</sup> This is because it is “the citizen’s right to know not just what the authorities are deciding but also the evidence and arguments motivating their decisions” (Sabel and Zeitlin (2010), p. 18). See also Craig (2008), p. 350.

<sup>452</sup> This can include studies and research conducted as part of impact assessments *prior* to the regulatory decision being made in order to calculate the costs and benefits of the proposed regulation as well as the potential adverse impacts that could derive from it (Craig (2008), p. 345).

<sup>453</sup> Ibid.

- (ii) Existing participation procedures: Information about decision-making procedures, as well as about opportunities for participation, enable affected entities to decide whether they should take steps to participate, and if so how this can best be achieved.
- (iii) Positions of other affected entities: Likewise, the provision of information on the different positions taken by other participants in the decision-making process, and on the actual impact that the rules and decisions have had on different entities, can help affected entities to evaluate the actual impact of decisions that have already been made.<sup>454</sup> This, in turn, can help them to decide whether it would be appropriate or fruitful to challenge a decision.

As different types of information can serve to facilitate realisation of different GAL criteria, this leads to a third issue regarding when information should be made available, and for how long.<sup>455</sup>

With regards to already existing laws or decisions, information must be provided sufficiently well in advance of any implementation date, so as to allow those who are potentially bound or significantly affected by these to understand fully and to make any necessary adjustments to achieve compliance. Hence a reasonable time lapse must be allowed between the publication date of a law or decision and the date from which the law or decision will be enforced.

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<sup>454</sup> This can include impact assessments conducted *after* the implementation phase of the power-wielder's decisions.

<sup>455</sup> See Craig (2008) p. 365 onwards. For example, of the "principles of access" in the EU context.

Information can also help affected entities in the exercise of their participation rights. As a result, this should be made available prior to the participation stage and certainly before any decision is made. It should also be made available for a reasonable length of time so as to allow affected entities to understand its content and to take advantage of the information in the exercise of their participation rights.<sup>456</sup>

Information can also help affected entities to assess the actual impact of the power-wielders' decisions, and in taking steps to contest these decisions or to challenge them in law. Information which serves this purpose may be made available after a decision is reached but before the affected entities' right to challenge the decision has expired.<sup>457</sup>

#### **4.4.2.1.2 Quality and Accessibility of Information**

The information made available should be clear and readily understandable by affected entities. In consequence, power-wielders may need to provide various kinds of information, some highly technical, some less so. They should not assume that information that is 'transparent' for one group of affected entities will necessarily be understood by all.<sup>458</sup> In addition, information must also be accurate and sufficiently detailed to allow different entities to assess properly whether they are likely to be affected by the proposed measure.

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<sup>456</sup> The availability of this information prior to the decision-making process is also the "first generation of participatory rights" (Bignami (2004), p. 63-7 referred to in Sabel and Zeitlin (2010), p. 19). This also fits with the informing steps in Arnstein's participation ladders. She points out that some information (for example about rights, responsibility and participation options) if provided at a late stage would not be beneficial for affected entities (or "citizens" in her terms) as they will have "little opportunity" to use this information in the participation processes and thus "to influence the outcomes for their benefits" (Arnstein (1969), p. 13).

<sup>457</sup> Usually the affected entities will be subject to a time limit during which they can apply for an appeal/review of the decisions in question.

<sup>458</sup> Fisher (2010), p. 294 "what is being made transparent is not transparent to everyone".

With respect to the manner in which information should be divulged to “significantly affected entities”,<sup>459</sup> if the information is not provided directly to them, for example through direct distribution, a press-release or publication, then this information should be available on request. In this case, the information should be made available at a reasonable cost so as to not to impose an excessive financial burden.<sup>460</sup> Information should also be integrated, in that it should be available from one accessible source. In recent times, efforts to enhance the quality of information and the manner in which it is made available have been made by many global administrative bodies through publications on their websites and through the webcasting of their proceedings.<sup>461</sup>

#### **4.4.2.2 Participation**

This concept of participation has two main dimensions. The first is the right of potentially affected entities to get involved in decision-making processes. The second is the power-wielder’s obligation to take into consideration the views of potentially affected entities.<sup>462</sup>

Participation is a key facet of accountability because it creates an accountability “forum”, which forms the essence of an accountability relationship.<sup>463</sup> Participation must occur before decisions are reached, because only when affected entities have an

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<sup>459</sup> Sabel and Zeitlin (2010), p. 19 “for transparency to serve as an effective tool for public accountability...information...must not only be open, in the narrow sense of not closed, but freely and widely available”.

<sup>460</sup> Buchanan and Keohane (2006), p.427.

<sup>461</sup> For example, in various Committee meetings of WTO and EU (e.g. EFSA).

<sup>462</sup> Dutta (2010), p. 17.

<sup>463</sup> See *supra*, Section 4.2.1 on the three elements of accountability

opportunity to participate are they able to influence final decisions. Participation allows potentially affected entities to present their views and relevant information, to challenge factual inaccuracies, to highlight negative effects and to put forward suggestions for change.

When discussing participation it is helpful to turn to the classic participation model “A Ladder of Citizen Participation”.<sup>464</sup> This was proposed by Arnstein back in 1969 and it remains “the core of many approaches to participation” and indeed is widely referred to by many academics and practitioners in different area of legal studies.<sup>465</sup> From Arnstein’s classic model it can be observed that mechanisms for participation operate on a spectrum since the level of involvement in the power-wielder’s decision-making process enjoyed by each affected entity can vary.<sup>466</sup> At one end of Arnstein’s participation spectrum, affected entities can participate through “notice and comment” procedure while at the other end they can cast a vote to decide on the final outcome. In between, affected entities have a right to be consulted by those wielding power.<sup>467</sup>

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<sup>464</sup> Here Arnstein proposed that there are eight levels of participation, ranging from non-participation (manipulation & therapy) to tokenism, where the elements of citizens’ participation emerge (informing, consultation, placation), to citizen power where citizens will be able to influence outcomes directly (partnership, delegated power and the ideal situation of citizen control). See Arnstein (1969), p. 13 onwards.

<sup>465</sup> See for example, Collins and Ison (2006), p. 1.

<sup>466</sup> In other words, the power of affected entities (or citizen in Arnstein’s term) to affect the outcome of decisions will vary (Arnstein (1969), p. 2).

<sup>467</sup> Arnstein (1969), p. 5. With regards to “notice-and-comment”, power-wielders are merely required to listen to the feedback from affected entities and to consider it. They may have to provide a reason for rejecting such feedback. However, the decision-making process still essentially rests with the power-wielders. For “consultation”, a more active role in decision-making processes can be expected. When affected entities have a right to be consulted, they are invited to not only put forwards their ideas, but when such ideas conflict with those of the power-wielders, alternative options and compromises are expected to be discussed. In such cases, the final outcome decided by the power-wielders are expected to reflect some (or all) of the affected entities’ feedback. In other words, consultations is closer to the power-wielders and affected entities “jointly making decisions together”; but for notice and comment, the power-wielders merely “listen and consider” to the affected entities’ opinions.

However, even “notice-and-comment” type participation will allow for an exchange of information to take place between power-wielders and affected entities. In such circumstances, the power-wielder is bound to take the affected entities’ comments into consideration and may be called upon to provide reasons should they decide to disregard the comments made. Consequently, even by providing “notice and comment” procedures, affected entities can seek to influence the outcome of power-wielders’ decisions and laws.

#### **4.4.2.3 Reasoned Decision-Making**

It is a well-established principle of administrative law that decision-makers must state reasons for their decisions.<sup>468</sup> This applies not only to the judiciary but also equally to legislatures and regulators. Reasoned decision-making helps to promote accountability. As explained previously, the rationale for the decisions should be divulged to affected entities at the time that the decision is proposed and/or adopted. It is only as a result of this that potentially affected entities can evaluate the proposed or actual decision and assess its weaknesses and strengths. If the reasons given appear to be unsound or unconvincing, affected entities may explore the reasons for this and/or endeavour to challenge the decision by way of appeal or review.<sup>469</sup>

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<sup>468</sup> This is also called “the principle of rationality” (Kingsbury (2009), p. 33).

<sup>469</sup> Dutta (2010), p.17.

#### **4.4.2.4 Proportionality and Other Related Substantive Standards**

GAL also requires that decisions conform to certain substantive standards. A non-exhaustive list of these substantive standards is put forwards by Kingsbury Krisch and Stewart. This includes proportionality, means-end rationality, and the avoidance of unnecessary restrictions. These standards are given clear expression in WTO law and their meaning and implications will be discussed further in the next chapter.

#### **4.4.2.5 Opportunity to Appeal or to Seek Review of Rules and Decisions**

GAL prescribes that decisions must be open to appeal or review. This is fundamental for establishing an accountability relationship as an opportunity to contest a decision creates a forum for discussion in which power-wielders' actions can be assessed according to accountability standards that have been laid down.

The right to appeal involves a process whereby an affected entity calls for a formal change to a previous decision. For administrative decisions, domestic legislation often provides for an individual's right to appeal to an administrative panel, court, tribunal or governmental entity.<sup>470</sup> In limited cases an appeal can be made to international bodies.<sup>471</sup> The appeal process is aimed at providing a means to rectify or change an earlier judgment or decision. It endeavours to ensure that, as far as possible, a correct

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<sup>470</sup> In the context of a judicial decision an appeal is often conducted through a higher court.

<sup>471</sup> For example, upon the parties' agreement, an appeal in sports disputes can be made to Internal Court of Arbitration for Sport.

decision is derived. By having an opportunity to appeal, affected entities that consider an administrative decision to be unsatisfactory are able to have the merits of the decision reconsidered by independent judges or panels. If the appeal is successful, the earlier decision will be overturned and will be replaced by a later one.

A separate, yet related, right of affected entities is their ability to seek review of an administrative decision.<sup>472</sup> This is a well-established principle of domestic administrative law,<sup>473</sup> is confirmed by international bodies,<sup>474</sup> and increasingly is framed in the language of human rights.<sup>475</sup> In the domestic context, a review of an administrative decision can be conducted by the judiciary<sup>476</sup> or by other independent tribunals.<sup>477</sup> In certain circumstances, it is also possible for individuals who have been affected by domestic administrative decisions to call for review by an independent international tribunal.<sup>478</sup>

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<sup>472</sup> The right to call for a review of the decision is derived separately. Even where legislation does not provide a right to appeal, the right to call for a review can be initiated (unless stated to the contrary) (Elliott and Beatson (2005), p. 6.)

<sup>473</sup> Dowdle (2006), p. 4-5. It should be noted that some variations remain regarding the type and nature of the decisions that can be subject to review. In most advanced democratic countries there exists some form of review of administrative decisions. However in some countries, notably the UK, the doctrine of parliamentary sovereignty applies and primary legislation is not reviewable.

<sup>474</sup> *Shirmp/Turtle*, para 180.

<sup>475</sup> For example, Article 14 ICCPR and Articles 6 and 13 of ECHR.

<sup>476</sup> That is by “courts” in the form of judicial review. In some countries, such as the UK and the US, this is performed by “ordinary courts” but in some countries, including France, Germany and indeed in Thailand, this is performed by special “administrative” and/or “constitutional” courts.

<sup>477</sup> This can, for example, be conducted by ombudsmen or by special enquiries.

<sup>478</sup> For example, an individual or organisation whose assets have been frozen by EU member states under Terrorism Acts may be able to call for a review by the European Court of First Instance, or in visa application cases, applicants who have been denied a Schengen visa may call for a review by the Schengen Information System. (Kingsbury (2009), p. 42 onwards).

The fundamental difference between appeal and review is that the latter often concerns the administrative process of deriving the decision rather than the final decision itself.<sup>479</sup>

One of the primary aims is to ensure that the outcome has been appropriately achieved and that no “illegality”, “irregularity” or “procedural impropriety” has been associated with the decision-making process.<sup>480</sup> Where an action for review is successful, the relevant decision may be declared unlawful, but the reviewing body will not adopt a new decision itself.

## 4.5 CONCLUDING REMARKS

The principles which make up GAL may be viewed as being constituting standards to underpin the external accountability relationship which should exist between Thai stakeholders and EU regulators. Having set out these core principles, the next chapter will examine the accountability mechanisms in place to ensure respect for them in the context of the application of EU food safety law in Thailand. These mechanisms will be evaluated in order to assess the extent to which they are adequate to secure external accountability. Proposals for accountability-enhancing reform will also be made.

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<sup>479</sup> Consequently, an evaluation of whether substantive standards such as proportionality and unreasonableness have been met by the power-wielders when delivering their decisions may also be relevant in the review process.

<sup>480</sup> Lord Diplock’s judgment in the *Council of Civil Service Unions v. Minister for Civil Service* [1985]. (GCHQ Case)

## **CHAPTER 5**

### **CLOSING EXTERNAL ACCOUNTABILITY GAPS FOR OFFICIAL EU FOOD SAFETY REGULATION IN THAILAND**

The previous chapter explored the concept of external accountability in global governance settings. It set out the different dimensions of accountability and explored different mechanisms through which external accountability can be achieved. This chapter will explain and evaluate the mechanisms in place to secure external accountability in the relationship between Thai stakeholders and EU governmental regulators, and consider the way in which these serve to give concrete effect to the principles of global administrative law (GAL). Starting with the WTO, it will then turn to the operation of entities in the CA model. Furthermore, to the extent that deficiencies are identified and an external accountability deficit is found to remain, this chapter will also make forward-looking suggestions for constructive improvement to existing frameworks to ensure enhanced external accountability.

#### **5.1 EXTERNAL ACCOUNTABILITY OBLIGATIONS IN THE WTO**

WTO law and governance provide a framework for establishing an accountability relationship between WTO Member States, including the EU and Thailand.<sup>481</sup> Further, WTO law and governance provide the additional elements necessary to secure external

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<sup>481</sup> External accountability relationships emerge between power-wielders, being those member states that instigate food-safety measures, and the affected entities which are those situated in other Member States.

accountability, including **standards**, **fora** and **sanctions**.<sup>482</sup> As will be shown, WTO standards closely resemble those associated with GAL. Over time these WTO-GAL standards have gradually been incorporated into the domestic structures and procedures of power-wielding Member States.<sup>483</sup> The WTO framework also establishes different **fora** in which these standards can be invoked and in which claims of non-compliance can be heard. In each **forum** different accountability mechanisms operate to ensure that power-wielding members are obliged to account for their actions and decisions insofar as these affect other members. Finally, depending upon which of the various accountability mechanisms is at play, WTO law and governance establish different kinds of **sanctions** to deter power-wielding members from neglecting their external accountability obligations or to punish those that have done so. Each of the elements of external accountability (standards, fora and sanctions) will be discussed below with specific reference to the WTO.

### **5.1.1 Application of GAL Criteria as Standards for External Accountability in WTO Law and Governance**

Although the term “GAL” is not explicitly used in the WTO Agreements, elements of GAL can be seen in the functioning of the WTO system and in the interactions between Member States to which this gives rise. As a result of WTO obligations and processes, power-wielding Member States come to be judged against standards that give effect to GAL norms.

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<sup>482</sup> See *supra*, Section 4.2.1

<sup>483</sup> Stewart and Badin (2009), p. 3.

In consequence, GAL and WTO law and governance are strongly connected. GAL provides a normative foundation to assess the role of WTO in mitigating accountability gaps between Member States. Meanwhile, since the content of GAL norms is in part derived from an examination of the overlapping practices of international and global institutions, the WTO's instantiation and application of GAL principles can serve also to elaborate and re-enforce the concept of GAL.

There are three different means through which GAL criteria are given expression as external accountability standards in WTO law and governance. Firstly, GAL criteria are frequently referred to in the text of the various WTO agreements. Consequently they are imprinted as *ex ante* legal obligations or “hard law” which must be complied with by WTO members. Secondly, WTO adjudicatory bodies, including dispute-settlement panels and the Appellate Body, are seen to apply GAL criteria as the standards applicable in disputes between members. As a result the WTO operates to hold Member States to account *ex post* when their actions or decisions are challenged by another Member State. This may be the case even when the specific WTO obligation being applied does not explicitly give effect to GAL criteria. When the dispute settlement bodies incorporate GAL criteria into existing WTO obligations, or where they require Member States to adhere to GAL criteria, these will consequently shape, *ex ante*, the governance practices of WTO members.<sup>484</sup>

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<sup>484</sup> Reports of the dispute-settlement bodies form part of WTO law. The dispute settlement bodies can also expand or narrow the GAL elements of legal provisions and occasionally they ensure that GAL criteria are incorporated into existing WTO law. Clear examples of this can be seen in a series of WTO cases where the power-wielding member state is deemed to have a duty to negotiate with all affected

Thirdly and finally a similar role is also performed, albeit in a very different way, through “soft law” instruments that take the form of non-binding guidelines, decisions and recommendations issued by WTO administrative bodies, especially the SPS Committee.<sup>485</sup> Although these soft law instruments are theoretically non-binding, in practice they play a crucial role in strengthening the position of GAL by providing standards of conduct to underpin external accountability. For example, the SPS Committee’s “Recommended Procedures for Implementation the Transparency Obligations of the SPS Agreement (Article 7)”<sup>486</sup> and the Secretariat’s Handbook on “How to Apply the Transparency Provisions of the SPS Agreement”<sup>487</sup> serve as a soft law interpretation of a hard law obligation. They are an important way of informing power-wielding members what precisely they need to do in order to discharge their hard law obligations relating to notification and consultation.<sup>488</sup> These soft law documents are useful for Member States since many parts of WTO law are only loosely defined and are unclear; and further, elaboration through adjudication can be slow and ineffective. These soft law instruments can act as a safe-harbour clause inducing Member States to comply on the basis that it seems less likely that a power-wielding

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WTO members. This was first laid down in the *Shrimp/Turtle case*, and later its scope was narrowed in the *US-Gambling case*.

<sup>485</sup> These are termed by Footer as “soft rules with soft to hard content” whereby non-binding documents can still serve to influence the actions of Member States in applying WTO rules (Footer (2010), p. 9, see also Scott (2007), p. 72)

<sup>486</sup> Thereafter the SPS Committee’s Recommended Procedures (G/SPS/7/Rev.2).

<sup>487</sup> Thereafter the Secretariat’s Handbook on Transparency, (September 2002).

<sup>488</sup> Under Article 7 and Annex B SPS Agreements (para. 4, G/SPS/7/Rev. 2)

member would be found to be in breach of a WTO obligation if it has complied with the relevant soft law.<sup>489</sup>

It is possible to divide these WTO GAL standards into two broad categories, substantive and procedural. A theoretical debate regarding the relationship and distinctions between substantive and procedural law is complex and beyond the scope of this thesis.<sup>490</sup> The categories are used here to emphasise the two different ways in which GAL standards featured in WTO law can be applied. In general substantive standards are applied as foundational principles that are used to appraise the actual content of decisions reached. In contrast, procedural standards impose procedural or process-related obligations on Member States. The two types of standard are closely inter-related and in some instances there will also be an overlap between substantive and procedural standards. Procedural standards are sometimes used as a means to promote respect for substance standards. For example, the requirement that power-wielding members have to give reasons for their decisions can be viewed as a procedural standard. However, by providing reasons, other substantive standards, such as means-end rationality, can also be fulfilled.<sup>491</sup>

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<sup>489</sup> The fact that a soft law instrument can act as a safe-harbour clause supporting affected members or defending power-wielders in disputes has been observed by academics in different fields of law (For example, Schrage (2003) in relation to corporate breaches of human rights in US courts). However, the legal position of soft law instruments in the WTO context is somewhat unclear. Although they have played a significant role in inducing member states to comply, their role in WTO disputes remains to be determined since case law on these issues has not been fully developed. To some extent, however, it can be argued that recognition of these soft law instruments has been expressed by the Appellate Body in *EC-Sardines* (see for example, Scott (2007), p.192. This will be discussed Section 5.1.2.3), and more recently by the Panel in the *US-Clove Cigarettes* case (This will be discussed in Section 5.1.1.2.1).

<sup>490</sup> See for example, Morgan (1957), Black (2000, 2001), Redish and Murashko (2008).

<sup>491</sup> For further discussion, see for example Scott (2007), Chapter 6 p. 216.

The next part of this chapter will set out the main GAL-type standards that are embodied in WTO law and governance, deploying this distinction between substantive and procedural standards.

### **5.1.1.1 Substantive Standards**

#### **5.1.1.1.1 Means-end Rationality**

The “means-end rationality” test, also known as the “nexus” test in the WTO,<sup>492</sup> is recognised as one of the major substantive GAL standards which WTO members are bound to respect.<sup>493</sup> There must be a rational relationship or a causal connection between a trade measure and the objective that it purports to pursue. That is to say the trade measure must be capable of making a genuine contribution to its stated goal.

In the context of food safety, the requirement for means-end rationality is given effect in WTO law in two main ways: firstly as a condition for invoking the general exceptions to the rules under Article XX GATT, and secondly as part of the rules themselves under Articles 2.2 and 5.7 of the SPS Agreement.

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<sup>492</sup> Trachtman in Scott (2007), p. 28 “it may . . . be concluded that the new test under (GATT) Article XX calls for an actual balancing of the degree to which the challenged measure contributes to the end pursued.”

<sup>493</sup> It should be noted that in some accounts, the rational relation test has been referred as part of the proportionality criterion. For example, in the context of the WTO and the EU, means-end rationality has also been discussed alongside the requirement to use the least trade-restrictive means. This has been viewed by some as being incorporated into the necessity test (see further the use of the doctrine in the EU in the discussion by Hofman in Barnard and Odudu (200), p.54 (fn 34), see also Von Harten, (2008). In the WTO context, see for example Ortino (2004), p. 455. However, means-end rationality is placed here as a separate requirement. This is because it was at first considered as a stand-alone substantive criterion by GALs’ founders. Secondly, WTO provisions include means-end rationality as a stand-alone criterion (for example, Article 2.2 SPS).

In the former, case law has established that power-wielding members are allowed to depart from existing WTO obligations provided that their trade measures are “necessary” or “relate to” one of the general exceptions.<sup>494</sup> The main general exception relevant to food safety is framed in terms of measures “necessary to protect human, animal or plant life or health”.<sup>495</sup> To demonstrate that a measure is “necessary”, a minimal degree of means-end rationality is required. There must be a plausible causal relationship between the Member State’s measure and the stated objective of protecting the life or health of a human animal or plant.<sup>496</sup>

The “nexus” test also forms the basis of Member States’ positive obligations under Article 2.2 of the SPS Agreement. Power-wielding members adopting an SPS measure must ensure that the measure is applied only to the extent necessary to protect the life and health of humans, animals and plants. It also must be based on scientific principles and be supported by adequate scientific evidence.<sup>497</sup> Similarly, to demonstrate that the measure is necessary a low, but nonetheless essential, means-end rationality test is applied. It must be shown that the measure can make a contribution to the end being pursued.<sup>498</sup> In addition, to demonstrate that the measure is based on scientific evidence,

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<sup>494</sup> Article XX GATT.

<sup>495</sup> Article XX (b) GATT.

<sup>496</sup> As long as the connection between the means and the end is “material” and “not marginal or insignificant”, then it is likely to be sufficient - *Brazil-Tyres* (para. 210). To be able to claim the exception however, Member States may have to face a “strong proportionality test” where the goal of the regulation will be weighed and balanced against other factors. This will be discussed in Section 5.1.1.1.2 (B) below.

<sup>497</sup> Article 2.2 is also founded on the proportionality principle, another main substantive standard of GAL. This will be discussed in the next section.

<sup>498</sup> *Korea-Beef* (para. 161).

there must be a rational and objective relationship between the SPS measure and the scientific evidence upon which the measure is based.<sup>499</sup>

*Prima facie*, this nexus test under Article 2.2 appears to be easy to satisfy as the power-wielding Member State can pursue the highest level of health protection<sup>500</sup> and can refer to minority scientific opinions in support of its measure.<sup>501</sup> It is merely required that the risk assessment “reasonably support” the measures taken, and hence with minimal scientific evidence the nexus test can be fulfilled.<sup>502</sup> However, in practice the nexus test has proved difficult to fulfil.<sup>503</sup> For example, in *EC-Hormones*<sup>504</sup> it was held that the scientific evidence relied on by the EU could not reasonably support the measure taken as it related to the existence of a general risk of cancer, but not to the specific risk at stake, i.e. the risk of carcinogenic or genotoxic hormone residues found in cattle meat when used for growth promotion purposes.<sup>505</sup>

A similar result also occurred in *Japan-Varietals*. Although the data provided by Japan hinted at product variety differences, they did not provide a justification as to why

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<sup>499</sup> *EC-Hormones* (1997 AB) para. 193, in order to show that the measure is based on risk assessment, “a rational relationship between the measure and the risk assessment is required”.

<sup>500</sup> It is a low threshold to establish even when the highest level of production is sought. See for example in *Australia-Salmon*, *EC-Hormones* (1997 AB), *Japan-Apples*.

<sup>501</sup> *EC-Hormones* (1997-AB), para. 193 and *Japan-Varietals* para. 77

<sup>502</sup> Andenas and Zleptnig (2007), p. 414.

<sup>503</sup> In other words it is a low but difficult threshold to meet, or one “too strict and too lenient”, Scott (2007), p. 79.

<sup>504</sup> AB (1997), WT/DS26, DS48/AB/R.

<sup>505</sup> *EC- Hormones* (1997-AB), para. 200. In addition, the scientific evidence was based on the opinions of Dr. Lucier and was made in relation to the scientific studies not carried out by him nor under his supervision. Further, the study focuses on the possibility of hormonal residue left in cattle meat rather than the risk to human health. Thus there was no rationality between the scientific case used by the EU and the conclusion used to support the ban.

different tests were required for different varieties of the same product.<sup>506</sup> Additionally, in *Japan-Apples*, the fact that Japan neglected other possible risks of fire-blight disease led the Panel to conclude that there was no rational relationship between the measures and the scientific evidence in question.<sup>507</sup>

Further, in *EC-Biotech* the scientific evidence relied upon by Austria was found not to constitute sufficient scientific evidence to support its safeguard measures taken against the introduction of T25 maize.<sup>508</sup> The two reports used by Austria failed to refer to the probability of the potential risk of negative long-term ecological effects stemming from the cultivation of this crop, and instead only made a general evaluation of the “possibility” that such a risk could occur.<sup>509</sup>

#### **5.1.1.1.2 Proportionality: (weak and strong)**

Proportionality is one of administrative norms explicitly identified by GAL.<sup>510</sup> In joining the WTO Member States retain considerable discretion to adopt trade measures in order to achieve, or contribute towards, legitimate objectives. These objectives may be set out in the WTO Agreement or they may be recognised by the dispute settlement

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<sup>506</sup> For example, where test results demonstrate that a similar test could lead to different results when applied to different product. *Japan-Varietals* (Panel) para. 8.42-43 affirmed by the AB report para. 83.

<sup>507</sup> *Japan-Apples* (AB report, p. 7 at para. 14). The measure involves a series of demanding requirements including designated disease-free areas in the export countries, to be surrounded by with 500 metre buffer zones, to be inspected tri-annually, and to be subject to special disinfection treatments for imported apples, and so on.

<sup>508</sup> *EC-Biotech*, (Panel), para.7.3046.

<sup>509</sup> *Ibid*, para.7.3044. Although it has been stated elsewhere that the risk can be quantitatively as well as qualitatively defined (*Australia-Salmon* (para. 124)) and confirmed in *EC-Biotech* (para. 7.3027), following *EC-Biotech*, there was a suggestion by the dispute settlement bodies to favour quantitative demonstration of risk. See further Scott (2007), p. 93-94.

<sup>510</sup> See *supra*, Section 4.4.2.4.

bodies. However, Member States may do so only on the proviso that the measures taken are proportionate.

The proportionality principle comes into play after the rationality test has been met and can be considered to consist of two main components. Firstly, there is the “least trade restrictive means” component where the power-wielding member has to demonstrate that the measure is applied only to the extent necessary to achieve the desired objectives or outcomes. Secondly, there is an element of “weighing-and-balancing” inherent in proportionality whereby the negative trade effects created by the measure are weighed and balanced against the importance of the objective pursued by the measure and the degree to which it contributes to realising this goal.

These two distinct components of proportionality are very different in terms of the intensity of scrutiny of Member State measures that they imply. To capture this, they have been described by Scott as constituting “weak” and “strong” proportionality tests.<sup>511</sup> With regard to the least-trade-restrictive means test, proportionality is applied in a “weak” form because WTO law relates only to the means used by a Member State in adopting a trade measure without considering the value of the objective or the “end” being pursued by that Member State.<sup>512</sup> However, when it comes to the “weighing-and-balancing” test, the value or weight of the objective pursued is also considered, relative at least to the level of trade restriction that the measure implies. In this case, both the

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<sup>511</sup> Scott (2007).

<sup>512</sup> This is, of course, subject to the end in question being one that is recognised as being a legitimate one by the WTO Agreements or by the dispute settlement bodies.

“ends” and the “means” will be subject to scrutiny under WTO law.<sup>513</sup> Strong proportionality is often known as proportionality “stricto sensu”.<sup>514</sup>

#### **A: The Least Trade Restrictive Means (Weak Proportionality)**

As with the rationality requirement, weak proportionality is inherent in the necessity test, whether in relation to the exception in GATT Article XX or in the rules, for example under Articles 2.2 and 5.6 of the SPS Agreement.<sup>515</sup> The concept consists of two parts. First, there must be no “less trade-restrictive” alternatives available which are, second, capable of achieving the member’s goal.<sup>516</sup> Trade measures have been found to be inconsistent with a weak proportionality test in a number of important cases including: *Thai-Cigarettes*, *Korea-Beef*, *Japan-Apples* and *US-Section 337*.<sup>517</sup> Here, less trade restrictive alternatives such as labelling and policing were deemed to be available and were judged to be capable of achieving the various members’ goals.

However, it should be noted that following *US-Gambling* the scope of the least-trade-restrictive means test has been significantly narrowed.<sup>518</sup> The term “least-trade-restrictive alternatives” has been deemed to cover only those measures that are

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<sup>513</sup> The Appellate Body’s introduction of proportionality criteria into the WTO law *Korea Beef* has been subject to scrutiny by some academics including Regan who considers this as “a serious intrusion on the Members’ regulatory autonomy” (Regan (2007), p. 349).

<sup>514</sup> See Andenas and Zleptnig (2007) and Von Harten (2008).

<sup>515</sup> *Australia-Salmon* and *Japan-Varietals*.

<sup>516</sup> Ortino (2004), p. 471, referred to in Andenas and Zleptnig (2007).

<sup>517</sup> *Thai-Cigarettes* (Panel Report para. 75), *Korea-Beef* (para. 63) *US-Gambling* (para. 304).

<sup>518</sup> In *US-Gambling*, in deciding whether the online-gambling ban by the US was necessary to protect public morals or to maintain public order, the possibility that the US could further engage in consultation with Antigua was construed as not being a reasonably available alternative to the prohibition of online-gambling since the results from any negotiation would be uncertain and might not have led to the level of public morals that was being sought by the US.

“objectively available” and not to include all “readily available” means.<sup>519</sup> Similarly, an alternative will not be deemed to be available if it would imply substantial additional costs for the regulating members, lead to uncertain outcomes,<sup>520</sup> or be beyond the technical, economic or financial reach of the regulating state.<sup>521</sup>

A similar approach has been taken by the dispute settlement bodies when interpreting the proportionality standard under Article 2.2 of the SPS Agreement, which also specifies that the SPS measure in question should only be applied to the extent “necessary” to protect human animal or plant life and health. Further, Article 5.6 states that SPS measures should not be “more trade-restrictive than is required to achieve an appropriate level of ...protection, taking into account technical and economic feasibility”.<sup>522</sup> In the footnote to this Article, a three part interpretation of the least-trade-restrictive-means requirement has been included to further clarify that for an alternative to be available it must (i) be “reasonably available” taking into account technical and economic feasibility, (ii) be capable of achieving the member’s “appropriate level of ...protection” and, (iii) be “significantly less trade-restrictive”. All of these conditions have to be fulfilled in order to strike the measures down as being disproportionate, as confirmed in *Australia-Salmon*<sup>523</sup> and *Japan Varietals*.<sup>524</sup>

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<sup>519</sup> *US-Gambling* (para. 317).

<sup>520</sup> *Ibid.*

<sup>521</sup> *Brazil-Tyres* (para. 171).

<sup>522</sup> The two provisions should be read together (*EC-Biotech* – para. 7.1430 and *Japan Varietals*, para. 8.71).

<sup>523</sup> Para. 194.

<sup>524</sup> Para. 8.72. In the recent *Tuna/Dolphin* (DS 381) dispute, the need to apply this three-pronged test for establishing weak proportionality was confirmed. The obligation which has arisen in this case was in relation to Article 2.2 TBT. However, the panel drew an analogy to the interpretative principles established in Article 5.6 SPS (para. 7.461) and the relevant case law (for example, to *Australia-Apples* in para. 7.468) in determining the US’s obligation under Article 2.2.TBT.

## **B: Weighing and Balancing: (Strong proportionality)**

This element of proportionality involves the process of “weighing and balancing” of the different rights and interests that interplay in the WTO framework. On one hand, there is the right of Member States to take measures to protect the life and health of humans, animals or plants. On the other hand, there are the legitimate interests of other WTO Member States in being free from unnecessary trade restrictions. By introducing a weighing and balancing test, the WTO dispute settlement bodies have strengthened the proportionality standard to ensure that the protective measure in question is not excessively onerous or restrictive of trade. The ‘excessive’ standard will be judged relative to the good that the contested measure seeks to pursue.

Strong proportionality applies to food safety measures in the WTO context under GATT Article XX and under the SPS Agreement. With regard to the former, the use of the weighing and balancing approach is relevant when determining whether the measure is necessary. This approach was initially used in *Korea- Beef* and later confirmed in *EC- Asbestos* and in *Brazil-Tyres*.<sup>525</sup> In applying this approach, different factors are taken into account in the weighing and balancing formula. These include: (i) the importance of the interest being pursued, (ii) the extent to which a measure contributes to the realisation of the end pursued, and (iii) the degree of disruption to imports or exports that it implies.<sup>526</sup>

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<sup>525</sup> *Korea-Beef* (para. 164), *EC-Asbestos* (para. 172), *Brazil-Tyres* (para. 142).

<sup>526</sup> *Korea-Beef* (para. 162-4).

Each factor is determined individually and is then weighed and balanced against other factors. However, from the power-wielding Member States' perspective, the first two factors are relatively easy to satisfy. For a food safety measure it is always the case that the protection of the life or health of humans is considered as being of the utmost importance and hence one in relation to which Member States' discretion should be respected.<sup>527</sup> Furthermore, as mentioned earlier in relation to means-end rationality,<sup>528</sup> only a minimal degree of contribution by the measure to the end being pursued is required.<sup>529</sup>

What is likely to be decisive in the weighing and balancing formula is, instead, the extent to which the measure is trade-restrictive. There are, however, no hard and fast rules about this. In general it can be deduced that if the measure contributes so little to the level of health protection sought, and if the measure is very demanding, then the measure is more likely to be struck down as disproportionate.

With regard to the element of weighing and balancing under the SPS Agreement, evidence of a strong proportionality can be seen in the dispute settlement body's ruling on Article 2.2 and Article 5.7.<sup>530</sup> As discussed earlier, Article 2.2 provisions require,

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<sup>527</sup> This has been confirmed in *Brazil-Tyres* where the risk was life-threatening infectious diseases including dengue fever and malaria (para. 176) or in *EC-Asbestos* (para. 172), where the risk arose from the carcinogenic properties of the banned substance.

<sup>528</sup> Supra Section 5.1.1.1.1.

<sup>529</sup> In other words, it is sufficient if the measures make a material contribution (*Brazil-Tyres* (para. 210)).

<sup>530</sup> To some extent it can be argued that Article 5.4 also carries some elements of strong proportionality because when "determining the appropriate level of SPS protection" Member States should "take into account the objective of minimising negative trade effects". In doing so it is possible that the Member States will have to weigh and balance other members' interest with their own. However, it has been clearly laid down in *EC-Hormones* that the word "should" under Article 5.4 does not impose a positive

*inter alia*, that the SPS measure should be applied only to the extent that it is “necessary” and is commensurate with the nature of the risk presented in each case.<sup>531</sup>

In deciding whether a measure is necessary, the nature and level of the prevailing risk will be weighed against the nature and level of trade restriction that the measure creates. If the measure is very demanding and the level of trade restriction is high, despite there being a negligible or low level of risk, then on balance the measure is likely to be viewed as being disproportionate.

It has also been suggested that weighing and balancing may also be relevant in satisfying Article 5.7 of the SPS Agreement in cases where there is scant scientific evidence and where power-wielding members wish to base their measures on minority rather than mainstream scientific opinion.<sup>532</sup> In determining whether Member States can rely on a minority scientific report, an element of weighing and balancing come into play since the dispute settlement bodies will have to take various factors into account. These include the subject matter of risk (whether the risk concerns human, animal or plant), the nature of the risk (whether the risk is long-term or imminent), disruptive effects on international trade, and other alternative means. This appears to have been applied in *EC-Biotech* where the Panel had to decide whether Austria could rely on minority scientific evidence to support its safeguard measure against the importation of

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obligation on the Member States and it is sufficient for them to take the objective of minimising negative trade effects “into account” (*EC-Hormones* (para. 8.166) ). (See also discussion in Scott (2007), p. 36 and 156).

<sup>531</sup> Another requirement under Article 2.2 is that the measure shall not be maintained without scientific evidence. However, this part of requirement has been discussed as part of the means-end rationality discussed earlier as part of the Section 6.1.1.1.1.

<sup>532</sup> Scott (2007), p. 109 onwards. Article 5.7 provides that where relevant scientific evidence is insufficient, a Member may put in place a provisional measure based on the available pertinent and relevant scientific information.

T25 Maize. As the risks were to the environment and plant health, rather than human life and health, and since they were neither imminent nor life-threatening, the Panel's finding was to disallow the minority report and to state that the measures were inconsistent with SPS Article 5.7.<sup>533</sup>

Conversely, if the associated risk relates to human health and if it is clear and imminent, for example where the measure relates to the prevention of the spread of highly infectious diseases such as Avian Flu or Swine Flu, then the Member State is likely to be allowed to base its risk assessment on a minority scientific report provided that it stems from a respectable source and that the means-end-rationality and necessity requirements have been satisfied. This appears to have been the reasoning of the Appellate in *EC - Hormones II* where the risk at stake was cancer caused by hormonal substances in beef. In this case, the risk was small and the scientific evidence relied upon by the EU in its risk assessment was not from the mainstream. Nonetheless the EU was allowed to rely on a minority scientific opinion, provided that it came from a "respected and qualified source", had been obtained through "scientific and methodological rigour to be considered reputable science" and provided that the "results of the risk assessments sufficiently warranted the SPS measure at issue".<sup>534</sup>

#### **5.1.1.2 Procedural Standards Which Contain Elements of GAL**

A wide range of procedural obligations is laid down and operationalised in the WTO. They operate mainly to give effect to the transparency and participation aspects of GAL.

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<sup>533</sup> *EC-Biotech*, (para.7.3044).

<sup>534</sup> *Hormones II*, (para. 591).

These procedural obligations were first laid down in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance initially adopted during the Tokyo Round, and later incorporated into various parts of the WTO Agreement including, for example, in Articles X and XXII GATT, Article 7 read with Annex B of SPS, and in Articles 2.9-2.12 of TBT. These hard law obligations are now also supported by a soft law instrument.

#### **5.1.1.2.1 Duty to Notify and Publish: to inform other members about proposed and new trade measures**

These obligations are laid down in Article X GATT; Article 7 read with Annex B SPS and to some extent is further specified by soft law documents including the SPS Committee's Recommended Procedures, the Secretariat's Handbook on Transparency and the Decision on Implementation and Related Issues and Concerns taken in the Fourth Ministerial Conference held at Doha on November 2001.<sup>535</sup> They must be complied with by power-wielding members prior to the adoption or introduction of new trade measures. This obligation requires not only that measures be notified and published, but specifies also how this is to be achieved and the circumstances in which the comments of other Member States must be taken into account. Following the recent Panel's ruling in *US-Clove Cigarettes* dispute, the significance of this notification and publication duty has been affirmed.<sup>536</sup>

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<sup>535</sup> WT/MIN (01)/17.

<sup>536</sup> It was held that this duty constituted a direct obligation binding upon the US, the power-wielding Member, when invoking a measure to ban the sale and importation of clove cigarettes (*US-Clove cigarettes*). It should be noted that the procedural obligations in this case concern obligations under the

There is a “temporal dimension” to this notification and publication duty. The duty arises in three stages throughout the power-wielding member’s decision-making processes, each serving to give effect to different GAL criteria. Furthermore some dimensions involve “passive” obligations where it is sufficient for the power-wielding members merely to perform the required acts, whereas others involve “active” obligations where the power-wielding members are required to engage and interact with affected members.

The first temporal dimension concerns several passive obligations that must be met early in the drafting stage of the proposed measure. A designated governmental entity<sup>537</sup> of the WTO member wishing to instigate a new food safety measure must perform the following acts: (i) publish the proposed measure at an early stage to allow for comments and amendments,<sup>538</sup> (ii) notify other members through the Secretariat of the proposed regulation and the products thought to be covered by the proposal, using the appropriate form,<sup>539</sup> (iii) provide reasons why this new regulation is necessary,<sup>540</sup> and (iv) upon request provide other members with copies of the proposal.<sup>541</sup>

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TBT Agreement. However, it has been ruled elsewhere that where there are strong conceptual similarities between the SPS and TBT terms, the analogy between them can be made (*EC-Sardines*, para. 275).

<sup>537</sup> This is specified in the Secretariat’s Handbook on Transparency, June 2002, (para. 7).

<sup>538</sup> Annex B 5 (a) SPS. Publication should be made soon after the draft of the entire text of the proposed regulation has been completed. In general, a 60 day minimum period should be allowed for comments to be put forward by affected Members, (para. 8, The SPS Committee’s Recommended Procedures) unless urgent. In such cases, the Member States can temporarily omit the procedural steps concerning prompt publication, but must follow suits after the urgency subsides (Annex B 6 SPS). In *US-Clove Cigarettes* case, the Panel stated that the decision of whether there was urgency rested on the Member State instigating the measure (para. 7.507).

<sup>539</sup> Annex B 5 (b) SPS. In the recent *US-Clove Cigarettes* case, this Member States’ “passive” duty was held to be absolute regardless of whether the information was already in the public domain. In this case, the US was found to be in breach of Article 2.9.2 TBT by failing to notify other WTO members via the Secretariat about the proposed technical regulation which prohibited the sale (and also the importation) of clove cigarettes (para. 7.541).

The obligations arising at this first stage are put in place to enhance transparency. By imposing a duty to notify and publish a proposal, WTO law reduces the affected members' burden of having to constantly search for details of proposed changes. In addition, the designation of one governmental entity to be the sole point of contact for information on the proposal helps to reduce the burden further as the information will be readily available from one source. Moreover, the disclosure of the proposal along with its objectives and rationale will help affected members to be fully aware of potential changes and to understand the reasons underlying the proposal.

The second stage of this duty comes during the drafting stage, which follows early publication and notification of the proposed measure, though it occurs before the proposal is adopted as law. During this stage there is an active duty to allow other member states to comment. The power-wielding member must also discuss comments made by other members and demonstrate that they have taken these comments into account in their decision-making processes.<sup>542</sup> Ideally the period for comment should be at least 60 days.<sup>543</sup> These obligations can be viewed as giving effect to the participation criterion as they institute a type of notice and comment procedure that

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<sup>540</sup> That is the Member State must give an objective and rationale for the measures. Annex B 5(b) SPS.

<sup>541</sup> (Annex B 5 (c) SPS). This should normally be made within 5 working days when requested (para. 14 G/SPS/7/Rev. 2). In *US- Clove Cigarettes*, the Panel decided that such an obligation only arose following a request for the copies made by the affected member (para. 7.545)

<sup>542</sup> Annex B 5 (b) SPS. In doing so, they should also provide a written explanation of how the comments have been taken into account (the Secretariat's Handbook on Transparency, para. 74). In the *US-Clove Cigarettes*, the Panel suggested that in order to demonstrate that the comments of other Member States were taken into account in the decision-making process, the US could present correspondence between its key executive figures, for instance, trade minister, committee chairman, ambassador and trade representative, which clearly contained a discussion of Indonesian interests and comments (para. 7.617 and 7.635-42).

<sup>543</sup> Unless there is an urgency, para.8 G/SPS/7 Rev.2(The SPS Committee's Recommended Procedures).

allows affected members an opportunity to have an input, with the possibility that the power-wielding member may make revisions to the measure in view of the comments put forward.

Third, there is a passive duty that must be fulfilled when the proposal has been adopted and becomes legislation. Annex B (2) of the SPS Agreement establishes an obligation for a Member States to publish promptly any new regulation, and to do so in a way that enables governments and traders of other Member States to become acquainted with it before it is legally enforced.<sup>544</sup> Member States must allow a reasonable period of time to lapse between the date of publication and the date of implementation so that affected members are given sufficient time to understand the regulatory change and to make preparations to comply with the new measure.<sup>545</sup> Here, guidance was laid down in the Decision on Implementation and Related Issues and Concerns taken in the Fourth Ministerial Conference held at Doha on November 2001. This provides for a time lapse of normally at least 6 months.<sup>546</sup> In the recent *US- Clove Cigarettes* dispute, the legal validity of this Ministerial Guidance was confirmed,<sup>547</sup> and the US was found to be in breach of its procedural duties by failing to allow a reasonable interval to lapse between the date of publication and implementation of its trade measure.<sup>548</sup>

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<sup>544</sup> Article X (1) GATT 1994 and Annex B (1) SPS.

<sup>545</sup> Annex B (2) SPS, unless there is an urgency.

<sup>546</sup> Para 3.2 WT/MIN/01/17- (Forth Session, the Ministerial Conference at Doha).

<sup>547</sup> This is because the Decision was made by the “highest organ of WTO” which has exclusive authority to interpret the covered WTO Agreements, (*US-Clove Cigarettes* para. 7.572). The relevant term in the guidance uses the word “shall” which infers the clear intention of “the highest organ of WTO” on what should be regarded as the “reasonable interval” (Ibid, para. 7.575).

<sup>548</sup> In this instance, the US only allowed a 90 day period between the date of publication and implementation to lapse and it could not identify any “urgent problem” to justify this shorter interval than the six-month period specified in the Ministerial Decision (Ibid, para. 7.587 and 7.592). As a result, the US measure was found to be in breach of Article 2.12 TBT (Ibid, para. 7.595).

#### **5.1.1.2.2 The Duty to Consult: to provide information and technical support to other members**

Closely related to the notification obligation, power-wielding members are also under a duty to provide adequate information and technical support to affected members. Under Article 7 and in conjunction with Annex B 3 SPS, power-wielding members must have a single enquiry point to provide answers to any enquiries put forward by interested members. During the drafting stage, that is prior to the measure being adopted, this enquiry point acts as a central point of contact for other WTO members and serves to provide and communicate answers provided by relevant national agencies.<sup>549</sup> In addition, the same national enquiry point operates during the implementation stage after the measure has been adopted and enforced, and is required to provide information and answers to other WTO members' enquiries regarding compliance with the SPS measure. It must be able to give information regarding both the regulations and any previous and other relevant legislation, together with supplying documents relating to inspection, quarantine, risk assessment and approval procedures. Furthermore, the enquiry point must, upon request, be able to advise about the approximate duration of, and the factors to be taken into account during, the approval, inspection and control procedures.<sup>550</sup>

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<sup>549</sup> Secretariat's Handbook on Transparency (September 2002, para. 12).

<sup>550</sup> In the EU there is the "export help-desk for developing countries" unit, a specially designated "one-stop" point of contact and "information bank" for exporters from developing countries. For more information see: [http://exporthelp.europa.eu/index\\_en.html](http://exporthelp.europa.eu/index_en.html).

Fulfillment of this consultation duty also increases transparency. By introducing the requirement for a central enquiry point, the scope or meaning of a proposed or new SPS measure may be clarified on the basis of information accessible from one source.

#### **5.1.1.2.3 The Duty to Negotiate: as part of GATT, Article XX – General Exception**

The duty to negotiate emerged following a series of cases concerning the scope of the general exception in Article XX GATT,<sup>551</sup> including *Tuna/ Dolphin*, *Shrimp/Turtle*, and *US-Gambling*.<sup>552</sup> This enhances participation opportunities for other Member States. A WTO member wishing to invoke one of the general exceptions, including for the protection of “human, animal, plant life or health”, must comply with the obligations contained in chapeau of Article XX.<sup>553</sup> In so doing they must ensure that the measures taken do not give rise to arbitrary or unjustifiable discrimination between different countries where the same conditions prevail, or serve as a disguised restriction on international trade. In *Shrimp/Turtle* the U.S. measures in question were found to constitute unjustifiable discrimination between countries where the same conditions prevail<sup>554</sup> since the United States had not engaged in serious across-the-board negotiations with all its trading partners prior to the implementation of its unilateral

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<sup>551</sup> This duty to negotiate is imposed in addition to the requirement to notify and to offer consultation opportunities arising from the treaty-based measures explained above.

<sup>552</sup> This is based on consultation being the least trade-restrictive means that can be employed by power-wielding members.

<sup>553</sup> Once the measure is proven to be necessary to protect the life or health of humans, animals or plants, a subsequent question to ask is whether the measure is consistent with the chapeau of the general exception – that is whether it could be deemed to be an arbitrary and unjustifiable restriction or a disguised discrimination to trade.

<sup>554</sup> *Shrimp/Turtle*, (para. 176).

regime.<sup>555</sup> It should be noted that in *Shrimp/Turtle* the nature and extent of this duty to negotiate was only vaguely defined.

Subsequently, in *Shrimp/Turtle II* and in *US-Gambling*, the scope of the duty to negotiate was narrowed by the Appellate Body. Members have to be open to engaging in serious negotiation with all potentially affected members prior to the adoption of a measure and during its implementation stage.<sup>556</sup> There is, however, no obligation to arrive at a mutually agreed outcome through negotiations of this kind.<sup>557</sup> As the Appellate Body observed, to find otherwise would imply that any potentially affected members would have a *de facto* capacity to veto the adoption of regulatory measures by other states.<sup>558</sup>

#### **5.1.1.2.4 Consultation Duty: as parts of the formal dispute resolution procedures**

Article 4 of the Dispute Settlement Understanding (DSU) provides a mandatory procedure for parties to WTO disputes to consult with each other before the establishment of a dispute resolution panel. This duty arises after the measure comes into force and when the affected member decides to raise a dispute against a power-

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<sup>555</sup> In *Shrimp/Turtle*, (para.172 ) it was affirmed that in order to comply with the chapeau of Article XX the US had a duty to negotiate with all, and not merely some, of the affected members.

<sup>556</sup> The issue in this case concerns the general exceptions under XIV GATS which concern trade in services. However, it was laid down that decisions concerning Article XIV GATS and XX GATT are relevant in both settings since they all concern similar terms of general exceptions (*US-Gambling* (para. 291-292)).

<sup>557</sup> *Shrimp/Turtle II* (para. 123 and para. 317). The issue here also concerns the proportionality principle and whether negotiation could be considered as a less trade restrictive alternative that could be expected to be employed by the US. The AB held that this was not the case.

<sup>558</sup> *Shrimp/Turtle II* (para. 123), this would be unreasonable as it can be open to abuse by the affected countries who could refuse to conclude negotiations with the power-wielding member.

wielding member. The DSU also contains provisions regarding time-limits and procedures for negotiation. For example, the power-wielding member has to respond to the consultation request within 10 days; the consultation process should commence within 30 days<sup>559</sup> and be concluded within 60 days. Only at this point, and if agreement is not reached, should a more adversarial process, involving the establishment of a panel, be initiated.<sup>560</sup> However, the DSU does not impose a specific obligation on parties to settle their dispute in the course of this consultation procedure. If it is clear to both parties that the consultation is failing they can call for the establishment of a panel at any time before the limitation period ends.<sup>561</sup>

Although this procedural standard only operates during a short time-frame prior to the full dispute commencing, it nonetheless opens an additional channel through which communication between power-wielding and affected members can take place. During these consultations, potentially affected members have an opportunity to seek clarification of the measure in question, request explanations, or to raise their specific concerns. In this way the consultation duty can contribute towards enhancing transparency and provide opportunities for participation. The success of this procedural duty in closing external accountability gaps between WTO members will be discussed when considering this duty as an accountability forum in Section 5.1.2.1 below.

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<sup>559</sup> Article 4.3, DSU.

<sup>560</sup> Article 4.7. There is also a special provision for urgency, for example when the subject concerns perishable goods. Article 4.8 *ibid*.

<sup>561</sup> Article 4(7) *ibid*, also Article 8(5). Alternatively they can voluntarily opt for good offices, conciliation or mediation processes under Article 5 DSU. In this event there are then further opportunities to conclude the dispute through less adversarial means.

#### **5.1.1.2.5 The SPS Committee's 'Specific Trade Concerns' Consultation**

##### **Procedure**

The SPS Committee convenes several times each year and all members may participate in these meetings.<sup>562</sup> During these meetings, WTO members have an opportunity to engage in an informal consultation process.<sup>563</sup> All affected members are free to raise their concerns regarding specific SPS issues, or to share their experiences with regard to an SPS measure adopted by another state.<sup>564</sup> Each member can also register complaints in relation to a particular SPS measure that is proposed or adopted by another member, and to pose questions in relation to it. When an issue or complaint is raised by a particular member, other members may enter into the dialogue in order to comment on the issue or to support the complaint.

The SPS specific trade concerns procedure is a soft law mechanism which instantiates various GAL criteria. Since questions can be raised in the Committee this procedure is particularly effective in realising GAL's transparency and reasoned decision-making

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<sup>562</sup> There is an equivalent procedure performed by the TBT Committee which runs meetings at least twice a year. During these meetings the Member States can also raise specific concerns in relation to other members' trade measures which are thought to be inconsistent with the TBT provisions. The discussion in this chapter will only focus on the work by the SPS Committee. However, it should be noted that some concerns that have been raised in the TBT Committees are on health-related aspects of products, although they are not regarded as being sanitary or phytosanitary measures. Such claims include those relating to the EU's REACH Regulation which, to some degree, applies to food contact materials, or on health warnings which are required to be affixed to food product packaging (such as Thailand's health warning on Alcoholic Beverages). In addition, some issues relating to 'other legitimate concerns' such as environmental protection and worker welfare will fall under the scope of TBT. This will be discussed in Section 6.3.2 below.

<sup>563</sup> See further Scott in Lang and Scott (2009).

<sup>564</sup> For example, Thailand has shared its experience regarding undue delays in relation to Article 5 Risk Assessment and interim measures of other members, (G/SPS/GEN/769). This report was submitted during the meeting of 28/02-01/03/2007. Other countries that have shared their experiences on this issue include Columbia (G/SPS/W/201) and Uruguay (G/SPS/W/160).

goals. Moreover, as WTO members can present their arguments, comments or opinions on specific SPS measures that have been proposed, though not yet adopted, this procedure provides an opportunity for other WTO members to participate in the power-wielding members' decision-making process and to seek to influence the final shape of the measures. Furthermore, as comments can be made regarding existing SPS measures, this procedure has been used as an informal way of reviewing existing decisions. Finally, as affected Member States have opportunities to try to persuade power-wielding Members to change their existing or future rules, this procedure can also help to achieve a degree of proportionality in the definition of SPS measures.

#### **5.1.1.2.6 Procedural standards that shape national administrative processes**

WTO law also imposes a range of procedural standards that shape members' internal administrative processes. In respect of food safety, the main provision is found in Article 8 SPS to be read alongside Annex C of the same Agreement. This concerns the control, inspection and approval procedures put in place by a Member State. There are also equivalent provisions contained in the Code of Good Practice for the Preparation, Adoption and Application of Standards under Annex 3 TBT Agreement.<sup>565</sup>

For a long time these procedural standards had not been interpreted by the dispute settlement bodies and were therefore considered as being subsidiary to other "main"

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<sup>565</sup> For example, to give effect to the proportionality principle Point E of the Code requires power-wielders to avoid creating further unnecessary trade restrictions in their administrative measures. This will be explained later in Section 6.3.2 regarding private standards 'obligations on 'other legitimate concerns'.

SPS provisions.<sup>566</sup> However this changed following the Panel's decision in *EC-Biotech* where it was held that the EU had breached its procedural obligation under Article 8 and Annex C (1) (a) SPS as a result of the undue delays associated with its *de facto* moratorium and approval procedure relating to the importation of genetically modified organisms. Subsequent to the *EC-Biotech* ruling and especially following a more recent *US- Poultry* dispute,<sup>567</sup> it is clear that the WTO has an important oversight role in the way in which food safety regulations are implemented by Member States.

These procedural standards are applied to a potentially broad range of national measures that "serve the purpose of checking and ensuring the fulfilment of substantive SPS Agreement".<sup>568</sup> They may be imposed on power-welding members over and above the substantive standards already discussed. Thus a national SPS measure that is perfectly consistent with the substantive standards laid down by WTO law can still breach the SPS Agreement if it is inconsistent with the procedural standards contained in Annex C. In order to invoke one of the procedural standards, the measure does not have to form part of an SPS measure, nor does it need to be assessed by reference to overall control, inspection and approval procedures. It is sufficient for an affected Member State to

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<sup>566</sup> This point came up in *Japan-Apples* on certification requirements. However, the issue was decided as a stand-alone SPS measure rather than as a control, inspection and approval procedure and therefore was ruled under Article 2.2 (whether it was based on sufficient scientific evidence) instead of Article 8 and Annex C SPS.

<sup>567</sup> In *US-Poultry* dispute the US was found to have breached Annex C and hence Article 8 SPS. This was because the introduction of Article 727 of the Agricultural Appropriation Act 2009 caused an undue delay in the equivalence approval procedure of China's poultry exports, normally performed by the Food Safety and Inspection Service (FSIS).

<sup>568</sup> *Ibid*, para. 7.428.

demonstrate one instance of wrongdoing in the control, inspection or approval processes.<sup>569</sup>

The procedural standards contained in Annex C of the SPS Agreement focus on preventing a power-wielding member creating unnecessary trade burdens in the application of their SPS-consistent measures, and as such these procedural standards enhance proportionality. The main procedural requirement is the avoidance of undue delays in national controls, inspections and approval processes.<sup>570</sup> This can be seen as an attempt to avoid the imposition of unnecessary burdens on affected Member States and may be considered to operate in support of the least trade-restrictive means-test which constitutes a weak proportionality requirement.

Furthermore, other GAL criteria are also given expression in Annex C. Apart from the provisions to control undue delay, other procedural obligations include the requirement that power-wielding members should ensure transparency in respect of their internal procedures, including by notification to affected Members of the expected time

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<sup>569</sup> *EC-Biotech*, para. 7.1504. Similarly, an administrative measure can be inconsistent with procedural standards and the SPS measure itself can also be inconsistent with other substantive standards laid down in the SPS Agreements. In *US-Poultry*, Section 727 of the US Agriculture Appropriation Act 2009 was found to be in breach of both procedural and substantive standards. In this case, Section 727 provided that US Congress funding would not be available to the USDA and its organs (including FSIS) for establishing or implementing a rule allowing poultry imports from China. This resulted in Congress prohibiting the FSIS to perform the normal approval processes to consider whether the Chinese poultry inspection system could comply with the US standard. The US approval procedures themselves were found to be inconsistent with Annex C (and hence also Article 8 SPS) and Section 727 was found to be in breach of several SPS substantive provisions, including Article 5.1 and 5.2 (as it was not based on risk assessment), Article 2.2 (as it was maintained without sufficient scientific evidence), Article 5.5 and Article 2.3 (as it established arbitrary or unjustifiable discrimination).

<sup>570</sup> Article 8 and Annex C (1) (a) SPS. Further, this element of avoiding unnecessary restrictions can also be seen under Annex C(1)(c) which indicates that the information requested for control, inspection and approval should only be limited to what is necessary, and is seen under Annex C(1) (e) which states that any requirements for control, inspection and approval of individual specimens of products must be limited to what is reasonable and necessary.

required.<sup>571</sup> Relevant documents must also be made available upon request. Furthermore, since Annex C (1) (b) also requires power-wielding members to give reasons for any unexpected delay, this provision contributes to the achievement of reasoned decision-making in accordance with GAL.

### **5.1.2 WTO Provisions of Fora, External Accountability Mechanisms and Sanctions**

The WTO framework not only gives effect to GAL criteria by laying down substantive and procedural standards, but also establishes various “fora” in which a power-wielding Member State’s compliance with these standards may be raised.<sup>572</sup> These fora are sometimes closely related to the standards outlined above, and they serve to re-enforce external accountability relationships in the WTO. These various fora also help to secure transparency and to create opportunities for participation. In addition they provide opportunities for affected WTO members to seek a review or appeal of other members’ food safety measures. They allow for food safety measures to be challenged, whether formally or informally, including through what is in effect a form of judicial review. Furthermore, different sanctions also operate in the various fora and can come into play where power-wielders fail to adhere to the substantive or procedural standards laid down. The summary WTO framework for enhancing GAL is set out in Table 8.

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<sup>571</sup> Annex C (1) (b).

<sup>572</sup> It should be noted that the existence of mechanisms to incorporate GAL criteria into the WTO regulatory framework has also been recognised by other prominent academics including Lang and Scott (2009) and Stewarts (2009).

The nature and operation of the various accountability-enhancing fora associated with the WTO will be set out and analysed below. This analysis will focus on three issues: the type of forum, the nature of the accountability mechanism in place, and the nature of the sanctioning system in operation. As will be shown, the term “fora” as used here includes those fora that are established as part of the WTO dispute settlement system as well as “administrative” fora such as WTO Committees. Where appropriate, reference is also made to the circumstances in which the forum in question has already been used to reduce external accountability gaps between WTO Member States in general, and more specifically in the area of food safety between the EU as the regulating state, and Thailand as the affected state.

<b>Forum</b>	<b>Operating Framework</b>	<b>Type</b>	<b>Accountability Mechanism</b>	<b>Sanction</b>
Bilateral / multilateral consultation under Article 4 DSU	WTO	Procedural duty: dispute settlement (prior to panel procedures)	Legal	Legal (threat of a full panel dispute to follow with risk of losing the case)
Panels' and Appellate Bodies' disputes	WTO	Dispute settlement	Legal	Legal (quasi-judicial review)
SPS Committee's complaint procedures	WTO	Administrative	Peer / Legal	Peer (being subject to constant peer pressure, disapproval  Legal (threat of legal proceedings through DSU))

**Table 8: Summary of WTO Framework of Fora,  
Mechanisms and Sanctions that Enhance the GAL**

### **5.1.2.1 Bilateral/Multilateral Consultations prior to Formal Dispute Settlement**

#### **(Article 4 DSU)**

Bilateral or multilateral consultation directed towards securing “a positive solution to a dispute” is the preferred first option in WTO dispute resolution.<sup>573</sup> Consultations of this kind enhance transparency and create opportunities for participation as noted above.<sup>574</sup> Additionally on their own, they create an accountability forum.<sup>575</sup>

This forum is subject to a number of limitations, including a “minimal” duty to enter into consultation without there being any requirement regarding the quality or outcome of the negotiations,<sup>576</sup> and a short-term operational time-frame.<sup>577</sup> However it has been successful in providing opportunities for affected states to raise concerns about food safety regulation adopted elsewhere. Affected members can raise concerns during the consultation stage leading to the establishment of a panel for settlement of any dispute in cases where they believe that the power-wielding member has departed from WTO standards. In addition, throughout these consultation processes affected WTO Members can seek to obtain clarification of the food safety measure in question.

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<sup>573</sup> See supra Section 6.1.12.2. Article 3(7), DSU.

<sup>574</sup> Supra Section 5.1.1.2.4.

<sup>575</sup> That is, they are an element of procedural standards and are themselves accountability fora.

<sup>576</sup> In *US-Gambling*, the Appellate Body narrowed the ground regarding parties’ duty to negotiate (also the interpretation regarding the alternative measures in the chapeau of the general exceptions). This was discussed earlier in Section 5.1.1.1.2 (A) in relation to weak proportionality.

<sup>577</sup> This procedure is to commence within 30 days after the members’ notification and to conclude within 60 days unless the parties opt to use good offices, conciliation or mediation process under Article 5 DSU, in which case there may be room for further consultation between the parties.

The accountability mechanism involved in this forum is legal in nature due to the connection between these consultations and the formal dispute resolution system, and also because the results of the consultations will be binding upon the parties. The sanction that may be applied to the power-wielding member in this forum is the commencement of a full dispute resolution process which can be lengthy, and in which the power-wielder runs the risk of losing the dispute.

Various outcomes can result from engaging in consultation in this forum, including clarification of the trade measure in question or a change in a Member States' rules and SPS determinations. Approximately one-third of all WTO disputes can be said to have been settled in this forum without resort to full dispute settlement. Since 1995, out of 418 WTO disputes, 141 have been settled under this process and an additional 20 disputes have been resolved through consultation commencing after the establishment of a WTO panel.<sup>578</sup>

To a certain degree, some caution should be exercised when considering the extent to which this forum helps to increase the recognition of GAL criteria and to enhance external accountability between the WTO Member States. On the one hand, a threat of full legal proceedings may encourage the power-wielding member to change its measures so as to make them more consistent with WTO standards. On the other hand, the possibility of lengthy and expensive legal proceedings may deter less powerful

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<sup>578</sup> As of 1 January 2011.

developing country affected members from continuing with legal proceedings and encourage them to settle the dispute quickly through this forum.<sup>579</sup>

The success rate of Thailand in settling disputes in this forum has been low. Hitherto Thailand, as an affected member, has only successfully settled five disputes in this forum.<sup>580</sup> None of the settled disputes concerned an EU SPS measure. Thailand has, nevertheless, settled two disputes concerning non-SPS measures with the EU,<sup>581</sup> and it has successfully used this forum to settle an SPS dispute with Egypt regarding a ban on Thai canned tuna, a case in which the tuna was alleged to contain genetically modified soybean oil.<sup>582</sup> In that dispute several potential breaches of GATT and SPS provisions were raised by Thailand.<sup>583</sup> However, following bilateral consultations prior to panel proceedings, Egypt decided to take into account conditions in Thailand, especially the capacity of the relevant Thai entities to test and issue certificates attesting that the product was GMO-free.<sup>584</sup> This, together with Thailand's affirmation that genetically

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<sup>579</sup> See for example Abbott (2007), Shaffer (2008), Evans and Shaffer (2010).

<sup>580</sup> As a respondent, Thailand has not settled a dispute through these forums. (Thailand has been directly subject to only three WTO disputes, all concerning custom duties (i.e. *Thailand - Customs Valuation of Certain Products from the European Communities*, *Thailand- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and Beams from Poland* and *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*).

<sup>581</sup> *EC — Duties on Imports of Rice (DS17)* which led to new negotiations between the EU and Thailand on milled rice duties, which were concluded in 2005. Two cases were also settled with the EU when Thailand acted as a third-party; *Customs Classification of Frozen Boneless Chicken Cuts and Generalized System of Preferences in EC — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*.

<sup>582</sup> *Egypt — Import Prohibition on Canned Tuna with Soybean Oil*.

<sup>583</sup> These relate to under Article I, Article XI, and Article XIII of the GATT; Article 2, Article 3, Article 5, and Annex B, Paragraph 2 and Paragraph 5, of the SPS Agreement.

<sup>584</sup> A DNA laboratory under the DOA was established in 1999 prior to the ban in 2000 and was fully operational at the time of the consultation. According to Thailand it had been using an advanced technique called the Real Time Polymerase Chain Reaction, a technique used by the EU to detect a minute GMO-DNA presence in foodstuffs. The DOA was therefore able to provide certification to canned-Tuna manufacturers attesting whether their products were, or were not, GMO free. The laboratory was also accessible to the manufacturers at a nominal fee. (See (in Thai): [http://www.foodmarketexchange.com/datacenter/industry/article\\_th/8\\_other/detail\\_th\\_43\\_12\\_4.htm](http://www.foodmarketexchange.com/datacenter/industry/article_th/8_other/detail_th_43_12_4.htm)) also

modified soybeans had not been used, eventually led Egypt to withdraw the ban to Thailand's satisfaction. Here the consultation process led to the closure of an external accountability gap in that Thailand was able to call Egypt to account by reference to WTO standards without the need for the case to proceed to full Panel proceedings.<sup>585</sup> This forum which is based on consultation prior to adversarial dispute settlement is still available to Thailand in its relationship with the EU, and indeed could be used to more actively by Thailand in the future settlement of disputes with the EU.<sup>586</sup>

#### 5.1.2.2 Formal Dispute Settlement in Panels and the Appellate Body

WTO panels and the Appellate Body hear disputes between Member States<sup>587</sup> and offer the possibility of quasi-judicial review of power-wielding Member States' actions.<sup>588</sup> Since Panel and Appellate Body reports must be complied with by the parties involved

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The Report from Thai Office of Industrial Economics, the Department of Industry regarding the evaluation of trade measures affecting Thai manufacturing exports (publication date 3/4/2003 can be found at [www.library.dip.go.th/multim/edoc/08752.doc](http://www.library.dip.go.th/multim/edoc/08752.doc) in Thai).

<sup>585</sup> For example this process resulted in Egypt adhering to WTO standards which contain elements of GAL, including means-end rationality (as laid down under Article 2.2, SPS, Agreement and (weak and strong) proportionality (as laid down under Article 5 as well as publication and notification procedural standards (Annex B 2 and 5)).

<sup>586</sup> This is especially so since the EU has already used this forum to settle disputes with other affected members concerning its SPS measures, for example, *European Communities — Measures Affecting Imports of Wood of Conifers from Canada* and *Restrictions on Certain Import Duties on Rice*.

<sup>587</sup> Individuals, business undertakings and NGOs cannot directly proceed in this setting. However they can put pressure on their governments to initiate disputes or become involved indirectly through the submission of amicus briefs. There is, however, controversy about whether private entities should be allowed to participate to a greater or lesser extent. See further, Shaffer (2001).

<sup>588</sup> The WTO dispute settlement body proceedings amounts to what has been referred to as a "quasi-judicial review". It possesses some judicial elements as it encompasses procedures found in traditional judicial dispute settlement including appeal to Appellate Body. However, it also possesses some arbitral elements whereby parties have some control over the procedures, for example with their ability to agree on the appointment of the panels. More importantly, it cannot be a "full" judicial review in a traditional sense because the Panel and Appellate Body cannot strike the regulating states' measures down if the measures are found to be in breach WTO obligations. They can call the regulating state to bring the measures into line with their decisions (unless agreed to the contrary by all the members in the DSU). If Members do not comply, then retaliatory measures in the form of 'suspension of concessions' can be taken by the affected members. There have also been active debates, beyond the scope of this thesis, about the nature of WTO legal proceedings. See further, for example; Bartel (2004), Croley and Jackson (1996))

in the dispute, and can only be rejected by a consensus of all WTO members, this forum constitutes a strong legal accountability mechanism which in practice is binding upon power-wielding members.<sup>589</sup> This creates a forum for the review of a Member State measure. In the context of the WTO, this is perhaps the most widely known forum for holding power-wielding members to account.

Food safety measures adopted by a power-wielding WTO member can be challenged by affected members on the basis that they are alleged to be in breach of WTO law, including those parts which give effect to GAL. Where a breach is found well-established WTO legal mechanisms operate to oblige power-wielding members to bring their measures into conformity within a reasonable period of time.<sup>590</sup> If they fail to do so then legal sanctions can be enforced. Compensation may be payable,<sup>591</sup> or the offending state may be obliged to suffer a suspension of trade concessions by the successfully complaining party or parties.<sup>592</sup> Whilst in principle suspension of concessions should occur in the sector that formed the subject matter of the dispute, or if not under the same agreement, in exceptional cases cross-retaliation in a different sector or under a different agreement may be allowed.<sup>593</sup>

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<sup>589</sup> Article 16(4) and 17(14) DSU. This helps to “transform the dispute settlement process from diplomatic facilitation to one of reasoned adjudication of a high quality”. (See Stewart and Badin (2009), p. 11).

<sup>590</sup> In other words, they have to be complied with promptly or within a reasonable period of time (Article 21 DSU). This is the preferred compliance method unless, of course, the decision is rejected by the consensus of WTO members.

<sup>591</sup> Article 22 (2) DSU.

<sup>592</sup> Ibid. The respondent will have to agree with the successful complainant on payment of satisfactory compensation, usually in the form of concessionary grants on specific products of interest. Alternatively if the amount of compensation cannot be agreed, the successful affected members would be allowed to retaliate, by temporarily suspending the concessions or other WTO obligations granted to the losing power-wielders.

<sup>593</sup> Article 22 (3) DSU, Ibid. See further, *EC-Bananas III (Ecuador)*, para. 173 where the complaining party was awarded the right to suspend goods and services as well as the TRIPs commitments. In

To date Thailand has participated in seventy dispute settlement cases, both as claimant and third party,<sup>594</sup> and respondent.<sup>595</sup> However, only seven of these cases concerned SPS measures. Of these seven disputes, two were initiated by Thailand as a complainant,<sup>596</sup> and five were joined by Thailand as a third party.<sup>597</sup> However, there has been only one case involving Thailand and an EU SPS measure; namely the *EC-Biotech* case in which Thailand supported the claim as a third party. In this case, the claims put forward were successful in that the EU *de facto* moratorium on the approval of biotech products, as well as the EU's product specific approval procedures were found to breach Article 8 and Annex C (1) (a) SPS. This was on the basis that they resulted in undue delays. Also the Member States' safeguard measures were found not to be based on risk assessment as required under Article 5.1 and consequently to also be in breach of Article 2.2.

It should be noted that WTO dispute settlement system has not been used frequently by Thailand or indeed by the majority of developing countries in relation to other countries' SPS measures. A relatively low number of developing countries have used

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addition, in *US-Gambling*, cross-retaliation was allowed concerning suspension of the commitments in TRIPS although the case was in relation to GATS.

<sup>594</sup> Fifty-seven of which were as a third party and thirteen as a complainant state. Of these there were twelve cases against the EU, four of which were raised by Thailand as the complainant (in *EC — Duties on Imports of Rice (DS17)*, *Generalised System of Preferences (DS242)*, *Export Subsidies for Sugar (DS283)* and *Customs Clarification of Frozen Boneless Chicken Cuts (DS286)*) and the remaining eight as a third party against the EU.

<sup>595</sup> So far there have been only three disputes raised against Thailand; two in relation to its customs and one on its anti-dumping duties. (*Thailand - Customs Valuation of Certain Products from the European Communities*, *Thailand- Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland and Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*).

<sup>596</sup> *Shrimp/Turtle, Egypt – Canned Tuna*.

<sup>597</sup> In the three Biotech cases, Australia – Fruit and Vegetables where Philippines was the claimant, and Australia Quarantine Regime where EU was the complainant.

these formal procedures compared with their use by developed countries.<sup>598</sup> This has given rise to the criticism that there is an imbalance of power between developed and developing countries in the WTO. Although the record of developing countries' participation has improved in recent years,<sup>599</sup> and there have been some cases where small developing countries have won disputes against large developed countries,<sup>600</sup> it is undeniable that these formal procedures can impose onerous burdens upon developing countries. In order to engage in formal dispute settlement a developing country has, at minimum, to allocate significant human and financial resources which may be stretched through the course of lengthy legal proceedings.<sup>601</sup> In addition they may also need to obtain expert legal or specialist advice when they deal with complex disputes with large developed countries.<sup>602</sup> Not all developing countries can afford this. Even those developing countries with a good dispute record, such as Brazil, are unlikely to be able to apply this adversarial strategy to all of their food industries on a regular basis.

In practice, however, there are “less-known” accountability fora<sup>603</sup> that have been more frequently exploited by developing countries, including by Thailand. Despite being less formal, these can provide opportunities for Thailand to participate more actively.

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<sup>598</sup> In 2009 developed countries started 60% of the disputes. The US and EU combined have initiated 41% of all disputes (Evans and Shaffer (2010), p. 2).

<sup>599</sup> Seven out of the top eleven most frequent complainants are developing countries (including Brazil and Thailand).

<sup>600</sup> For example, Antigua in *US-Gambling*.

<sup>601</sup> This can be as long as two years. In fact it can be argued that a number of disputes that have been considered under Article 4 DSU may have been settled a result of lengthy financial and human resource constraints. For further information see, for example, Evans and Shaffer (2010) and Shaffer et al (2008).

<sup>602</sup> The strategy of using specialist international law firms has been successfully deployed by Brazil (See Shaffer et. al, (2008), p. 458.) For disputes initiated by Brazil the private sector also greatly contributes financial support to cover legal costs.

<sup>603</sup> This fits with the term described by Lang and Scott as “the Hidden world of WTO governance” (See Scott in Lang and Scott (2009)).

Participation in these fora has often served to encourage power-wielding Member States to comply with their WTO obligations.

#### **5.1.2.3 The SPS Committee as a Forum for Achieving External Accountability**

The SPS Committee's complaint procedure is the first "less-known" forum to have been used substantially by Thailand as an affected Member State to instantiate the concept of external accountability. As a result, although the work of the SPS Committee has often gone un-noticed, it has been observed by Lang and Scott that the Committee's complaint procedure has played a crucial role in enhancing accountability in the WTO framework.<sup>604</sup> This is because, firstly it gives effect to GAL criteria including transparency, participation and reasoned decisions as discussed in Section 5.1.1.2.5 above. Secondly it serves as an accountability forum in its own right to enforce adherence to WTO law. Here the Committee's specific trade complaint procedure serves as a forum to elaborate upon the meaning of open-ended WTO standards, and also serves to shape the substance of GAL criteria contained in these WTO standards.<sup>605</sup>

Activities in the Committee rely upon a variety of different accountability mechanisms. The first involves peer accountability (amongst Member States) as the driving force to make power-wielders comply with WTO-GAL standards. Both the member raising a specific trade concern and those supporting it are in effect passing judgment upon their

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<sup>604</sup> See Lang and Scott (2009) p. 607 onwards.

<sup>605</sup> It should be noted that the SPS Committee operates as a closed-club, where the main players are the WTO members themselves. Limited participation is allowed for non-members including the Codex Alimentarius, the OIE and IPPC which enjoy permanent observer status and other international organisations which enjoy *ad hoc* observer status. As will be explained below, these non-members can also perform supporting roles to the affected member states when they raise GAL- type claims under this forum. However, the Committee's procedure does not allow participation by NGOs.

peers. Specific trade concerns are raised before the entire Committee and are recorded in the minutes of the meetings. After a concern is raised, the Member State initiating the measure has an opportunity to respond to the concerns raised. In doing so they are called to give reasons in support of their measure. Where the concern is unresolved, the Committee returns on a regular basis to consider the issues in subsequent meetings. In such cases the power-wielding Member States can once again be criticised by the affected member who launched the complaint and by other supporting members.

These activities, which involve repeated condemnation of Member States for their failure to comply with their obligations in the WTO, often create pressure for them to take additional steps to ensure that their measures are brought into line with WTO standards.<sup>606</sup>

In the Committee, peer pressure can influence and eventually shape a power-wielding member state's regulatory practices. It can induce them to change those of their trade measures that depart from WTO standards. The sanction that operates here is the collective disapproval or condemnation by peers.

Moreover, although less apparent, legal accountability also operates in the SPS Committee. Even though legal sanctions cannot be directly applied to a WTO member

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<sup>606</sup> The mechanism of peer accountability operating in this context is somewhat similar to the "constructivism" theory of international relations. This theory implies that states are social entities interacting with one another in international communities including those belonging to international organisations to which states are party. As states interact in this way shared norms or values emerge. These are considered as appropriate practices to which all states in the EU should adhere. They would, in turn, shape the states' behaviour and expand their own interests to encompass the interests of other states and the internal norms of the international environment to which they belong. (For further information on constructivist theory see, for example, Cohen (2009) and Alkoby (2008)).

that has breached its WTO obligations, the possibility nonetheless remains that Committee proceedings will serve to highlight the existence of a breach of WTO law and hence to provide grounds for a formal challenge to an SPS measure in the WTO system for the settlement of disputes. There have already been numerous occasions where Member States, having failed to resolve specific trade concerns in the SPS Committee, have proceeded to formal dispute settlement. In such a situation, the information that affected members gather during their interactions with power-wielding members in the Committee can be useful in the subsequent formal legal proceedings.

The significance of this was intimated by the Appellate Body in the *EC-Sardines* case.<sup>607</sup> The relevant point in this case concerned Peru's argument that it could not be expected to discharge its initial burden of proof because it could not identify what the EU's objectives were in promulgating the contested measure. However, the Appellate Body disagreed and stated that interactions between members operating in a variety of fora as part of their transparency obligations,<sup>608</sup> could serve to make available the kind of detailed information that Peru, as an affected member, needed to discharge its initial burden of proof.<sup>609</sup>

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<sup>607</sup> *EC-Sardines* para. 277.

<sup>608</sup> Including those contained in Article 2.5 TBT, (to provide enquiry points (Article 10.1 TBT) (para. 279), and to consult as part of the dispute settlement process leading to the Appellate Body stage (under Article 4 DSU) (para. 280). (Ibid).

<sup>609</sup> In *EC-Sardines* the Appellate Body referred to the transparency provisions under TBT and Article 4 DSU but did not specifically refer to the discussions in the SPS Committee forum. However, by analogy it can also refer to information obtained under other WTO forums, including the SPS Committee's procedures.

Similar evidence of this can be seen in the Thailand - Egypt dispute on canned tuna as discussed earlier in Section 5.1.2.1.<sup>610</sup> The issue was first highlighted in SPS Committee before it progressed to dispute settlement proceedings,<sup>611</sup> and finally ended at the bilateral consultation stage before a panel had been established.<sup>612</sup> The information regarding Egypt's measures and its justification for the ban obtained by Thailand during the Committee's discussions would have been useful to Thailand, as a complaining member, in discharging its initial burden of proof. More importantly, some information discovered in the Committee forum - that the Egyptian measure was only remotely linked to the justification provided - might also have helped Thailand to finally persuade Egypt to lift the ban during the consultation process without having to resort to the establishment of a full panel. One of the more convincing arguments put forward by Thailand to counter the Egyptian claim was that it was not possible for Egypt to detect any GMO presence in the oil as had previously been claimed during the SPS Committee's forum since the final stages of processing canned tuna would, in any event, have destroyed the relevant genetic DNA material essential for a GMO check.<sup>613</sup>

The success of the Committee has led it to be referred to by various academics as a "source",<sup>614</sup> "engine" and "agent" of GAL.<sup>615</sup> When compared with the dispute

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<sup>610</sup> *Egypt — Import Prohibition on Canned Tuna with Soybean Oil*.

<sup>611</sup> It was first highlighted in G/SPS/R/19, para. 103-104, 01/06/2000 and has been discussed subsequently in Committee forums.

<sup>612</sup> This dispute was later been settled under the consultation process prior to the establishment of the Panel. See prior discussion relating to this case under the Article 4 DSU forum, see supra, Section 5.1.2.1. Other SPS disputes have also commenced in this proceeding and have subsequently moved on to the Panel's establishment. For example, the GSP issue relating to the *EC-Banana* dispute arose in G/SPS/R/43, para. 40-41 and the concerns regarding the EU approval of Biotech, which was later sent to the *EC-Biotech* Disputes, came up in G/SPS/R/25, para. 102-105.

<sup>613</sup> G/SPS/GEN/203 para. 116.

<sup>614</sup> This Committee's procedures have therefore become successful GAL procedural mechanisms (Stewart and Badin (2009) p. 15 referring to Cassese (2005), p. 109).

settlement system, this more informal forum constituted by the Committee has been used more often and has been more actively resorted to by developing countries than has the DSU.<sup>616</sup> Moreover the interplay of the two principal accountability mechanisms under this forum, peer and legal, creates strong *ex ante* and *ex post* incentives for power-wielding members to ensure that their SPS measures are in accordance with WTO law, including those parts that give effect to GAL. The constant peer pressure imposed by Member States that lodge or support complaints, and to certain extent, the prospect of a legal action to follow, can be said to have encouraged power-wielding members to re-visit their proposed or actual SPS measures and to try to adjust these in the light of the concerns raised. There are consequently good reasons to think that the Committee is an important agent of external accountability, and that it serves to give effect to GAL. Put simply, approximately one-third of all specific trade concerns raised in the SPS Committee have been fully or partially resolved to the satisfaction of the Member States raising the complaints.<sup>617</sup>

Both the EU and Thailand have been active participants in this forum. The EU has been particularly active in both raising and defending specific trade concerns. To date the EU has raised sixty-three concerns, twenty-two of which have been either partially or fully resolved.<sup>618</sup> The EU itself has been the subject to fifty-nine complaints, thirteen of

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<sup>615</sup> Lang and Scott (2009), p.607.

<sup>616</sup> At the end of 2009, out of 290 concerns developing countries have raised 146. The peak of the number of issues raised was 42 in 2002 following the outbreaks of Mad Cow Disease. Source: WTO news on the overall specific concerns raised through the SPS Committee. (17 & 18 March 2010). Also available at: WTO news: [http://www.wto.org/english/news\\_e/news10\\_e/sps\\_17mar10\\_e.htm](http://www.wto.org/english/news_e/news10_e/sps_17mar10_e.htm).

<sup>617</sup> As of January 2011, out of 290 issues, 79 have been resolved in full and 18 have been partially resolved.

<sup>618</sup> However, none of these were raised in relation to Thai SPS measures.

which have been resolved either by revocation or through amendments to the measures in question. Thailand has also been an active and frequent player in this forum in contrast to its activity level in the dispute settlement system. To date Thailand has been involved in fourteen complaints; nine specific trade concerns have been initiated by Thailand as the complainant, and an additional five complaints raised by other members were supported by Thailand.

Of these fourteen complaints, three have been made regarding EU SPS measures, two of which were initiated by Thailand on issues regarding the MRL of aflatoxins in foodstuffs and import restrictions on soy sauce containing MPCD substances.<sup>619</sup> The third complaint related to an EU restriction on gelatine imports, a case in which Thailand played the role of a supporting member.<sup>620</sup> Two of the three complaints relating to EU SPS measures have been resolved. The concerns relating to aflatoxins have fully been resolved to the satisfaction of all members and the concern relating to gelatine imports has also been partially resolved. The remaining concern relating to soy sauce is on-going and is likely to be revisited by Thailand in the Committee's forthcoming meetings.

It should be noted that the success of the SPS Committee in enhancing the external accountability of WTO members is not only measured by the number of complaints that have been resolved, but also by the ability of affected members to make power-wielding

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<sup>619</sup> The complaint on aflatoxins led to an extended period for resolution; it was resolved in 2004. (see for example, G/SPS/R/11, pa 15-19, G/SPS/R/12, para. 11-14, G/SPS/R/33 para. 48-49). With regard to the soy sauce issues, discussions are still on-going. This issue was raised most recently in 2004 (See G/SPS/R/22, para. 11-14, G/SPS/R/25, para.106, G/SPS/R/26, para. 134-136, and G/SPS/R/27/para. 132).

<sup>620</sup> See for example G/SPS/R/10, para. 16 and G/SPS/R/25, para. 34. The issue was raised in 1999 and was resolved in 2001.

members adhere to the WTO standards that give effect to GAL. Even in cases where the complaints have not been resolved, and where they are still subject to on-going debate, power-wielding members initiating food safety measures can still be called to account and are liable to be judged by their peers, who will express their disapproval and present them with opposing arguments. It is clear from the language in the minutes and reports of the regular Committee meetings that affected and supporting members have exerted pressure upon power-wielding members to demonstrate that WTO-GAL standards have been adhered to.

This can be seen from strong statements made by Thailand in this forum in relation to numerous SPS measures which are thought to depart from WTO standards, including Mexico's bans on Thai milled rice,<sup>621</sup> Australia's restrictions on prawns from the Association of South East Asian Nations (ASEAN)<sup>622</sup> and EU import restrictions on soy sauce.<sup>623</sup> Consequently, until the complaints are resolved, the national administrations of the power-wielding members are subject to on-going criticism and are judged by their peers in this forum against those WTO procedural and substantive standards that contain elements of GAL. Power-wielding members cannot normally remain passive in the face of such criticism and are obliged, by dint of the procedures of the Committee and perhaps the prospect of formal dispute settlement proceedings, to at least offer reasoned justification for SPS measures in response. Where there is no reasoned justification that could be construed as being consistent with WTO obligations

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<sup>621</sup> G/SPS/R/19 para. 4 where Thailand has posed 6 questions to the Mexican authority.

<sup>622</sup> This is a regional economy organisation, to which Thailand is an active member. G/SPS/R/29 para. 10-11 (G/SPS/R/21 para. 85).

<sup>623</sup> G/SPS/R/21, para. 36-40.

it is often easier for power-wielding members to amend the offending measure so as to achieve greater alignment with WTO standards or, alternatively, for them to withdraw the offending measure entirely.

It is also important to note that developing countries that raise specific trade concerns can receive assistance from the Secretariat, other international bodies that have observer status, or from other WTO members that support them in their complaints.<sup>624</sup> Thailand has benefitted by obtaining this kind of support in the Committee. As an example, it received supporting arguments from the EU and OIE representatives when complaining about Australian measures on cooked chicken meat that specified strict times and temperatures needed to cook the product.<sup>625</sup> It was argued by Thailand that these measures were impractical for manufacturers as they involved cooking at a high temperature and for a long time, thereby adversely affecting the texture and taste of chicken meat. The EU agreed with this and made particularly strong arguments to support Thailand, demanding justification from Australia as to why these measures were necessary. The EU posed important questions to the Australian representative and urged a precise and prompt response from the Australian Authority.<sup>626</sup> In the same dispute the OIE also expressed its willingness to assist in an arbitration process upon

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<sup>624</sup> See the discussion in Scott (2007), p. 53 where WHO representatives used their observer status to present supporting arguments in favour of Tanzania's complaints against the EU's food import bans that were based on the possible contamination of Cholera in four African countries. In this concern WHO representative expressed their supporting opinion that the presence of Cholera was not unique to the banned countries but could also be found in at least 50 other exporting countries. Thus the EU's outright import ban on the grounds of the possibility of Cholera contamination alone would be unjustified (G/SPS/R/10, para. 57, G/SPS/204/Rev.5/Add. 3, para. 55).

<sup>625</sup> G/SPS/R/12, para. 42-45. For example the meat has to be cooked at 70°C for 95 minutes, 76°C for 30 minutes or 80°C for 15 minutes (G/SPS/GEN/90).

<sup>626</sup> The EU demanded an explanations as to why de-boned cooked chicken was allowed whereas boned chicken was not, and whether the measures were properly applied and monitored in Australia, *et cetera*. (G/SPS/GEN/96).

request from the SPS Committee or from the parties involved in the complaint.<sup>627</sup> Here the strong supporting arguments made by EU and the OIE's willingness to assist Thailand to settle the issue with Australia helped to enhance the validity of Thailand's claim. In this instance Australia was subject to disapproval by at least two members before the Committee, and was required to present more detailed justification in support its measures and to provide scientific evidence drawn from its risk assessment in subsequent meetings.<sup>628</sup>

Thailand has been particularly successful in this forum when it has urged a number of power-wielding members to adhere to their external accountability obligations through compliance with WTO GAL standards. With respect to the WTO's transparency and notification obligations, Thailand has regularly been able to require many power-wielding members, including some developed countries, to provide further explanation, elaboration and justification in relation to their food safety measures. This can be seen above in relation to Australia's temperature requirement for cooked poultry meat, Australia's ban on fresh prawns,<sup>629</sup> Mexico's ban on Thai milled rice<sup>630</sup> and also in relation to the EU's ban on soy sauce containing the substance MCPD.<sup>631</sup>

Furthermore, through this forum Thai governmental entities have been able to participate indirectly in the decision-making processes of power-wielders, or in cases where the measures have already been adopted, to call for review of existing measures.

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<sup>627</sup> G/SPS/R/12, para. 42-45.

<sup>628</sup> G/SPS/GEN/204 para. 8-13.

<sup>629</sup> G/SPS/GEN/204/Rev 11.

<sup>630</sup> G/SPS/GEN/216, para. 6.

<sup>631</sup> G/SPS/GEN/204/Rev.11.

This has been possible as a result of the deliberations that ensued both from the raising of specific trade concerns and as a result of being able to communicate and exchange information with the power-wielding Member State. Although power-wielding members are not obliged to amend their measures to reflect Thailand's concerns they will, at minimum, be under pressure to consider the objections presented by affected and supporting members since they can be called upon in Committee meetings to provide a response.

Moreover, Thailand has enjoyed particularly good success in this forum when raising proportionality-based concerns. These have resulted in power-wielding members reviewing, or in some cases amending, their measures to Thailand's satisfaction with the result that Thailand did not need to initiate formal dispute settlement proceedings. As an example, Thailand was successful in convincing the South Korean authorities to revoke the zero listeria tolerance for uncooked poultry products.<sup>632</sup> This was achieved on the basis that there was no causal connection between the measures, the risk assessment and the results sought by Korea since the Thai products were clearly labelled that they should be cooked before consumption.<sup>633</sup> This also occurred in respect of the Mexican ban on Thai milled rice where Thailand was able to argue on similar grounds. The Mexican authorities finally lifted the ban since the presence of Khapra beetle found in Thai milled rice was also found in both domestic rice and in rice imported from other countries that had not been subject to such restrictions.<sup>634</sup>

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<sup>632</sup> Here it required that all imported poultry meat (including meat intended for further processing) was free of *Listeria monocytogenes*. (G/SPS/GEN/204/, p. 13).

<sup>633</sup> Hence the cooking process would kill the microbial substances.

<sup>634</sup> G/SPS/R/19, para. 4 also G/SPS/GEN/105, para. 4.

Even in situations where the complaint proceedings are long, tedious and yet to be resolved, Thailand has been able to call for respect of proportionality as it can urge power-wielding members to minimise the negative trade effects faced by Thai entities, either by giving additional technical assistance or by offering alternative methods for compliance. This is seen following Thailand's complaint regarding an Australian ban on fresh durian.<sup>635</sup> Here, Thailand argued that compulsory sampling techniques used by Australia were unreasonably complicated and could not easily be conducted on Thai durian,<sup>636</sup> and that, as such, they did not represent the least-restrictive means of achieving their objective. Although the issue is unresolved and the ban has not been lifted, it is hoped that Thailand's arguments might in the future persuade the Australian authorities to allow the use of alternative sampling processes that are more cost-effective for Thai growers.

In addition, the offer of alternative measures by an importing country can also be seen following Thailand's complaints on the EU's ban on soy sauce. Thailand claimed that the ban was excessively trade-restrictive and not proportionate on the basis that the level of MCPD - the banned substance - was set too low to be detectable by commercially viable means. Although the issue is still on-going, the EU authorities have at least agreed to review the existing MCPD level.<sup>637</sup>

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<sup>635</sup> G/SPS/GEN/204/Rev.3, p.15.

<sup>636</sup> This is due to seasonal limitations. Fresh durian is only available for a short period annually and waiting for lengthy sampling results can affect the quality and ripeness of fruit that need to be imported promptly. A further reasoning made by Thailand was that the measure was based on an out of date risk assessment conducted in 1999 and that had remained unchanged as of 2003.

<sup>637</sup> G/SPS/GEN/204/Rev.11 (para. 222).

Furthermore, similar results can be seen following the complaints made in relation to Australia's ban on ASEAN's fresh prawns on the ground that the possibility existed of some exotic aquatic diseases being transferred to native species.<sup>638</sup> Despite the issue being unresolved, in order to mitigate unnecessary trade burdens Australia has offered a regular review of its risk assessments and stated that it would welcome the submission of evidence from Thailand and other ASEAN countries. Moreover, following discussions in the Committee, Australia also offered technical assistance and agreed to consider the possibility of establishing a disease-free zone in Thailand with the prospect that exportation of prawns from this area could be resumed.<sup>639</sup>

To sum up, through this forum Thailand has been able to make power-wielding member states adhere to the WTO standards that give effect to GAL. This forum has brought about a significant degree of transparency for Thailand. It has been able to obtain clarification and justification of actual and proposed trade measures. In many cases, although the measures have not been lifted, discussion in this forum has either opened the door to further participation or to a review of the measures concerned. Power-wielding members often commence bilateral discussions with a view to exploring the possibility of introducing a less trade-restrictive measure or to providing technical assistance. Moreover, there have also been opportunities for Thailand, as a member launching a complaint, to receive significant support from other WTO members and international organisations. Similarly, there have been situations in which Thailand, as

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<sup>638</sup> The diseases in this case concerned White Spot Syndrome and Yellow Head Virus. Australia argued that disease transfer was possible because illegal fresh prawns were used as fishing bait.

<sup>639</sup> G/SPS/GEN/204/Rev.11 (para. 35).

an advanced developing country, was able to play a leading role in putting forward complaints on behalf of other members, as is seen in the complaints made regarding Australia's ban on fresh prawns,<sup>640</sup> and the EU's ban on soy sauce. In both of these cases Thailand raised and presented its own complaints and did so also on behalf of other ASEAN countries.

## **5.2 The Application of GAL as Accountability Standards in the Competent Authority “Network” Forum**

The concept of the Competent Authority (CA) model was introduced earlier in Part III of Chapter 3 which also set out its advantages to Thailand and the EU. For Thailand, as described earlier, the particular advantage of the CA model is its presumed equivalency status and its ability to react quickly and effectively to actual or threatened food safety outbreaks. Equally, the CA model allows the EU to assure the quality of imported goods and to overcome difficulties in “keeping imports safe”.<sup>641</sup>

Here I will examine another advantage of CA model, namely its ability to mitigate external accountability gaps. It is argued in this section that GAL criteria have also come to be applied as standards of conduct that underpin the relationship between the EU and Thailand as a result of the CA model. In this thesis, the CA model is the second “less known” forum whereby Thai entities can call EU regulators to account with regard to their actions or decisions that generate cross-border effects for Thai entities. The

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<sup>640</sup> G/SPS/R/30, para. 52-53.

<sup>641</sup> This is the term described by Bamberger and Guzman amongst others and has been discussed previously in Part III Chapter 3.

GAL standards applied in this setting are similar to those featured in WTO law. However the recognition of these standards in the CA context is not well defined in written form, either under treaties or in case law. On the contrary, they operate mostly through “network” co-operation constituted by the CA model. The findings presented in this section are novel and drawn heavily upon my empirical research.

As explained previously in Chapter 4, two types of network have emerged from the application of EU food safety regulation in Thailand.<sup>642</sup> The first is a network of governmental entities in which agencies, high and low-ranking governmental officials and national regulators interact with one another. On the EU side there is DG-SANCO, the FVO and the competent authorities of the EU Member States. For Thailand there are the staff and sub-entities of the Ministry of Agriculture and Co-operatives, the Ministry of Commerce, the Ministry of Public Health, the Ministry of Industry, the Ministry of Foreign Affairs and their trade representatives in Brussels. In addition, there is the second type of network that is hybrid in nature, involving participation by Thai governmental and private entities.

Within each network a variety of activities take place, including information exchange, discussions about the basis of food safety legislation and the presentation of justifications for food safety measures in place. These activities occur both as part of day-to-day activities and in the course of specific missions. Depending on the circumstances, the activities can be formal or informal. These network activities play a crucial role in providing another forum to re-enforce respect for the criteria established

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<sup>642</sup> See *supra*, Section 4.1.1.2.

by GAL. As stated earlier, although GAL criteria are not laid down as written standards in the framework of the CA model, respect for them can be observed from the practices and interactions that take place amongst Thai and EU participants in these networks.

In this communications network, peer and legal accountability mechanisms operate in the same way as in the SPS Committee. However, the term “peer” in this context refers to those EU and Thai entities whose staff communicate and co-operate with each another in the networks concerned. Staff and entities are able to pass on their comments and suggestions to their peers. If the comments are not taken-up without valid explanation the other party may be condemned by their counterparts in subsequent communications.

As to legal accountability, since Thailand and the EU are both WTO members there always remains the possibility that Thailand can invoke its concern in one of the WTO fora.<sup>643</sup> Although no legal disputes between EU and Thailand have arisen from unsuccessful negotiations in the network forum, the legal significance of network activities should not be overlooked. Already, in the recent *US-Clove Cigarettes* case, network communications between US and Indonesian were relied upon by the US, together with US official internal correspondence to demonstrate that it had discharged its obligation under Article 12.3 TBT to take Indonesia’s financial, development and trade needs into account. In this dispute, the US relied upon a series of letters between

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<sup>643</sup> Either through the SPS Committee’s forum or the dispute settlement procedures.

key official figures on both sides.<sup>644</sup> By analogy, there is no reason why correspondence between EU and Thai government officials in the CA model cannot carry similar legal significance if future disputes between the EU and Thailand were to arise. Activities within this framework are summarised in Table 9 below.

<b>Forum</b>	<b>Operating Framework</b>	<b>Type</b>	<b>Accountability Mechanism</b>	<b>Sanction</b>
Governmental networks in the CA model	CA Model	Administrative / networks of state entities	Peer / Legal	<p>Peer (Loss of trust / subject to constant peer pressure or disapproval)</p> <p>Legal (Threat of legal proceedings through DSU or complaints through the SPS Committee)</p>

**Table 9: Summary of “CA-Model” Framework of Fora,  
Mechanisms and Sanctions that Enhance the GAL**

<sup>644</sup> *US-Clove Cigarettes* (para. 7.635). These include letters between the Indonesian Trade Minister and the US Trade representative and between the Ambassador of Indonesia and the US Senate Leader.

The existence of governmental network activity can be seen from the results of interviews with a number of Thai governmental staff as well as from concrete evidence in FVO reports. It emerged in these interviews that Thai CAs have been able to obtain considerable clarification in respect of compliance with EU food safety law as a result of their communication with relevant EU entities. Evidence of network interactions of this kind is seen in the “official” advice given by the FVO that is contained in its reports with regard to Thailand. FVO advice is addressed to Thai CAs. As well as containing warnings, the FVO issues clear guidelines and specific recommendations on the exact procedures that the Thai CA must adopt in order to demonstrate the equivalence of Thai export control systems to those of the EU. These documents are often issued following an FVO inspection or following the triggering of RASFF in relation to Thai products. Recent examples include the FVO Report on Pesticide Control and Prevention of Microbial Contaminant in Thailand,<sup>645</sup> where clear recommendations were made on the precise steps that needed to be taken to achieve conformity. These steps included a requirement that the DOA must provide information about the EU MRL to its approved farmers, and that the sampling process must be in accordance with Codex Guidelines.<sup>646</sup> In another recent FVO report on Poultry Inspection,<sup>647</sup> clear recommendations were given to the DLD that it was required to change its sampling process in respect of poultry carcasses in order to comply with relevant EU food safety law.<sup>648</sup>

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<sup>645</sup> During 3-11 March 2010 (DG-SANCO 2010-8575).

<sup>646</sup> Including the Codex’s CAC/GL 27/ 1997, which is referred to in Regulation EC/2073/2005.

<sup>647</sup> DG-SANCO 2009-8061.

<sup>648</sup> For example, that the “neck skin” method rather than the “rinsing method” has to be used (p. 7, source: *ibid*).

Following such communications from EU staff, Thai CAs have an opportunity to submit their comments and are able to communicate to the EU in order to clarify any misunderstandings that may have arisen in the course of FVO inspections or during the triggering of RASFF. They can also submit action plans for the implementation of recommendations issued by the EU.

In addition to these “official” communications from the FVO and DG-SANCO, similar types of interaction are also conducted through informal correspondence between EU and Thai governmental staff. This channel of network communication is invoked more often and on a greater scale than that involving official communication. Such unofficial communication takes place during FVO visits, with Thai CAs submitting observations to explain any relevant local circumstances. Exchanges also occur in the intervals between such visits on a regular basis.

These networks contribute towards achieving respect for GAL. This is because, first of all, they offer another useful communication channel between EU and Thai entities thereby enhancing transparency. This can be seen from the extent to which the EU offers clarification to Thai CA during and after FVO inspections. The clarification of existing laws promotes transparency by helping Thai CAs to understand the essence and objectives of EU food safety regulations and to set out appropriate compliance measures. Following clarifications of this kind, Thai CAs are able to pass the information on to producers and exporters in the relevant industries during their regular or special meetings. During the interviews, this type of information provided by the EU was stated to be “very important” and “always to be taken seriously” by the Thai CA

and, where possible, to be “followed word-by-word”.<sup>649</sup> Additional information received in this way is especially important since, from the CAs’ perspective, many EU regulations are “unclear” and the exact compliance procedures “can initially be difficult to comprehend”.<sup>650</sup>

Clarifying information is also exchanged in informal networks where Thai government officials, both domestically and in Brussels, often use their contacts with EU governmental staff to request detailed information or suggestions regarding compliance with specific EU food safety laws.<sup>651</sup> During the interviews some specific examples of this type of daily network activity were given, including a direct request by the staff of Thai National Bureau of Agricultural Commodity and Food Standards (ACFS) to DG-SANCO staff for further clarification on Regulation EC/396/2005. In their correspondence the Thai staff specifically requested a full list of pesticide substances that would be subject to MRL control. The list was duly given to them by the EU staff via e-mail and so helped to increase transparency by assisting Thai CAs to establish full compliance with the EU Regulation.<sup>652</sup>

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<sup>649</sup> In cases where full compliance with the recommendations has not been achieved, work towards achieving full compliance is started by the CAs. Apart from evidence from the interviews, this was also demonstrated by the evaluations of the implementation of previous recommendations by the FVO in its “follow-on” missions. For example, in the recent mission on the control of pesticide and prevention of contaminants (DG-SANCO 2010-8575) the FVO evaluated that out of the eleven recommendations previously made, six have been fully addressed and, for the other five, the work has been started. (p. 13-14).

<sup>650</sup> Rakpong J., personal interview with Saowaluck Suppakamolseene, Policy and Plan Analyst of the ACFS, Bangkok, 6/8/2008 and telephone interviews with Dr. Pennapha Mattayomphong, the Director of Bureau of Livestock Standards Certification, Bangkok 09/2008.

<sup>651</sup> Correspondence can be made via telephone call or through email.

<sup>652</sup> Rakpong J., personal interview with Saowaluck Suppakamolseene and other Policy and Plan Analysts of the ACFS, Bangkok, 6/8/2008.

Another example is a verbal request for clarification regarding the EU's requirement for laboratory independence. In this case, FVO staff suggested to DLD staff that the DLD should seek third-party certification to demonstrate compliance. Once the DLD had pursued this course of action, the Thai CA's compliance with the independence requirement was no longer questioned by the FVO.

Other informal network activities that have contributed towards enhanced transparency include the EU's occasional provision of technical assistance and technological transfers to assist Thailand in its compliance with EU food safety law. An example of this was seen in relation to the detection and laboratory testing processes for the banned substance Nitrofurantoin. The MRL of Nitrofurantoin was set in an EU regulation because of its potentially carcinogenic character.<sup>653</sup> Subsequent to the "Nitrofurantoin crisis" of 1999-2001, a period during which the EU imposed several bans on Thai shrimp and poultry products due to the high presence of Nitrofurantoin in a large number of consignments,<sup>654</sup> the EU provided considerable technical training to Thai CA staff both at home and in EU Member States.<sup>655</sup> It was observed by a number of high-ranking staff that the Thai CA has "probably learned a lot" about how to comply with the EU Nitrofurantoin regulations, and that the training given by the EU has provided strong foundations for appropriate technical procedures that are still used in the Department's laboratory

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<sup>653</sup> Regulation EEC/2377/90 (the main MRL regulation), Annex IV.

<sup>654</sup> Commission Decision 2002/251/EC of 27 March 2002 which imposed protective measures upon fishery and aquaculture products and poultry meat from Thailand.

<sup>655</sup> One training session was given to the Thai staff who attended the interview at Bristol, UK (Rakpong J., personal interview with Chardchai Thiratinanarath, the Director of Bureau of Quality Control of Livestock Products, DLD, Bangkok, Thailand, 20/8/2008).

today.<sup>656</sup> Similar transparency enhancement can also be seen in the context of the EU's training given during 1999-2000 on animal welfare regulations. It has been suggested that knowledge from this training played a significant part in the DLD's improved understanding of the animal welfare procedures required at export abattoirs and has contributed to full compliance by Thai poultry exports in respect of EU animal welfare rules.<sup>657</sup>

Transparency is further enhanced through the CA model as information that Thai governmental entities receive from the EU is passed down the supply-chain to producers and exporters via the activities of "hybrid" networks between Thai governmental and private entities. These network activities emerge as Thai CAs communicate with producers and exporters to the EU markets. During their regular exporter meetings,<sup>658</sup> or special meetings should urgent food safety concerns arise, the Thai CAs have been able to "pass on" information they have obtained during information exchange, training or in correspondence with EU staff. Likewise, during these meetings Thai CAs are able to obtain information about compliance problems encountered by producers and exporters and can pass this information on to EU staff.

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<sup>656</sup> Following the required measures being put in place by the Thai CA, the ban on Thai products was revoked (in Commission Decisions 2003/477/EC of 24 June 2003 and 2003/895/EC of 19 December 2003) and the requested sampling tests at the border were gradually reduced to a normal levels. Rakpong J., personal interview with Dr. Jirawan Yamparyoon, Deputy Director of the Ministry of Fisheries, Bangkok, Thailand 9/9/2008.

<sup>657</sup> This has in fact led to a national law on animal welfare, issued in 1999. Rakpong J., telephone interview with Dr. Suphanan Boonyakarn, Staff at the Bureau of Livestock Standards Certification, Bangkok, Thailand 09/2008.

<sup>658</sup> Regular meetings between the CAs and the main exporters occur every 4-6 weeks.

Participation, in addition to transparency, has been enhanced through these network activities. Thai governmental entity staff have, on numerous occasions, been able to provide explanations in relation to emerging food safety incidents concerning Thai exports. These explanations have played a major part in influencing EU decisions to lift or limit import bans. As a result Thai entities can be considered to have participated in EU decision-making.

Given the ability of Thai entities to participate in this way and to persuade the EU to lift or limit the scope of its import bans, these network activities can also be thought to have enhanced respect for proportionality. There have been many cases where communication between Thai and EU entities has limited the scope of EU import bans.

Examples can be taken from the two case studies, such as the Shigella and Avian Flu incidents discussed previously in Chapter 3.<sup>659</sup> In these two incidents, once the source and the cause of each problem were found, the relevant Thai CA provided explanations to the EU's DG-SANCO. These explanations were made through the submission of a correction of facts and comments following the release of the FVO draft reports, as well as through informal communication between the CA and DG-SANCO staff. It has been noted from the interviews that the ability of Thai governmental entities to explain the source and the cause of these two food safety incidents, together with their willingness to apply additional measures,<sup>660</sup> led the EU to limit the scope of the bans.<sup>661</sup>

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<sup>659</sup> See *supra* Section 3.4.2.2.

<sup>660</sup> Additional preventive measures include; for example, making sure that all the fresh products exported are marked to indicate that the products should be cooked before used since the contaminant can be destroyed at high temperature.

More recent incidents can be seen in which indirect participation by Thai governmental entities led the EU to desist from applying import bans on Thai poultry products in 2008-2009, and on vegetable produce in early 2011. In the first incident two RASFFs were triggered when laboratory tests revealed poor hygienic conditions in respect of two samples taken from Thai cooked and frozen poultry meat.<sup>662</sup> However, after investigations were conducted by the Thai CA using its own traceability system to identify the source and the likely cause of the problem, it discovered and communicated to the EU that there were problems with the samples sent but the products themselves were safe.<sup>663</sup> After this claim was verified, a ban was not in fact introduced by the EU.

The second incident concerns the potential ban on Thai vegetables discussed earlier in Chapter 3.<sup>664</sup> Following the triggering of a RASFF, the DOA decided to impose an export ban on the majority of Thai vegetables destined for the EU market until the source of the problem was found.<sup>665</sup> Subsequently the DOA found that the source of the problem was from a particular group of herb and spice producers, and a long-term DOA ban on plant certification continued to be imposed upon this source as a result.<sup>666</sup>

In this incident the EU initially communicated to the Thai CA that the introduction of a

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<sup>661</sup> In the Shigella incident the ban continued to be imposed on a particular establishment until such time as their products were tested and verified to be “all-clear”. In the Avian Influenza incident the ban was applied only to the particular type of product that continued to be at risk (i.e. uncooked poultry products).

<sup>662</sup> Notifications dated 18/02/2008 and 2/1/2009. Explanation in Thai and EU correspondence is also recorded in the FVO Mission Report DG-SANCO 2009-8061 p. 7.

<sup>663</sup> In the first sample there were possible leakages from the foam box containing the samples and in the latter case there was a 2 day delay in collection of the sample. Source: *ibid*

<sup>664</sup> See *supra*, Section 3.4.2.2.

<sup>665</sup> Over 20 types of vegetables were subject to this ban ([www.krobkruakao.com](http://www.krobkruakao.com), the new reports from the Ministry of Agriculture dated 6/1/2011. See also : <http://thairecent.com/Business/2011/813630/>).

<sup>666</sup> Even though vegetable exports from other exporters could resume, the DOA continued to carry out 100 per cent checks on all vegetable consignments to the EU. As of April 2011, these extra checks were still on-going.

ban on Thai vegetables was possible. However, when Thailand proffered explanations and kept the EU fully informed via regular reports, the EU decided not to issue any actual ban.<sup>667</sup>

It should be noted that to a large extent, this type of network activity has also resulted from informal correspondence whereby Thai CA entities can communicate directly with EU staff and give first-hand explanations regarding their food safety concerns. This has often occurred during FVO inspections and was mentioned on several occasions during the interviews. In the poultry case study, for example, it was asserted that Thai CA staff could occasionally provide first-hand, on-the-spot explanations when EU FVO inspectors expressed their concerns. A specific example given during an interview with a number of high-ranking Thai officials was that during one FVO visit; a comment was made by a chief FVO inspector regarding the hygiene conditions in a processing factory as a result of high condensation occurring in the factory.<sup>668</sup> However, a satisfactory on-the-spot explanation was given to the FVO inspector by the Thai CA staff who were responsible for factory quality control. It was explained that that the condensation naturally occurred due to the heat from the sterilised hanger technique<sup>669</sup> and since the products had already been cooked and the premises sealed-off and sterilised, there was

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<sup>667</sup> The reports made by Thai DOA to the related to the cause and source of the incident. The information regarding this incident can also be found at [www.matichon.co.th](http://www.matichon.co.th) (in Thai) (reports dated 6/1/2010 and 28/1/2010).

<sup>668</sup> The EU inspector observed that the water vapour produced in the factory could reach the factory's ceiling and drip back onto the meat.

<sup>669</sup> The weather was particularly hot on the day of inspection. In the hot and humid ambient environment in Thailand, the elevated temperature of 97 degrees Celsius used to cook chicken would naturally produce this vapour.

no hygiene risk to the food.<sup>670</sup> Had no such network of communication existed an adverse report could have been submitted, or in the worst case Thai poultry exports might have been subjected to a total export ban.

### **5.3 CONCLUSION: MAINTENANCE OF GAL CRITERIA IN THE WTO AND CA MODEL FRAMEWORKS**

This chapter has sought to demonstrate that the adverse effects of cross-border EU governmental food safety regulations have been substantially mitigated by the existence of external accountability enhancing fora that operate under the framework of WTO law and as a result of the CA model. In each of the various fora, GAL criteria have been given expression, both by dint of the functioning of these fora, and by virtue of their capacity to enhance compliance with GAL standards. The various fora under discussion here operate largely on the basis of peer accountability, with government officials on both sides evaluating and probing claims made by their counterparts. Contrary to what might have been expected, the degree to which Thailand, as an affected WTO member, has been able to use the “lesser-known” fora of the SPS Committee and the governmental network under the CA model, is quite striking. One of the significant, but somewhat unremarked, contributions of these “lesser-known” fora is their ability to help Thailand to mitigate the cross-border effects of other countries’ food safety laws.

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<sup>670</sup> Rakpong J., personal interview with Mr. Wanchai Polprasertkul and other staff at Bureau of Livestock Standards and Certification, DLD, Bangkok, Thailand 9/2008.

The above discussion demonstrates that the frameworks put in place by the WTO and by the CA model can lend significant support to the quest for external accountability. It is also clear that these frameworks play a crucial role in mitigating the external accountability gaps between the EU and Thailand that would otherwise exist.<sup>671</sup> Nevertheless, it is also important that the benefits secured by Thai government entities and representatives in these frameworks are passed on to those entities most affected in Thailand – that is to the producers and exporters in the relevant food industries.

It is clear that when Thai staff succeed in persuading the EU to change its SPS measures it is Thai producers and exporters who will ultimately benefit. This is because they will be subjected to less-restrictive measures and be able to supply more produce to the EU market. However, the pathways for transferring the benefits obtained from transparency, participation and reasoned decisions are not always clear. It has been suggested that these benefits will be transferred through “public-private” network activities involving both the Thai CA and producers and exporters in the relevant food industries. These activities include exporters’ meetings, training courses and workshops that take place at regular intervals. However, it has also emerged that small producers in rural areas have been unable to participate fully in these network activities, which are generally held in Bangkok- the capital city, due to financial and time constraints. Although to some extent the information received by government entities can be communicated to small producers by local CA staff, or in the case of Thai poultry through on-site DLD staff, there can be a long delay in such information reaching small

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<sup>671</sup> However, some of the various fora, mechanisms and sanctions have been used more frequently and successfully than others.

producers in rural areas. Consequently it is also crucial for Thai governmental entities to ensure that the benefits obtained as a result of participation in accountability enhancing fora are shared with all producers and exporters. In addition, this could also be a factor that has contributed to the “internal” short-term compliance problem which was raised earlier in Chapter 3.<sup>672</sup> It is clear that Thailand also needs to strengthen and expand its own hybrid network activities further to ensure that the particular needs of small producers are addressed. This can be done, for example, by introducing local export helpdesks for small producers, or by conducting exporters’ meetings and training events in some of the more remote rural areas.

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<sup>672</sup> Supra, Section 3.5.

## **CHAPTER 6**

### **PRIVATE STANDARDS AND EXTERNAL ACCOUNTABILITY: A CRITIQUE AND RECOMMENDATIONS FOR A WAY FORWARD**

The previous chapter examined how the external accountability of the EU in relation to Thailand has been enhanced through WTO and the competent authority (CA) model. The focus of this chapter is to investigate whether similar accountability frameworks are in place in relation to bodies adopting private standards.

The significance of private standards as an element of EU food safety law for Thailand cannot be overestimated. As seen from the two case studies in Chapter 3, recent years have seen a crucial change in the regulatory landscape for Thai food exports to the EU.<sup>673</sup> In addition to EU food safety law being enforced through the CA model, there is increasing regulation by private bodies as supermarkets in the EU have started to request that Thai producers and exporters comply with, and be certified in accordance with, various private standards. Private regulation is initiated by EU supermarkets, especially those in Western Europe, who require their suppliers to be certified as part of their contractual obligations. As illustrated by the baby corn and poultry case studies, as well as by interviews with exporters to the EU market in other food sectors,<sup>674</sup> most EU

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<sup>673</sup> See *infra*, Section 3.2.4 and 3.3.4.

<sup>674</sup> Further interviews were conducted on the impact of private standards on Thai producers and exporters in other food sectors. I joined the field trip organised by the Post Harvest Institution of Chiangmai University on capacity building by pomelo producers in Wiang Gaen district, Chiang Rai province, who are supplying their produce to EU supermarkets for the first time. They had to undergo changes in their

importers require compliance with various private standards. Compliance with private standards is required so often that it may reasonably be asserted that private standards now effectively constitute another layer of transnational food safety regulation for Thai exports to the EU. Official EU regulation and private standards apply cumulatively and not as alternatives. While EU food safety regulation and private standards often cover similar issues, evidence from the case studies shows that private standards are frequently stricter and more detailed in the requirements they impose. So pronounced is this shift in favour of private standards that further detailed analysis of stakeholders' experience is required.

The structure of this chapter is as follows. Firstly it will identify the external effects of private standard regulation in Thailand, including the benefits of private standards for Thai stakeholders and the burdens that they impose. It will argue that these standards impose substantial additional financial costs and are often rigid, impractical and ill-suited to local conditions. The concerns expressed by Thai stakeholders during the case study interviews will also be noted, and in particular where they raise procedural issues.

The chapter will then turn to consider the external accountability dimension of private standards, examining critically the operational practices of standard-setting bodies from the perspective of Global Administrative Law (GAL). Whilst it is acknowledged that

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farm practices in order to comply with the private standards (Rakpong J., personal and group interviews carried out during the field trip between 30/6/2008 and 2/7/2008). In a separate interview with a small exporter who supplies a variety of tropical fruit to various supermarkets in the Netherlands, it became clear that suppliers have to comply with GlobalGAP as well as the supermarkets' own standards (Rakpong J., telephone interview with the owner of Excelfruit, 8/9/2008). Similarly, Thai shrimp producers have to comply with the specific standards demanded by EU supermarkets (Rakpong J., personal interview with Mr. Suniti Ajarawong at his shrimp farm in Sam Roi Yod district, Prachuab Khiri Khan province and the leader of the fisheries co-operative at the same location (30-31/7/2008).

there is wide variation in the behaviour of different standard-setting bodies, it is argued that many, if not all, of these bodies fall short in ensuring that they are externally accountable to Thai stakeholders when assessed by the substantive and procedural criteria endorsed by GAL.

This chapter will conclude by looking forwards rather than backwards,<sup>675</sup> and by examining possible avenues for reform. It will begin by assessing the possibilities inherent in the WTO framework. It will argue that despite the inherent shortcomings in this framework, it seems clear that the EU currently fails to fulfil its WTO imposed obligation to supervise the activities of the bodies that set private standards. A recent innovation in the UK approach to the control of private standard-setting will be assessed and discussed in the context of considering what steps the EU could take to mitigate the external accountability gaps which exist in relation to private standards and to comply with its WTO obligations.

## **6.1 EXTERNAL EFFECTS OF PRIVATE STANDARDS IN THAILAND**

### **6.1.1 Benefits of Private Standards**

In both case studies, Thai exporters accepted that compliance with private standards brings them some benefits. Firstly, the good agricultural practices (GAP) demanded by

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<sup>675</sup> In both case studies, regulation by private standards runs alongside governmental regulation under the CA model. It has been over a decade since private standards were first introduced by EU supermarkets as contractual obligations for Thai exporters. It would be futile to attempt to revoke the system at this stage by simply boycotting private standards altogether.

private standards can create positive spill-over effects and better working conditions for agricultural workers. GAP limits the use of chemical and improves worker safety by requiring better equipment and training in the field of health and safety. Improvements of this kind would not have been made so quickly in Thailand without the requirements imposed by private standards.<sup>676</sup>

Secondly, private standards can serve to clarify the substance of EU food safety regulations, especially those not subject to detailed explication by DG-SANCO or the Thai CAs. Whilst it will often be the case that private standards go beyond what is required by EU law, compliance with them serves to reassure Thai producers and exporters that they are acting in accordance with EU law. In certain cases the detailed rules laid out in private standards can serve as guidelines to clarify existing EU food safety regulations, which themselves are sometimes vaguely written and contain “unfamiliar terminologies”. This was evident from both case studies in relation to the introduction of HACCP,<sup>677</sup> where certain Thai exporters were initially unsure about the nature of the ‘critical control points’ to be put in place in their establishments. Exporters were able to follow amendments to the HACCP regime put in place by private standard-setting bodies such as GlobalGAP, BRC and IFS, and to use these as a benchmark to establish the critical control points required. The precision of private standards is considered valuable by those poultry exporters involved in large-scale

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<sup>676</sup> This was very much the situation in the case of organic baby corn producers in Mae Ta District, where Soil Association and GlobalGAP standards were considered as tools to improve their health and safety. Another example can be given in relation to small farmers of pomelo in Chiang Rai, as presented in the study on Integrated Supply Chain Management of Exotic Fruits from the ASEAN Region conducted by the Post-harvest Institution, Department of Agriculture, Chiangmai University, in which I have had during July 2008 an opportunity to interview the farmers subscribing to the project in Wiang-gan District, Chiangrai Province, Thailand.

<sup>677</sup> Regulation EC/852/2004.

integrated production. Due to the size of their operations, producers need to plan months in advance for updating infrastructure and training additional staff. By the time that governmental guidelines or recommendations are released there is often insufficient time for their implementation. However, the detailed and precise instructions laid out in private standards allow the poultry exporters to begin updating their operations without having to wait for the release of official guidance.

Another benefit perceived by poultry exporters is that private standards serve as a quality guarantee and, together with the governmental measure put in place by the CA,<sup>678</sup> are believed to have helped Thai poultry exporters regain the trust of EU importers following the emergence of food safety incidents, particularly the highly-publicised Avian Influenza crisis. Thai producers were among the first in a developing country significantly affected by Avian Influenza to regain their status as leading suppliers to the EU market.<sup>679</sup>

### **6.1.2 How the Financial Burdens on Producers and Exporters are Aggravated by the Proliferation of Standards**

Despite their benefits, private standards have imposed additional production costs on Thai producers and exporters. Producers and exporters have realised that these costs must be absorbed in order to export to the EU. However, the proliferation of private standards has led to a considerable and unnecessary increase in production costs. EU

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<sup>678</sup> See *supra*, Chapter 3 Part II.

<sup>679</sup> It should be noted that these have to be done through product diversification from raw to processed meat.

supermarkets normally require Thai producers and exporters to comply with not just one but with multiple standards.<sup>680</sup> As Thai producers and exporters may supply many EU supermarkets, and with each supermarket imposing its own specific requirements, compliance with the resulting plethora of standards has increased costs significantly.

The impact of this increased financial burden is most acute for small and medium-sized producers/exporters. For each private standard with which producers and exporters need to comply, extra funding for certification and renewal costs has to be set aside. Furthermore, there are also the costs of compliance involved in upgrading or replacing facilities, training workers, improving working conditions and so on.<sup>681</sup> Beyond this, there are also inspection and verification fees to be paid to each certifying body and to their inspectors, as well as the costs of each inspector's visit which includes their fee, accommodation and transportation.

These costs are especially onerous for small and medium-sized producers, not only because they can be high, but also because they are not simply "one-off" but are ongoing. This flows from the fact that certification is granted for a limited time, usually for a period of one year, at which point renewal will have to be paid for and sought. Furthermore, additional costs are incurred since it is also common for standards to be updated every few years due to the continuous development of "improved" versions for each private standard. For example, at the time of the interviews with baby corn

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<sup>680</sup> Arguably, this is not the least trade-restrictive means, since there is no recognition of measures which have already been approved and certified by other certification schemes.

<sup>681</sup> A specific example has been given in the case of baby corn where producers have to regularly apply for the certification with the updated version of GlobalGAP. Some of them are not able to update fast enough to be certified with the most recent version.

producers and exporters the GlobalGAP standard progressed to Version 3 despite certain exporters having just achieved Version 2.<sup>682</sup> Each time a standard is revised facilities need to be updated and staff need to be trained so as to “catch-up” with the requirements of the new version.

Moreover, there is sometimes a duplication in the requirements imposed by different standards, yet compliance needs to be certified individually. For example, HACCP and traceability are basic requirements that are incorporated into most private standards. Nonetheless, full compliance with HACCP, traceability and other basic food safety criteria still has to be tested and approved for each and every certification requested, regardless of whether compliance has already been certified by the Thai CA<sup>683</sup> or under another private certification scheme. It has been highlighted that this duplication exacerbates the financial burden associated with private standards because it leads to an unnecessary increase in production costs without a concomitant increase in producers’ income.<sup>684</sup>

To mitigate this duplication there have been some initiatives by standard-setting bodies to benchmark different standards schemes. However, this benchmarking has been

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<sup>682</sup> GlobalGAP and BRC, which are essential respectively for fresh and chilled baby corn and poultry products supplied to EU supermarkets, are now at Versions 4 and 5 respectively. GlobalGAP used to be updated every 3 years. This frequency of updates led to producer complaints that it does not allow sufficient time for producers to adjust to a new system and then prepare for additional upgrades. Following GlobalGAP Version 4, the standard-setting body has pledged that from now on upgraded versions will be only introduced every 4 years.

<sup>683</sup> Likewise, Thai governmental bodies do not accept that private standards, even where they incorporate more exacting requirements than their own, can be recognised as satisfying the more lenient requirements under governmental schemes.

<sup>684</sup> Usually the inspector’s fee is set as a daily rate.

conducted only for a limited number of universal standards<sup>685</sup> and is not yet widespread. Past initiatives to benchmark in this way will be discussed in Section 6.2.1 below.

Furthermore, the proliferation in different supermarkets' private standards causes business uncertainty since producers and exporters find it difficult to anticipate the additional costs associated with compliance. Given this uncertainty, and the high compliance and certification costs, it is often necessary for small producers to seek financial assistance. While this kind of assistance is sometimes available in Thailand, it is by no means commonplace. In most cases small producers need to obtain assistance from the Thai government or from non-profit entities. For example, the group of small baby corn producers interviewed in the case study was able to achieve compliance with SA and GlobalGAP standards as a result of assistance from the Thai cooperative organisation called "Green-Net Foundation".<sup>686</sup> The foundation aims to promote sustainable and organic agriculture and has assisted producers in obtaining low-interest loans through the local "Bank for Agriculture and Agricultural Cooperatives" (BAAC). Others producers were required to obtain loans from commercial banks and were consequently discouraged from supplying the EU market due to on-going and high production costs as a result of private standards.

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<sup>685</sup> For example, where the benchmarking between BRC, IFS, SQF and Dutch HACCP has been recognised, and also GlobalGAP option 3.

<sup>686</sup> Or "Saiyai Pandin" in Thai. Rakpong, J. personal interviews with the head of Mae Ta co-operative administrative staff, Mae-on sub district, and telephone interview with GreenNet foundation, 5/01/2010. For further information see : <http://www.greennet.or.th/e0000.htm>.

For small and medium-sized baby corn exporters<sup>687</sup> the financial burden brought about by having to comply with a number of private standards are relatively more significant and represent a large proportion of their production costs. For example, in relation the baby corn producers in Mae-Ta, Chiangmai, it was stated that certification fees for two private standards that they needed to comply with and associated costs (such as payments for inspectors' accommodation and transportation) accounted for about 7 percent of their annual production costs. This does not include the costs of ensuring compliance with these standards.<sup>688</sup> Consequently the majority can only afford to maintain GlobalGAP certification, as opposed to certification with other private standards. They consider the cost of obtaining GlobalGAP certification to be “commercially tolerable” as it is recognised by many supermarkets throughout the EU.<sup>689</sup> However, they cannot afford to have certification with other private standards in place. It is only when the possibility of winning a contract with a particular EU importer emerges, or when specifically requested by their EU business counterparts, that these firms will apply for additional certification. It has been emphasised that the difficulty and complexity of complying with various private standards has led some exporters to limit the number of EU “customers” supplied, and has led to some being deterred from supplying certain supermarkets.<sup>690</sup> In some cases the increased financial burden brought about by the proliferation of standards has played a significant part in forcing small exporters out of business, or in them having to change their crop

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<sup>687</sup> Such as P. Prime or Chatchawan Farms.

<sup>688</sup> It was considered that such compliance costs are difficult to estimate. Source: Rakpong, J. personal interviews with the head of Mae Ta cooperative administrative staff, Mae-on sub district (January 2010).

<sup>689</sup> Personal interviews with the owner of P. Prime (Mr. Pratom Tankum) and Chatchawan Farm, (Mr. Suppakit Rattanasirimontri), Nakornpratom, Thailand 09-10/07/2008.

<sup>690</sup> Here, the exporters asked to be anonymous. The interview was conducted in Bangkok during July 2008.

production or having to re-direct sales to the domestic market or to that of neighbouring countries.<sup>691</sup>

The financial burden brought about by the proliferation of private standards is less onerous for large exporters who appear to be able and willing to absorb additional costs through their economies of scale and to treat these costs as being necessary long-term investments to secure large contracts with EU supermarkets.<sup>692</sup> The fact that they may have to comply with different standards does not deter them since, proportionately, this adds little by way of unit-costs given their high production volumes. In essence they are willing to comply so long as they are still able to absorb any increase in production costs and to maintain their market share.

For example, the “big three” Thai baby corn exporting companies, namely KC-Fresh, Swift and River Kwai, have always maintained valid and up-to-date certification under GlobalGAP, along with certification in relation to a number of other private standards frequently requested by EU supermarkets. Similarly, with their economies of scale, poultry exporters, most of which are large-scale, integrated firms, are able to afford certification with all of those private standards that could conceivably be requested by

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<sup>691</sup> This is because any improvement in prospects resulting from meeting various private standards can be very short-term. In an interview held on 23/06/2008 in Chiang Mai province, Thailand with the owner of Lanna Frozen Food, a baby corn broker who had previously supplied her products to a number of EU supermarkets, she stated that following the increasing demands of private standards and particularly, with standard proliferation, her company switched to supplying products to domestic and other foreign markets including Russia, Malaysia and several in the Middle East where private standards (at the time of the interview) were not a common condition for market access.

<sup>692</sup> For example, large exporters in both industries presented in the case studies did express their opinions during the interviews that they could accept various EU supermarkets’ requests for private standards as being a “licence to enter the EU market place”.

EU importers including BRC, IFS and ACP as well as with the supermarkets' own standards.

Despite their different experiences, producers of all sizes clearly expressed the view that private standards have become a “common” condition for EU market access alongside governmental regulations operated under the CA model. In fact, the introduction of private standards by EU supermarket importers has become so commonplace that these standards have become “the rules of the game” and no longer operate to confer a distinctive competitive advantage on Thai exporters as against other exporters.<sup>693</sup> However, a majority of the producers and exporters interviewed did not consider the continuing proliferation of private standards to be a healthy development for the Thai agricultural industry. During the interviews a number of producers and exporters expressed the view that instant recognition, by way of benchmarking or mutual recognition between different standards, would be a welcome development and would especially help small producers and exporters to stay in the business of supplying food exports to the EU.

### **6.1.3 Impractical Burdens**

In addition to the financial burden, Thai producers and exporters to the EU often encounter impractical burdens associated with private standards. Yet there are few, if

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<sup>693</sup> Reference: interviews with various exporters 2008 (Rakpong J, personal interview held during meeting with the Thai Broiler Processing Exporters Association, Bangkok, Thailand 7/08/2008, personal interview held during meeting with staff from GFPT, Bangkok, Thailand 7/08/2008, personal interview held during meeting with Mr. Nathsak Pattanachaikul (Chief Operating Officer of Sahafarm) and Mr. Kasem Trakoonlerswilai (Deputy director Sahafarm building, Bangkok, Thailand, 2/9/2008).

any, ways in which producers can communicate with the private standard bodies located in the EU to negotiate alternative equivalent measures that could be easier, cheaper or more practical to apply in Thailand.

Below are important observations spelling out of the kinds of impractical burdens experienced by Thai producers and exporters in complying with EU private standards. These were highlighted by producers and exporters during a number of interviews.

#### **6.1.3.1 The Content of Private Standards: Extends to Cover Other Legitimate Concerns**

In both case studies, the private standards imposed by EU supermarkets on Thai food exports encompassed both traditional food safety concerns and ‘other legitimate concerns’ unrelated directly to food safety.<sup>694</sup> These included environmental matters, wildlife protection and worker welfare. The regulatory scope of private standards has expanded beyond that of the CA model and has made many ‘other legitimate concerns’ unrelated directly to food safety, also conditions for EU market access.

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<sup>694</sup> As previously discussed in Chapter 2 (Section 2.5), the term ‘other legitimate concerns’ in the area of food safety have been categorised into two types: (i) those with a strong link to food safety (such as animal welfare) which are encompassed within the scope of the EU food safety framework, and (ii) those traditionally unrelated to food safety (including environmental protection and worker welfare as cited above). In this Section, the term ‘other legitimate concerns’ is used to refer to the second type of legitimate concerns. It should be noted that to some extent the lines between food safety and non-food safety issues are blurred. For example, it can be argued that regulation of GMOs covers environmental issues to protect native plant and animal species and prevent them from being exposed to GMO mutation. Conversely it can be argued that GMO regulation concerns food safety since their long-term public health effects have yet to be scientifically identified.

The balance of regulation between food safety and ‘other legitimate concerns’ contained in each standard will vary depending on the actual product and the objectives of each standard.

#### **6.1.3.2 Private Standards Impose Requirements that are Stricter and More Detailed than Official EU Regulation**

Private standards often impose requirements that are defined in a way that is highly prescriptive. With regard to food safety aspects, the regulatory scope of private standards often overlaps with EU standards enforced under the CA model. However, the private standards are often stricter and more specific than those laid down by the EU. For example, in the poultry and baby corn case studies, both the EU and private standards pursue a management-based approach based upon the concepts of HACCP and traceability. Nonetheless, the requirements imposed by private standards are more detailed. With regard to HACCP requirements for example, GlobalGAP specifies not only the exact critical control point (CCP), but also the strict and detailed practices that need to be performed at each CCP. For instance, in the product handling of vegetables as applied to baby corn producers, detailed specifications have been laid down as to how the personal hygiene of workers can be assured. These include specific provisions for workers’ lockers and changing rooms, designated areas for washing hands, for

smoking, eating and drinking, the strict admittance of visitors to the working areas, and so on.<sup>695</sup>

As to ‘other legitimate concerns’, the detailed specifications in private standards are even more apparent. For example, environmental protection is heavily regulated under GlobalGAP. In order to obtain GlobalGAP certification, baby corn producers must submit documentation relating to sustainable farming practices which in turn includes information about soil management and site-history management. There are also detailed “minor-must” provisions,<sup>696</sup> on waste and pollution management, including submission of a re-cycling and re-use plan and provisions of separate areas for recyclable and dangerous products. Moreover there are provisions on environmental conservation including the establishment of wildlife conservation plans.<sup>697</sup> Worker welfare has also been comprehensively addressed as part of these “minor must” requirements, whereby farmers and exporters have to demonstrate that the specified requirements on workers’ health and welfare have been followed. These include the training of workers on hygiene practices, the handling of chemical substances, provision of first aid and training on the appropriate use of first aid equipment, and the provision of rest areas for workers.

Specific requirements on similar issues are also included in supermarkets’ own standards. Tesco’s Nature’s Choice, which applies to some baby corn and poultry exporters, contains specific regulatory sections on pollution prevention, including the

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<sup>695</sup> Source: GlobalGAP checklist for fruits and vegetables (version 3).

<sup>696</sup> See *supra*, Chapter 2 Section 2.5.3.1 of which 95 percent have to be complied with.

<sup>697</sup> Source: Control Point and Compliance Criteria Integrated Farm Assurance of GlobalGAP.

prevention of pesticide discharges into groundwater coastal and inland waterways, the control plans for odours and greenhouse gases emissions, controls of light and noise emissions. Similar to GlobalGAP, there are requirements addressing wildlife and landscape conservation<sup>698</sup> and the maintenance of the existing local landscapes, footpaths, bridleways or any features or buildings of historical importance. Detailed requirements on environmental protection, recycling and energy conservation have also to be followed by Tesco's suppliers. These include demands that their energy plan must be independently audited and that their water supply must come from a permitted source and be used within the permitted quantities, and that their fertilizer usage must be in accordance with Tesco's policies.

### **6.1.3.3 Private Standards: Problems of Rigidity in Application**

As explained earlier in 6.1.1, specific rules on food safety in private standards bring, to some extent, benefits to producers and exporters in Thailand. These can serve to interpret EU law or to demonstrate compliance with it. However, there is widespread concern among Thai producers and exporters regarding the detailed nature of the manner in which private standards regulate 'other legitimate concerns'. They expressed concern about rigidity and inflexibility in the application of private standards and observed that they appear to have adopted "western practices" without taking local conditions in Thailand into consideration. Whilst Thai producers and exporters appreciate the need for including 'other legitimate concerns' in private standards, they pointed out that the adoption of such rigid requirements will not necessarily bring about

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<sup>698</sup> Including a written integrated management plan to protect and encourage diversity of wildlife with periodic evaluation for the protection of existing habitats.

the intended results.<sup>699</sup> In addition, these rigid requirements do not allow for the substitution of cheaper local alternatives potentially able to deliver the same, or better, results.

By way of example, a GlobalGAP farm requirement to enhance workers' welfare insists on the need to provide a separate rest area for workers within the agricultural site so that they can have an appropriate "lunch-break".<sup>700</sup> In practice, the rest areas are rarely used by the local workers as they prefer to take their lunch break at home or in local food stalls.<sup>701</sup> With regard to another standard (SA) requirement whereby a wildlife buffer zone must be in place, these are respected and complied with by the farmers in order to obtain certification. However, it was pointed out in a group interview that these buffer zones are not generally used by local wildlife.<sup>702</sup> Nonetheless, in some of the baby corn producers' views, this adds little to local wildlife protection where the diversity of local wildlife exists in forests rather than on the farm sites. They observed that rural farm cultivation in Thailand does not have the same adverse impact on wildlife species as intensive farms in Europe.<sup>703</sup> Here, local baby corn farmers observed that it would have been more useful if, for example, the certification recognised existing local conservation plans that are conducted collectively amongst different producers so as to conserve local wildlife and the environment. In respect of

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<sup>699</sup> Consequently this raises the question of means-end rationality, an issue which I will return to in Section 6.3.5 below.

<sup>700</sup> This is considered to be a "minor-must requirement".

<sup>701</sup> Although this is complied with by Thai producers under the certification scheme.

<sup>702</sup> It has been observed that the requirement for wildlife buffer zones around a plantation has been taken from European wildlife protection practice where many important and sometimes endangered species remain on farms. However, it has been claimed by Thai producers that most of the local endangered wildlife reside in nearby forests where there is a more comprehensive conservation plan under their community forestry project. (Rakpong J., group interview with baby corn farmers, Mae Ta, Mae-On sub-district Chiangmai 27/07/2008).

<sup>703</sup> Local farmers wish to remain anonymous in this example.

baby corn plantations in the case studies, the local community has already been actively involved in community forestry management projects and they consider this to be more effective in protecting local wildlife. However, this local scheme is not recognised by the private standard. Instead, they have to draw up a new and less relevant wildlife protection plan at their farms in order to pass the standard's assessment.

Additional concerns was also raised during the interviews regarding the organic standards of the Soil Association (SA) which prohibit post-harvest burning, considering it to produce excessive CO<sub>2</sub> which can contribute to global warming and thus damage the environment. Local producers claim that post-harvest burning in Thailand is a controlled process, that it helps release essential nutrients back into the soil and provides more benefits than disadvantages.

In another example, EU supermarkets request Thai exporters to obtain certification services from a specific EU-based auditing firm despite the availability of suitably qualified and cheaper local auditors. To attain Tesco's Nature Choice standard only one company, UK-based CMI, is authorised as a certifying body and no alternative local certifying bodies may be entrusted with the certification tasks. In addition, Thai baby corn producers are sometimes requested by EU supermarkets to obtain GlobalGAP certification from EU-based auditing companies, such as SGS, which is based in Geneva thereby saddling the producers and exporters with higher fees and costs than

would result from using domestic Thai certifying bodies.<sup>704</sup> This is surprising given that the capabilities and qualifications of SGS have been subject to detailed scrutiny, and it was suspended as a recognised auditor for three months from September 2009 under the UN Clean Development Mechanism. It was criticised on the basis that its on-the-spot inspections “raised concerns regarding the quality of its verification work”.<sup>705</sup> Although this suspension occurred under a different auditing scheme, it does raise questions about the reliability of the preferred EU-based auditors and about the assumption that they will provide superior services.

#### **6.1.3.4 The Role of Private Standards in Ensuring Compliance with EU Law**

It can be argued the EU is using private standards as well as the CAs in Thailand to enforce some of its own food safety law. Post-BSE, many EU regulations have encouraged the imposition of private standards on overseas suppliers. This is because they place direct responsibility on EU food business operators to ascertain that “reasonable steps” have been taken to ensure that EU food imports comply with EU food safety regulation.<sup>706</sup>

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<sup>704</sup> They have to pay the certification fee and other associated fees including transportation and accommodation costs. In the exporter interviews, for a six month contract with a Dutch supermarket, the owner of a medium-sized exporting baby corn company was requested to obtain the GlobalGAP standard through an auditing company called SGS despite his company having already obtained GlobalGAP certification with a Thai auditing company and despite this still being valid in respect of the relevant delivery time. With regards to this incident, the exporters wished to remain anonymous. The interview was conducted in July 2008 in Bangkok, Thailand.

<sup>705</sup> An example is SGS’s certifying work on auditing and certifying “Clean Development Mechanism” (CDM) projects under the UN carbon-offsetting scheme. It was suspended for 3 months from September 2009 because the on-the-spot inspections by the CDM executive board revealed that there were six inconsistencies in information submitted by SGS-approved projects.

<sup>706</sup> There are also other reasons, for example the need to protect their reputation. Further studies are needed to try to understand better the supermarkets’ intents. This is beyond the scope of this thesis.

For example the EU “General Food Law”, Regulation EC/178/2002, imposes direct responsibility on food business operators to take all reasonable steps to ensure that the food products they supply are safe. Under Article 17(1) of Regulation EC/178/2002 “food and feed business operators...shall ensure that foods or feeds satisfy the requirements of food law... and shall verify that such requirements are met”. Further, under Article 19 if a food business operator considers, or has reason to believe, that food which it has imported, produced, processed, manufactured or distributed is not in compliance with food safety requirements it shall immediately initiate procedures to withdraw the food in question from the market, to inform consumers of the reason for its withdrawal and, if necessary, recall the product from consumers. In addition, national law generally provides an importer’s defence of due diligence in cases of breaches of food safety concerning imports.<sup>707</sup> For example, the UK Food Safety Act provides a defence of due diligence for food businesses’ breaches (Section 21, Food Safety Act 1990 C. 16) and Irish legislation has similar provisions under the Irish adoption of the European Communities (General Food Law) Regulation 2007, S.I. No. 747/2007- Section 5 (3).

Due to their direct liabilities in having to take reasonable steps under this regulation, and the fact that in doing so there is a due diligence defence, EU supermarkets are proactive in ensuring that “reasonable steps” have been taken to ensure their imports comply with relevant EU food safety law. This is especially important as they may not have direct control over their suppliers or may be uncertain about the exporting

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<sup>707</sup> Here, they can attempt to demonstrate that reasonable steps have been taken by them to conduct due diligence before importation.

country's domestic regulations. One way to overcome this quality control problem is of course to rely on private standards as due diligence, demanding that suppliers comply with food safety measures that exceed requirements under EU food safety law. In this way EU law is effectively enforced in relation to overseas suppliers through the imposition of private standards.

#### **6.1.4 Governance Problems: Concerns over Lack of Transparency, Participation and Opportunity to Appeal/Review**

In addition to the financial and operational burdens arising from the need to comply with private standards, producers and exporters in the case studies expressed numerous concerns about the process of adopting and implementing private standards. Their concerns may be divided into four parts:

- notification of revisions,
- transition periods,
- participation, and
- contestation.

##### **6.1.4.1 Lack of Adequate Notification of Revisions to Standards**

In a number of interviews, one of the most serious concerns expressed by Thai producers and exporters was the lack of notification from standard-setting bodies about potential or actual revisions/changes made or about to be made to existing standards. Actual or potential amendments to existing standards are frequently not notified to the

producers and exporters until the standards enter into force and when compliance is required. Furthermore, when producers and exporters are notified, the revisions introduced can be difficult to understand.

An example of this problem can be drawn from the baby corn case study when the Soil Association (SA) made a proposal for a major change in its standards for organic produced in 2007.<sup>708</sup> According to the contemplated change, all air freighted products would no longer qualify as ‘organic’ under its scheme unless the producers of the product could demonstrate that they had sufficiently mitigated their “Carbon Footprint”. The discussion within the SA has now been closed and on this occasion the SA backed down. However, small producers in Thailand were not notified about this potential change. They expressed concerns about this and stated that had the proposal been communicated to them, they would have attempted to put forward relevant information and support for their position.

Meanwhile, although major producers and exporters of baby corn knew about this potential change, many of them did not fully understand its implications. They said that the issues arising were complex and involved highly technical issues. While the large producers and exporters knew these issues were being discussed, they did not know how to set about seeking clarification of them.

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<sup>708</sup> The discussion can be found at:  
<http://www.soilassociation.org/LinkClick.aspx?fileticket=%2Bsuqx5aaMko%3D&tabid=234>

It is interesting to observe that while these matters were actively debated in several SA meetings in the EU, no attempt was ever made to notify, explain or clarify these complex issues to the organic baby corn producers in Thailand.

#### **6.1.4.2 Lack of an Adequate Transition Period Pending the Entry into Force of New Standards**

A closely related issue often raised by Thai producers and exporters is the rapidity with which new or amended standards enter into effect. It is frequently the case that revisions to private standards are not communicated to them in a timely manner before the standards come into force. This occurred in the poultry case study when poultry exporters were required to respond quickly to an urgent request from EU importers to implement Freedom Food, a demanding animal welfare standard. In similar circumstances, as noted previously, the baby corn producers were required to react quickly to changes brought about by GlobalGAP Version 3, whilst many smaller producers were still struggling to deal with Version 2.

In these cases inadequate transitional periods were allowed for Thai producers and exporters to take those steps necessary to comply with the changes. The producers and exporters require adequate time to familiarise themselves with the new criteria – to fully appreciate and understand the changes, to update their facilities and train their staff before new or amended standards can fully take effect. When there is an inadequate transition period, there can be gaps in certification, leading to a situation in which Thai exports are excluded from EU supermarkets for a number of weeks or months. In such

cases producers sometimes have to divert their produce to the domestic market or to alternative export markets.

#### **6.1.4.3 Lack of Opportunities for Participation in the Standard-setting Process**

Given that the application of private standards raise both financial and practical problems for Thai producers and exporters, it is interesting to note that there is no permanent or appropriate channel of communication for Thai producers and exporters to contact the standard-setting bodies in the EU to voice their concerns, provide explanations or challenge impractical requirements.

Thai producers and exporters are concerned about their exclusion from the process leading to the adoption of private standards. For example, in the SA's proposal to revise the conditions for organic produce discussed previously, some farmers from developing countries, including Kenya and Nigeria, were informed and consulted. However, Thai organic baby corn farmers and exporters certified by the SA were not consulted about this potential change at any time during the 18-month long discussion.<sup>709</sup>

Producers and exporters were deeply concerned about the absence of opportunities for them to be heard in the process of adopting or revising standards. They felt that the main problem was a lack of communication. There was a feeling that had better channels of communication existed, it would have been possible to mitigate the

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<sup>709</sup> Another example concerns participation in GlobalGAP. GlobalGAP is known to have a small African Farmers Working Group whereby representatives of small holders from a number of specific countries in Africa are invited to give their views during meetings. No similar arrangement is in place in Thailand.

practical and financial problems arising from the rigid application of private standards in Thailand.

#### **6.1.4.4 Absence of Opportunities to Challenge or Contest Existing Standards**

Because of the lack of communication channels, producers and exporters in the case studies often found themselves lacking opportunities to lodge complaints or challenge the content of recently adopted standards. In addition, Thai producers and exporters expressed their concerns regarding the absence of adequate opportunities to challenge refusals to certify particular operators as being in compliance with the standards in question. Although some standards allow producers and exporters to undergo re-examination,<sup>710</sup> in practice producers and exporters are deterred from doing so because the re-examination process can be complicated and expensive. This is particularly so for small producers since the process of finding technical evidence to challenge a refusal is often beyond their means. Moreover, the re-inspection processes impose substantial costs on small producers in that they will incur re-inspection fees in addition to the costs for inspectors' transportation and accommodation.

With the plethora of financial and operational problems brought about by rigid specifications, lack of transparency, insufficient transitional periods and an absence of opportunities for participation and contestation in the standard-setting processes, Thai producers and exporters have little choice but to endeavour to comply with the EU importers' demands for fear of suspension or revocation of their certification. When

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<sup>710</sup> For example, Tesco's Nature's Choice allows for a petition to the decision made by CMi, the sole certifying body. This has to be made within 21 days (infra Section 6.2.1).

suspension does occur it results in significant disruption to their trade and they risk losing existing EU market-share in view of strong competition from other producers at home and abroad.

## **6.2 EXTERNAL ACCOUNTABILITY OBLIGATIONS FOR PRIVATE STANDARD-SETTING BODIES**

The sections that follow will turn to exploring the mechanisms and processes in place to mitigate the negative external effects of private standards that have been highlighted by Thai producers and exporters. A comparison of private standard-setting schemes with those run by the EU shows that they fall significantly short of ensuring external accountability in relation to significantly affected Thai entities. Although the current CA model between EU and Thailand is not perfect, and further improvements are required to incorporate smallholders' special needs, at least substantial external accountability-enhancing fora and mechanisms exist, both in WTO law and within the CA model framework itself as demonstrated in Chapter 5. It is in light of this that the absence of similar accountability-enhancing fora and mechanisms in relation to private standards emerges as an issue for concern.<sup>711</sup> As seen in the two case studies presented earlier in this work,<sup>712</sup> private regulators take decisions that are capable of creating spill-

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<sup>711</sup> The pressing need for enhancing private standards' accountability has also recently been put forwards by Hachez and Wouters (2011), who base their justification on a notion of "public", rather than "external accountability". The term "public" used by them refers to "stakeholders" or those who are "affected" or "regulated" by private standards, including "consumers, producers, commercial intermediates, retailing groups" (Ibid, p.689). By and large, their notion of "public" incorporates the same group of "significantly affected entities" used here. However, their "accountability" concept is narrower, merely incorporates "transparency", "participation" and "reason-giving decision" criteria but not the other two criteria of GAL. (Ibid, p.692-695)

<sup>712</sup> See supra Section 3.2.4 and 3.3.4.

over effects in Thailand. These effects often impose significant burdens upon Thai producers and exporters. However, there is little in the world of private standard-setting that operates to give effect to GAL.<sup>713</sup>

The absence of external accountability mechanisms mean that Thai stakeholders are unable to participate on a regular basis in EU private regulators' decision-making processes. Even were accountability fora to exist, and even if Thai entities were able to participate in them, there would be little, if any, opportunity for them to obtain assistance from the Thai government. This is due simply to the fact that Thai governmental entities, especially the CAs, view private standards as being outside of their remit. Private standards are considered to be contracts between private entities and as falling outside of public law.

The types of problems experienced by Thai producers and exporters in relation to private standards are not unique, and have also been reported in other studies on the impact of private standards in other parts of the world.<sup>714</sup> There appears to be an increasingly widespread acceptance that the process of adopting and implementing private standards should be subject to some form of regulatory control. However, no

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<sup>713</sup> Even where these fora do exist, they do not enhance the power-wielders' adherence to GAL criteria at the level guaranteed by the WTO and CA model frameworks.

<sup>714</sup> For general studies on the effects of private standards see, for example Bonsi et.al (2008), where the authors discuss the long-term effects of private standards in eco-labeling certificates, maintaining that they do not increase producers' competitiveness in long term. See in particular p. 421, where the authors refer to "Kuznets Curve" illustrating that income received from obtaining certification would increase in the short term, but in the long term when more producers join the schemes, income would gradually decrease. Other studies have been carried out following the WTO/FAO and UNCTAD workshops and were presented on 25/6/07. See for example specific country case studies in relation to Malaysia, Vietnam and Thailand in UNCTAD (2007), and Tam (2005) in relation to Vietnam.

consensus has been reached regarding the optimum framework or the nature or extent of the regulatory controls that should be applied.<sup>715</sup>

As discussed in the previous chapter, where the activities of power-wielders create significant external effects on stakeholders outside their political or operational domains, power-wielders should be susceptible to being held to account. There should be no exception where the power-wielders are private entities. Consequently there is a need for external accountability-enhancing frameworks to be put in place, and for standards, mechanisms and sanctions to be established. It is to this issue that the next part of this chapter turns.

As a first step it is appropriate to explore the current situation regarding the external accountability of the private standard-setting bodies highlighted in the case studies. In so doing, consideration will be given to each element of external accountability, that is, “standards”, “fora” and “sanctions”. Unlike the situation in regard to governmental entities operating in the CA model, in which the WTO and the CA model give effect to GAL, there is considerable divergence in the approaches taken by different private standard-setting bodies. Initiatives on the part of private standard-setting bodies are voluntary, and therefore the approach that has emerged is both fragmented and variable.

Given the large number of private standards applicable to Thai food exports to the EU, it would be unrealistic to attempt to explain in detail the regulatory approach adopted by

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<sup>715</sup> Discussions regarding the need to establish frameworks to control private standards have also taken place in WTO, FAO and UNCTAD in their 2007 meetings. The WTO has established a special working group on private standards (see *infra* Section 6.3.4).

each and every standard-setting body. Accordingly, the following discussion presents the main GAL elements observed in respect of the main standards that feature in the two case studies presented in Chapter 3. Consideration is given to the question of whether these initiatives have achieved respect for GAL criteria or have contributed to the closure of external accountability gaps.

### **6.2.1 Recognition of GAL Criteria as External Accountability Standards**

Most private standards are generated in a setting that seeks to ensure respect for at least some GAL criteria. The main focus is on enhancing transparency and creating opportunities for participation. While some standards have used their own codes of good practice to promote respect for GAL, others have chosen to join third-party regulatory schemes that instantiate some elements of GAL. Overall there is wide variation in the manner and degree to which different standard-setting bodies ensure respect for GAL.<sup>716</sup>

It can be said that GlobalGAP is the leader in giving effect to GAL criteria as external accountability standards. This can be seen, for example, in the availability of its group certification option.<sup>717</sup> Under this scheme, though subject to certain riders, small and medium-sized producers can jointly obtain GlobalGAP certification as a single legal

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<sup>716</sup> Self-regulation has been preferred by the majority of private body power-wielders, including for example GlobalGAP, Tesco and M&S standards as they can be flexible in setting their own rules and laying down their own procedures on how and when these GAL criteria can be invoked and given expression.

<sup>717</sup> Option 2 of GlobalGAP certification.

person that in practice comprises a group.<sup>718</sup> In this way they can share the overall costs of obtaining certification so that the cost per group member is greatly reduced. This option was used by a small group of baby corn producers in the case study.<sup>719</sup> The availability of this option can be seen as an attempt to inject some element of proportionality into the certification process, by bringing about a cost reduction in joining the scheme and thereby limiting the trade constraints experienced by Thai producers/exporters.

Another example of GlobalGAP seeking to avoid the imposition of unnecessary burdens caused by the proliferation of private standards can be found in its benchmarking option whereby conformity with other certification schemes' requirements, whether private or governmental, can be deemed to be equivalent to certification under GlobalGAP.<sup>720</sup> Once benchmark status is granted, there is no need for producers to be certified under GlobalGAP. When this benchmarking exercise is completed the costs associated with having to obtain multiple certifications are reduced. So far 11 national GAP schemes have been successfully benchmarked against GlobalGAP,<sup>721</sup> while benchmarking has

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<sup>718</sup> They must be registered and presented as a legal person, i.e. must be registered under a single company or a co-operative. In addition, there must be an effective internal traceability system in place. Contractual obligations between individual producers and the registered group are usually in place to ensure effective controls and inspections. Sanctions, ranging from warnings to suspension or cancellation of membership, can be imposed within the group to make individual producers comply with GlobalGAP standards (Source: Annex I: 1 and Part 3 of the GlobalGAP Version 3).

<sup>719</sup> Small farmers of Mae-Ta sub-district were able to obtain group certification as a co-operative through a tie-up with the larger Greennet co-operative.

<sup>720</sup> The application for this option falls under Options 3 and 4 of GlobalGAP.

<sup>721</sup> These include the schemes established in 10 countries including in Austria (AMAGAP), Colombia (Florverde), Germany (QS-GAP), Kenya (KFC Silver-standard), Netherlands (MPS-GAP and IKB), New Zealand (New Zealand GAP), Spain (UNE 155000), Switzerland (SwissGAP Hortikultur), UK (Assured Produce) and recently Thailand (ThaiGAP). Source: GlobalGAP Annual Report 2010, p. 53).

also begun for 16 other schemes.<sup>722</sup> Since many benchmarked schemes will be run by national governments or hybrid public-private entities there will be an increasing number of opportunities for governmental entities to negotiate with the standardising body on the behalf of domestic producers and exporters. In theory, governments should, at a minimum, be able to provide producers and exporters with appropriate technical assistance.<sup>723</sup> It should be noted that in May 2010, ThaiGAP scheme, run by Kasetsart University in a partnership with the Chamber of Commerce, was certified as being equivalent to GlobalGAP after a 6 year campaign.<sup>724</sup> However, the operation of ThaiGAP is currently limited to a few trial farms. It remains to be seen whether and to what extent this new GlobalGAP equivalent scheme can contribute towards closing external accountability gaps which have arisen from the extensive operation of GlobalGAP in Thailand

GlobalGAP has also introduced special projects targeted at enhancing participation in its setting of standards. These include 20 individual “national smallholder schemes”,<sup>725</sup> one of which applies in Thailand.<sup>726</sup> In addition, there are special African observer

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<sup>722</sup> The benchmarking process has begun - for instance schemes are in place in China, South-Korea, Mexico, Chile and Japan. Source: *ibid*.

<sup>723</sup> This option has been applied to the national GAP schemes of Kenya, Mexico, Chile and Japan, which are all partly government run. According to the GlobalGAP report, each of these schemes provides more opportunities for small producers/farmers and NGOs to participate, and for small producers to obtain some technical assistance from their national governments (Garbutt (2007)). Despite these positive results from its own actions, this GlobalGAP benchmarking option has also been subjected to some criticisms, *inter alia*, that the equivalence concept is restricted, that the process can be time-consuming and that there is a need to constantly re-apply for certification with the emergence of each new version (Vossenaar (2007) p. 9-15).

<sup>724</sup> This differs from the DOA’s compulsory GAP scheme for fruit and vegetable exports cited in the baby corn case study. Source: Keeratipatpong (2011), found at <http://www.bangkokpost.com/business/economics/258461/closing-the-gap-in-agriculture-standards>, <http://thaigap.org/th/>.

<sup>725</sup> These include schemes in EU countries such as in Germany and the Netherlands (started in 2002). Garbutt (2007).

<sup>726</sup> The project was first established in 2007.

schemes<sup>727</sup> for smallholders in African countries. Under both schemes smallholders' experts, including leaders of the GlobalGAP members,<sup>728</sup> moderators<sup>729</sup> and a member from GlobalGAP's Committee are invited to participate in roundtable discussions at which they can raise their concerns directly with the technical working groups.<sup>730</sup> Subsequently the issues will be passed on to those involved in the standard-setting, either to the sectoral Committees or to the Secretariat for presentation to the Board. According to GlobalGAP, these unique schemes have provided an increase in opportunities for smallholders to participate and have increased transparency since smallholders are able to request interpretations and guidelines in their local languages,<sup>731</sup> define their local agenda, and co-operate with other smallholders both domestically and internationally.<sup>732</sup>

Some attempts to give expression to GAL have also been made by other standard-setting bodies but not to the same extent as GlobalGAP. For example in Tesco's "Nature's Choice", one of the "bespoke" supermarket standards which is applicable to all fresh produce supplied to TESCO UK (including fresh baby corn in the case study), there is a group certification option that is intended to reduce individual producers' costs and fees.<sup>733</sup> However, there are few opportunities for participation available to Tesco's suppliers, including those in Thailand. There are no specific national or

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<sup>727</sup> These are for smallholders from Kenya, South Africa, Ghana and Senegal. (Source *ibid*).

<sup>728</sup> These are farmers or leaders of small communities.

<sup>729</sup> These can be academics from developing countries.

<sup>730</sup> UNCTAD (2010). However, it is clear from the case study results that many small producers and exporters, located outside Bangkok, the capital, are unaware of this scheme.

<sup>731</sup> As of 2010 national guidelines have been introduced for the Netherlands, Germany, Belgium, France, Italy, Colombia, Thailand, Chile, Guatemala and South Africa. (GlobalGAP Annual Report 2010).

<sup>732</sup> Garbutt (2007), International Workshop on GlobalGAP Group Certification, Frankfurt (2008).

<sup>733</sup> Cox's TESCO presentation (2007) asserts that the cost of auditing per farm is reduced following the introduction of the joint certification option.

regional discussion groups although some growers may occasionally be invited to participate in the “Nature’s Choice” Standard Advisory Committee.<sup>734</sup> However, Tesco does have an appeal mechanism that enables producers who do not agree with decisions made by CMi – the certifying body – to appeal within 21 days against decisions.<sup>735</sup>

Conversely some standard-setting bodies have subjected their activities to regulatory controls administered by third parties. These can be dubbed as being “umbrella standards” where common codes of practice, containing some elements of GAL, must be adhered to by all members. However, membership is optional for the standard-setting bodies and they can, in theory, leave these schemes at any time.<sup>736</sup>

Examples of umbrella schemes of this kind include the International Organisation for Standardisation (ISO) family, the International Social and Environmental Accreditation and Labeling Alliance (ISEAL) which is applied to social environmental certifications,<sup>737</sup> the International Federation of Organic Agricultural Movements (IFOAM) – for organic standards, and the Global Food Safety Initiative (GFSI) – for good manufacturing practice standards. Nevertheless great variations exist regarding the extent to which GAL criteria are given expression, even amongst independent third-party schemes.

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<sup>734</sup> According to TESCO, they will be sitting alongside Tesco’s technical experts, CMi (the certifying body) and the Registrar. See further: <http://www.tescofarming.com/tnc.asp>.

<sup>735</sup> Source: *ibid*.

<sup>736</sup> Except in situations where some standards, usually ISO, are required to secure certification under another schemes.

<sup>737</sup> These are standards that mainly target regulating issues of ‘other legitimate concerns’. Members include, for example, Fairtrade, Forest Stewardship Council, Marine Stewardship Council, Sustainable Agriculture Networks and Rainforest Alliance.

An example is the ISO 22000 series that incorporates some GAL criteria in its action plans that are intended to be used to achieve good manufacturing practice. The recent action plan for 2005-2010 aimed to achieve increased participation by smallholders from developing countries, to establish mechanisms for national and regional training designed to improve smallholders' awareness and capacity, and to deploy electronic communication systems. These initiatives were intended to enhance transparency and participation. Nevertheless, the underlying concepts are set out as a broad framework, and the detail is articulated by individual members. These efforts also fall short in that there is no permanent scheme for smallholders similar to that put in place by GlobalGAP.

A different approach for injecting GAL criteria is taken by the GFSI, an “umbrella of standards” which also runs a benchmarking scheme similar to that of GlobalGAP. Once producers are certified under any one of its listed standards, including International Food Standard (IFS), British Retail Consortium (BRC) and Safe Quality Food (SQF), they will instantly be recognised as having complied with the other standards on the GFSI list.<sup>738</sup> This can be seen as an attempt to ensure respect for proportionality through the avoidance of unnecessary burdens as it makes achieving certification more cost-effective for producers and exporters. An attempt to create greater opportunities for participation can also be seen in the GFSI's scheme, as a result of their convening multi-stakeholder meetings.<sup>739</sup> Producers and food experts are invited to discuss GFSI's

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<sup>738</sup> As of 2007, several EU food safety schemes have been benchmarked under the GFSI including IFS - Version 4, BRC - Version 4, the SQF, Dutch HACCP Option B and the New Zealand GAP. Swoffer (2007).

<sup>739</sup> For general information see: <http://www.mygfsi.com/structure-and-governance.html>.

new proposals for updated versions of their standards and the recommendations of the stakeholder meeting are put forward to the technical Committee and also reviewed by the Board.

All of these actions by private entities to introduce GAL criteria into their standards of conduct are worthwhile initiatives and are desirable insofar as the promotion of external accountability is concerned. However, as seen from the examples above, there is a great variation in the approaches taken and in the degree and extent of GAL recognition. Even the best of the controlling schemes, namely GlobalGAP, does not provide a framework that ensures respect for all elements of GAL. For example, as is evident from the burdens experienced by Thai producers and exporters as set out in Section 6.1.3.3, GlobalGAP has not yet addressed means-end rationality in a manner sufficient to ensure that its requirements can achieve the results desired. Similarly, it has not yet fully addressed the proportionality issue by ensuring that the least-trade restrictive local alternatives are deployed rather than the specifications laid down.<sup>740</sup> GlobalGAP itself falls short in terms of transparency in that it does not allow an adequate time lapse between the date of publication of new requirements and the date by which it is to be applied. Further, it has neither a permanent body that Thai producers and exporters can consult on compliance matters, nor a permanent communication channel to permit information and comments to be put forward by them.

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<sup>740</sup> Supra, Section 6.1.3.3, on exact CCP points, wildlife conservation plans and prohibition of the use of fire to clear fields.

### 6.2.2 Accountability-Enhancing Fora and Mechanisms

There is also great variation amongst private standard-setting bodies in respect of the existence of fora for external accountability. As explained previously, they may either choose to be governed by their own regulatory schemes or by schemes run by third parties of their choice. However in both cases, limited information about their procedures is made available to affected stakeholders, including to those in Thailand.

Furthermore, even where a forum exists to facilitate participation it tends to be possible on an *ad hoc* basis only. For example, as evident from a number of interviews with producers and exporters in the baby corn case study, even where participation was possible, only large, but not small or medium-sized, producers and exporters were able to participate actively.<sup>741</sup> This is due to the relatively high costs associated with participation. Standardising bodies often charge attendance fees and hold meetings and workshops outside of Thailand.<sup>742</sup> The participation costs are often beyond the means of small Thai producers. In contrast to participation by Thai governmental entities under the WTO or CA model frameworks, the costs of participation with EU entities in various fora are borne by the Thai government on the basis that government representatives are bound, under Thai administrative law, to negotiate with EU entities on behalf of producers and exporters. As previously discussed in Chapter 5, the

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<sup>741</sup> Source: interviews with various groups of baby corn producers and exporters.

<sup>742</sup> For example, one of the key objective of 2009 Asia/Pacific “United on Good Agricultural Practices” tour held in Kuala Lumpur, Malaysia, was to have discussions on how to enhance small-scale farmers’ participation. However, there was a conference registration fee for individual participants who are GlobalGAP members (\$US 300) and the conference was held outside Thailand.

information and benefits that the Thai government receives from these negotiations will be ultimately passed on to the producers and exporters.

Moreover, compared to the wide variety of accountability mechanisms available in the CA model and in the WTO, the range of mechanisms for promoting external accountability in private standard-setting is much more limited. It appears that at present, only peer, reputational and market mechanisms operate. There is no effective legal mechanism to underpin or support these. Furthermore, it is also debatable whether any of these mechanisms operates effectively. The most severe sanction that could be applied to private entities that depart from the established procedures giving effect to GAL is expulsion from the “umbrella of standards”. They could similarly experience the disapproval of their peers or suffer reputational costs. However, so far no severe sanctions of this kind have been reported in relation to EU standard-setting bodies.

Overall, in the current environment private entities are essentially the “masters of their own rules”. They have discretion to frame their own codes of practice, to decide on their regulatory frameworks and to choose the “peers” with whom to share a code of practice. There is presently no central regulatory framework to control private standards in the EU. There are no shared “accountability standards” to which all standard-setting entities in the EU can be expected to comply, no official permanent fora where other bodies, affected entities or the general public can express their

concerns, disapproval or condemnation, nor any concrete mechanisms for obtaining redress in law.<sup>743</sup>

There is good reason to believe that the lack of a central regulatory framework and legal mechanisms for external accountability in private standard-setting may have contributed to the financial and operational problems experienced by Thai stakeholders. This is because there are few, if any, ways in which the problems they experience can be made known to the private entity power-wielder, and few opportunities to discuss possible alternatives or solutions to problems that arise. As a result, the top priority to have emerged from studying the cross-border effects of EU food safety regulation in Thailand is for steps to be taken to increase the external accountability of bodies that set private standards. Although it is clear that something is required in order to mitigate the current external accountability gap in the setting of private standards, the optimum solution is yet to be found. In an effort to contribute to the task of articulating a solution, the next section will examine the potential role of WTO law.

### **6.3 SHOULD THE WTO BE A STARTING FRAMEWORK FOR REFORM?**

At the outset it can be argued that a potential framework for the control of private standard-setting activities is already laid down in WTO law. There, the obligation to supervise the bodies that set private standards is not directed at individuals but rather at

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<sup>743</sup> Source: Author's observation of the current operations of various private standards which are applicable to the Thai food producers and exporters. However, there is now a prospect of a UK initiative to subject private standards' operations to the Groceries Supply Code and the adjudicator (See below Section 6.5).

WTO Member States. However, on this point existing WTO provisions are excessively broad, unclear and are open to many different interpretations.

### **6.3.1 SPS Control**

The SPS Agreement obliges Member States to take steps to oversee the activities of private standard-setting bodies. Article 13 SPS places a tripartite obligation upon Member State governments:

- (i) to take “such reasonable measures as may be available to them” to ensure that non-governmental entities within their territories comply with the relevant provisions of this (SPS) Agreement;
- (ii) not to “take measures which have the effect of, directly or indirectly, requiring or encouraging such non-governmental entities to act in a manner inconsistent with the provisions of this (SPS) Agreement”;
- (iii) to ensure that they rely on the services of non-governmental entities for implementing their SPS measure only if these entities comply with the provisions of this (SPS) Agreement.<sup>744</sup>

It should be noted that the term “provisions” under Article 13 has not been defined. However, since the SPS Agreement does not distinguish between voluntary and mandatory measures but instead refers to “any measures” to protect human, animal, plant life or health,<sup>745</sup> Article 13 appears to suggest that Member States should take

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<sup>744</sup> Emphasis added.

<sup>745</sup> Under Annex A (1)(a) it applies to “all sanitary and phytosanitary measures”, in other words “any measures” that may directly or indirectly affect international trade. This is different to the approach taken

steps to ensure that private standard-setting bodies comply with the terms of the SPS Agreements in full. In other words, in so far as the SPS Agreement gives effect to GAL, Member States must, where reasonably possible, ensure that private standard-setting bodies respect the terms laid down in SPS Agreement, as discussed previously in Section 5.1.1, in relation to both substantive and procedural standards. These include obligations relating to means-end rationality (Article 2.2 and 5.7 SPS Agreement), weak and strong proportionality (Article 2.2, 5.6 and 5.7), prompt notification, a reasonable time-lapse between publication and implementation (Article 7 read with Annex B(5)), provision of information and technical support (Article 7 read with Annex B (3) ), an appropriate time-frame for certification and the avoidance of undue delays in the control, inspection and approval procedures (Article 8 read with Annex C).

Whilst the language of Article 13 makes it clear that Member States, including the EU, have a duty to take “reasonable” steps to control the operations of private standard-setting bodies, it is far from clear what this requires and or even means. The most problematic term is the word “reasonable” in the first part of Article 13.<sup>746</sup> Although this word has also been used elsewhere in the SPS Agreement, for example in Annex C (3),<sup>747</sup> Articles 4,<sup>748</sup> and 5.7,<sup>749</sup> the concept of “reasonableness” has not yet been clarified by the dispute settlement bodies. In fact a guideline to assist in interpreting this term is

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under TBT (see below) where a distinction is made between measures with which compliance is mandatory (technical regulation) and those that are voluntary (standards).

<sup>746</sup> It is also an uncertainty as to what kind of action could be construed as being “measures which have the effect of, directly or indirectly, requiring or encouraging” non-governmental entities to act inconsistently with the provisions of the SPS Agreement.

<sup>747</sup> Here the SPS provisions will not prevent Members from carrying out “reasonable” inspections within their own territories.

<sup>748</sup> This relates to equivalence, where exporting countries shall allow “reasonable” access to importing Members for inspection, testing and other relevant procedures.

<sup>749</sup> Where Members put in place a provisional measure based on the available pertinent and relevant information they should review the measure within a “reasonable” period of time.

still being developed by the SPS Committee.<sup>750</sup> However, even without further clarification from the WTO it is important that content and meaning be given to these crucial demands.

### 6.3.2 TBT Control

In a manner similar to the SPS Agreement, the TBT Agreement imposes obligations on Member States to take “reasonable measures” to control private standard-setting activities. The definition of “standards” under Annex 1 refers to instruments with which compliance is “not mandatory”.<sup>751</sup> In the area of food safety, this TBT obligation will apply to standards that regulate ‘other legitimate concerns’.<sup>752</sup>

For private standards, Member States are required to take such “reasonable” measures as may be available to them to ensure that private standardising bodies accept and comply with the TBT Code of Good Practice laid down in Annex 3 (thereafter “the Code of Good Practice”).<sup>753</sup> Further, and similar to the obligations in the SPS

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<sup>750</sup> *Infra*, Section 6.3.4.

<sup>751</sup> “Standards” are any “document approved by a recognised body that provides for common and repeated use, or rules, guidelines or characteristics for products or related processes and production methods” with which compliance is not mandatory. This definition varies from technical regulation, where compliance is mandatory Annex 1 TBT (2 and 1). Some academics have called this type of standard “voluntary” so as to juxtapose with the term “technical” standard used under Article 2 (see for example: Joshi (2004), p.74 and Gandhi (2005). It should also be noted that a Member State’s obligation for monitoring “standards” is significantly less than that imposed in relation to “technical regulations” where compliance is mandatory. In the latter case the full TBT obligations apply and the Member State must “ensure” that the measures are not “more trade restrictive than necessary to fulfil the necessary objectives” of, *inter alia*, “national security requirements, prevention of deceptive practices, human health of safety, animal or plant life or health or the environment” (Article 2.2).

<sup>752</sup> Under TBT Agreement, Article 1.5, TBT provisions do not apply to SPS measures. This has been confirmed by the *Hormones II* decision (*US-Hormones* para. 8.29).

<sup>753</sup> Article 4.1 TBT Agreement. Likewise, standardising bodies that have accepted and continue to comply with the Code of Good Practice will be acknowledged by Members as having complied with the TBT Agreement (Article 4.2). In the case of governmental standards, members must “ensure” that they accept and comply with the Code of Good Practice laid down in Annex 3 TBT.

Agreement, Member States must not take measures that directly or indirectly, require or encourage the standardising bodies to act in a manner inconsistent with the Code of Good Practice.<sup>754</sup>

It can be observed that Member States' obligation in the TBT Agreement to oversee the activities of private standard-setting bodies is limited to ensuring that they comply with the Code of Good Practice. Under the SPS Agreement, Member States have to ensure that private standard-setting bodies comply with the Agreement in its entirety.

The provisions in the Code of Good Practice include recognition of GAL criteria as a standard of conduct to ensure that external accountability gaps are mitigated. The Code includes a commitment to proportionality, transparency and participation. Examples are given below:

*Point E:* Standards shall not be prepared, adopted or applied so as to create unnecessary obstacles to international trade; this can be viewed as enhancing weak proportionality by subjecting the affected entities to a least-trade-restrictive means test.

*Point F:* Preference should be given to existing international standards; this can also be viewed as enhancing weak proportionality criteria.

*Point H:* Duplication and overlap between standards should be avoided; this also contributes further to ensuring respect for weak proportionality.

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<sup>754</sup> Article 4.1 TBT Agreement. In addition, since the obligation is directed at the member states, WTO fora in which legal accountability mechanisms and sanctions operate will be relevant here.

*Point J:* Work programmes must contain the name and address of a standardising body. Details of standards should be made available every six months. These requirements serve to enhance transparency.

*Point L:* The submission of comments by interested parties should be allowed during a 60 day period prior to the adoption of standards. This can be viewed as enhancing opportunities for participation.

As with Article 13 of the SPS Agreement, the TBT Agreement is vague in places. We see this in Article 4, where the TBT Agreement places an obligation on Member States to take those “reasonable measures as may be available to them” to ensure that private standards within their territory adhere to the TBT Code, and not to take measures which can encourage standardising bodies to act in a manner inconsistent with this. Uncertainty can also be found in the language used in the TBT Code of Good Practice itself. The Code contains some vague terms including “where appropriate”<sup>755</sup> and “make every effort”.<sup>756</sup>

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<sup>755</sup> Point I regarding the specification of standards based on performance, rather than design or descriptive characters, and point K which concerns membership of ISONET.

<sup>756</sup> Point H concerning the avoidance of duplication and overlap between standards.

### 6.3.3 Unclear Obligations under the SPS and TBT Agreement

The lack of clarity characterising the Member States' obligations in relation to private standards relates to use of the term "reasonable" which features in both Article 13 SPS and Article 4 TBT Agreement. Although this term has not been subjected to the dispute settlement bodies' interpretation, an attempt to clarify it is made here.

It may be thought that the term "reasonable" leaves considerable discretion to power-wielding Member States. The first reason for this is that when comparing the term "reasonable" with the term "necessary", which appears elsewhere in the same Agreement, the term "necessary" appears to convey a more significant degree of WTO control over Member States' actions. For example, when the term 'necessary' is used in Articles 2.2 and 5.6 of the SPS Agreement, the principle of (weak) proportionality will apply.<sup>757</sup> Conversely, the use of the term 'reasonable' seems to imply more space for member States to make subjective as opposed to objective judgment about what steps are required.<sup>758</sup>

Also, a discretion-enhancing interpretation fits with the principle of "*in dubio mitius*", the general principle of international law that has been referred to by the Appellate Body in *EC-Hormones* as being a supplementary means of interpretation. According to this principle, when faced with an unclear term in the WTO Agreement, the dispute

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<sup>757</sup> See supra, Section 5.1.1.1.2.A. Similar interpretation applies when the term appears under the TBT Agreement. For example, under Article 5.1.2 TBT Agreement, where Member States have to ensure that the conformity assessment procedures, belonging to their central governments' technical regulations or standards, shall not be stricter than is necessary so as to give adequate confidence that imported products conform to the technical regulations or standards.

<sup>758</sup> See also Scott (2007), p. 233.

settlement bodies should defer to the sovereignty of the Member States and prefer an interpretation that causes the least interference with the decisional autonomy of Member States.<sup>759</sup>

Since this subjective term (reasonable), leaves considerable discretion to Member States, inconsistency in interpretation and application is likely to emerge. On the one hand, a Member State may consider it sufficient to publish a code of conduct for all standard-setting bodies, stressing that respect for WTO/GAL criteria is required. On the other hand, greater action may be demanded by another Member State which could insist, for example, on the setting up of an independent body to review private standards on the basis of WTO/GAL.

Further guidelines to clarify what might constitute “a reasonable measure” would be useful to those trying to invoke these provisions to encourage Member States to take steps to regulate the activities of private standard-setting bodies. In the absence of clear guidelines or clarification from the WTO, these terms are open to abuse and it may well be the case that only the most flagrant breaches of the SPS provisions or the TBT’s Code of Good Practice will be condemned by Member States or made subject to control.

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<sup>759</sup> *EC- Hormones*, para. 165. In this case, the AB has faced with the task of interpreting the terms “by conforming those measures with international standards, guidelines and recommendations”. It rejected the Panel’s interpretation that Article 3.1 imposed an outright obligation on the Member States to comply with international standards “in the here and now”. Instead it opted for a more lenient and less onerous approach and stated that Article 3.1, merely set a goal for the Member State to realise in the future.

### 6.3.4 WTO's Initiatives to Clarify Vague Terms

The WTO needs to strengthen its legal framework for enforcing the obligation of WTO members to supervise the activities of private standard-setting bodies. However, for this framework to act as an effective starting point for systematic reform, the relevant provisions of the SPS and TBT Agreements require further clarification. Even though the objectives of Article 13 SPS and Article 4 TBT are clear in setting out that the Member States must “do something” that they consider “reasonable”,<sup>760</sup> to ensure that private standards in their territories comply with the provisions of SPS Agreement and the TBT Code, there is a lack of clarity about the type of measure or the intensity of intervention that would suffice.

To date, some attempts have been initiated, though not yet concluded, by the WTO to clarify the Article 13 SPS obligation. The SPS Committee's Working Group on Private Sector Standards has been entrusted with this task. Discussions in the Working Group are on-going and significant further work is required.<sup>761</sup> In the meeting that took place at the end of March 2011, the Member States participating in the Working Group were able to agree only on certain basic issues.<sup>762</sup> These included confirmation of the Committee's mandate to develop a working definition of “private standards”, the need

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<sup>760</sup> As previously discussed, it will likely be for Member States to decide on what actions count as reasonable.

<sup>761</sup> The issue of private standards was first raised in the SPS meeting when St Vincent and Grenadines put forward their concerns about the binding effects of EurepGAP certification for bananas destined for EU supermarkets. The first special discussion session and establishment of a working group on this issue took place in Oct 2006.

<sup>762</sup> In a more recent SPS Committee meeting, 30 June – 1 July 2011, the discussions and debates on Member States' control over the private sector standards continued but no further issues were agreed.

to exchange information with the Committee’s “sister organisations”<sup>763</sup> and the WTO Secretariat, the importance of Member States taking steps to help private standard-setting entities in their territories to understand those issues raised in the SPS Committee, and the need to develop material that clarifies and underlines the importance of SPS obligations in relation to private standard-setting. However, Member States participating in the Working Group continue to differ in their approach on both the nature and the extent of the actions that need to be deployed to discharge Article 13 obligations.<sup>764</sup> Given this deadlock in Committee discussions it is likely to be some time before Members will agree to any concrete clarifications.

### **6.3.5 Potential Breaches of SPS and TBT Agreement by the EU in Relation to Private Standards**

It is understandable that many WTO Member States, including the EU, wish to leave the nature of their obligations vis-à-vis private standard-setting bodies vague. The conclusions of the WTO’s Working Group could carry some legal significance in interpreting those provisions that are currently unclear. At a minimum, they could act as soft law instruments, helping affected Member States, including Thailand, to suggest to the EU that it needs to do more to supervise the standard-setting bodies operating within its territory. They could also serve as a basis for Member State to raise specific trade concerns.

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<sup>763</sup> Namely the Codex Alimentarius, the World Organisation for Animal Health (OIE) and the International Plant Protection Convention (IPPC).

<sup>764</sup> In addition, during the June - July 2011 meeting, a consensus on a clearer definition of “private standards” under SPS provisions could not be reached.

Although there have been no WTO disputes on this point, given current circumstances it can be argued that EU is currently in breach of its obligations under Article 13 SPS and Article 4 TBT. However, in order to establish this it must first be demonstrated that private entities operating from the EU are in fact acting in a manner inconsistent with the relevant terms under the SPS and TBT Agreements.

#### **6.3.5.1 Standard-setting bodies' Inconsistency with the SPS Agreement**

As shown in various studies by different international organisations and academics,<sup>765</sup> many standard-setting bodies operating in the EU, including those originating from supermarket chains, acting in a manner that is inconsistent with the provisions contained in SPS Agreement and TBT's Code of Good Practice. We saw examples of these inconsistencies drawn from the result of EU/Thai case studies earlier in Section 6.1.3.

With regards to SPS obligations, breaches of Article 2.2 may well have occurred, for example in relation to the requirements that (i) Thai baby corn producers have to keep traceability records for at least two years, instead of 6 months as recommended by the Commission<sup>766</sup> and, (ii) that they are required to be audited by expensive EU-based auditing firms.<sup>767</sup> Both measures may well be construed as being in breach of the proportionality requirement.<sup>768</sup> From the information currently available, it is difficult

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<sup>765</sup> For example, the studies by UNCTAD (2007), Bonsi et al. (2008).

<sup>766</sup> See supra, Chapter 2, Section 2.3.

<sup>767</sup> For example, some baby corn producers are required by EU supermarkets to conduct inspections undertaken by a company by the name of CMi. (See supra, Section 6.1.3.3).

<sup>768</sup> See Article 2.2, which is to be read with Article 5.6 of the SPS Agreement (Supra, Section 5.1.1.1.2 A).

to see how these demanding requirements are necessary to protect human health. In both cases, less trade-restrictive alternatives that are capable of achieving the same level of health protection appear to be available. In the case of the traceability requirement, the Commission recommendation could have been relied upon, while for the auditing requirement, the services of local auditors could have been accepted as well.

Furthermore, and as seen from the case studies, the application of certain EU private standards in Thailand has fallen short of compliance with the procedural standards laid down under Article 7 and Annex B of the SPS Agreement. Examples can be drawn from the earlier discussion of governance issues relating to private standards.<sup>769</sup> This can be seen in the lack of opportunities for smallholders to participate in the standard-setting processes, and also in the inadequate transition periods allowed for implementing the standards. Here, there are potential breaches of Annex B of the SPS Agreement, which demands, *inter alia*, an opportunity for affected parties to comment on proposed measures,<sup>770</sup> and a reasonable time-lapse between the date of publication and the date of implementation of new SPS measures.<sup>771</sup>

#### **6.3.5.2 Standard-setting bodies' Inconsistencies with the TBT Agreement**

Some of the rigid requirements imposed by private standards relating to 'other legitimate concerns' seem likely to breach the TBT Code of Good Practice. For

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<sup>769</sup> This was previously discussed in some detail in Section 6.1.4.

<sup>770</sup> Annex B 5 (b) SPS

<sup>771</sup> Annex B (2) SPS, This is subject to the urgency exception.

example, the obligation to prepare wildlife protection plans without recognition of more effective local conservation schemes,<sup>772</sup> could be argued to be inconsistent with Points E, H and I of the Code of Good Practice; these Points concern (i) the avoidance of unnecessary obstacles to international trade, (ii) the avoidance of duplication in different standards, and (iii) the use of performance rather than design criteria.

#### **6.3.5.3 The EU's Potential Breaches of Article 13, SPS Agreement**

It can also be argued that, notwithstanding the vagueness of Article 13 SPS, the EU is in breach of its obligation to take those “reasonable measures” available to it so as to ensure that standard-setting bodies comply with the terms of the SPS Agreement in full. It is possible to make this argument because of the detailed empirical findings set out earlier concerning the relationship between EU regulation and private standards.

As previously discussed,<sup>773</sup> the language of this obligation is problematic in that it includes the unclear term “reasonable measure” which calls out for urgent clarification. However, although Member States may be expected to enjoy discretion in defining what counts as a “reasonable measure”, certain procedural obligations may be thought to apply as a result of this obligation.

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<sup>772</sup> Supra Section 6.1.3.3.

<sup>773</sup> Supra Section 6.3.3.

It is common for the WTO dispute settlement bodies to require that Member States demonstrate that certain procedures have been followed in discharging their WTO obligation. We see this in past disputes concerning various WTO Agreements.<sup>774</sup>

An analogy may be drawn with two past disputes, *Japan- Apples* and *Canada Alcoholic Beverages*. In *Japan Apples*, procedural requirements were imposed by the Appellate Body when deciding whether Japan had fulfilled its risk assessment obligations under Article 5.1, SPS Agreement.<sup>775</sup> In this case, the Appellate Body injected procedural requirements into its interpretation of Article 5.1, which had to be satisfied by Japan in justifying its measure. It held that Japan had to demonstrate that it had considered the possibility of deploying less-trade restrictive alternative measures. In so doing, Japan would have to show that it had evaluated the likelihood of the entry and establishment of the fire-blight disease in relation to each of these alternative measures. Only after this, would Japan be allowed to reject the alternative measures as being incapable of delivering the level of protection being sought.<sup>776</sup>

Another case concerning the establishment of procedural requirements is *Canada-Alcoholic Beverages*. In this case the Panel had to deal with a similarly unclear term in Article XXIV: 12 GATT which required Member States to “take reasonable measures as may be available” to ensure observance of (the GATT’s) provisions by regional and

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<sup>774</sup> For example, in relation to GATT, notably, in *Shrimp/Turtle* (para. 176), the WTO injected an additional duty to negotiate with all affected members in order to discharge the Member State’s obligations under the chapeau of Article XX GATT. (See discussion in *supra* Section 5.1.1.2.3).

<sup>775</sup> “To ensure that their measures are based on an assessment...of the risk to ...plant life” (taken from Article 5.1).

<sup>776</sup> Since in this case other alternative measures had not been considered, Japan was found not to have conducted a proper risk assessment. Para. 209, *ibid.*

local governments. In this dispute Canada was required to demonstrate that it had made a “serious, persistent and convincing effort to secure compliance” by the provincial liquor board with the relevant GATT provisions.<sup>777</sup> This case offers a close analogy with Member States’ obligation under Article 13 SPS, in that it concerns the relationship between a WTO member state and other entities operating within its territory.

It is quite conceivable that a similar interpretation would be adopted by the dispute settlement bodies when determining the nature and scope of the EU’s obligations under Article 13, SPS Agreement. As such, procedural requirements would be imposed on the EU. It is possible that the EU would, *inter alia*, have to demonstrate that it had taken steps of various kinds. For example, even without interfering with the EU’s substantive discretion, it would be open to the dispute settlement bodies to require the EU:

- to access what private standard-setting bodies have done to ensure compliance with WTO law,
- to identify potential breaches of WTO on the basis of this,
- to consider what steps could be taken by it to bring these breaches of WTO to an end,
- to give reasons to justify a decision not to take the steps available on the basis that it would not be reasonable to do so,
- where steps are not rejected as unreasonable, the EU could be required to show that it has made a serious, persistent and convincing effort to secure compliance on the part of the private standard-setting bodies.

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<sup>777</sup> Para. 5.37

At present the EU lacks any framework for supervising the activities of private standard-setting bodies in the area of food safety.<sup>778</sup> The absence of any framework attests clearly to the fact that no measures have been taken by the EU and also that no explanation of why this is so has been given. There is then a strong possibility that the EU is in breach of the first part of Article 13.

The failure of the EU to take steps to control the activities of private standard-setting points is especially unfortunate when placed in the context of the earlier discussion in this chapter. In part 6.1.3.4, it was argued that the EU and/or the Member States may be encouraging food retailers to rely on private standards by conferring some authority on these standards when it comes to defining the contours of general EU food safety regulation and when ascertaining the validity of a due diligence defence. This is not to suggest that either the EU or its Member States are encouraging the use of private standards that breach the SPS Agreement, which would itself be a breach of the second part of Article 13, SPS. However, it could be the case that this inter-relationship between official food safety regulation and private standards may be thought to make the EU's complete lack of regulatory control over private standard-setting more apparent.

More tentatively, it could also be argued that the EU is in breach of the third part of Article 13, SPS, which insists that member States must not rely upon the service of non-governmental entities to implement official SPS regulations unless those non-governmental entities comply with the provision of the SPS Agreement. To the extent

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<sup>778</sup> For example, there is no concrete evidence of the procedural requirements in points (a) to (d) having been followed by the EU.

that private standards have come to play an important role in defining what is required by the EU's general food safety law, and in giving a substance to the due diligence defence,<sup>779</sup> it can at least be argued with some plausibility that the EU is relying indirectly on private standard-setting bodies to enforce official EU food safety law.

#### **6.3.5.4 EU's Potential Breaches of Article 4, TBT Agreement**

Having established earlier that a number of private standards relating to 'other legitimate concerns' may be inconsistent with the TBT Code of Good Practice,<sup>780</sup> this section turns briefly to consider the EU's obligation under Article 4, TBT Agreement. The relevant part of Article 4 is a positive obligation which requires Member States to take "reasonable measures as may be available to them" to ensure that non-governmental standardising bodies in their territories accept and comply with the TBT Code. As with Article 13, SPS Agreement, this TBT obligation is vague due to the core requirement "to take reasonable measures".

Even if substantial discretion may be expected to be granted to the EU in deciding what is considered to be a reasonable measure (or measures) to ensure respect for the Code, again the EU is likely to be required to demonstrate that it has discharged certain procedural requirements of the kind already set out in Section 6.3.5.3 above.

It is important to stress that as of 2010 most of the main EU private standards presented in the case studies, including GlobalGAP, Tesco's Nature's Choice, Soil Association

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<sup>779</sup> Recall the discussion in *supra*, Section 6.1.3.4.

<sup>780</sup> See *supra*, Section 6.3.5.2.

and BRC have not been included in the official list of standard-setting bodies that have voluntarily accepted the TBT Code of Good Practice.<sup>781</sup> There is no evidence to suggest that the EU has taken any steps to encourage them to do so.

## **6.4 THE EU'S INITIATIVES TO CONTROL PRIVATE STANDARDS**

In an ideal world, the SPS Committee would arrive at a clear understanding of the nature and scope of Member States' obligations in relation to private standards. This, however, is unlikely to occur in the near future. Thus, despite the SPS Committee's initiative, it is important that other entities also take steps to oversee the activities of private standard-setting bodies. In particular, it is crucial for the EU to take steps to mitigate the external accountability gap that originates from private standards adopted within its domain. Not only would this benefit third countries and their producers and exporters, but it would also benefit the EU itself by ensuring that it has satisfied its WTO obligations.

It would be impractical for this thesis to propose a detailed institutional model for the EU. This would need to be the subject of further studies and discussions, and would need to take into account the opinions and interests of all stakeholders, including those inside and outside the EU. The views of supermarkets, standardising bodies and producers in the EU and third countries would need to be taken into account. However,

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<sup>781</sup> As of 1 January 2010, there are over 170 standardising bodies that accept the code. (Source: <http://www.iso.org/iso/wto-tbt-scd.pdf>).

this thesis can provide important data by reporting upon the experiences of Thai stakeholders so far. Also it puts forward GAL as a possible framework for thinking about how external accountability can be achieved. The previous chapter offered examples of good practices in this regard, demonstrating in particular the key role that informal and “under -the -radar” processes and networks can play.

As a first step in constituting a supervisory framework for private standards, the EU should identify the GAL criteria that private standard-setting bodies should respect. In any event, there would need to be initial agreement on minimum standards for achieving transparency, participation, proportionality, reasoned decision-making and opportunities for appeal/review. In order to fully discharge the EU’s obligations under WTO law, these minimum standards would have to be in accordance with the demands of the SPS Agreement and the TBT Code of Good Practice. Were this approach to be followed, private standard-setting bodies would be required to put notice and comment type procedures in place, with a view to increasing transparency and gathering feedback from stakeholders both within and outside the EU. They would have to demonstrate the means-end rationality of their requirements, to allow for measures that are equivalent in effectiveness to be used, and to be prepared to stand before a forum in which affected entities in the EU and in other countries could challenge the requirements they impose. Sanctions would also have to be available for situation in which the bodies in question do not observe the EU legislation or code.

In taking steps to supervise the activities of private standard-setting bodies, the next task for the EU is to devise a suitable accountability forum to ensure that private standard-setting bodies are encouraged to comply with GAL criteria. On the basis that both Article 13 SPS and Article 4 TBT give discretion to Member States to take “reasonable measure”, it is clear that the EU has considerable freedom to select the kind of accountability forum that it sees fit. In so doing, the EU should be encouraged to strike an appropriate balance between effectiveness and flexibility.<sup>782</sup>

The EU’s regulatory framework for supervising the activities of private standard-setting bodies needs to be effective in order to demonstrate to Member States and to the WTO that a “serious, persistent and convincing effort” has been made. On one hand, this may be thought to militate in favour of the introduction of an EU directive which compels Member States to ensure that standard-setting bodies in their territory, including supermarkets, adhere to established standards and do so on the basis of clearly defined procedural guarantees.

We already see an attempt of EU law to supervise activities of private entities in this way. For example, in order for private certification bodies to be able to certify compliance with the EU’s sustainability criteria for biofuels, these standard-setting

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<sup>782</sup> The problems of trying to devise a regulatory framework that strikes the right balance between flexibility and effectiveness is not unique in the case of new EU regulatory framework to supervise activities of private standards. However, it has been an ongoing problem in other regulatory frameworks and subject to many global governance debates by various academics. See further the following works for more discussions on this issue; in relation to the EU, see Trubek et. al (2005) and Scott and Holder (2006), for international law see, the works by Abbott and Snidal (2000), and for the WTO framework, see further the works by Lang and Scott (2009), (2010) and the work by Footer (2008)).

bodies must operate in accordance with some key elements of GAL. Only private certification bodies which meet adequate standards of reliability, transparency and independent auditing may be approved by the Commission to perform this verification of compliance function in EU law.<sup>783</sup> Admittedly, the biofuels example is different from the food safety example because in the former private standard-setting bodies are directly acting as *de facto* agents of compliance with official EU law.<sup>784</sup> Notwithstanding this difference, this regulatory option could be further explored. In so doing, it would be important to look closely at the Commission's practice in supervising and approving private entities in relation to the biofuels certifications in order to ascertain whether any lessons can be learned from this regulatory framework.<sup>785</sup>

On the other hand, however, it is the case that given the large number of standard-setting bodies operating in the EU and the wide diversity in their procedures and current level of GAL recognition, it may be less controversial and more realistic for the EU to adopt a 'soft law' approach in their supervision of standard-setting bodies.<sup>786</sup>

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<sup>783</sup> See Article 17(5) of Directive 2009/28/EC. For an analysis see Lin (2010).

<sup>784</sup> Recall, however, the discussion at 6.3.5.3 above, where the close relationship between EU law and private standards was identified and discussed.

<sup>785</sup> The Commission has recently approved seven schemes of this kind. For details see: [http://ec.europa.eu/energy/renewables/biofuels/sustainability\\_schemes\\_en.htm](http://ec.europa.eu/energy/renewables/biofuels/sustainability_schemes_en.htm).

<sup>786</sup> Soft law has been defined as "rules of conduct which in principle are not legally binding but which nevertheless may have practical effects" (Snyder (1995) in Trubek (2005), p.1). This term is often used to refer to instruments such as guidelines, codes of conduct and declarations (Footer (2008), p. 4). Soft law instruments frequently place considerable emphasis upon procedural instruments although substantive outcomes can be included as well.

For example, the EU could draw up guidelines for private standard-setting. These guidelines could identify the accountability standards which incorporate GAL criteria and urged these to be respected by all private standard-setting bodies. At the same time, they could leave flexibility to individual standard-setting bodies to articulate how the respect for these standards can best be achieved. Standard-setting bodies could also be required to report to the Commission about the steps that they are taking to ensure respect for these accountability standards. Furthermore, these reports could be made available to both the general public and peers which are other standard-setting bodies in this instance. As more information becomes available over the course of time about which procedures and mechanisms are effective in ensuring the standard-setting bodies' respect for GAL, the Commission could update its guidelines and, where appropriate, it could further expand and clarify their terms.<sup>787</sup>

In adopting a soft law approach of this kind, the Commission should consider additional steps to be taken to ensure that reputational mechanisms can play an important role. For example, the Commission could follow its current practice regarding the EU Member States' compliance with directives by issuing a "name and shame" report about the compliance record of individual standard-setting bodies.<sup>788</sup> The Commission could

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<sup>787</sup> This suggestion draws upon literature in the tradition of democratic experimentalism. See for a discussion Scott and Holder (2006) and Sabel and Zeitlin (2010).

<sup>788</sup> In relation to directive and Member State compliance, see for example the Lamfalussy league table at: [http://ec.europa.eu/internal\\_market/securities/docs/transposition/table\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/transposition/table_en.pdf).

even introduce a ‘good practice’ logo which could be used by the best-performing standard-setting bodies of this kind.<sup>789</sup>

There has been considerable discussion in academic literature about the capacity of soft law to induce changes in the behaviour of states and other actors.<sup>790</sup> The findings presented in this thesis are of relevance to this debate. It has been argued that both the CA Model and the SPS Committee operate as important accountability fora and succeed in enhancing respect for GAL criteria. The operation of peer mechanism in these fora is based in significant part upon soft law. This is especially noteworthy in the case of the CA Model, where almost continuous interactions between EU and Thai officials have led the EU to adjust its regulatory demands and to provide assistance to Thai stakeholders to achieve compliance with EU law, even in circumstances where the EU’s legal entitlement to take steps to ensure the safety of imported food is not in any doubt.<sup>791</sup> Consequently, changes in behaviour have been seen to occur, even in circumstances where a threat of legal challenge was absent or at least remote.<sup>792</sup>

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<sup>789</sup> For example, the possibility of deploying an EU recognition symbol for “GAL compliance” standards similar to what has been done in the case of the “EU-Flower”, a central EU-based eco-label voluntary scheme for textiles, could be explored (See further: [http://www.eco-forum.dk/textile-purchase/index\\_files/Page2303.htm](http://www.eco-forum.dk/textile-purchase/index_files/Page2303.htm)).

<sup>790</sup> Some of the most interesting literature on the topic is co-authored by legal academics and international relations scholars. See especially Finnemore and Toope (2000) taking issue with Abbott and Snidal’s famous understanding of legalisation (2000). See also Brunnee and Toope (2008), Cohen (2009), Alkoby (2008) and Bush and Reinhardt (2000).

<sup>791</sup> The question of why informal interactions of this do succeed in inducing behavioural change is outside of the scope of this thesis. One argument may be drawn from “constructivism”, which sees governmental entities operating in transnational networks as forming part of an international community with shared norms. Within this community, transnational learning can occur and also peer pressure can be brought to bear in relation to those who depart from these shared norms. See Brunnee and Toope (2008).

<sup>792</sup> To give one example, the EU offered a technical assistance to train Thai CA staff following its Nitrofurans restriction, this was given voluntarily even without the potential threat of Thailand challenging

Of course, ultimately, the EU need not make a definitive choice between “hard” and “soft” law approaches in order to shape the activities of private standard-setting bodies. It may be that in the first instance non-binding guidelines are to be preferred. These, combined with a reporting requirement of the kind set out above, could assist the Commission in gathering information, in evaluating a wide range of different approaches and practices and, ultimately, in drawing up ‘best practice’ guidelines that could over time be incorporated into hard law.<sup>793</sup> Either way, as noted above, the challenge for the EU is to strike an appropriate balance between effectiveness and flexibility. It is, therefore, crucial for the EU to ensure that its preferred approach is kept under continuous review. Only then will it be able to claim that “serious, persistent and convincing efforts” to ensure that private standard-setting bodies operate in conformity with the relevant WTO obligations have been made.

## **6.5 THE UK INITIATIVE**

Even though there has been no attempt to supervise private standards at the EU level, an initiative has been launched at the national level in the UK. This national initiative has the benefit of contributing towards UK fulfillment of its WTO obligations under the SPS and TBT Agreements. However, the UK scheme is still under development and so

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the EU’s entitlement to invoke the SPS measure or to commence a dispute settlement proceeding against the EU (see *Supra* Section 5.2).

<sup>793</sup> For a very recent example of a transition from soft to hard law in EU law see the Industrial Emissions Directive (Directive 2010/75/EU,) which makes BAT (best available techniques) Reference Documents binding on Member States. These reference documents were non-binding under the earlier Directive on Integrated Pollution Prevention Control (recently codified as Directive 2008/1/EC).

far it appears to have achieved somewhat limited results. Regardless, the EU could observe and learn lessons from this UK development.

The UK system comprises a Grocery Supply Code of Practice (thereafter the Grocery Code)<sup>794</sup> and a Grocery Code Adjudicator System (thereafter the Adjudicator).<sup>795</sup> These were established in 2010 and updated in May 2011 following the introduction of Draft Groceries Code Adjudicator Bill.<sup>796</sup> They are intended to become fully operational in 2012.<sup>797</sup> Under the current system, primary supermarket suppliers both within and outside the UK and including those in Thailand, can complain to the Adjudicator that UK supermarkets have to not adhere to the demands of the Grocery Code. They can also register complaints regarding unfair treatment by supermarkets or by other entities in the supply chain. When fully established, this UK scheme will create an accountability forum which stakeholders from abroad may use to enhance the external accountability of power-wielders further up the supply chain.

The standards of conduct underpinning this system are laid down in The Grocery Code itself. This applies to UK retailers with a turnover of over £1bn, which includes all major UK supermarket retailers.<sup>798</sup> In general, the Code requires supermarkets to base their operations on good-faith commercial practices, including in relation to provisions

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<sup>794</sup> This has been established since 4/2/2010 but is subject to further development by the Department of Business.

<sup>795</sup> This is working under the Office of Fair Trading.

<sup>796</sup> The draft Bill can be found at: <http://www.bis.gov.uk/assets/biscore/business-law/docs/d/11-936-draft-groceries-code-adjudicator-bill.pdf>.

<sup>797</sup> The full bill is expected to be published during the second parliamentary session, in May 2012 Source: <http://www.farmersguardian.com/home/business/business-news/clegg-urged-to-push-on-supermarket-adjudicator-plans/43473.article> .

<sup>798</sup> Source: Section 7 of Draft Groceries Code Adjudicator Bill 2011. These include, Asda, Co-op, M&S, Morrison, Sainsbury, Tesco, Waitrose, Aldi, Iceland and Lidl.

on offer prices and payments to producers.<sup>799</sup> It also introduces some activities that can be construed as being directed towards ensuring enhanced respect for GAL. These include a requirement to give reasonable notice of a change in the standard's requirement and an explanation in the event that a supplier is delisted or where changes are made to the procedures governing the supply chain.<sup>800</sup> These provisions can, of course, be considered as contributing towards the reasoned decision-making and transparency criteria of GAL. Meanwhile, the fact that affected entities can raise complaints can be seen as offering an opportunity for review of a measure, even though the forum in which this review is understood does not take the form of a formal tribunal or court.

The operation of this adjudication system as laid down in the Draft Groceries Code Adjudicator Bill is currently based on soft law. An option for incorporating hard law in the form of financial penalties is currently being debated.<sup>801</sup> Currently however, the Draft Bill only provides that the adjudicators can provide advice, recommendations and assistance to suppliers and can “condemn” both any departures by supermarkets and standardising bodies from the Grocery Code, and any unfair practices conducted by domestic or overseas suppliers. The Adjudicator can add offending supermarkets to a “name-and-shame” list, comprising UK entities that have imposed unfair treatment on

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<sup>799</sup> Section 8 Draft Groceries Code Adjudicator Bill 2011.

<sup>800</sup> Section 8 and 9 Draft Groceries Code Adjudicator Bill 2011.

<sup>801</sup> Section 18 of Draft Groceries Code Adjudicator Bill 2011 states that “....where an investigation finds that a large retailer has breached the Groceries Code, (the adjudicator may) decide whether to make recommendations to the retailer, require it to publish information about the instigation (or if the Secretary of State adds a power to do so) impose a financial penalty on the retailer”. The option of granting the Groceries Code Adjudicator with more legal powers is still being debated and during recent parliamentary hearings on the issue (as at 24 January 2012) this option is still possible. (Source: <http://www.foodmanufacture.co.uk/Regulation/Food-firms-welcome-Groceries-Code-Adjudicator-calls>).

small producers.<sup>802</sup> This can be seen as a mechanism of reputational accountability with the potential for sanctions in the form of a threat to public reputation.

This UK move is commendable. However, in order to fully discharge their WTO obligations, the UK and indeed the EU, would have to go further in many respects. The elements of GAL contained in the Code, as compared with those given effect by the WTO, are fairly minimal. For example, the Code falls short of recognising opportunities for participation in standard-setting and in giving effect to substantive standards relating to means-end rationality and proportionality. Any EU framework to supervise the activities of private standard-setting bodies should on the contrary use the SPS provisions and the TBT Code as its guide.

It is relevant to stress again that the operation of the UK adjudicator scheme is, at present, based only on soft law. At present the UK scheme is not supported by a legal mechanism that would permit the adjudicator to strike-down offending standards or to impose legal sanctions on errant supermarket or standard-setting bodies.<sup>803</sup> It remains to be seen whether the action of naming and shaming alone will constitute an effective reputational accountability mechanisms and will be sufficient a driver to achieve behavioural change in the standard-setting bodies and the supermarkets concerned. The EU regulators should, in the meantime, monitor the effectiveness of this UK development.

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<sup>802</sup> Source: Section 18, Draft Groceries Code Adjudicator Bill 2011.

<sup>803</sup> However, there has been a proposal to inject this scheme with some form of legal mechanisms and sanctions, for example by creating a dispute resolution system that allows the adjudicator to strike down any unfair acts by UK supermarkets or standard-setting bodies for breach of contract. However, it is likely that the industry will resist such a development. See further: <http://www.law-now.com/law-now/2010/GroceriesCode+AdjudicatorAugust10.htm?cmckreg=true>.

## 6.6 CONCLUSION

This Chapter has focused upon analysing the stark differences between the control frameworks applicable to EU governmental regulation and EU private standards. For Thailand, both forms of regulation are important parts of the EU food safety regulatory framework and are in effect binding upon Thai entities, as was demonstrated by the case study results. However, only EU governmental regulation has been subjected to a high degree of external accountability controls by WTO law and by network activities in the CA model. Private regulation, on the contrary, has been subjected to a much lesser degree of regulatory control.

Given the great variation in form and level of GAL recognition amongst different EU private standard setting bodies, it is difficult to generalise the overall extent to which private standard setting bodies respect GAL and mitigate the external accountability gaps that may otherwise arise in relation to Thailand. However, it can be concluded that significant external accountability gaps have already been generated by the cross-border activities of private standard setting bodies in Thailand, as most of these bodies have only been able to achieve a somewhat limited and inadequate level of GAL recognition. The main conclusion that can be taken away is that no private standard setting body lives up to the various demands imposed by GAL. While different bodies perform better or worse in respect of particular distinct criteria, none ensures adequate respect for GAL as a whole.

For example, GlobalGAP can be considered as being the “leader” in recognising the transparency criterion through the provision of most of its documents in local languages. Regarding participation, GlobalGAP also performs better than the other standard-setting bodies because it provides a permanent forum through which national smallholders can participate on a regular basis. Conversely, participation opportunities provided by other standard-setting bodies, including Tesco’s Nature Choice and that of the Soil Association, are provided solely on an *ad hoc* basis. With regard to the proportionality criterion, several standards, including GlobalGAP and GFSI (which incorporates the BRC, SQF and IFS standards), have attempted to achieve compliance through their benchmarking options. Such benchmarking options are not available in TESCO’s “Natures Choice” or Marks & Spencers’ “From Field to Fork” standards. For the right to appeal and the opportunity to call for a review, Tesco’s Nature Choice performs better than the other standards on the basis that it explicitly provides producers with a right to appeal within 21 days against any decisions made by the certifying body – CMi.

Even GlobalGAP, the standard setting body widely considered to be a leader in taking steps to give effect to GAL, has only managed to achieve a minimal level of GAL recognition. For example, while its decision to provide documentation in local languages is commendable, the type of transparency achieved as a result amounts to the mere provision of accessible information. Other important aspects of transparency, relating for example to “when” the information should be made available, have not yet been addressed by GlobalGAP. As the results of the case studies have demonstrated,

information pertaining to potential alterations to rules often fails to reach many affected entities in Thailand sufficiently far in advance of the alterations to allow for the participation of affected entities in the decision-making process.

Moreover, the inadequacy of the transitional periods provided before new requirements enter into effect has not yet been properly addressed, and inadequate transitional periods continue to be set. Furthermore, in the context of participation, although GlobalGAP's move to establish a participatory scheme for smallholders is commendable, at present the degree of participation granted to affected entities in Thailand is fairly limited and in reality amounts only to a "notice-and-comment" type procedure. Similarly, while GlobalGAP's benchmarking options are intended to reduce the burden imposed by proliferating standards and to secure proportionality, other key aspects of proportionality, such as mean-ends rationality have not been addressed.

Given the wide external accountability gaps still being generated by the introduction and application of EU private standards, further efforts are needed to hold power-wielding private entities to account in relation to significantly affected entities outside of the EU. The EU, as a WTO Member State, has obligations to take reasonable steps to control the application of private standards by ensuring that they comply with the relevant provisions laid down in the SPS Agreement and in the TBT's Code of Good Practice. Although any discussion regarding a concrete framework to control EU-wide private standards is saved for future studies, this thesis suggests that the EU should, at minimum, endeavour to fulfill its obligations under WTO law. In so doing, it could learn from its past experiences in dealing with Thai governmental entities, both within

the WTO and CA model frameworks. These experiences demonstrate that mechanisms of peer and reputational accountability can play an important role.

## **CHAPTER 7**

### **CONCLUSION**

The findings presented in this thesis rest upon empirical, doctrinal and theoretical investigation and analysis. In essence, the thesis has explored the contours of EU food safety regulation, examined its multifarious effects in Thailand, analysed these effects from the perspective of global governance and external accountability, and proposed outline solutions to the problems that have emerged.

Following a brief introduction, Chapter 2 began by setting out the main elements and characteristics of EU food safety regulation in the wake of the BSE crisis. This charted the shift in EU law in the direction of a management-based regulatory approach, exemplified by the concepts of traceability and Hazard Analysis and Critical Control Points. It also looked at the emergence and role of the European Food Safety Authority and at the increasingly important concept of ‘other legitimate concerns’. Although these core concepts are still evolving, they shape in fundamental ways the complex regulatory environment in which Thai entities involved in the food export business operate today.

In Chapter 3, this thesis used these doctrinal underpinnings to facilitate empirical research. Chapter 3 is a long chapter and consequently it was divided into three parts. The first two parts presented in-depth two case studies on the cross-border application and impacts of EU food safety regulation in Thailand, in relation to fresh/chilled baby corn and cooked poultry products. These case studies demonstrated that there are two main types of EU regulation which constrain Thai exports to the EU. The first type of

EU regulation takes shape within what was called the “Competent Authority Model” (CA Model). This little known institution emerged as key to an understanding of the operation of EU food safety regulation in Thailand. The second type of regulation was by way of private standards, including those set by individual supermarkets and standard-setting bodies inside and outside the EU. Both types of regulation were seen to generate significant spill-over effects in Thailand. In relation to private standards, these effects were merely outlined in Chapter 3 and explored in greater depth in Chapter 6.

The third and final part of Chapter 3 explored and evaluated the CA Model. It argued that this governance framework brings advantages both to Thai stakeholders and to regulators and consumers in the EU. As far as Thai exporters are concerned, the CA Model serves to militate against the danger of the EU imposing costly and damaging food import restrictions or bans. For the EU, the CA Model serves to ensure that the safety of Thai food is significantly secured even before the food export reaches the border of the EU.

These case studies leave no doubt as to the significance of the spill-over effects generated by EU food safety regulation. It was particularly striking that the CA Model gives rise to frequent and intense interactions between EU and Thai regulators and that these interactions are capable of bringing about fundamental institutional change in Thailand. While there was certainly evidence of positive spill-over effects, including an improvement in the level of food safety of some products made available for sale in

Thailand, negative effects were seen to arise as well.<sup>804</sup> For example, in relation to the CA Model, the regulatory change introduced by the Thai CA in the course of pursuing Thai export compliance with EU food safety demands can be costly and can leave small producers and exporters struggling to comply.

The most serious negative effects in Thailand were experienced as a result of the introduction of private standards. It became clear in Chapter 3, and again in Chapter 6, that many diverse standards of this kind are being applied. The standards are often rigid and inflexible and sometimes not at all suitable for the circumstances in which they are being applied and the environment in which they operate. There is evidence that they sometimes impose unnecessary financial burdens on Thai producers and exporters and that they create a variety of operational problems. This was apparent both in relation to standards which concern mainstream food safety issues, such as on food production hygienic conditions, animal disease control, and in relation to standards that address issues closely related to ‘other legitimate concerns’.

It became especially apparent in relation to private standards that their negative effects for Thai stakeholders arise in part as a result of their substantive contours and in part as a result of the procedures in place for adopting and enforcing them. Stakeholders commented upon the lack of transparency surrounding private standards, the irregularity and lack of notice for changes in standards’ requirements, and upon the absence of

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<sup>804</sup> These positive and negative external effects which emerged from the CA model were laid down in Part III of Chapter 3 whereas those concerning private entity regulation were discussed in Chapter 6 (Section 6.1).

meaningful opportunities to participate in the adoption of private standards or to challenge new requirements that emerge.

In contrast with official EU food safety regulation, which operates in accordance with the CA Model, it became clear that there are few, if any, pathways that Thai producers and exporters can exploit to assist them in achieving compliance with private standards, and to influence the content of the standards set. While private standards operate as *de facto* conditions for EU market access, they nonetheless fall outside of the scope of the CA Model at the current time.

While the thesis presented its empirical findings in Chapter 3 (and in relation to private standards also in Chapter 6), it turned in Chapter 4 to focus upon the theoretical context in which EU food safety regulation operates. It argued that this context can best be understood by reference to the concept of global governance, in view of the increasingly important role that private actors play and in view of the multi-level and transnational interactions which occur as a result of EU food safety regulation. Particularly striking and important in this respect was the role that transnational networks comprising EU and Thai entities play in the regulation of food safety and this is a dimension which has in the past been largely overlooked. As we will see below, these transnational networks play a crucial role in mitigating and resolving the negative effects of EU food safety regulation in Thailand, particularly as a result of the operation of the CA model.

Having explored the concept of global governance as a way of shedding theoretical light on the operation of EU food safety regulation, Chapter 4 then turned to examine the

related concept of external accountability. As other academics have pointed out, global governance situations frequently generate external accountability gaps. This is because those regulating and those subject to regulation operate in different regulatory spaces; whether in different countries or different organisational domains. Thus, for example, regulators in the EU operate in a different polity than the Thai stakeholders to whom the regulations are addressed and affected. In keeping with Robert Keohane's work, accountability gaps of this kind are captured by the language of 'external accountability gaps'.<sup>805</sup>

Chapter 4 went on to argue that it is important to evaluate existing mechanisms and procedures for inculcating external accountability and, where necessary, to propose improvements to mitigate or close external accountability gaps. In order to do so, the concept of external accountability had first to be more fully explored. It was suggested that three features form indispensable elements of an accountability relationship, including standards, accountability fora and sanctions. The shift from internal to external accountability, and from unitary to pluralistic conceptions of accountability, means that these elements may be instantiated in less familiar forms. Thus, for example, while courts can constitute an external accountability forum and legal redress operate as a sanction, where external accountability deficits arise, additional types of fora and sanctions may well be required. Chapter 4 argued, for instance, that peer review can also serve as an effective accountability forum and that peer condemnation and reputational loss may operate as effective sanctions.

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<sup>805</sup> Grant and Keohane (2005), *supra*, Section 4.1.2.

Still building on Keohane's work, and in a bid to give further content to the concept of external accountability, Chapter 4 turned to increasingly influential scholarship in the new area of Global Administrative Law (GAL). It argued that this scholarship provides a framework for identifying accountability standards that sometimes do apply, and at any rate should apply, in global governance settings. Looking to the over-lapping operational practices of a wide range of international and transnational organisations, GAL scholars have succeeded in articulating a range of accountability standards that can be used to underpin external accountability relationships in global governance settings. Among the most important criteria they identify are; transparency, participation, reasoned decision-making, proportionality and opportunities for appeal or review.

Having set out a theoretical framework for thinking about external accountability and about possible mechanisms for promoting this, the thesis then turned to evaluate EU food safety regulation from this perspective.

Chapter 5 focussed upon external accountability in the context of official EU food safety regulation. It established that a number of external accountability-enhancing mechanisms already exist in this sphere. These mechanisms offer Thai stakeholders support in calling EU power-wielders externally to account. Here, the CA model and the WTO were seen to play an all important role, including crucially in a number of lesser known fora established by the WTO, including its SPS Committee. While room for improvement was identified, in many respects the CA model and the WTO serve to

instantiate external accountability relationships between different states. This claim was substantiated by examining respect for each of the GAL accountability criteria in the WTO and CA-model framework in turn.

Chapter 6 then turned to examine external accountability relationships between the EU and Thailand in relation to private standards. It should be recalled that it is in relation to private standards that the most pressing operational problems were identified and in respect of which the most vociferous complaints were made. Chapter 6 made clear that, by comparison with official EU food safety regulation, private standard setting bodies are less accountable to external stakeholders and that fewer mechanisms exist to ensure respect for the accountability standards identified by GAL. Even the sector leaders, in particular the GlobalGAP standard, fail by some distance to emulate the achievements of the WTO and the CA Model.

The final substantive part of Chapter 6 then focussed upon exploring ways to enhance external accountability in relation to private standards, in particular as between Thailand and the EU. It took WTO Law as its perhaps counter-intuitive starting point. It argued that the TBT and SPS Agreements already establish a framework for enhancing the external accountability of private standard-setting bodies and that they do so by requiring WTO's Member States to take *reasonable* steps to ensure that these bodies act in accordance with the specified substantive obligations these agreements lay down. It recognised that the term 'reasonable' is unclear, and that it is unlikely that Member States will be able to reach agreement about its meaning any time soon. This, notwithstanding the efforts of the SPS Committee in this regard.

Nonetheless, and notwithstanding this lack of clarity, Chapter 6 argued that the EU does incur some obligations to control its private standard-setting bodies under WTO law, and that as things stand the EU is in clear breach of these obligations. EU private standard-setting bodies regularly breach WTO norms and yet the EU does nothing at all to oversee or to constrain the activities of these bodies. While the EU may enjoy wide discretion in deciding what is to count as a reasonable measure, there is no evidence that the EU has turned its mind to this question or that it has actively considered and rejected any particular options.

As such, Chapter 6 argued that the EU *is required*, as a matter of WTO law, to take some concrete steps to regulate or at least to consider regulating, the activities of private standard-setting bodies that operate in its domain. While this chapter stops short of providing a blueprint for what the EU must do, considering this to be the tasks of future research. It draws upon earlier analysis in relation to official EU food safety regulation in making possible future action. The chapter concludes by examining a recent UK initiative to strengthen the accountability relationship between UK supermarkets and those from whom they get their supplies. It is suggested that this initiative can provide a starting point in thinking about what steps the EU could take to enhance the external accountability of private standard-setting bodies operating within its domain.

Overall, it is suggested that this thesis makes an original and important contribution to existing literature on the global governance of food safety, with particular reference to Thailand and the EU. Particularly important in this respect is the empirical research that

was carried out. It was as a result of this that the impact of EU food safety regulation in Thailand could be accurately gleaned. This empirical research revealed material of considerable interest. Perhaps the most important findings that emerged relate to the operation of the CA Model and to the significant and growing impacts of EU private standards on Thai stakeholders.

The thesis also brought together and developed different bodies of academic literature, concerning global governance, external accountability and global administrative law. It used this literature to understand and evaluate existing accountability relationships between entities operated in different polities or states and to put forward a critique of the current situation in relation to official EU regulation and private standards which operate as market entry conditions for access to the EU.

Here, the concept of network governance also emerged as being key. This is particularly apparent in relation to the CA Model, where transnational interactions between EU and Thai officials served to create and strengthen external accountability relationships and to mitigate and sometimes overcome concrete food safety problems. The CA model and the SPS Committee, both serve as “lesser known” but effective fora for achieving external accountability and, from this, important lessons may be learned. These lessons are most obviously relevant in thinking about how to reform the practice of private standard-setting bodies, but they are relevant also for other developed and developing countries. The “CA Model” serves not only to ensure that imported food is safe, but that the burden imposed on producers and exporters is considerably reduced.



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## **APPENDIX I: TABLE OF ABBREVIATIONS**

ACFS	National Bureau of Agricultural Commodity and Food standards
ACP	Assured Chicken Production
BE	Buddhist Era (Thai year numbering system)
BRC	British Retail Consortium
BSE	Bovine Spongiform Encephalopathy
CA	Competent Authority
CAP	Common Agricultural Practice
CAS	Controlled Atmosphere Stunning
CCP	Critical Control Point
CDM	Clean Development Mechanism
Codex	Codex Alimentarius
CP	Charoen Pokphand
DFT	Department of Foreign Trade
DG-SANCO	Directorate General for Health & Consumers
DLD	Department of Livestock Development
DOA	Department of Agriculture

DOF	Department of Fisheries
DSU	Dispute Settlement Understanding
ECHR	European Court of Human Rights
EFSA	European Food Safety Authority
EU	European Union
EUREPGAP	European Retail Parties Good Agricultural Practice
FAO	Food and Agriculture Organisation
FIFA	Federation International Football Association
FSC	Forest Stewardship Council
FVO	Food and Veterinary Office
G8	The Group of Eight
GAL	Global Administrative Law
GAP	Good Agricultural Practice
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GFPT	General Food Poultry (Thai) Company
GFSI	Global Food Safety Initiative

GlobalGAP	Global Good Agricultural Practice
GMO	Genetically Modified Organism
GMP	Good Manufacturing Practice
HACCP	Hazard Analysis Critical Control Point
ICANN	Internet Corporation of Assigned Names and Numbers
IFOAM	International Federation of Organic Agricultural Movements
IFS	International Food Standard
IMEU	Intelligence Monitoring and Early Warning Unit
Interpol	International Police
IOC	International Olympic Committee
IPPC	International Plant Protection Convention
ISEAL	International Social and Environmental Accreditation and Labelling Alliance
ISO	International Organization for Standardisation
MFN	Most Favoured Nation
MOAC	Ministry of Agricultural and Cooperatives
MRL	Maximum Residue Limit
M & S	Marks and Spencer

NASA	National Aeronautics and Space Administration
NGO	Non Governmental Organisation
OIE	World Organisation for Animal Health
PC	Phytosanitary Certificate
PEFC	Pan-European Forestry Certification Council
PETA	People for the Ethical Treatment of Animals
PPM	Part per Million
Q	Quality (standard)
RAFSS	Rapid Alert System for Food and Feed
REACH	Registration Evaluation Authorisation and Restriction of Chemicals
RFID	Radio Frequency Identification
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SA	Soil Association
SFI	Sustainable Forestry Initiatives
SGS	Société Générale de Surveillance
SMEs	Small and Medium Size Enterprises
SOP	Standard Operating Procedure

SPS	Sanitary and Phytosanitary
SQF	Safe Quality Food Standard
TBT	Technical Barriers to Trade
TRIPS	Trade-related Aspects of Intellectual Property Rights
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USDA	United States Department of Agriculture
WIPO	World Intellectual Property Organisation
WHO	World Health Organisation
WTO	World Trade Organisation

## **APPENDIX II: LIST OF INTERVIEWS**

### June 2008

- Rakpong J, personal interview with Mr. and Mrs. Nikorn (the fruits and vegetable brokers), Lanna Frozen Co., Chiangmai, Thailand, 23/06/08
- Rakpong J., personal interview with Mr. Supamit, the Vice Dean of Agricultural Departments, Chaingmai University, Chaingmai, Thailand 23/06/08
- Rakpong J, interview held during meeting with Mrs. Sripree Duangkaewruean, Head of administrative staff of Mae Ta Cooperative, Mae-on sub-district 25/06/2008 (followed with several telephone correspondence)
- Rakpong J, interview with Assistant Professor Vitcha Sardsud, Wieng-Gan District, Chiangrai, 30/06/2008-01/07/2008

### July 2008

- Rakpong J., group interviews with pomelo farmers/exporters, Wieng-Gan district, Chiangrai 01/07/2008
- Rakpong J, personal interview held during meeting with the Thai Broiler Processing Exporters Association, and the staff from GFPT, Bangkok, Thailand 07/08/2008
- Rakpong J., personal interviews with Mr. Rattanasirimontri, Chatchawan Import Export and Packaging, Nakornpratom, Thailand, 08/07/2008

- Rakpong J., group interview held during meeting with the Thai Fruit and Vegetable Producer Associations' representative, Mr. Pratom Tankum and two baby corn exporters, Nakornpratom, Thailand, 10/07/2008
- Rakpong J., personal interview held during meeting with the Thai Fruit and Vegetable Producer Association, Nakornpratom, Thailand and two owners exporting companies 10/07/2008, Nakornpratom and Bangkok, Thailand.
- Rakpong J., personal interview held during meeting with Mr. Namjan the leader of Mae Ta cooperative, Mae-on sub district 21/07/2008
- Rakpong J., group interview with baby corn farmers, Mae Ta, Mae-On sub-district Chiangmai 27/07/2008
- Rakpong J. personal interviews with Mr. Pat Apaimool, Mae Ta, Mae-On sub-district Chiangmai 21/07/2008 27/07/2008
- Rakpong J., personal interviews with Mr and Mrs. Ajarawong, Shrimp farmers, Pranburi, Prajuab-kirikhun, Thailand, 07/2008
- Rakpong J., personal interviews with Khun "Hia-di", a small shrimp farmer, Pranburi, Prajuab-kirikhun, Thailand 07/2008
- Rakpong J., personal interviews with a group of shrimp farmers/exporters, The Shrimp Farmers' Association of Pranburi River Delta , Pranburi, Prajuab-kirikhun, Thailand, 07/2008

### August 2008

- Rakpong J., personal interview with Saowaluck Suppakamolseenee, The Policy and Plan Analyst of the ACFS, Bangkok, 06/08/2008
- Rakpong J., personal interview with Mr. Prayoon Leelangamwongsa, Class 8 Official Veterinarian, ACFS, Bangkok, Thailand 06/08/2008
- Rakpong J., group interview held during meeting with the Thai Broiler Processing Exporters Association, and the staff from GFPT, Bangkok, Thailand 7/08/2008.
- Rakpong J., personal interview with Mr. Anan Sirimongkolkasem, the President of Thai Broiler Processing Exporters Association, GFPT, Bangkok, Thailand 7/8/2008
- Rakpong J., personal interview with Mr. Kukrit Arepagorn and Ms. Vimongrat Premisiri, Associate Manager and legal technicians of a poultry company- GFPT exporting company, Thailand, Bangkok, Thailand, 7/8/2008
- Rakpong J., personal interview with Director Cherdchai Thiratinarat, Director of Bureau of Disease Control and Veterinary Service *Bangkok*, Thailand 20/08/2008.
- J. Rakpong, personal interview with Mrs. Tippawan at the Ministry of Commerce, Department of Foreign Trade, Nontaburi Thailand 21/08/2008.
- J. Rakpong, telephone interview with Ms Supamas, trade staff at the Europe Department, the Ministry of Foreign Affairs, Thailand, 27/08/2008

- J. Rakpong, telephone interview with “Khun Koog”, staff at the Department of Agriculture, MOAC, Bangkok, Thailand 27/08/2008

#### September 2008

- Rakpong J., telephone interview with the Director of One-stop-service, the Department of Agriculture, MOAC, Bangkok, Thailand, 01/09/2008
- Rakpong J., personal interviews held during meeting with Mr. Nathsak Pattanachaikul, Chief Operating Officer of Sahafarm, Bangkok, Thailand, 2/09/2008
- Rakpong J., personal interviews held during meeting with Mr. Kasem Trakoonlerswilai, Deputy Director of Sahafarm, Bangkok, Thailand, 2/09/2008
- Rakpong J., personal interviews with “Khun Jui”, staff at Coastal Fisheries Research and Development Bureau, Department of Fisheries, Ministry of Agricultural and Cooperatives, Bangkok, Thailand, 04/09/2008
- Rakpong J., telephone interviews with Ms. Orawan (“Khun Eed”) the owner and manager of Excelfruits Thailand (suppliers to Excelfruits International (Netherlands), Bangkok, Thailand, 08/09/2008
- Rakpong J., telephone interviews with Dr. Pennapha Mattayomphong, the Director of Bureau of Livestock Standards Certification , Bangkok 09/2008
- Rakpong J., personal interview with Dr. Jirawan Yamprayoon, the Deputy Director of the Ministry of Fisheries, Bangkok, Thailand 09/9/2008

- Rakpong J., telephone interview with Dr. Suphanan Boonyakarn, Staff at the Bureau of Livestock Standards Certification, Bangkok, Thailand September 2008
- Rakpong J., personal interview with Ms. Kritsana Kukumpanitch, staff at Fish Inspection and Quality Control Division Department of Fisheries, Department of Fisheries, MOAC, Bangkok, Thailand 18/9/2008
- Rakpong J., personal interview with Mr. Wanchai Polprasertkul, the staff at Bureau of Livestock Standards and Certification , DLD, Bangkok, Thailand September 2008
- Rakpong J., personal interview with Mr. Sasi Chareonpoj, the staff at Bureau of Livestock Standards and Certification, DLD, Bangkok, Thailand September 2008
- Minutes from two exporters meeting with the Department of Agricultural, MOAC prior to the FVO's visits under its mission on Phytosanitary checks , 28-29 August 2008
- Rakpong J., personal interview with the Director of One-stop-service, the Department of Agriculture, MOAC, 29/09/2008
- Minutes from exporters' meeting at the Thai Chamber of Commerce, Bangkok, Thailand, 29/09/2008

## 2010

- Rakpong J, telephone interview with Ms. Peerajit, Organic Agriculture Certification Thailand or ACT, Chaingmai, Thailand, 21/12/2009

- Rakpong, J. personal interviews with the administrative staff of Mae Ta Cooperative, Mae-on sub district, January 2010
- Rakpong J., telephone interview with Green-Net foundation, January 2010.

## APPENDIX III: TABLE OF CASES

### UK Cases

- *Council of Civil Service Unions v. Minister for Civil Service* (1985) AC 374.

### EU Cases

- *Pfizer Animal Health SA v Council of the European Union* (2002), T-13/99, ECR II -3305.
- *Radlberger Getränkegesellschaft mbH & Co., S. Spitz Kommanditgesellschaft v. Land Baden-Württemberg, Intervener: Federal Republic of Germany* (2004) ECJ 14-12-2004, ECR I-11763.

### WTO Cases

- ***Australia—Salmon***  
*Australia — Measures Affecting Importation of Salmon*, WT/DS18/9, adopted 23 February 1999.
- ***Brazil—Tyres***  
*Brazil— Measures Affecting Imports of Retreaded Tyres* (AB-2007-4), WT/DS332/AB/R 3, adopted December 2007.

- **Canada —*Provincial Liquor Boards (EEC)***

*Canada — Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304-35S/37 1989, adopted 22 March 1988.

- **EC —*Asbestos***

*European Communities—Measures Affecting Aspects and Asbestos-Containing Products* (AB-2000-11), WT/DS135/AB/R, adopted 12 March 2001.

- **EC—*Bananas III (Ecuador)***

*European Communities— Regime for the Importation, Sale and Distribution of Bananas* (AB-1997-3), WT/DS27/AB/R, adopted 9 September 1997.

- **EC—*Biotech***

*European Communities- Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006.

- **EC—*Frozen Chicken***

*European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (AB-2005-5), WT/DS269/AB/R, WT/DS286/AB/R, adopted 12 September 2005

- **EC—*Hormones***

*European Communities—Measures Concerning Meat and Meat Products (Hormones)* (AB-1997-4), WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998.

- ***Hormones II***

*United States/Canada—Continued Suspension of Obligations in the EC-Hormones Dispute, WT/DS320/AB/R, WT/DS321/AB/R, adopted (14 November 2008)*

- ***EC— Generalised System of Preferences***

*European Communities—Generalized system of Preferences, Request to Join Consultations, WT/DS242/2, adopted 20 December 2001*

- ***EC — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/13, adopted 14 September 2011.***

- ***EC — Duties on Imports of Rice, WT/DS17/1, adopted 11 October 1995.***

- ***EC— Sardines***

*EC— Trade Description of Sardines (AB-2002-3), WT/DS231/AB/R, adopted 26 September 2002.*

- ***Egypt— Canned Tuna***

*Egypt— Import Prohibition on Canned Tuna with Soybean Oil, G/SPS/GEN/203, adopted 27 September 2000.*

- ***Korea — Beef***

*Korea— Measures Affecting Imports of Fresh, Chilled and frozen Beef, (AB-2000-8), WT/DS161/AB/R, WT/DS169/AB/R, adopted 11 December 2000.*

- ***Japan — Apples***

*Japan— Measures Affecting the Importation of Apples (AB-2003-4), WT/DS245/AB/R, adopted 26 November 2003.*

• ***Japan— Varietals***

*Japan— Measures Affecting Agricultural Products* (AB-1998-8),  
WT/DS76/AB/R, adopted 22 February 1999.

• ***Shrimp/Turtle***

*United States— Import Prohibition of Certain Shrimp and Shrimp Products*  
(AB-1998-4), WT/DS58/AB/R, adopted 12 October 1998.

• ***Shrimp/Turtle II***

*United States—Import Prohibition of Certain Shrimp and Shrimp Products,*  
*Recourse to Article 21.5 of the DSU by Malaysia* (AB -2001-4),  
WT/DS58/AB/RW, adopted 22 October 2001.

• ***Thailand — Customs Valuation of Certain Products from the European Communities***, WT/DS 370/1, adopted 30 January 2008.

• ***Thailand-Steel***

*Thailand— Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland* (AB-2000-12), WT/DS 112/AB/R, adopted 12 March 2001.

• ***Thailand — Cigarettes***

*Thailand— Customs and Fiscal Measures on Cigarettes from the Philippines*,  
(AB-2011-1), WT/DS371/AB/R, adopted 17 June 2011.

- ***Tuna/Dolphin***

*United States— Restrictions on Imports of Tuna*, DS 21/R-39S/155, and adopted 3 September 1991.

- United States — *Measures Concerning the Importation, Marketing and sale of Tuna and Tuna Products*, WT/DS 381/R, circulated 15 September 2011.

- ***US — Gambling***

*United States— Measures affecting the Cross- border Supply of Gambling and Betting Service* (AB-2005-1), WT/DS285/AB/R, adopted 7 April 2005.

- ***US— Clove Cigarettes***

*United States— Measures Affecting the Production and the Sale of Clove Cigarettes*, WT/DS406/R, adopted 2 September 2011.

- ***US—Poultry***

*United States — \_ Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 29 September 2010

- ***US— Section 337***

*United States— Section 337 of the Tariff Act of 1930 and Amendments Thereto*, WT/DS186/1-3., adopted 18 January 2000.

## **APPENDIX IV: TABLE OF LEGISLATION**

### International Legislations

- Recommended International Code of Hygienic Practice for Processed Meat and Poultry Products, Codex, CAC/RCP 13-1976, rev. 1 (1985))
- Codex Alimentarius's Guidelines for the Application of the Hazard Analysis Critical Control Point (HACCP) System (CAC/GL 18-1993).

### WTO

- Understanding on Rules and Procedures Governing the Settlement of Disputes (The Dispute Settlement Understanding, DSU) Article 3.7, 4.3, 4.7, 4.8, 5, 8.5, 16.4, 17.14, 21, 22.2
- General Agreement on Tariffs and Trade (GATT): Article X, XX (b),
- General Agreement on Trade in Services (GATS): Article, XIV (b)
- The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement): Article 2.2, 5.4, 5.6, 5.7, 7, 8, 13 Annex B, Annex C
- Agreement on Technical Barriers to Trade (TBT Agreement), Article 2.5, 4.1, Annex 1, 3
- Ministerial Conference (Fourth Session), Doha, 9-14 November 2001: Implementation and Related Issues and Concerns (WT/MIN (01)/17)

- SPS Committee's Recommended Procedures for Implementation the Transparency Obligations of the SPS Agreement (Article 7), (G/SPS/7/Rev.2, 2 April 2002)
- Secretariat's Handbook on "How to Apply the Transparency Provisions of the SPS Agreement" (September 2002)

#### Regional Legislations (EU)

- Commission Decision 74/234/EEC of 16 April 1974 relating to the institution of a Scientific Committee for Food (OJ L 136/1, 20/05/1974)
- Council Decision 78/923/EEC of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes (OJL 323/12, 17/11/1978)
- Council Regulation (EEC) No 2377/90 of 26 June 1990 laying down a Community procedure for the establishment of maximum residue limits of veterinary medicinal products in foodstuffs of animal origin (OJ L 224/1, 18/08/1990 )
- Council Directive 90/496 of 24 September 1990 on nutrition labelling for foodstuffs (OJ L 276/40, 03/10/1990)
- Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ L 198/1, 22/07/1991)

- Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ L 340/17, 11/12/1991)
- Council Directive 91/630/EEC of 19 November 1991 laying down minimum standards for the protection of pigs (OJ L 340/33, 11/12/1991)
- Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs (OJ L 175/1, 19/07/1993)
- Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing (OJ L 340/21, 31/12/1993)
- Commission Decision 94/85/EC of 16 February 1994 drawing up a list of third countries from which the Member States authorize imports of fresh poultry meat (OJ L 44/31, 17/02/1994)
- Commission Decision 94/984 of 20 December 1994 laying down animal health conditions and veterinary certificates for the importation of fresh poultry meat from certain third countries (OJ L 378/11, 31/12/1994)
- Council Directive 95/29/EC of 29 June 1995 amending Directive 90/628/EEC concerning the protection of animals during transport (OJ L 148/52, 30/06/1995)
- Commission Decision 95/273/EC of 6 July 1995 relating to the institution of a Scientific Committee for Food (OJ L 167/22, 18/07/1995)
- Council Directive 97/2/EC of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves (OJ L 25/24, 28/01/1997)

- Commission Decision 97/4 drawing up provisional lists of third country establishments from which the Member States authorise import of fresh poultry meat (OJ L 002/6, 04/01/1997)
- Commission Decision 97/134/EC of 31 January 1997 laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by Commission experts in third countries (OJ L 051/54, 21/02/1997)
- Commission Decision No 97/404/EC of 10 June 1997 setting up a Scientific Steering Committee (OJ L 169/85, 27/06/1997)
- Commission Decision 97/579/EC of 23 July 1997 setting up Scientific Committees in the field of consumer health and food safety (OJ L 237/18, 28/08/1997)
- Commission Decision 98/140/EC of 4 February 1998 laying down certain detailed rules concerning on-the-spot checks carried out in the veterinary field by the Commission experts in third countries ( OJ L 38/14, 12/02/1998)
- Council Directive 98/58/EC of 20 July 1999 concerning the protection of animals kept for farming purposes (OJ L 221/23, 08/08/1998)
- White Paper on Food Safety, Com (1999) 719 final
- Commission Regulation (EC) No 730/1999 of 7 April 1999 laying down the marketing standard for carrots (OJ L 93/14, 8/04/1999)
- Council Decision 1999/468/EC of 28 June 1999, laying down the procedures for the exercise of implementation powers conferred on the Commission (OJ L 184/23, 17/07/1999)

- Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (OJ L 203/53, 03/08/1999)
- Council Regulation 1804/1999 supplementing Regulation (EEC) No 2092/91 on organic production of agricultural products, and indications referring thereto, on agricultural products and foodstuffs to include livestock production (OJ L 222/1, 24/08/1999)
- Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31/1, 01/02/2002)
- Commission Decision 2002/251/EC of 27 March 2002 concerning certain protective measures with regard to poultry meat and certain fishery and aquaculture products intended for human consumption and imported from Thailand (notified under document number C(2002) 1319) (OJ L 084/77, 28/03/2002)
- The Communication from the Commission to the Council and the European Parliament on Animal Welfare Legislation on farmed animals in Third Countries and the Implication for the EU. Com (2002) 626 final. Brussels (18/11/2002)
- Treaty Establishing the European Community (C 325/33, 24/12/2002)
- Commission Decision 2003/477/EC amending Decision 2002/251/EC to revoke the protective measures with regard to the fishery and aquaculture products imported from Thailand of 24 June 2003 (OJ L 158/61 , 27/06/2003)

- Commission Regulation (EC) No. 1304/2003 of 11 July 2003 on the procedure applied by the European Food Safety Authority to requests for scientific opinions referred to it (OJ L 185/6, 24/07/2003)
- Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed (OJ L 268/1, 18/10/2003)
- Commission Decision 2003/895/EC of 19 December 2003 amending Decision 2002/251/EC to revoke the protective measures with regard to certain consignments of poultry meat imported from Thailand (OJ L333/88, 20/12/2003)
- Commission Regulation (EC) No 85/2004 of 15 January 2004 laying down the marketing standard for apples (OJ L 13/3, 20/01/2004)
- European Union Commission Regulation (EC) No 86/2004 of January 15, 2004 laying down standards for pears (OJ L 13/19, 20/01/2004)
- Commission Regulation (EC) No 843/2004 of 28 April 2004 amending the rates of refunds applicable to certain products from the sugar sector exported in the form of goods not covered by Annex I to the Treaty (OJ L 127/65, 29/04/2004)
- Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules food of animal origin (OJ L 139/55, 30/04/2004)

- Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ L 226/83, 25/06/2004)
- Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuff (OJ L 139/1, 30/04/2004)
- Commission Directive 2004/62/EC of 26 April 2004 amending Council Directive 91/414/EEC to include mepaniprym as active substance (OJ L 125/38, 28/04/2004)
- Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ L 191/1, 28/05/2004)
- Commission Decision 2004/478/EC of 29 April 2004, concerning the adoption of a General Plan for Food and Feed Crisis Management (OJ L 212/30, 16/06/2004)
- Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 ( OJ L 3/1, 05/01/2005)
- Commission Recommendation 2005/108/EC of 4 February 2005 on the further investigation into the levels of polycyclic aromatic hydrocarbons in certain foods (OJ L 34/43, 08/02/2005)

- Regulation 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L70/1, 16/03/2005)
- Commission Regulation (EC) No 411/2009 of 18 May 2009 amending Regulation 798/2008 laying down a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the Community and the veterinary certification requirements (OJ L 124/3, 20/05/2009)
- Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 200/11, 22/07/2006)
- Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404/9, 30/12/2006)
- Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 (OJ L 396/1, 30/12/2006)
- Commission Regulation 327/2007 of 27 March 2007 derogating for 2007 from Regulation (EC) No 1445/95 as regards the dates of issue of export licences in the beef and veal sector (OJ L 87/5 , 28/03/2007)
- Council Directive 2007/43/EC, laying down minimum rules for the protection of chickens kept for meat production (OJ L 182/19, 28/06/2007)

- Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ L 189/16), (OJ L 189/1, 20/07/2007)
- Commission Decision (EC) No. 2007/777 laying down the animal and public health conditions and model certificates for imports of certain meat products and treated stomachs, bladders and intestines for human consumption from third countries and repealing decision 2005/432/EC (OJ L 312/49 30/11/2007)
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ L 2007/C 306/01, 17/01/2007)
- Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control ( OJ L 24/8, 29/01/2008)
- Commission Regulation 597/2008, of 24 June 2008 amending Regulation (EC) No 372/2007 laying down transitional migration limits for plasticisers in gaskets in lids intended to come into contact with foods (OJ L 164/12, 25/06/2008).
- Commission Regulation (EC) No 798/2008 of 8 August 2008 laying down a list of third countries, territories, zones or compartment from which poultry and poultry products may be imported into and transit through the Community and the veterinary certification requirements ( OJ L 226/1, 23/08/2008)
- Commission Regulation 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on

organic production and labelling of organic products with regard to organic production, labelling and control (OJ L 250/1, 18/09/2008)

- Commission Regulation 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (OJ L 334/25, 12/12/2008)
- Commission Regulation (EC) No 411/2009 of 18 May 2009 amending Regulation (EC) No 789/2008 laying down a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the Community and the veterinary certification requirements (OJ L 124/3, 20/05/2009)
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140/16, 05/06/2009)
- Treaty on the Functioning of the European Union (C 83/47), 30/03/2010)
- Commission Decision of 30 November 2010 amending Decisions 2005/692/EC, 2005/734/EC, 2006/415/EC, 2007/25/EC and 2009/494/EC as regards avian influenza (notified under document C(2010) 8282) (OJ L 316/10, 02/12/2010)

- Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emission (integrated pollution prevention and control) (OJ L 334/17, 17/12/2010)

- Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55/13, 28/02/2011)

#### National Legislations (Thai)

- Plant Seed Act B.E. 2518 (1975),
- Fertilizer Act B.E. 2518 (1975),
- National Food Act B.E. 2522 (1979),
- Consumer Protection Act B.E. 2522 (1979)
- Dangerous Substance Act B.E. 2535 (1992),
- Department of Agriculture Notification on 18 August 2005
- Agricultural Standards Act B.E. 2551 (2008)
- Plant Quarantine Act 1964 (amended 1 March 2008)
- Ministry of Commerce Announcement (of 23 February and 4 August 2009 and of 11 April 2003) specifying commodities which need to obtain a health certificate prior to exportation.

#### National Legislation (EU Countries)

- The Food Hygiene (England) Regulation 2006
- Food Safety Act 1990, (UK) Section 21

- The European Communities (General Food Law) Regulation 2007, S.I. No. 747/2007, (Ireland) Section 5(3)

#### National Legislation (Others)

- (USA) Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems of 25 July 1996
- (USA) The Bio-Terrorism Act 2002 (Section 306)

#### List of Private Standards Mentioned

- Assured Chicken Production
- British Retail Consortium
- EU-Flower
- GlobalGAP
- Global Food Safety Initiative
- Grocery Supply Code of Practice
- International Food Standards
- International Social and Environmental Accreditation and Labelling Alliance
- RSPCA's Freedom Food Standards
- Safe Quality Food
- Soil Association's Standard
- Mark and Spencer's From Field to Fork Standard
- TESCO's Nature's Choice