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# Private Standards of Non-Governmental Organizations in the Field of Sanitary and Phytosanitary Measures Application

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**Abstract**
*The relevance of the article is as follows: on the one hand, the importance of sanitary and phytosanitary measures as an integrating category, a category that stands at the crossroads of agrarian, environmental, social and international policies is not yet fully realised and therefore significantly underestimated; on the other hand, at the present stage, it is impossible to ignore the objective growth of the role and importance of non-governmental organisations in regulating the relations in the field of sanitary and phytosanitary measures. The purpose of the article is to identify and highlight the range of issues related to the relations between the State and non-governmental organisations which approve their own standards in the field of sanitary and phytosanitary measures, between the World Trade Organization (WTO) and the same non-governmental organisations, and also between the WTO and the State under whose jurisdiction a non-governmental organisation approves its own standards in the field of sanitary and phytosanitary measures. The leading methods of scientific cognition were: the dialectical method, which served as the methodological basis for scientific cognition, reflecting the relationship between theory and practice, as well as the conceptual provisions of legal science; formal logical method was used to analyse the content of current national and European legislation on the legal regulation of the application of private standards in the field of sanitary and phytosanitary measures; the comparative legal method was used to analyse and study the EU requirements, in particular the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures and practical mechanisms that can be implemented in national legislation and put into practice; the conclusions and proposals contained in the article are formulated using the method of dogmatic (logical) analysis. The article covers a range of issues related to the relations between the State and non-governmental organisations that approve their own standards in the field of sanitary and phytosanitary measures and notes that internal corporate standards and policies play a significant role in the activities of most international companies, which ensure that company employees comply with the requirements of both international and national legislation. The study revealed the following results: 1) the issue of risks of private standards has been updated, namely, they are not always based on scientific data, as required*

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*by the Agreement on the Application of Sanitary and Phytosanitary Measures; differ from international standards; such standards are stricter than official sanitary and phytosanitary requirements; require additional costs for small suppliers; private standards are set without transparency, consultation and appeal systems; private standards are diverse and not harmonised; the rule of Further research on the purpose of increasing the influence of private standards in international trade; development and justification of the procedure for introducing standards; determination of the role of the state and its responsibility; analysis of the prospects for the introduction of stricter requirements by non-governmental organisations; development of methodological foundations for the extension of certain international legal obligations to private individuals are considered promising.*

***Keywords:*** *sanitary and phytosanitary measures; WTO; EU; international standards; non-governmental organizations; international trade.*

# Приватні стандарти неурядових організацій у сфері застосування санітарних та фітосанітарних заходів

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**Анотація**

*Актуальність теми цього дослідження полягає в тому, що, з одного боку, важливість санітарних та фітосанітарних заходів як інтегруючої категорії, яка стоїть на перехресті аграрної, екологічної, соціальної та міжнародної політики, ще повною мірою не усвідомлена й тому суттєво недооцінена, а з іншого – на сучасному етапі неможливо ігнорувати об'єктивне зростання ролі та значення неурядових організацій у регулюванні відносин санітарних та фітосанітарних заходів. З огляду на це метою статті є виявлення й висвітлення кола питань, присвячених відносинам між державою та неурядовими організаціями, які затверджують власні стандарти у сфері санітарних і фітосанітарних заходів, між Світовою організацією торгівлі (СОТ) і цими ж неурядовими організаціями, а також між СОТ та державою, до юрисдикції якої належить неурядова організація, яка затверджує власні стандарти у сфері санітарних та фітосанітарних заходів. Провідними методами наукового пізнання стали: діалектичний метод, який виступив методологічним підґрунтям наукового пізнання, що відображає взаємозв'язок теорії та практики, а також концептуальні положення юридичної науки; формально-логічний метод застосовано під час аналізу змісту чинного націо-*

*нального та європейського законодавства щодо правового регулювання застосування приватних стандартів у сфері санітарних та фітосанітарних заходів; порівняльно-правовий метод застосовано при аналізі та дослідженні вимог ЄС, зокрема положень Угоди про застосування санітарних і фітосанітарних заходів та практичних механізмів, які можна імплементувати в національне законодавство та запровадити у практичній площині; формулювання висновків і пропозицій, які містяться у статті, здійснено за допомогою методу догматичного (логічного) аналізу. Висвітлено коло питань, присвячених відносинам між державою та неурядовими організаціями, які затверджують власні стандарти у сфері санітарних і фітосанітарних заходів. Наголошується, що в діяльності більшості міжнародних компаній значну роль відіграють внутрішні корпоративні стандарти й політики, завдяки яким забезпечується дотримання співробітниками компаній вимог як міжнародного, так і національного законодавства. У ході дослідження отримано такі результати: 1) актуалізовано питання ризиків приватних стандартів, а саме: вони не завжди базуються на наукових даних, як того вимагає Угода про застосування санітарних і фітосанітарних заходів; відрізняються від міжнародних; такі стандарти жорсткіші за офіційні санітарні та фітосанітарні вимоги; потребують додаткових витрат з боку дрібного постачальника; приватні стандарти встановлюються без прозорості, консультацій та систем апеляції; приватні стандарти різноманітні та не гармонізовані; ігнорується правило еквівалентності, яке лежить в основі Угоди про застосування санітарних і фітосанітарних заходів; 2) висвітлено блок проблемних питань, сформульованих як відносини «СОТ – держава, до юрисдикції якої належить неурядова організація, що затверджує власні стандарти у сфері санітарних та фітосанітарних заходів». Убачаються перспективними подальше дослідження мети зростання впливу приватних стандартів у міжнародній торгівлі; вироблення та обґрунтування процедури введення стандартів; визначення ролі держави та її відповідальності; аналіз перспектив введення неурядовими організаціями більш сурових вимог; опрацювання методологічних основ поширення на приватних осіб певних міжнародно-правових зобов'язань.*

***Ключові слова:*** *санітарні та фітосанітарні заходи; СОТ; ЄС; міжнародні стандарти; неурядові організації; міжнародна торгівля.*

## Introduction

In modern legal doctrine, the importance of sanitary and phytosanitary measures as an integrating category, the one that stands at the crossroads of agrarian, environmental, social and international policies, is not yet fully realized and therefore significantly underestimated. The lack of scientific and methodological understanding leads to the lack of a conceptual vision of the legislation's strategic development in the field

of sanitary and phytosanitary measures application. Even accession to the WTO and European integration obligations did not lead to qualitative changes in the direction of developing the doctrinal foundations of the legislation reform that regulates sanitary and phytosanitary requirements in agriculture. The rapid, geometric growth of legislation in this area, which has taken place over the past few years, remains practically imperceptible in science. All legislative changes are carried out under the slogans of European integration and the fastest possible implementation of European legislation, and therefore mostly do not raise questions about their conceptual basis. This leads to the unsystematic accumulation of normative material, which occurs in isolation from the real development of agrarian relations [1].

At the same time, the objective growth of the role and importance of non-governmental organizations at the current stage in the regulation of sanitary and phytosanitary measures relations (hereinafter – SPS) cannot be ignored. At the same time, it is interesting that the states differ greatly in their attitude towards non-governmental organizations and recognition of their role. For example, in Chinese scientific doctrine, which is based on ancient legal traditions and the legal culture of this country, the role of the state in global economic management is highly valued, while paying less attention to non-governmental organizations and civil society [2, pp. 578-594].

In the conditions of economic globalization, states lose their autonomy, in addition, they are forced to share their political and social powers, and their sovereignty with businesses, international organizations and many groups of citizens known as non-governmental organizations [3].

This process is ambiguously evaluated and can be viewed from different angles. Foreign researchers reveal tendencies towards experimental forms of management, with an emphasis on private management. In the sphere of SPS, this has a direct manifestation, as through the development of a multitude of private standards, codes of conduct and quality assurance schemes, non-governmental organizations (in particular transnational corporations – TNCs) are replacing traditional intergovernmental regimes in solving significant global environmental and socio-economic problems, ranging from logging forests, depletion of fisheries, climate change, ensuring proper working conditions and ending with the observance of human rights [4, pp. 320-407].

That is, non-governmental organizations are increasingly taking over the functions of regulating relations, which were previously the exclusive competence of states. This directly applies to the relations regulation of the SPS application.

The purpose of the article is to identify and highlight a range of issues related to relations between the state and non-governmental organizations that approve their standards in the field of sanitary and phytosanitary measures, between the WTO and the same non-governmental organization, as well as between the WTO and the state to whose jurisdiction the non-governmental organization belongs, which approves its standards in the field of SPS.

The tasks of the study are to highlight a range of issues related to relations between the state and non-governmental organizations that approve their own standards in the field of sanitary and phytosanitary measures, and it is noted that in the activities of most international companies, internal corporate standards and policies play a significant role, thanks to which the company's employees comply with the requirements both international and national legislation; updating the issue of the risks of private standards, namely: they are not always based on scientific data, as required by the Agreement on the Application of Sanitary and Phytosanitary Measures; differ from international ones; such standards are stricter than official sanitary and phytosanitary requirements; require additional costs from the small supplier; private standards are set without transparency, consultation and appeals systems; private standards are diverse and not harmonized; the rule of equivalence, which is the basis of the Agreement on the Application of Sanitary and Phytosanitary Measures, is ignored; the legal nature investigation of the legal relationship formulated as the relationship "WTO is a state under whose jurisdiction belongs a non-governmental organization that approves its own standards in the field of sanitary and phytosanitary measures".

**Literature review**

The fundamental basis for the research was the works of domestic scientists who expressed ideas related to the subject of the study, in particular, G. Anisimova, A. Getman, H. Grigor'eva, A. Dukhnevych, V. Yermolenko, I. Karakash, N. Kobetska, T. Kurman, V. Nosik, A. Stativka, T. Kharytonova, M. Shulga and others. At the same time, the issue of legal relations between the state and non-governmental organizations that approve their standards in the field of sanitary and phytosanitary measures, as well as the identification and analysis of the private standards risks, require comprehensive research.

**Material and Methods**

Based on the defined research subject, a comprehensive approach to the application of scientific research methods was chosen. The methodological basis of the study, taking into account the comparative legal aspect

embedded in the subject of the study, is the comparative legal method, which was used to study various scientific approaches to the content and form of legal regulation of sanitary and phytosanitary measures application under the law of Ukraine, the WTO and the EU; to study the legislation of some foreign countries in the field of application of sanitary and phytosanitary measures in agriculture. The formal-logical method was used when building the structure of the work, presenting the main provisions, formulating definitions and categories, substantiating conclusions and recommendations. Formulation of conclusions and proposals contained in the article is made using the method of dogmatic (logical) analysis.

**Results and Discussion**

Three blocks of problematic interrelated issues were formulated to reveal comprehensively the peculiarities of the non-governmental organizations influence on relations of the SPS application, based on three groups of problems (the problem of influence – providing access to the decision-making process within the framework of the WTO, the problem of justice, which consists in giving non-governmental organizations the right to appeal to the dispute resolution body within WTO and the problem of standards, which includes the issue of establishing private standards that are different or stricter than international ones).

***Relations "the state – non-governmental organizations that approve their standards in the sphere of SPS"***

Internal corporate standards and policies play a significant role in the activities of most international companies. Thanks to these documents, compliance by company employees with the requirements of both international and national legislation is ensured that is the so-called "compliance" (observance, execution) is ensured. At the same time, the principle is implemented according to which, in case of discrepancies between the requirements of the national legislation of one or another country and the requirements of internal corporate rules, the affiliated company must comply with those requirements that are stricter [5, pp. 205-221; 6, p. 291]. At the same time, powerful companies, putting forward their own stricter standards, actually force them to adhere to them, since they have significant market weight. Suppliers have no legal obligation to comply with these requirements. However, as soon as such standards become the norm and begin to be widely used, entrepreneurs have no other choice, otherwise, they risk losing their place in the market. As an example, we can offer the requirements and sanitary standards of the European Spice Association (ESA), which sets minimum levels of pesticides, salmonella, Escherichia coli, etc. They are widely used by European entrepreneurs and

have an impact on trade that is different from the impact of state standards. For example, the Indian Spices Council takes these requirements into account when manufacturing its products [7, p. 303].

In some cases, there is a hybridization of standards – when private standards are recognized by state regulatory structures. National governments can find themselves "caught" between their international obligations and the demands of their citizens. In addition, they may be faced with a difficult choice: either respond independently to the concerns of their consumers and risk the same, entering into a conflict with international obligations; or respond to manufacturers who oppose "private burden" that nominally exceeds the requirements set forth by the WTO [8, pp. 488-504].

The general rule, according to which the state is not responsible for the economic activities of private individuals, and private companies being independent legal entities are not responsible for the actions of the state in which they are registered [5, pp. 205-221], problematic issues are not exhausted.

***Relations "WTO – non-governmental organizations that approve their standards in the sphere of SPS"***

The WTO – as an institutional embodiment of the global trade system – formed the main rule for all member states: the requirements for SPS should be based on international standards, primarily approved by the "three sisters" – the Codex Alimentarius Commission, WHO, IPPC. Other standards imposed by states are subject to in-depth analysis to establish the scientific validity of such requirements. Against the background of such clear determination and limitation of the official states' manoeuvrability, a significant curtailment of their opportunities in the sphere of the SPS application, the construction of a whole formal and substantive obstacles system that makes it difficult (or impossible) to depart from international standards, the freedom and unaccountability of private sector organizations stand out very clearly, which set their standards, ignoring all the barriers carefully constructed by WTO law for states. A clear example is GlobalG.A.P. – the leader in the standardization of agricultural products. In 2015, 153461 producers of vegetables and fruits were certified according to the standards of this organization.

What are the risks of private standards? Firstly, as mentioned above, they are not always based on scientific data, although this is one of the most important requirements of the Agreement on the Application of the SPS. Secondly, such standards differ from international ones. Thirdly, such standards are stricter than official sanitary and phytosanitary requirements (for example, this applies to the maximum permissible level of pesticides

in products). Fourth, they require additional costs on the part of the small supplier. Fifth, private standards are set without transparency, consultation and appeals systems, which in turn can facilitate abuse by NGOs as they leave providers without recourse. Sixth, private standards are diverse and not harmonized. Seventh, the rule of equivalence is ignored, which is the basis of the Agreement on the application of the SPS [9, p. 205].

***Relations "WTO is a state to which jurisdiction belongs a non-governmental organization that approves its standards in the sphere of SPS"***

This block of problematic relations becomes a natural consequence of all previous ones, because as a result of the emergence of private standards, additional obstacles for international trade appear, and the WTO calls on the relevant state to take certain measures to correct the situation. However, WTO member states react ambiguously to objections in this matter. For example, the issue of private sector standards was first raised at the meeting of the WTO Committee on SPS in 2005, when St. Vincent and the Grenadines expressed its concern about EUREPGAP (today GlobalGAP) requirements for the import of bananas and other goods into the territory of the United Kingdom because such requirements were stricter than those of the EU. In turn, the EU stated that EUREPGAP is an association of retail chains, and therefore the union has no right to interfere in the activities of this private organization, as it represents the interests of consumers. This issue became the subject of further study, and in 2008 a special task force was established to gather information. The 30 respondents included both developed and developing countries [8, p. 205]. The results of the conducted research demonstrated a deep contradiction between the attitude of developed countries and developing countries to private standards. If less developed countries regard private standards as an additional barrier to market access, more developed countries insist on the right of private individuals to set their level of product safety.

***State responsibility for the actions of non-governmental organisations***

The main question that arises in this context is whether the states are responsible for the violation of the rules of the Agreement on the Application of the SPS by non-governmental organizations. States, of course, try to defend the position of the autonomy of non-governmental organizations and the impossibility of the official authorities to bear responsibility for the actions of private individuals.

For a more thorough answer to this question, it is worth analyzing the provisions of the Agreement on the Application of the SPS. Art. 13 of the Agreement states that "Members shall take such reasonable measures

as may be available to them to ensure the implementation of the relevant provisions of this Agreement by non-governmental institutions in their territory, as well as by regional bodies of which the relevant institutions in their territory are members". That is, the following conclusions can be drawn from this norm: a) the state undertakes to take reasonable and affordable measures to ensure that non-governmental institutions fulfil the requirements of the WTO regarding the SPS (such wording excludes a direct obligation to ensure implementation); b) it is clear from the very wording of the norm that it is about the obligation to facilitate, to create appropriate conditions so that non-governmental organizations can fulfil the stipulated requirements; c) there is no detailing and disclosure of "justified measures that may be available to them" (this gives a formal right, for example, to the EU not to put pressure on GlobalGAP, referring to the fact that such a measure would be unjustified because it would cross the limits of public authority intervention in the activity private person).

The same Art. 13 provides an interesting rule according to which "Members shall not take measures that would directly or indirectly compel or encourage such regional or non-governmental institutions or local government bodies to act in a manner contrary to the provisions of this Agreement". The rule establishes a safeguard for states that might be tempted and try to abuse the rather liberal rule analyzed above regarding the absence of a direct obligation to influence non-governmental organizations. Yes, the state should not create conditions that would encourage non-governmental organizations to violate WTO norms regarding SPS. However, the question arises, is, for example, the state policy of promoting a healthy lifestyle, consumption of organic products and/or products produced in compliance with high environmental requirements, such an encouragement? This is most clearly shown in the example of the EU. Indeed, European society has reacted rather harshly to attempts to flood their domestic market with hormone-raised meat. The same opposition was recorded regarding the import of GMO products. Therefore, the state for a long time, conducting appropriate educational, informational, and cultural policies, contributed to the formation of a society whose values were high organic requirements for food. If we assume that such behaviour is a violation of the relevant norm of the WTO Agreement on the application of SPS, then we must agree that the progressive development of society, as well as its movement towards sustainable development, will stop.

The last norm of Art. 13 of the WTO Agreement on the Application of SPS requires members to "ensure that they rely on the services of non-governmental agencies for the application of sanitary or phytosanitary measures only if these agencies comply with the provisions of this

Agreement". There are two doctrinal positions regarding the interpretation of this part: some scientists believe that on this basis the state can be held responsible for the entire private sector, while others narrowly interpret this norm, arguing that the state is responsible only for those organizations that it has permitted to enter their standards [10].

In our opinion, the analyzed norm means that in cases when the state officially recognizes the services of non-governmental organizations in the sphere of SPS (for example, recognizes their certificates, conclusions, entrusts them with inspections, etc.), then it thereby recognizes that these institutions comply with the provisions of the WTO Agreement. Ideally, this means that such NGOs apply international standards.

According to some scientists, the WTO legal regime should be extended to private individuals as well [11, pp. 99-122], in particular, based on an expanded interpretation of the concept of "assignment of behaviour to the state" (State Attributability). In international law, there is a general principle according to which the behaviour of private individuals or entities cannot be attributed to the state under international law. However, in some cases, such behaviour may, nevertheless, be considered as the behaviour of the state due to the special factual connection between the person who performs such behaviour and the state [12, pp. 249-254].

It can be seen that this is precisely a return to the above-analyzed provision that in the case of deliberately entrusting a non-governmental organization with certain functions in the sphere of SPS, the state thereby ensures that such a non-governmental organization complies with the provisions of the WTO Agreement. This forms a connection between the public authority and a non-governmental organization, which can form the basis of the state's responsibility for the actions of such a non-governmental organization.

**Conclusions**

The study reveals the growing role and importance of non-governmental organisations at the present stage, which cannot be ignored, since non-governmental organisations are increasingly taking over the functions of regulating relations that were previously the exclusive competence of the States, and this directly relates to the sphere of sanitary and phytosanitary measures. The article establishes that the risks of using private standards are that they are not always based on scientific data, as required by the Agreement on the Application of Sanitary and Phytosanitary Measures, differ from international standards, are stricter than official sanitary and phytosanitary requirements, and require additional costs for a small supplier. At the same time, private standards are set without transparency, consultation and appeal systems. Private standards are diverse and not

harmonised, ignoring the rule of equivalence that underpins the SPS Agreement.

The problems analyzed above require the fastest solution given the rapid development of private standardization in the field of SPS. Why is it so important to find a way out of the current situation? First, the influence of private sector standards in international trade has grown over the years [13, p. 901]. Second, it is not known what their main purpose is: to secure consumers or to prevent specific suppliers from entering the market. Thirdly, it is necessary to develop a procedure for the introduction of standards and determine what role the states play in this and to what extent they are responsible for it. In addition, it should be determined whether non-governmental organizations can introduce stricter requirements [8, p. 205]. This line of scientific research is very promising because, as Agni Calfagianni writes, there is currently a lack of guidance on the principles that can attribute ethical duties to private institutions [13, p. 901; 14, pp. 174-186].

This requires a thorough study of the methodological foundations of the extension of certain international legal obligations to private individuals.

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