

## The Role of Contracts, Standards and Certification in Protecting Fundamental Rights

MATTEO FERRARI

**Abstract** This paper deals with the role that contracts, standards and certification can play in guaranteeing the protection of fundamental rights in international supply chains. Recourse to standards and certification can be conceived of as a way to create uniformity in protecting fundamental rights when economic players of different nationalities are involved. A contract is an additional legal mechanism designed to make standards and certification binding for such actors. This paper demonstrates the role of these private legal instruments in rural development, human rights, safety at work, environment protection, and food safety by elaborating and comparing three case studies. The case studies are devoted to describing standards and certification systems in the coffee sector that implement norms and principles and thereby facilitate network-building among various stakeholders. Compliance with these collections of norms is enforced by private contracts, as a rule, and enables co-operation between multinationals and their suppliers.

**Keywords:** • private contracts • international • human rights • environment protection • food and work safety • rural development

---

CORRESPONDENCE ADDRESS: Matteo Ferrari, Ph.D., Assistant Professor, University of Trento, Faculty of Law, via Verdi 53, 38122 Trento, Italy, email: [matteo.ferrari@unitn.it](mailto:matteo.ferrari@unitn.it).

<https://doi.org/10.4335/978-961-6842-91-4.8> ISBN 978-961-6842-91-4

© 2019 Institute for Local Self-Government Maribor

Available online at <http://www.lex-localis.press>.

## 1 Introduction

One of the pillars of rural development is represented by the protection of human rights, since the latter are instrumental in fostering the quality of life and well-being of farmers. In this context, by rural development I mean “an ongoing and essentially interventionist process of qualitative, quantitative and/or distributional change leading to some degree of betterment for groups of people” (Buller and Wright 1990). However, in an age of globalization it is crucial for farmers to have access to markets, and in particular to international markets, if they are to have a chance to prosper. Thus, the protection of human rights must be pursued while considering the international dynamics within which rural development takes place. In particular, it is necessary to balance the protection of the interests of economic players who, as mentioned, nowadays operate on a global level, and the need to protect and promote farmers’ fundamental rights, an issue that appears to concern the local level.

A clash between the global and the local appears to exist: the protection of human rights at the local level seems to be capable of negatively affecting the smooth operation of international food supply chains. The problem is exacerbated by the fact that while economic exchanges are usually thought of as the domain of private parties, the protection of human rights is traditionally conceived of as the province of public action. It is seemingly difficult to reconcile the public dimension of human rights with the strong private flavour that international supply chains have: how can a public goal (i.e. the advancement of human rights) become part of a private exchange?

As the following pages attempt to show, the clash between the local and global, as well as between the private and the public, is more theoretical than practical: these different dimensions can, and often do, co-exist. Indeed, the emergence of international food supply chains and the use of tools pertaining to the domain of private law can revitalize the protection of human rights. The goal of this chapter is thus to introduce readers to the interplay between the protection of human rights, on the one hand, and the role that private standards, certification and contracts can play in international food supply chains, on the other.

## 2 Conceptual framework

The first part of the paper offers a short description of some terms and concepts that will play a crucial role in the following analysis. In addition, it illustrates the starting problem; namely, how to protect human rights in international food supply chains via recourse to tools of private law.

Starting from the latter point, protecting human rights in the international context faces several challenges, ranging from the definition of what human rights are to the policy options that can better guarantee their effectiveness worldwide. One of the most pressing

issues is represented by the lack of a supranational authority with the power to police the application of the norms that provide for the protection of such rights. Of course, national states have this kind of power, but they are not always effective at promoting human rights and prosecuting their violation, either because they lack the will and/or infrastructure to pursue this task or because their power stops at the nation's borders. The latter point is particularly important in the context of international food supply chains, which, as we will see, operate in different countries and involve parties from different nations (including, often, multinational corporations). Moreover, as mentioned at the outset, the protection of human rights is traditionally conceived of as the province of public intervention, while international food supply chains are typically governed through instruments that belong to private law. Thus, there seems to exist a gap between the regulatory contexts related to human rights and international food supply chains: the first are regulated by public law, and the second by private law. How may these two different environments be reconciled? Before showing how scholarship has dealt with this problem, it is apt to define a few terms crucial for our analysis.

The first term to be defined is that of 'human right', an expression frequently employed in different national and international texts. A key point of reference in understanding what I mean by human right is offered by the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948. According to Art. 2, human rights are all the rights and freedoms established in the Declaration and belonging to every human being "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In other terms, human rights are those rights that every human being has for the simple reason of being a member of the human family.<sup>1</sup>

The second term to be defined concerns the notion of private standards (Brunsson and Jacobsson 2000). These are rules that are created by private actors, rather than by public ones, and that, as such, are voluntary in nature. Indeed, private standards do not rely on the power states have to impose conduct and sanction those who do not adopt such conduct. Thus, as a matter of principle, operators are free to decide whether to follow standards. Nowadays, the use of private standards is widespread, especially in the international context. The reason is the fact that, since there is no such a thing as 'global law' – i.e. norms that can be imposed regardless of national borders –, private standards create a sort of common set of rules that can be applied worldwide (on a voluntary basis). Why should professional operators adhere to standards voluntarily? The answer is connected to the incentives associated with adopting such private standards: the greater such incentives are, the higher the probability that the private standard will be applied by the parties. In other terms, the adoption of private standards, being voluntary, depends on the benefits parties will obtain by complying with them: for example, if farmers comply with a private standard they might obtain access to a lucrative market; a processor might adopt a private standard in order to improve the quality of the goods it purchases; or a

retailing chain might use private standards to attract consumers (Giovannucci and Ponte 2005, 287; Poncibò 2007).

In the context of international supply chains, there are three sets of incentives that are more relevant in explaining the success of private standards.

- The first concerns the drive for legal homogeneity. Especially in the case of long supply chains involving players acting in different legal systems, it becomes crucial to have a set of rules that are homogeneous and can overcome differences in national regulation.
- The second set is represented by the drive for interoperability. In the case of integrated supply chains, in which different operators are involved at different stages of production and marketing processes, it is very important that such operators are able to interact on the basis of some common features.
- The third type of incentive is related to the need to provide more detailed specifications in the case of activities involving complex technical factors: in many cases public norms do not achieve the level of detail that is needed by private operators and/or they leave some room for discretionary choices. Private standards are thus aimed at restricting such space for discretion and offering a more detailed operational guide to private actors.

Within the broad province of private standards, I focus on one specific type; namely, the so-called ‘suppliers’ codes’ (Frynas and Blowfield 2005; Jenkins *et al.* 2004). These are codes enacted by large business operators (e.g. multinational corporations active in the processing or marketing of foodstuffs), with the scope of providing a set of rules that suppliers must comply with if they want to enter (or continue) a business relationship with such operators. In other words, these corporations create their own rules in order to better manage their production and/or distribution processes, and they ask their business partners to also follow them. The rules I am referring to here are private standards that are established by so-called chain leaders (i.e. the business operators who control the supply chain) (Cafaggi 2016, 230). The way through which these standards are created can differ, as the case study will show. The relationship between the chain leader and suppliers is hierarchical, while it becomes more cooperative in the phases of monitoring compliance with the content of codes (Cafaggi 2016, 223–224). The reason why private standards and suppliers’ codes are relevant for our analysis is that suppliers’ codes increasingly incorporate provisions concerning the protection of human rights. In particular, the codes impose on suppliers the duty to protect human rights in their business activities and are integrated by more detailed documents offering guidance about how to guarantee such protection (Cafaggi 2016, 231–232).

Suppliers’ codes contain private norms that can be applied worldwide since they are not dependent on a particular, national legal system. Nonetheless, one might wonder how this is possible. In other terms, how can these codes be binding and, more specifically, binding regardless of national borders? There are two possible mechanisms.

- The first revolves around the idea that compliance with codes is a prerequisite for entering into a business relationship with a chain leader: since the latter is usually a meaningful economic player, suppliers have a strong incentive to do business with this actor and therefore to comply with the codes. Lack of compliance with the private standards could amount to the impossibility of commencing negotiations with the chain leader.
- The second mechanism is represented by a specific private legal tool that can be employed to make the codes binding, namely, a 'contract'. More specifically, international contracts allow the chain leader to impose their own private standards on suppliers who operate in different states. While the first mechanism temporally operates prior to the birth of a business relationship between the chain leader and the supplier (such a relationship will not even arise if suppliers do not comply with the code), a contract aims at regulating the business relationship once it has arisen, making codes binding for the duration of the relationship itself.

But what is a contract and what is an international contract? The common idea behind the term 'contract' is that of an agreement binding two or more parties who must perform defined activities on behalf of the counter-parts. These activities are specified in the contract itself and give rise to legal obligations (i.e. to duties that the contractual parties have to perform). Of course, how a contract is regulated varies depending on the legal system in operation: nonetheless, the core idea that a contract represents a binding agreement is shared almost universally.

Another common way of looking at contracts is to conceive of them as the legal vessel through which economic exchanges take place in a market. If a farmer wants to sell his produce to a processor or a retail chain, he will have to define a contract regulating that sale. In the context of rural development, contracts are the mechanisms by which farmers can obtain access to the market; if farmers want to access an international market, they will have to underwrite an international contract. The latter is an agreement in which the two or more parties have different nationalities and/or operate under different legal systems. In such cases, the problem that can arise is deciding which national law should be applied. If one contractual party is South African and another French, should South African or French contract law be applied? These kinds of conflict are solved either via rules that form part of a special branch of the law called private international law,<sup>2</sup> or through international conventions that define common rules that apply in different countries in a uniform way.<sup>3</sup> In the first case, there is a national law that prevails, while in the second, no national law prevails since what are applied are norms that go beyond national borders (i.e. are international). In any event, the concept of contract is almost universally recognized and contractual agreements are enforced, even if through different modalities, in almost all legal systems.

Another set of problems concerns the monitoring of compliance with suppliers' codes. Suppliers might have an incentive to declare that they are following a code, while in real

terms they are not. How is it possible to control suppliers' behaviour? A tool often employed in these cases is certification. Certification is a mechanism that the law provides to supply and validate information that the market considers valuable. In the case of suppliers' codes, for market players and in particular for the chain leader it is important to know if suppliers are complying (e.g. whether they are protecting and promoting workers' rights in the workplace): the fulfillment of these conditions can determine important consequences such as the willingness of the chain leader to conclude supply contracts, the price to be paid to the suppliers, reputational damage suffered by the chain leader if, for example, it becomes known to the public that the chain leader is employing suppliers who violate workers' rights, etc. The monitoring of compliance with suppliers' codes is complex: the chain leader does not always have access to objective criteria – such as, for example, chemical parameters – to monitor suppliers' compliance, since the protection of human rights is somewhat immaterial; moreover, the chain leader cannot rely on what suppliers state, since they might have an incentive to cheat provided that the chain leader has no objective criteria for examining the truthfulness of what suppliers declare. Of course, the chain leader might send their own inspectors to a supplier to check if they are complying with a code, but this might be costly for the chain leader and, moreover, might give rise to the duplication of costs in cases in which there is one supplier code common to different chain leaders whose compliance can be monitored once on behalf of all the leaders. Thus, chain leaders usually make recourse to so-called certification bodies which are professional enterprises that operate in a third-party, independent way and which check whether suppliers are actually implementing what is provided for in suppliers' codes. The cost of this monitoring is borne by the suppliers who obtain a certificate if the inspection is positive; i.e. if the certification body finds that the suppliers' code has been complied with.

Finally, the expression 'international food supply chain' refers to an arrangement in which a chain leader is supplied with goods and/or services by other subjects (the suppliers) operating in different parts of the world (for example, a coffee processor operating in Germany might buy coffee beans from farmers and cooperatives located in Ethiopia or Colombia). Being a *food* chain, this arrangement concerns the supply of raw agricultural commodities, processed foodstuffs and beverages, and takes the form of contracts (e.g. for the sale of goods) that link the chain leader with suppliers and that specify the rights and duties contractual parties have with respect to each other. Private standards, suppliers' codes and certification contribute to integrating the contents of contracts.

### 3 The state of the art

The role that private standards, certification and contracts have in international food supply chains can be tackled from different perspectives. Scholars have focused their attention on the following main issues.

1) *The regulatory function of contracts.* Law scholars have underlined that contracts are increasingly applied to pursue goals usually pertaining to the realm of public law. Traditionally, it is within the realm of public law to establish rules concerning health, safety, environmental, labour conditions and the like. But things are changing. Private law, and contract law in particular, is able to create norms that define the conditions mentioned before by including contractual terms and/or by making reference to private standards that identify the conduct parties must follow in order to protect the environment, the health and well-being of their employees, the safety of consumers, and so on. In other terms, contract law is able to create the same types of rules traditionally provided by public law through a system of self-regulation and self-governance implemented by the contractors themselves (Brownsword *et al.* 2017). This use of contracts is especially evident in the international context, since it is there, we face the lack of a unitary body of public rules; contract law can thus create the common regulatory ground among different geographical areas that allows business to flourish (Cafaggi 2013; Park and Berger-Walliser 2015). The regulatory use of contract law also has a 'dark side'. The most obvious sign of this concerns the fact that a contractor who is in a dominant position *vis-à-vis* their counterpart can unilaterally shape the regulatory content of a contract in a way that favors his own interests. In other terms, the asymmetries that often characterize the bargaining force of contractual parties can also translate into regulatory asymmetries, thus deepening preexisting disparities between contractors. Going beyond the interests of single contractors, the regulatory implications of contract law pose a challenge both in terms of democratic accountability and wealth distribution for society at large.

2) *Suppliers' codes and Corporate Social Responsibility (CSR).*<sup>4</sup> The emergence of codes of conduct and suppliers' codes may be located within the larger phenomenon of Corporate Social Responsibility (CSR). This process is driven by large corporations who use such codes to (try to) govern social and environmental issues, such as labour conditions, fair prices, pollution, etc. Scholars have pointed to the fact that CSR in general, and codes of conduct/suppliers' codes in particular, can be appraised in two different ways (Mundlak and Rosen-Zvi 2011, 604). On the one hand, they should be conceived of as a substitute for public intervention and an effort to fix some of the problems and limits of public rules. On the other hand, they may represent a rhetorical device for masking the profit-driven nature of global economic activities. Lund-Thomsen (2008) provides a general global critique of the effectiveness and benefits of codes of conduct, also offering some advice about how to improve them. In both cases, the efficacy of such codes depends on the ability of corporations to communicate information about

their codes and practices to different types of agents and intermediaries, such as consumers, financial institutions, and public bodies (Mundlak and Rosen-Zvi 2011, 605–606).

3) *The public-private divide*. As mentioned, one possible way to think of suppliers' codes is to consider them an alternative to public regulation. This idea raises the issue of the relationship between private standards and public regulation. The interconnections between the two are copious, mutual and complex. On the one hand, the two are complementary, since private standards fill those gaps that are left open by public regulation. For example, private standards are more flexible and less prone to obsolescence than public rules; they can in some cases be used as a benchmark for enacting future, public legislation; private standards cannot substitute public regulation since they pose obligations that go beyond and are additional with respect to those posed by public law; private standards are more effective than public norms in regulating global supply chains (Saadoun 2013; Lytton 2019). On the other hand, scholars have underlined the fact that private standards can be somewhat antagonistic in relation to public norms since they pose additional costs to economic actors who not only have to comply with public legislation, but also with private orders (Saadoun 2013). As underlined in the previous section, the growing importance of private standards is re-shaping administrative law (Lytton 2019) and leading us to also critically reconsider the public-private divide that has traditionally been a feature of continental European legal systems.

4) *Private standards as a barrier to, or trigger of, rural development*. Scholars debate whether private standards and global supply chains represent factors capable of promoting rural development or, on the contrary, they are an obstacle to the achievement of such a goal (Lee *et al.* 2012). Some authors fear that food standards create additional burdens for smallholders and thus pose a barrier to entry for them with respect to international markets. As mentioned above, food chain leaders (e.g. retailers and supermarkets) are able to unilaterally dictate their own conditions to small producers, thanks also to the creation and use of private standards (Henson and Humphrey 2009). Other authors think that codes of conduct, suppliers' codes and private standards in general have a positive impact on smallholders and farmers since they allow them to upgrade their productive infrastructure, increase product quality and improve existing farming techniques, in this way fostering access to global supply chains and international markets (van Beuningen and Knorringa 2009). It is probably impossible to solve this dilemma: depending on the sociocultural context, market conditions, infrastructure, specific features of the product and the supply chain concerned, etc. private standards and suppliers' codes can either advance or retard rural development. In other words, only a case-by-case analysis can provide answers about the relationship between private standards and rural development.

5) *The importance of monitoring performance and sanctioning non-compliance*. It can be difficult to ascertain whether suppliers are really complying with codes of conduct.



This might be due to difficulties in getting access to the information important for assessing compliance (e.g. since this information is controlled only by the firm which should comply with the code); to reluctance to reveal cases of code violation because of the fear of retaliation (e.g. employees' fear of being fired or marginalized if they reveal a violation in the code of conduct by their employer); to the geographical distance between the chain leader and its suppliers (e.g. costs of organizing inspections); or to a lack of a specific expertise with measuring compliance (e.g. a lack of staff who have been trained in the areas covered by the codes of conduct). Therefore, it is crucial that the contracts between chain leaders and suppliers not only provide for the obligation to comply with the codes of conduct/suppliers' codes, but also establish monitoring procedures for monitoring the actual implementation of these acts by suppliers. These monitoring procedures should be effective: in order to be so, they have to be structured in a way that guarantees that they are impartial, independent, sufficiently funded, and adequate staffed. A further corollary of the need to provide for monitoring mechanisms is represented by the necessity of sanctioning those suppliers who do not comply with codes of conduct/suppliers' codes (Cafaggi 2016). Again, the sanctioning system should be effective. This requires that sanctions are sufficient to discourage parties from breaching the codes and that their application is rigorous.

6) *The influence of private standards and certification on contractual remedies.* The logic behind private standards and certification regimes differs from that which characterizes traditional contract law. On the one hand, as noted before, contracts can include terms that make private standards, suppliers' codes, codes of conduct and certification binding for the contractual parties. On the other hand, these standards and certification are capable of influencing and changing the contractual structure within which they are included. This phenomenon becomes clear if one looks to contractual remedies (Cafaggi and Iamiceli 2014). Traditional contractual remedies are centered around the idea of terminating the contractual relationship and compensating the aggrieved party for any losses suffered due to breaches of the contract; in contrast, in the case that a contract makes reference to private standards and certification, remedies tend to be more cooperative in character and aimed at keeping the contractual relationship alive (e.g. by correcting the causes of the breach of contract) and renegotiating terms already agreed upon (Cafaggi and Iamiceli 2015).

#### 4 Case studies from the coffee sector

The coffee sector offers an interesting case study in which to both demonstrate many of the dynamics described above and to develop a few comparative remarks about the strengths and pitfalls of codes of conduct, suppliers' codes, private standards and certification (Slob and Oldenziel 2003; Giovannucci and Ponte 2005; Muradian and Pelupessy 2005; Raynolds *et al.* 2007; Macdonald 2007; Neilson 2008).

The coffee industry has experienced major changes since the late 1980s. Until 1989, the International Coffee Agreement (ICA) was in place; this instrument created a highly regulated market under which coffee prices were largely determined at a central level, as well as the quotas of coffee that each producer could export (Ponte 2004, 3). After the collapse of the Soviet Union and the rise of neoliberalism, many of the reasons for supporting the Agreement disappeared, thus the ICA was supplanted by a free-market regime with the coffee roasters acting as chain leaders and producers of so-called green coffee (raw coffee) as suppliers (Haight 2011, 75–76; Ponte 2004, 3–4; Muradian and Pelupessy 2005, 2029–2030). The regulatory power both of the ICA and of national states have now largely vanished, since relations are now determined mostly by buyers; i.e. coffee roasters and international traders (Ponte 2004, 4). The changes that occurred in the 1990s had a major negative effect, especially on small farmers, since between the latter and the roasters there are huge differences in terms of bargaining power. The risk is of a race to the bottom, with farmers forced to accept unequal contractual terms simply because they do not have the force to oppose them. However, consumers and NGOs have become more aware of the imbalances that the end of the old coffee governance regime may have created. Thus, the public became (and still is) increasingly interested in the dynamics of the coffee supply chain and how these dynamics can affect not only the quality of what they drink, but also the social, economic and environmental context in which the coffee is produced.

In the new context, chain leaders have increasingly made recourse to private standards in the forms of codes of conduct and suppliers' codes, both in order to meet consumer demand for sustainable products and to manage their supply chains through the establishment of quality- and ethical parameters that suppliers must comply with. Of course, lacking the authority/power to formally impose their conditions – differently from national states – chain leaders have increasingly made recourse to contracts that include terms that transform private standards/codes of conduct into contractual obligations. This is a clear example of what was described before as the regulatory function that contracts are capable of fulfilling.

In particular, sustainability has become a key term for the coffee sector (Ponte 2004, 9 ff). The notion of sustainability is a broad one: it encompasses environmental preservation, workers' protection, the economic and financial viability of the supply chain with particular regard to the defence of weak parties such as small farmers; and public and ethical issues concerning the impact of the supply chain on society generally. There are different private standards, certification and codes of conduct aimed at fostering sustainability in the coffee sector; simultaneously, chain leaders have followed different paths to (try to) promote sustainability. Comparative analysis of these different elements can help to shed some light on the inner structure of these different tools and to better understand the operational relevance of the theoretical issues we have analysed in the previous sections.

We will compare three different cases where private standards, certification and codes of conduct have been used to govern the coffee supply chain. These cases show the different strategies that chain leaders can employ, as well as the different roles that public, international and non-profit bodies can play.

*The Baseline Common Code of the Global Coffee Platform*

The first case study concerns the Baseline Common Code (BCC)<sup>5</sup> operated by the Global Coffee Platform (GCP),<sup>6</sup> a network of different stakeholders operating in the coffee sector (Neilson and Pritchard 2007). The application of the BCC is ensured by Coffee Assurance Services (CAS).<sup>7</sup> GCP's general goal is to create a common baseline for coffee production around the world with regard to social, environmental and economic sustainability. The BCC is one of the tools through which such a result may be achieved, and the ambition is for it to become the benchmark for the coffee sector globally. Any entity operating in the coffee supply chain and in a producing country can be subject to the Code: this includes roasters, mills, cooperatives, estates, etc. BCC's main features are that it focuses only on one specific sector, is it applied to different operators working in multiple contexts and legal systems, and it is built around detailed principles and unacceptable practices. These principles and practices are grouped under the umbrella of the three different types of sustainability mentioned before (social, environmental, economic). Under each principle is listed three possible scenarios (marked, respectively, in green, yellow and red) with a few indicators for each scenario.

For example, within the social sustainability category one principle concerns 'Discrimination'. Three different scenarios are described. In the first scenario (green) is listed 'Positive action programmes to secure equal rights are implemented'; in the second (yellow), 'Awareness to secure equal rights is raised and concrete steps to develop positive action programmes are evident'; under the third scenario (red), 'No positive action to either raise awareness or secure equal rights is evident'. In order to assess if a scenario really exists, a few indicators can be used. Thus, with regard to the green scenario one, one indicator is 'The policy and procedures are being implemented, i.e. potentially vulnerable groups are identified, and efforts have been made in order to explain in further detail the procedures to them, in particular the grievance mechanisms. There is evidence that this and other actions to remove the obstacles that foster discrimination are being developed'; for the yellow scenario, "In case incidents of discrimination, harassment or abusive treatment have occurred, these are being addressed"; in the case of the red one, "Incidents of discrimination, harassment or abusive treatment have occurred".<sup>8</sup>

The BCC is designed to be applied on a voluntary basis since it is the by-product of a private initiative brought into being by the GCP. In this sense, it is an example of a private standard originating from a third party (the GCP), managed by an independent entity (the CAS) that acts as a certification body, and is designed to be applied by multiple users.

*The Supplier Code of Conduct of Starbucks Corporation*

The second case study concerns the Starbucks Supplier Code of Conduct (SCC).<sup>9</sup> There are two texts that are relevant in this regard: the Supplier Code of Conduct and the supplemental Starbucks Supplier Social Responsibility Standards (SSRS).<sup>10</sup> Both determine the social obligations that Starbucks' suppliers agree to fulfill; they are both quoted in the Supplier Guidance Global Requirements (GGR),<sup>11</sup> thereby defining the standards that are applied to suppliers concerning not only socio-ethical sustainability, but also coffee quality, business processes, use of logos and trademarks, and packing and shipping requirements.

This latter document is relevant since it provides that all the standards established in the GGR (including, therefore, the SCC and the SSRS) are requirements "supported by our Standard Terms and Conditions and/or additional contract (including purchasing documents). Failure to meet the requirements outlined here may result in the collection of damages and eventual termination of the relationship". The language employed is rather clear. The standards Starbucks requires suppliers to follow are part of the contractual relationship that exists between Starbucks and its suppliers: if the latter fail to comply with these standards, this gives rise to breach of contract (and the possibility that Starbucks will ask for compensation for damages and terminate the contractual relationship).

Going back to the SCC and the SSRS, we note that they are very concise documents. SCC is only one page long, is dated June 2004, and lists five principles suppliers are required to comply with.<sup>12</sup> These principles are more fully specified in the SSRS. What it is worth noting again is the idea that the SCC and SSRS are binding since they are part of a contract suppliers are required to sign. In order to reinforce such provisions, the SCC states that "Failure to comply, or failure to work with Starbucks or a third party to correct non-complying situations, are grounds for cancellation of open orders, discontinued use of non-complying production sites, or termination of our business relationship".<sup>13</sup> The SSRS is four pages long, is dated November 2006, and is built around six sections: Transparency, Worker Health and Safety, Worker Treatment and Rights, Worker Hours and Compensation, Environmental Protection, Compliance and Corrective Action. The standards established in the six sections are supplemental with regard to the minimum requirement specified in the introduction of the SSRS itself, according to which suppliers have "to comply with all applicable laws, codes and regulations, including health codes, employment and discrimination laws, environmental regulations, safety codes and building ordinances for each location in which they do business".

It is clear that these private standards are integrating, not supplanting, public norms. Two other points deserve to be highlighted. First, most of the SSRS is focused on workers' conditions; only one section is devoted to the protection of the environment and no specific section focuses on other stakeholders' interests. Starbucks' primary interest seems thus to be in labour conditions and workers' rights, while other economic, social

and environmental issues play a minor role. Second, the first section in the SSRS establishes a transparency principle which appears to represent a prerequisite with respect to the implementation of the other principles listed in the document. The transparency principle requires suppliers to disclose conditions that might clash with the principles and values encapsulated in the standard; moreover, they are required to give Starbucks, or third parties designated by Starbucks, access "... to their operations, policies, processes, and relevant records" and to allow for "unannounced inspections of their records and facilities".

The SCC and SSRS represent another example of private standards that Starbucks uses to vertically coordinate its supply chain. The use of private standards to control suppliers is evident if we consider that Starbucks has unilaterally elaborated its own standards, differently from in the case of BCC where the standards were the output of a joint effort by different stakeholders. Starbucks' control over the standardization process is probably motivated by the need to have standards that are more in line with Starbucks' necessities and concerns.

*The Responsible Supply Chain Process applied by Illycaffè S.p.A.*

The third case study concerns the Responsible Supply Chain Process standard (RSCP)<sup>14</sup> employed by the coffee roasting and espresso producing company Illy.<sup>15</sup> This standard was developed by *Det Norske Veritas* (DNV),<sup>16</sup> one of the leading standard-setters and certification bodies worldwide. Initially, the RSCP standard was elaborated with reference to the coffee sector and later expanded to other production areas.<sup>17</sup> The standard is not available online and therefore cannot be analysed in detail. Nonetheless, DNV describes it as a system tailored to the "company's own strategic decisions and core products," which therefore implies a thorough analysis of the congruence of the company's processes and products with its goals. The final aim is to create an effective management system "of all major risks associated with environmental performance and pollution reduction; product quality & consumer issues; product safety; labor & fair operating practices; local community engagement; risks to human resources and human rights".<sup>18</sup> Thus, the RSCP is a management standard used to help companies to structure and then operate their sustainability policies. It is the company that provides the content of these policies, while the standard is conducive to maintaining them. Illy was the first company worldwide to apply this standard and to be certified as compliant with it. Indeed, it seems that Illy was a sort of pilot project in terms of developing the standard itself, and thus, in a circular way, contributed to shaping the standard's contents.

Even if the RSCP standard is not available, we can analyse the Sustainability Policy published by Illy.<sup>19</sup> This document is one of the most important outputs of the process described above through which the standard was employed to help the company (Illy) to build (and then make effective) their sustainability policies. The Sustainability Policy employs a long-term time horizon since the document covers the period until 2030. There are two sections of the text that are worth mentioning. First, the methodological approach.

The first step involves analysing seventeen sustainable development goals, then identifying nine macro-objectives, including targets in relation to each macro-objective, and finally creating a sustainability action plan spanning from 2017 to 2021. The second part of the text concerns sustainability commitments for 2030. These cover three macro-areas: responsible supply chain and sustainable agriculture; happiness and quality of life; circular economy,<sup>20</sup> and innovation.

In Illy's Sustainability Policy document, we cannot find any references to the protection of human rights: the focus seems to be more on environmental and economic sustainability than on social sustainability. However, this does not mean that the protection of human rights is not a part of Illy's policies. In a related webpage devoted to sustainability there is a section specifically concerning human rights.<sup>21</sup> There are references both to international agreements and guidelines<sup>22</sup> Illy complies with, and to the RSCP standard.<sup>23</sup> In addition, it is expressly provided that Illy will include "explicit reference to the Code of Ethics in all contracts, though a clause on respect for human rights in procurement and along the supply chain". Thus, all the standards, internal policies and international guidelines created and/or applied by Illy become contractual obligations that suppliers must comply with.

The DNV standard offers another example of a private standard incorporated into a contract. Differently from the other two case studies, it involves a third-way solution by which the standard setter does not establish the sustainability standards companies must comply with, but rather the methodology through which each single company can create its own sustainability policies.

#### **4 Comparative remarks**

The comparison of the three case studies leads to the following conclusions.

1. In all case studies, references to human rights have been included in private standards. In other terms, the protection of human rights provided for in international conventions and agreements has been "translated" into private norms and principles. The reasons why such "translation" has taken place is never clearly specified. Sometimes it appears to be part of a marketing strategy, especially when private corporations are directly involved (e.g. Starbucks and Illy): developing standards (Starbucks) or adhering to standards (Illy) concerning CSR is a way to signal to the market that corporations are not only profit-driven but also care about values other than money. In particular, it is a way to attract those consumers who are most interested in the protection of such values (Giovannucci and Ponte 2005, 287; Poncibò 2007). Even if references are to values other than money, it should be borne in mind that compliance with these standards is in any case market-oriented and thus it is impossible to avoid a profit-driven logic. In other cases, the reasons why private standards have been developed are more mixed. In the case of BCC (Case Study 1), some of the subjects who partake of this initiative are enterprises

and are most likely market-driven in their choices, much as in the cases of Starbucks (Case Study 2) and Illy (Case Study 3). However, in Case Study 1 we can identify other, non-profit-oriented stakeholders who participate in the BCC initiative, such as civil society organizations, trade unions and public institutions. Here, a market logic probably does not reflect all the interests involved in the choice to take part in the BCC.

2. The BCC evaluation system (Case Study 1) classifies three possible variations in terms of compliance with the specified norms: the optimal situation (green colour), an acceptable situation (yellow colour) and an unacceptable one (red colour). The classification system is not binary (achievement of a goal/lack of achievement of a goal), but more nuanced thanks to the introduction of the yellow scenario. This adds flexibility in terms of pursuing sustainability goals.
3. Some standards (for example, Starbucks' SSRS in Case Study 2) focus more on social issues (labour conditions and workers' rights) than on other ones (environmental protection, community interests, etc.). Other standards like the BCC (Case Study 1), are broader in their focus, taking into account social, environmental and economic variables and giving them balanced consideration. The DNV standard represents a third possible way (Case Study 3), with more of a focus on the methodology that chain leaders should follow in building their sustainability policies.
4. In the BCC case (Case Study 1), the production of the standard is centralized through the operation of an international professional association for the sector: the Global Coffee Platform (GCP), which has specific expertise and is directly involved in the sector in connection with which the standards are established. In Starbucks' case, the standards are created directly by the chain leader and are thus internal and unilateral. In the case of Illy, the standard that is employed is created by a third party and is not sector-specific. The case of Illy (Case Study 2) is an interesting one since the RSCP standard does not directly define the sustainability policies the company has to implement, but rather provides for procedures and methods for building such policies and managing them. Thus in the case of Illy we find a sort of third-way solution with respect to the two alternative solutions represented by BCC (Case Study 1) and SCC (Case Study 1). Indeed, sustainability policies in these two cases are neither written at a centralized level (as in the BCC case) nor unilaterally at the company level (as in the Starbucks case). Rather, in Case Study 3 the resulting policies are the output of cooperation between, on the one hand, the company which sets the standard, verifies compliance and issues the respective certification (DNV) and, on the other hand, the company that implements it (Illy).
5. The level of detail of the standards can differ. Sometimes they are quite detailed and specific, as in the case of BCC (Case Study 1), while sometimes they are represented in the form of short principles, as in the example of Starbucks' SCC (Case Study 2). Finally, sometimes the standards are generic, meaning that they are not specifically tailored to the coffee sector, as in the case of Illy (Case Study 3).

6. With regard to verification of compliance with the standards, the systems described in the above case studies explicitly include some kind of monitoring mechanisms, even if the strategies for verifying them differ. In the case of Illy (Case Study 3), there is a private certification body (DNV) which is internationally recognized, operates in many sectors, and applies different types of standards. In the BCC case (Case Study 1), CAS, a dedicated certification body, has been established, which is again a private entity with very specific expertise and a focus only on the verification of the BCC. In the Starbucks case (Case Study 2), the company refers to two possible ways of verifying compliance: audits conducted by Starbucks itself, or by a third party designated by the company.

It should be added that the use of private standards to promote CSR and the protection of human rights is not a panacea. This approach has its problems and limits. For example, with reference to the coffee supply chain and in particular to Fair Trade certified coffee<sup>24</sup> – a type of certification in which the protection of human rights and social responsibility in general plays a pivotal role – Haight (2011, 76) points to at least four such limitations.

- First, market conditions (e.g. the price for premium quality coffee) can have a huge impact on the effectiveness of these social sustainability schemes: there are cases in which coffee farmers' cooperatives "are choosing to default on their Fair Trade contracts" due to the higher prices they can get on the open market.
- Second, the main focus of Fair Trade standards is small farmers, meant as small landowners, since these standards are addressed at cooperatives and a prerequisite of becoming a member of the cooperative is being a small landowner. This implies that the interests of the migrant laborers who represent the poorest segment of the coffee community and are not part of the cooperatives are marginalized.
- Third, there is a lack of transparency in business dealings due to several factors, such as – for example – the fact that documents are not translated into a language that farmers can understand. This implies that farmers cannot control how the extra money the cooperative gets because of the Fair Trade scheme is spent. Thus, "records kept by cooperatives have shown that premiums paid for Fair Trade coffee are often used not for schools or organic farming but to build nicer facilities for cooperatives or to pay for extra office staff".
- Finally, Fair Trade "provides incentives for some farmers to remain in the coffee business even though the market signals that they will not be successful. If a coffee farmer's cost of production is higher than he is able to obtain for his product, he will go out of business. By offering a higher price, Fair Trade keeps him in a business for which his land may not be suitable".

In general, Reynolds *et al.* (2007, 159) note that some of the certification initiatives in the coffee sector lack a robust democratic basis since in some cases NGOs and certification systems are being used to legitimize the control of processors and distributors over the coffee supply chain. The point is reinforced by considering that "certifications reflect Northern-based standards and procedures and may raise barriers to



entry for producers". Macdonald (2007, 809) stresses the fact that while codes of conduct have contributed to the empowerment of marginalized groups, there is still a lack of cooperation between public and private actors whose decisions can affect the conditions of such groups. Neilson (2008, 1619) highlights the issue of cost. Namely, the implementation of the standards defined in the codes of conduct requires financial investment that might be unavailable to farmers: "Corporate self regulation imposes requirements without necessarily offering developmental support". Finally, Neilson and Pritchard (2007, 328) note that private standards, CSR and codes of conduct run the risk of being perceived as vehicles of a neo-imperialist agenda due to "allegations of regulatory capture by corporate interests" and to the imposition of the "audit-culture mentality of Western corporate models".

## 5 Conclusions

The paper introduces readers to a complex and rapidly evolving area in which the law interacts with rural development in order to promote the latter. But rather than using the traditional tools of public law (taxation, direct payments, the building of infrastructure, etc.), the chapter seeks to show how rural development can be promoted through the use of the tools of private law, namely private standards, certification and contracts. The angle from which the phenomenon has been analysed is quite specific: the relationship between private law, rural development and the protection of fundamental rights. Such a relationship does exist and is becoming more important in a context in which consumers are increasingly interested in social sustainability, borders are becoming porous, and supply chains more global, yet there are still major differences in the level of protection of human rights in different countries. Even if the subject matter touched upon here seems quite narrow, it represents a first introduction into the complexities that characterize rural development and international supply chains.

### Notes:

<sup>1</sup> See the Preamble of the Declaration: '... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. See also Art. 1 of the European Convention on Human Rights, 4 November 1950: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

<sup>2</sup> These rules employ specific indexes to determine which national law should be applied: for example, the place where the activity provided for in the contract must be conducted; the presence of contractual clauses specifying which national law prevails, etc.

<sup>3</sup> An example in the field of contract law is represented by the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna in 1980.

<sup>4</sup> Corporate Social Responsibility (CSR) is a type of self-regulation by international private business aimed at ensuring the implementation of certain ethical principles in the operation of businesses.

<sup>5</sup> BCC = Baseline Common Code, a document which forms the basis of the voluntary self-regulation of the companies in the coffee sector. The document is a collection of economic, social, environmental and food safety rules and principles.

<sup>6</sup> GCP = Global Coffee Platform: an international professional association of the coffee sector. Available at: <https://www.globalcoffeeplatform.org/> (15 March, 2019).

<sup>7</sup> CAS = Coffee Assurance Services is a private company which owns and operates the so-called “4C coffee certification system”.

<sup>8</sup> See p. 16 of the BCC.

<sup>9</sup> Starbucks Corporation is an American coffee company and coffeehouse chain. As of 2018, the company was operating in 28,218 locations worldwide. For its Supplier Code of Conduct see: <https://www.starbucks.com/business/suppliers>; see also: <https://www.starbucks.com/about-us/company-information/business-ethics-and-compliance> (15 March, 2019).

<sup>10</sup> SSRS = Starbucks Supplier Social Responsibility Standards: a set of social criteria for becoming a supplier of the Starbucks Company.

<sup>11</sup> GGR= Supplier Guidance Global Requirements: a set of criteria for becoming a supplier of Starbucks Company.

<sup>12</sup> The principles are: “Demonstrating commitment to the welfare, economic improvement and sustainability of the people and places that produce our products and services; Adherence to local laws and international standards regarding human rights, workplace safety, and worker compensation and treatment; Meeting or exceeding national laws and international standards for environmental protection, and minimizing negative environmental impacts of suppliers’ operations; Commitment to measuring, monitoring, reporting and verification of compliance to this code; Pursuing continuous improvement of these social and environmental principles”.

<sup>13</sup> The final section of the SSRS contains a similar provision, although more detailed: “Failure to meet a corrective action plan commitment will be considered a material breach of our agreement and may result in cancellation of current orders and/or termination of our contractual relationship. Gross violations or illegal activities will be cause for outright and immediate termination of our contractual and business relationship” (bold in original).

<sup>14</sup> RSCP = Responsible Supply Chain Process standard; a certification system. Initially applied to the green coffee supply chain, it has since become a model for use with any kind of product line. See <https://www.dnvgl.com/services/responsible-supply-chain-process-certification-11193> (15 March, 2019).

<sup>15</sup> Illycaffè S.p.A. (branded as illy) is an Italian coffee roasting company that specializes in the production of espresso.

<sup>16</sup> DNV GL = Det Norske Veritas - Germanischer Lloyd, an internationally accredited certification society headquartered in Norway. The company provides services for several industries including maritime, renewable energy, oil & gas, electrification, food & beverage and health-care. It was created in 2013 as a result of a merger between two leading organizations in the field, Det Norske Veritas (Norway) and Germanischer Lloyd (Germany).

<sup>17</sup> See <https://www.dnvgl.com/services/responsible-supply-chain-process-certification-11193> (15 March, 2019).

<sup>18</sup> See <https://www.dnvgl.com/services/responsible-supply-chain-process-certification-11193> (15 March, 2019).

<sup>19</sup> See: [http://valuereport.illy.com/pdf/Sustainability\\_Policy\\_2030\\_ENG.pdf](http://valuereport.illy.com/pdf/Sustainability_Policy_2030_ENG.pdf) (15 March, 2019).

<sup>20</sup> Circular economy: a sustainable system of technologies and supply chains in which resource input and waste, emissions and energy leakages are minimized. The linear economy is the opposite, where production is based on a so-called “take, make, dispose” model.

<sup>21</sup> See: <http://valuereport.illy.com/> (15 March, 2019).

<sup>22</sup> “Adherence to the principles of the ILO - International Labor Organization; [...] Adherence to the Global Compact of the United Nations since 2012”.

<sup>23</sup> “Adherence to Responsible Supply Chain Process; Setting out of a Sustainability Policy to represent illycaffè’s values, objectives, commitments and governance in the area of sustainability”.

<sup>24</sup> Fair Trade, as applied to coffee, is one of the standards in the coffee sector with the most stringent social justice standards (Raynolds *et al.* 2007, 159).

### References:

- Brownsword, R., van Gestel, R. A. J. & Micklitz, H. W. (eds.) (2017) *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law* (Cheltenham: Edward Elgar).
- Brunsson, N. & Jacobsson, B. (2000) *A World of Standards* (Oxford: Oxford University Press).
- Buller, H. & Wright, S. (1990) Introduction: Concepts and policies of rural development, In: Buller, H. & Wright, S. (eds.) *Rural Development: Problems and Practices* (Surrey: Gover Publishing Company).
- Cafaggi, F. (2013) The regulatory functions of transnational commercial contracts: new architectures, *Fordham International Law Journal*, 36(6), pp. 1558–1616.
- Cafaggi, F. (2016) Regulation through contracts: Supply-chain contracting and sustainability standards, *European Review of Contract Law*, 12(3), pp. 218–258.
- Cafaggi, F. & Iamiceli, P. (2014) Supply chains, contractual governance and certification regimes, *European Journal of Law and Economics*, 37(1), pp. 131–173.
- Cafaggi, F. & Iamiceli, P. (2015) Contracting in global supply chains and cooperative remedies, *Uniform Law Review*, 20(2–3), pp. 135–179.
- Council of Europe (1950) *European Convention of Human Rights* (Strasbourg: Council of Europe), available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (March 15, 2019).
- Frynas, J. G. & Blowfield, M. E. (2005) Setting new agendas: critical perspectives on Corporate Social Responsibility in the developing world, *International Affairs*, 81(3), pp. 499–513.
- Giovannucci, D. & Ponte, S. (2005) Standards as a new form of social contract? Sustainability initiatives in the coffee industry, *Food Policy*, 30(3), pp. 284–301.
- Haight, C. (2011) The problem with fair trade coffee, *Stanford Social Innovation Review*, available at: [https://ssir.org/articles/entry/the\\_problem\\_with\\_fair\\_trade\\_coffee](https://ssir.org/articles/entry/the_problem_with_fair_trade_coffee) (March 15, 2019).
- Henson, S. & Humphrey, J. (2009) *The impacts of private food standards on the food chain and on public standard-setting processes* (Rome: Food and Agriculture Organization of the United Nations), available at: <http://www.fao.org/3/a-i1132e.pdf> (March 15, 2019).
- Jenkins, R., Pearson, R. & Seyfang, G. (2005) *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (London: Earthscan Publications).
- Lee, J., Gereffi, G. & Beauvais, J. (2012) Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries, *Proceeding of the National Academy of Sciences of the United States of America*, 109(31), pp. 12326–12331.
- Lund-Thomsen, P. (2008) The global sourcing and codes of conduct debate: five myths and five recommendations, *Development and Change*, 39(6), pp. 1005–1009.
- Lytton, T. D. (2019) Technical standards in health & safety regulation: Risk regimes, the new administrative law, and food safety governance, In: Contreas, J. L. (ed.) *Cambridge Handbook of Technical Standardization Law, Vol. 2: Administrative Law, Copyright, Trademark, and International Law* (Cambridge: Cambridge University Press).
- Macdonald, K. (2007) Globalising justice within coffee supply chains? Fair Trade, Starbucks and the transformation of supply chain governance, *Third World Quarterly*, 28(4), pp. 793–812.

- Mundlak, G. & Rosen-Zvi, I. (2011) Signaling virtue? A comparison of corporate codes in the fields of labor and environment, *Theoretical Inquiries in Law*, 12(2), pp. 603–663.
- Muradian, R. & Pelupessy, W. (2005) Governing the coffee chain: the role of voluntary regulatory systems, *World Development*, 33(12), pp. 2029–2044.
- Neilson, J. (2008) Global private regulation and value-chain restructuring in Indonesian smallholder coffee system, *World Development*, 36(9), pp. 1607–1622.
- Neilson, J. & Pritchard, B. (2007) Green coffee? The contradictions of global sustainability initiatives from an Indian perspective, *Development Policy Review*, 25(3), pp. 311–331.
- Park, S. K. & Berger-Walliser, G. (2015) A firm-driven approach to global governance and sustainability, *American Business Law Journal*, 52(2), pp. 255–315.
- Poncibò, C. (2007) Private certifications schemes as consumer protection: a viable supplement to regulation in Europe?, *International Journal of Consumer Studies*, 31(6), pp. 656–661.
- Ponte, S. (2004) *Standards and sustainability in the coffee sector. A global value chain approach*, UN Conference on Trade and Development and International Institute for Sustainable Development, available at: <https://www.iisd.org/library/standards-and-sustainability-coffee-sector-global-value-chain-approach> (March 15, 2019).
- Raynolds, L. T., Murray, D. & Heller, A. (2007) Regulating sustainability in the coffee sector: a comparative analysis of third-party environmental and social certification initiatives, *Agriculture and Human Values*, 24(2), pp. 147–163.
- Saadoun, S. (2013) Private and voluntary: Are social certification standards a form of back-door self-regulation?, *Columbia Human Rights Law Review*, 45(1), pp. 281–325.
- Slob, B. & Oldenziel, J. (2003) *Overview of codes of conduct and ethical trade initiatives in the coffee sector* (Amsterdam: SOMO – Centre for Research in Multinational Corporations), available at: <https://www.somo.nl/wp-content/uploads/2003/10/Coffee-Codes.pdf> (March 15, 2019).
- United Nations (1980) *United Nations Convention on Contracts for the International Sale of Goods* (Washington D.C.: United Nations), available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (March 15, 2019).
- United Nations (1948) *Universal Declaration of Human Rights* (Washington D.C.: United Nations), available at: <http://www.un.org/en/universal-declaration-human-rights/> (March 15, 2019).
- van Beuningen, C. & Knorringa, P. (2009) *Inclusive improvement: standards and smallholders—Taking stock and moving on* (The Hague: HIVOS).