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The Evolution of the Global Food Safety Initiative

The Dynamics of the Legitimacy of a Transnational Private Rule-Maker

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9.1 INTRODUCTION

The Global Food Safety Initiative (GFSI) is an industry-driven meta-regulator that has proven to be influential in shaping both industry practices and public policy making in the field of food safety across the globe. GFSI makes a particularly promising case for investigating how a transnational private regulator has changed over time and shown resilience in overcoming deep-rooted legitimacy challenges (or "crises") to its private authority. In 2000, a group of leading international supermarket chains founded the Global Taskforce on Food Safety, Quality and Security "to set voluntary standards for food products sourced by retailers around the world."[1] Twenty years later, GFSI has become a leading global business organization in the food industry, promoting "continuous improvement in food safety management systems around the world".[2] That goal is principally pursued by the assessment or, as GFSI calls it, "benchmarking" of private food safety certification schemes that regulate food production and processing to a common, global industry standard. In 2021, over 150,000 certificates from 12 GFSI-recognized food safety certification programs had been issued in 162 countries and numerous food safety experts participated in its committees and events.[3]

In our analysis of the evolution of GFSI, we will discuss its governance structure, its activities, and its framing. The lens through which we assess that evolution is the concept of legitimacy understood in terms of institutionalization theory. To survive, any organization needs social acceptability and credibility.[4] In other words, they

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[1] D. Orgel, CIES planning Global Food Safety Initiative, *Supermarket News*, May 22, 2000, www.supermarketnews.com/archive/cies-planning-global-food-safety-initiative.

[2] GFSI, What Is GFSI, www.mygfsi.com/about-us/about-gfsi/what-is-gfsi.html.

[3] GFSI, GFSI Governance Model and Rules of Procedure, Version 042021 (2021), at 81; GFSI, Recognised Certification Programmes, www.mygfsi.com/certification/recognised-certification-programmes.html.

[4] W. R. Scott, *Institutions and Organizations: Ideas, Interests and Identities*, 4th ed. (2014), at 71

require legitimacy from those actors that have an interest in their activities. For private, non-state regulatory organizations such as GFSI, building and maintaining legitimacy is of vital importance.[5] In the spirit of this book, one can say that this labor is an essential means to harness endogenous and exogenous forces that undermine the organization's regulatory effectiveness and thus lead to its crisis, in order to adapt and demonstrate resilience.[6] Whereas traditional state authority is often taken for granted, non-state regulators "must obtain legitimate rule-making authority . . . from salient constituencies in their organizational field."[7] Legitimacy provides justifications and a shared understanding of what is acceptable or appropriate. GFSI needs the cooperation of other parties in order to achieve its regulatory goals. More specifically, GFSI depends on the participation of retailers, certification program owners, food manufacturers, food producers, and others in the food supply chains, as well as on the support of authoritative organizations and persons, whether public or private. These actors constitute different legitimacy communities with their own values, priorities, and interests.[8] Changes in these traits challenge the legitimacy of GFSI, put it at risk of organizational crisis, and thus require from it a response of resilience to find a new equilibrium allowing for the continuation of its activities.

We will argue that GFSI has evolved as a transnational private rule-maker through continued processes of pluralization of its constituents, increased transparency, ratchetting up of food standards' quality, and globalization of its benchmarking activities. In these dynamics, we suggest, GFSI has sought to respond to criticisms and changing demands of its legitimacy communities. GFSI has evolved from a relatively limited retailer-led initiative into a leading actor in the field of global food safety. The GFSI benchmarking requirements are regarded as top of the bill and both national and international governmental organizations have accepted GFSI as a reliable industry partner in policy debates on food safety. In short, GFSI has expanded on many fronts as a transnational regulator, thus widening and deepening its legitimacy basis. Despite its growth and diversification in terms of (board) membership, GFSI has not changed its initial objectives: it still is an industry-led organization, of which the constituents are food safety experts of large

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[5] S. Bernstein and B. Cashore, Can Non-state Global Governance Be Legitimate? An Analytical Framework (2007) *Regulation and Governance* 1; J. Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes (2008) 2 *Regulation and Governance*, 137, at 148–149; D. Casey, Interactions, Iteration and Early Institutionalization: Competing Lessons of GLOBALGAP's Legitimation, in *Transnational Business Governance Interactions: Empowering Marginalized Actors and Enhancing Regulatory Quality* (S. Wood, R. Schmidt, K. Abbott, B. Eberlein, and E. Meidinger eds., 2019), 183; D. Fuchs, A. Kalfagianni, and T. Havinga, Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation (2011) 28:2 *Agriculture and Human Values* 353.

[6] Cf. Sections 1.2.1, 1.2.5, and 7.3 in this volume.

[7] L. H. Gulbrandsen, Accountability Arrangements in Non-state Standards Organizations: Instrumental Design and Imitation (2008) 15 *Organization* 563, at 568.

[8] Black, *supra* note 5; Casey, *supra* note 5.

food corporations. We will show that many of the changes the organization has gone through can be interpreted as a response to the opposition voiced by internal and external actors in the light of developments in the field of food safety and its certification.

Our account of the evolution of GFSI is mainly based on the content analysis of publicly available documents and on the research we carried out on GFSI before. We studied GFSI publications, newsletters, and press releases. More in particular, we analyzed how the governance structure of GFSI and the benchmarking requirements changed between 2000 and 2020. We also verified what activities GFSI has undertaken over the years and how it frames its mission. In addition, we use information from interviews with two member of the GFSI Global Regulatory Affairs Working Group and other interviews that we conducted in earlier research in the field of food safety governance.[9]

We start this chapter by discussing the concept of legitimacy as developed in the work of Richard Scott and of Julia Black.[10] Subsequently, we will introduce GFSI as a transnational private rule-maker. This introduction lays the ground for the analysis of GFSI's evolution, in which we focus on the processes of pluralization, transparency, globalization, and ratchetting up of standards' quality. We will show how these processes have contributed to the gaining and maintaining of legitimacy, and we will analyze how GFSI has sought to manage the conflicting interests involved and be resilient to these dynamics.

9.2 DYNAMICS OF LEGITIMACY IN TRANSNATIONAL PRIVATE RULE-MAKING

Legitimacy, it has been recognized in academic literature on regulation and governance, constitutes a necessary attribute of any actor in the successful pursuit of regulatory goals.[11] Most scholars of regulatory governance would agree that legitimacy essentially turns on "the acceptability and credibility of the organization to those it seeks to govern."[12] For lawyers, that may imply that a legal mandate is bestowed upon the regulator by a recognized state authority, such as a Parliament or a court,

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9   T. Havinga and P. Verbruggen, The Global Food Safety Initiative and State Actors: Paving the Way for Hybrid Food Safety Governance, in *Hybridization of Food Governance: Trends, Types and Tesults* (P. Verbruggen and T. Havinga eds., 2017), 183; P. Verbruggen and T. Havinga, Food Safety Meta-controls in the Netherlands (2015b) 6:4 *European Journal of Risk Regulation* 512; T. Havinga, Private Regulation of Food Safety by Supermarkets (2006) 28:4 *Law & Policy* 515.
10   Scott, *supra* note 4; Black, *supra* note 5.
11   R. Baldwin, M. Cave, and M. Lodge, Introduction: Regulation: The Field and the Developing Agenda, in *The Oxford Handbook of Regulation* (R. Baldwin, M. Cave, and M. Lodge eds., 2010), 25.
12   Black, *supra* note 5, at 144.

and that the actor operates within the bounds of that mandate.[13] Political scientists may stress the democratic representativeness of beliefs, expectations, and interests of those affected by the regulatory activities or the effects and costs of these activities on the attainment of the regulatory goals.[14]

Private rule-making at the transnational level presents a challenging case for the construction of legitimacy. In that domain, traditional state-based mechanisms of democratic legitimacy are generally absent. Legitimacy is not self-evident and must be socially developed by the regulatory organization in relation with those that are sought to be governed.[15] In the absence of such legitimacy, the risk of regulatory failure is apparent and can lead the regulator into organizational crisis. In the same vein, Bernstein and Cashore stress the "political legitimacy," that is, the general support for a regime or governance institution, which transnational private governance systems require to be effective.[16] In their view, it "requires institutionalized authority (whether concentrated or diffuse) with power resources to exercise rule as well as shared norms among the community."[17] In this sociological conception, legitimacy is an empirical observation that results from the acceptance of the organizations' conduct by others. Legitimacy, then, is dynamic and may come and go with the change of legitimacy demands from those in and outside the regulatory regime, such as regulated entities, regulatory intermediaries, and beneficiaries.[18]

Richard Scott has provided a powerful and widely accepted theoretical framework to capture the dynamics of institutionalization and legitimation. In his framework, institutions are built on three pillars: regulative, normative, and cultural-cognitive systems.[19] Related to these three pillars, he discusses three general mechanisms that may lead to institutionalization: (i) increasing returns stressing the role of incentives and interests as motivating force, (ii) increasing commitments stressing the role of identity and mutual social relations, and (iii) increasing objectification of shared beliefs embedded in routines and forms stressing the role of ideas (Table 9.1).[20]

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[13] E.g., C. M. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (2007); M. Eliantonio and C. Cauffman, *The Legitimacy of Standardisation as a Regulatory Technique in the EU – a Cross-disciplinary and Multi-level Analysis: An Introduction'* (2020), at 23–26. See also Section 1.3.2 in this volume stating that "private power accumulation is a continuous process that starts with the delegation (explicit or tacit) of power and thus the transfer of legitimacy to a private body."

[14] E.g., F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999), at 7–21.

[15] Black, *supra* note 5, at 144; C. Scott, Standard-Setting in Regulatory Regimes, in *The Oxford Handbook of Regulation* (R. Baldwin, M. Cave, and M. Lodge eds., 2010), 113.

[16] Bernstein and Cashore, *supra* note 5.

[17] Bernstein and Cashore, *supra* note 5, at 351.

[18] K. W. Abbott, D. Levi-Faur, and D. Snidal, Theorizing Regulatory Intermediaries: The RIT Model (2017) 670 *The Annals of the American Academy of Political and Social Science* 14. To be sure, many political scientists view legitimacy as a dynamic property of institutions. See also Scharpf, *supra* note 14, at 26, who astutely notes that "Legitimacy cannot be considered an all or-nothing proposition."

[19] Scott, *supra* note 4, at 59.

[20] Scott, *supra* note 4, at 144–151.

TABLE 9.1. *Three pillars or reasons for institutionalized legitimacy*

Pragmatic	Moral	Cognitive
In line with economic interests	Goals perceived as morally appropriate	Accepted as inevitable
Increasing returns	Increasing commitments and norm generation	Increasing objectivation of shared beliefs embedded in routines
Strategic / cost-benefit calculations	'Thick' institutionalization in procedures, routines, rituals, and symbols	Objectivation of shared believes in a community
Low resilience	Intermediate resilience	High resilience

In line with this triptych, Black distinguishes between three sets of reasons for organizational legitimacy.[21] "Legitimacy may be pragmatically based: the person or social group perceives that the organization will pursue their interests directly or indirectly. It can be morally based: the person or social group perceives the goals and/or procedures of the organization to be morally appropriate. Finally, legitimacy can be cognitively based: the organization is accepted as necessary or inevitable." Black argues that the degree of resilience of organizational legitimacy of a transnational private regulator differs for the three types of legitimacy: pragmatic legitimacy is least resilient, cognitive legitimacy is most resilient, normative legitimacy is in between.[22]

As Scott stresses, "robust institutionalization is often the product of multiple mechanisms that interact with and reinforce each other."[23] The three distinctive mechanisms or sets of reasons may be perceived as phases in an institutionalization process: first, cost benefit calculations are dominant. Subsequently, "thick" institutionalization may take place creating social entanglements by hardening rules and procedures and creating rituals and symbols. In a final stage of institutionalization, shared beliefs are objectified resulting in the assumption that things could not be otherwise. In line with this thinking, Bernstein and Cashore have shown for non-state market driven (NSMD) governance systems that political legitimacy is constructed in a three-phase process with different relationships between the actors and participation of different actors.[24] They distinguish between three phases in the process of gaining political legitimacy:

- the initiation phase, early support of a small number of firms based on strategic calculations;

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[21] Black, *supra* note 5, at 144.
[22] Black, *supra* note 5, at 145.
[23] Scott, *supra* note 4, at 151.
[24] Bernstein and Cashore, *supra* note 5.

- the phase of widespread support, gaining support from firms whose practices are further away from the NSDM requirements, norm generation begins; and
- the phase of political legitimacy, participation in shared community, strategic calculations occur within, not about, NSMD systems. The systems that were included in the study of Bernstein and Cashore had not reached this phase yet.

These three phases echo the triad of institutionalization mechanisms flagged by Scott and the reasons for organizational legitimacy discussed by Black. The early stage of NSMD governance systems is characterized by a logic of consequences and calculations based on self-interest; later on, a logic of appropriateness and normative motivations become more important. Bernstein and Cashore elaborate in detail the building of political legitimacy for what they call NSMD.[25] Key elements are the conflicting interests between firms and NGOs and that NSMD governance systems deal with global problems that firms have little incentive to address, such as fair trade or sustainable forestry. As these issues are not key to GFSI (NGOs are not involved in GFSI and food safety is a major concern for most companies in the food industry) this specific elaboration is not relevant for our study. What is relevant, however, is the question of whether we can recognize similar mechanisms of institutionalization of legitimacy in the evolution of GFSI.

Casey recently applied the thinking of private regulators as responding to legitimacy demands in an empirical study of the GlobalGAP, the world's most widely adopted private food safety certification program, which has also been benchmarked by GFSI. Casey contends that for GlobalGAP "early institutionalization of structures, practices and processes have a significant influence on legitimacy by cementing the distribution of power within an organization and crystallizing a dominant organizational logic."[26] We will assess whether and how the distribution of power and the dominant logic within GFSI has changed since its initial phase.

In our comparative analysis of the evolution of GFSI, we focus on changes in its governance structure, its activities, and its framing. We will see how these changes in the distribution of power, in the benchmarking requirements, in the kind of activities undertaken, and in the dominant narrative have contributed (or not) to the construction of legitimacy and to what extent they can be attributed to legitimacy demands.

9.3 THE RISE OF GFSI

GFSI was launched in 2000 against the background of the proliferation of multiple overlapping and competing private food safety standards initiated by retailers and

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[25] Ibid.
[26] Casey, *supra* note 5, at 188.

food firms in the aftermath of the BSE crisis and other incidents.[27] In the 1990s, leading supermarket chains such as Tesco and Sainsbury in the United Kingdom and Albert Heijn in the Netherlands, started to develop their own comprehensive quality assurance schemes specifying detailed requirements for their suppliers. These retailers wanted to reduce risks and liability costs and inspire confidence for consumers.[28] Private retail-driven food safety standards have expanded ever since. Food retailers collaborated and created industry standards such as the British Retail Consortium (BRC) Global Standard (1998), EurepGAP (1997),[29] and the International Food Standard (2003).

GFSI was established to promote globally accepted food safety standards. The original taskforce consisted of thirteen European-based supermarket chains predominantly from the United Kingdom and France.[30] Two and a half years later, the taskforce had grown to fifty-two members, mostly from Europe.[31] The retailers wanted one or a limited number of global food safety standards that they could ask their suppliers to meet. This should produce significant cost savings for retailers and suppliers by reducing the number of food safety audits. Rather than developing one single normative standard of its own, GFSI benchmarks rival standards following a set of requirements laid down in the GFSI Guidance Document in order to coordinate, converge, and ratchet up existing standards. The first version of this meta-regulatory standard was published in 2001. The GFSI Benchmarking Requirements are frequently updated, with Version 2020 being the eight edition. In December 2022, twelve certification program owners have earned GFSI recognition, and three government-owned voluntary certification standards were found "technically equivalent."[32] The GFSI Benchmarking program has become a powerful tool in the global food market, because many major supermarket chains and food manufacturers require their suppliers to be certified against a GFSI-recognized

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[27] Havinga and Verbruggen, *supra* note 9; M. Webb, Overview of Food Safety Standards, in *Food Safety, Market Organization, Trade and Development* (A. Hammoudi, C. Grazia, Y. Surry, and J.-B. Traversac eds., 2015), 45.

[28] L. Fulponi, Private Voluntary Standards in the Food System: The Perspective of Major Retailers in OECD Countries (2006) 31 *Food Policy* 1; Havinga, *supra* note 9.

[29] The EuropeGAP standard evolved into the GlobalGAP standard. While both GlobalGAP and GFSI were initiated by supermarket chains headquartered in Europe, it is important to point out that the two are very different. GlobalGAP is a standard-owner setting food safety standards for agricultural produce. GFSI is a meta-regulator benchmarking standards (such as GlobalGAP's standard) and organizing events and campaigns to encourage standard development, harmonization, and implementation.

[30] Ahold, Asda/Walmart Europe, Carrefour, Delhaize Le Lion, ICA Sweden, Marks & Spencer, Metro, Migro, Opera, Safeway UK, Sainsbury, Superquinn, Tesco. The plan was to soon add US supermarkets: Kroger, Albertson's, Supervalu, Wegmans Food, Loblaw (Orgel, *supra* note 1).

[31] In January 2013, fifty-two supermarket chains had joined the GFSI taskforce, thirty-seven from Europe, seven from the United States, and eight from other non-European countries.

[32] https://mygfsi.com/how-to-implement/recognition/certification-programme-owners; https://mygfsi.com/how-to-implement/technical-equivalence/.

standard. Accordingly, we have suggested, GFSI should be seen as an industry-driven meta-regulator that has proven to be influential in shaping both industry practices and public policy making.[33]

9.4 GFSI'S ORGANIZATIONAL AND REGULATORY EVOLUTION

The evolution of GFSI from its inception can be studied through four distinctive processes: (1) pluralization of its constituents, (2) increased openness and transparency of its governance and rulemaking activities, (3) expansion and ratchetting up of food standards' quality, and (4) globalization of its benchmarking activities.

9.4.1 *Pluralization of Its Constituents*

GFSI started as a taskforce within CIES – The Food Business Forum, a membership organization of major food retailing companies and their suppliers.[34] The taskforce consisted exclusively of supermarket chains. Its membership expanded from thirteen European retailers in 2000 to fifty-two retailers in 2003. In 2004, a board was formed consisting of eight retail members. In 2005, GFSI transformed its organization structure from a membership organization to a not-for-profit foundation under Belgium law managed by the CIES,[35] which later merged into the Consumer Goods Forum (CGF).[36] It was CIES/CGF who took the final decisions on important governance issues for GFSI, including its structure, strategy, and membership.

The board of the separate legal entity GFSI was dominated by retailers in those first years. Gradually, this power distribution has changed. In October 2008, GFSI announced that it has created a new governance structure for the board. In addition to retailers, from that moment on food manufacturers and food service companies were also awarded membership on the noard. Two vice-chairs of the board are appointed from each of these two categories.[37]

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[33] P. Verbruggen and T. Havinga, The Rise of Transnational Private Meta-regulators (2016) 21 *Tilburg Law Review* 116.

[34] CIES membership is by invitation only and there are an equal number of retailer and of supplier member companies.

[35] Orgel, *supra* note 1; Verbruggen and Havinga, *supra* note 33, at 125.

[36] CGF is a global, parity-based industry network, driven by its members. It brings together the CEOs and senior management of over 400 retailers, manufacturers, service providers, and other stakeholders across 70 countries and reflects the diversity of the industry in geography, size, product category, and format. Forum member companies have combined annual sales of EUR 3.5 trillion. The CGF is governed by its board of directors, which includes 50 manufacturer and retailer CEOs and chair(wo)men, www.theconsumergoodsforum.com/.

[37] GFSI press release October 30, 2008, Retailers, manufacturers and food service join forces globally to ensure safe food for consumers.

In 2020, the board consists of eleven retailers, ten manufacturers, and two food service providers.[38] So, retailers lost their majority. All retailer and manufacturer board members are from CGF member companies,[39] which are prioritized in the board and other GFSI committees.[40] In 2021, the board was replaced with a steering committee to align GFSI with the governance model of the CGF.[41] In the steering committee, manufacturers have the majority.[42] The implications of this "modernization" are unclear at the moment of writing.

In 2020, for the first time, the board elected its own chairs. They chose two co-chairs and two vice-chairs representing retail and manufacture in a parity-based system of governance. Previously, the chair was appointed by CGF. This seems to indicate that GFSI has gained some independence from the CGF. However, in the 2019 version of the governance model, the GFSI office managed by CGF was given more duties and powers.[43] And this is even more so in the 2021 version.[44]

GFSI thus remains an industry-driven organization run by large international food corporations. According to its governance rules: "Steering Committee membership is not assigned to service providers ... including associations, certification programme owners, certification or accreditation bodies, food safety related service providers."[45] A balanced representation is one of the criteria for appointment in the steering committee: "Balanced geographical and industry sector representation i.e. manufacturing and retail, including the need to have significant representation from both large and small industry companies to ensure that decisions take into account the divers perspectives within the industry."[46]

Although GFSI was an organization exclusively for retailers, from the start other stakeholders in the global food supply chain were involved in its activities and the pursuance of its regulatory goals. A draft version of the first edition of the guidance document (2001) was circulated for external consultation and "external comments have been incorporated" in the second edition (2002). In 2002, GFSI announced the formation of a "Stakeholder group, open to representatives of all links in the food chain in order to participate in the endorsement [benchmarking] process."[47] The Stakeholder Advisory Forum currently consists of retail, manufacturer, certification

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[38] https://mygfsi.com/who-we-are/gfsi-board.

[39] Thirteen of them are from a company that is also represented in the board of CGF. We checked membership on the CGF website, www.theconsumergoodsforum.com/.

[40] GFSI, GFSI Governance Model and Rules of Procedure, February 2015, mygfsi.com; GFSI, GFSI Governance Model and Rules of Procedure, May 2019, mygfsi.com.

[41] CGF/GFSI, The Consumer Goods Forum (CGF) Coalition of Action on Food Safety: The Global Food Safety Initiative (GFSI) (2021).

[42] Thirteen manufacturers and nine retail and food service steering committee members from thirty-seven CGF coalition members, https://mygfsi.com/who-we-are/governance.

[43] GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40.

[44] GFSI 2021, *supra* note 3, art III

[45] Ibid., art V B, at 12. Compare GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40, article IV C.

[46] GFSI 2021, *supra* note 3, art C2, at 14

[47] Information from www.ciesnet.com/global_food/main.html.

program owner members, audit and certification organizations, and an accreditation organization.[48] In September 2006, the "retailer only" taskforce was replaced by a technical committee including other stakeholders in the food chain as well as the certification industry.[49] This committee provides technical expertise and advice for the GFSI Board. For example, the committee formulates the benchmarking requirements, which are then determined by the Board. Technical working groups are composed of four manufacturers, four retailers, four certification/accreditation bodies, four service providers, and all recognized certification program owners.[50] The benchmarking committees were composed of experts from retailers, suppliers, or food service companies (balanced) and a representative from a national accreditation body.[51] The 2020 benchmarking document states that the assessment of a certification program is performed by the GFSI technical manager and the benchmark leader.[52] So again, more tasks for the GFSI management.

In addition, GFSI has strategically coordinated its regulatory activities with government representatives. One of the four top priorities of the organization in 2002 was "to encourage co-operation between the world-wide food sector and national and pan-national governments and authorities." GFSI staff and participating firm representatives engaged in talks with national and international governments to explain GFSI's mission and the value of third-party certification.[53] GFSI's objective is to establish partnerships with governments. Over time, GFSI has entered into agreements, partnerships, and Memoranda of Understanding (MoUs) with various international and national government organizations, such as the International Accreditation Forum (2003), several Chinese agencies (2015), the United Nations Industrial Development Organization (UNIDO) (2016), and the Mexican National Service for Agroalimentary Public Health, Safety and Quality (2017).[54]

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[48] https://mygfsi.com/who-we-are/working-groups/.

[49] CIES, What We do: Food Safety Global Food Safety Initiative, www.ciesnet.com. For example, in March 2008, the Technical Committee had fifty-four members from fifty organizations: fourteen retailers, three retailer associations, ten manufacturers, twelve certification bodies, five standard owners, and one accreditation body.

[50] GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40. This specification of the composition of technical working groups is not found in the 2021 version of the governance model anymore. The working group composition is determined by the steering committee "ensuring balance where possible between stakeholders from different relevant sectors." GFSI 2021, *supra* note 3, art. VII B, at 29.

[51] GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40.

[52] GFSI, GFSI Benchmarking requirements, Version 2020 (2020), part I, at 4.

[53] Information from www.ciesnet.com/global_food/main.html. Havinga and Verbruggen, *supra* note 9; and P. Verbruggen and T. Havinga, Transnational Business Governance Interactions in Food Safety Regulation: Exploring the Promises and Risks of Enrolment, in *Transnational Business Governance Interactions: Empowering Marginalized Actors and Enhancing Regulatory Quality* (S. Wood et al. eds., 2019), 28, discuss the interactions between GFSI and governments.

[54] In a presentation on its website the following public private partnerships are listed: Canada (CFIA 2015), China (CNCA 2015), Japan (MAFF 2016), Mexico (Senasica 2016), United States (FDA 2016), Argentina (ministry of agribusiness 2017), Chile (Achipia 2017), Europe (Heads of

From 2016 onwards, GFSI has hosted at its annual Global Food Safety Conference (GFSC) a meeting of governmental food officials and international governmental organizations, followed by a meeting of governments with the GFSI Board.[55] These meetings provide a global platform to discuss ongoing national food safety reforms and the role that third-party audits and certification can play. In these meetings, GFSI representatives explained the GFSI system and governmental representatives pointed out where areas need to be strengthened. National governments essentially voiced two concerns: (i) the quality and reliability of audits and auditors and (ii) the equivalence of the GFSI requirements with national food safety regulations. International governmental organizations such as the Food and Agricultural Organization (FAO) of the United Nations and the World Trade Organization (WTO) were very skeptical about private standards and perceived private food safety standards mainly as a trade barrier in emerging markets.[56] The organization of the government-to-business (G2B) meeting has been formalized with the creation of an organizing committee in September 2020. The committee has eighteen members (eleven representatives of national governmental organizations, six representatives of international public organizations, and one representative of the GFSI Board).[57] Members are expected to "commit to the GFSI outcome of building trust in GFSI" and to "engage their organisation."[58]

In 2014, GFSI introduced the option for government-owned voluntary certification programs to be benchmarked as a technical equivalent. Unlike GFSI recognition, technical equivalence does not include the assessment of the program's governance and operational management. The reason for introducing this possibility seems to be the desire to accept Chinese certification programs that are managed by governmental agencies. Public voluntary certification programs that applied and achieved technical equivalence are China HACCP, Canadian Grain Commission HACCP, and USDA Agricultural Marketing Service. The fact that not only China but also Canada and the United States have had public standards benchmarked by GFSI is an indication of the dominance and the credibility and authority that GFSI has acquired globally.

food safety agencies group 2017), Vietnam (IFC 2018). Partnerships with international governmental organization include: Unido, Oio, WTO/STDF, IFC, Government-to-Business (G2B) Meetings, GFSP and Codex Alimentarius. See: GFSI, Global Food Safety Initiative. Safe Food for Consumers everywhere. General presentation (2020).

[55] Organized by the G2B Organizing group. Its mandate, appointments, and decision making process is regulated in the Governance rules, art X (GFSI 2021, *supra* note 3).

[56] M. Martens and J. Swinnen, Private Standards, Global Food Supply Chains and the Implications for Developing Countries, in *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (A. Marx et al. eds., 2012), 153; G. H. Stanton, Food-Safety Related Private Standards: The WTO Perspective, in *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (A. Marx et al. eds., 2012), 235.

[57] Government-to-Business (G2B) Organising Committee, https://mygfsi.com/who-we-are/working-groups/.

[58] GFSI, Government to Business Charter & Mandate (2020).

GFSI Board members are CEOs from major food corporations – retailers, manufacturers, and food services who purchase many food products and raw materials. SMEs and farmers who produce and supply these products and other stakeholders are not represented in the board and in working groups. On its website, GFSI emphasizes the existence of a GFSI community: "GFSI exists thanks to a global community of passionate people who volunteer their time and expertise because they believe that everyone has a right to safe food. They share a common understanding that collaboration is the key to achieving what no one company or country can achieve alone . . .. Countless individuals from over 150 companies have contributed to over 25 Technical Working Groups, Local Groups, Task Forces, Committees and the Board of Directors."[59]

Finally, it should be noted that none of the recognized certification programs covers the retail of food, even though major corporate retailers initiated GFSI and still are a powerful constituent of GFSI. This illustrates that GFSI is meant to develop the private regulation of supply chains belonging to major food retail and food manufacturing corporations. Apparently, there was no need to regulate the retail sector itself.

9.4.2 *Advances in Openness and Transparency*

In the early years, the governance of GFSI was only loosely organized as a taskforce of retailers within CIES, the food business forum. Over the years, the openness and transparency of the organization has gradually increased. This applies to the governance of GFSI, its benchmarking procedure, and the transparency of the certification programs submitted to the benchmarking procedure.

The benchmarking requirements are publicly available on the GFSI website and outline the benchmarking procedure and requirements. The current GFSI governance model and rules of procedure specifies its objectives and the internal governance of GFSI: mandates, decision-making procedures, the frequency of meetings, eligibility criteria, election and responsibilities of the steering committee and sub-committees, the working groups, and local groups. A code of ethical conduct, obligatory statements of commitment, and a complaints procedure are also included.[60] The internal organization has now been highly formalized through a rulebook of eighty-seven pages.

Appointment of members of the GFSI board and committees was initially "by invitation only." Currently, a call for candidates is distributed and interested parties can apply to be appointed. The eligibility criteria, the appointment process, and – in some cases – the distribution of members over categories are laid down in the GFSI

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59 https://mygfsi.com/who-we-are/alumni/.
60 GFSI 2021, *supra* note 3.

governance model.[61] The 2015 and 2019 version contained the provision that GFSI holds a register of Benchmarking Committee members on its website.[62] However, this register could not be found on the website. According to the benchmarking document from 2020 a "list of all GFSI-approved Benchmark Leaders is available from GFSI upon request."[63] So it seems that this information is not easily available (anymore). The benchmarking process is regulated in the Benchmarking Requirements document.[64] The benchmark leader and the GFSI technical manager perform the assessment of a certification program and give their recommendation whether to recognize the program. It is the board who approves the benchmark leader and takes the final decision on approval.

GFSI publishes on its website which standards are recognized and which are under review. The latter was not so obvious in 2005. Hugo Byrnes, director of food safety at CIES noted: "There are three other standards under review, which cannot be made public yet. If these are rejected by GFSI, it could cause embarrassment under their respective owners."[65] Elsewhere, we can read which three standards were "under consideration."[66] The current website provides information for each certification program in which of the seven steps of the benchmarking process it is.[67]

On its website, GFSI has a library of free downloadable documents including training material of the Global Market Program, consultation documents and reports and case studies. GFSI is less transparent about financial issues. It is clear that the participation of food safety experts on the board, working groups, and local groups is paid for by the food companies where these experts are employed. There are complaints about the high fees for conferences and the reluctance of the management of GFSI to account for this.

The benchmarking requirements include ever more requirements related to the governance structure of standard owners. Certification programs need to be available for all food firms and all certification bodies should be able to certify against the program. Information that a standard owner should make publicly available include the normative document, the list of certification bodies that are accredited to certify for the standard, rules to prevent conflicts of interest, and a register of valid certificates.

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[61] GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40; GFSI 2021, *supra* note 3.

[62] GFSI 2015, *supra* note 40; GFSI 2019, *supra* note 40, art VIII c.

[63] GFSI, *supra* note 52.

[64] Ibid., at 8.

[65] L. Joppen, Extension of GFSI Family. Efsis Out, SQF Europegap in, *Food Engeneering & Ingredients*, February 2005, at 9.

[66] In *Food Engineering & Ingredients*, April 2005: "The following standards are 'under consideration': Dutch HACCP, the China Retailers Standard and the New Zealand Fresh Produce Programme." Only Dutch HACCP was recognized by GFSI. The other two standards probably failed the test.

[67] https://mygfsi.com/how-to-implement/cpos-undergoing-benchmarking.

9.4.3 *Expansion and Ratchetting up of Food Standards' Quality*

From its inception, GFSI aimed at improving the quality and credibility of food safety standards. This includes the substantive norms in the benchmark requirements, transparency and integrity of food scheme owners and certification bodies, and the quality and reliability of audits.

Already, the first GFSI benchmarking requirements were based on international authoritative norms from the Codex Alimentarius Commission and the ISO/IEC Guide 65. Initially, the benchmark requirements only consisted of a list of items that an application should contain, the consequent steps in the procedure, and some time limits.[68] With every new edition, the benchmarking requirements have been tightened and new themes have been added. Usually, when a weakness or issue that needs attention is in the spotlight, GFSI decides to introduce a new technical working group to investigate the matter and to make recommendations as to how to tackle the issue. Such groups were introduced for third-party certification, auditor competences and auditor training, alignment with national authorities, capacity building in global markets, food defense, food safety culture, and managing risks in produce and leafy greens. The activity of these groups often results in new or adapted requirements in the GFSI guidance document. New topics that were introduced in the benchmarking requirements include, for example:

- reducing the risks of food fraud (in response to the horsemeat scandal);
- auditor competences and auditor training;
- stricter requirements for the frequency and scope of audits;
- unannounced audits were added, first optional, later mandatory;
- extended requirements related to scheme owner management and governance; and
- requirements related to food safety culture.

Subsequently, new scopes and sector-specific requirements followed. The first editions only had general requirements for all schemes. The 2020 edition consists of general requirements for all certification programs and specific requirements for twenty scopes covering the whole food supply chain from farming, processing, distribution, and the retail and supply industry, such as feed production, food safety services, and food packaging.

What remains constant, despite all the new themes, is the exclusive focus on food safety. Other themes such as animal welfare and environment or ethical sourcing are explicitly kept out.[69] Moreover, just like the very first edition, the 2020 edition

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[68] GFSI, The Global Food Safety Initiative Guidance Document, 2nd ed, February 12, 2002, part III.

[69] GFSI, *supra* note 54.

contains three key elements: HACCP; a food safety management system; and Good Practices for Agriculture, manufacturing, and distribution (GAP).

One of the main concerns over the past twenty years has been the reliability of food safety audits and certificates. This is a crucial issue as the value of the recognized certification programs depends on thorough and reliable food safety audits. Doubts about food safety certificates are voiced over and over again by governments, media, and parts of the food industry. GFSI recognizes these weaknesses and tries to explain the system to everyone and to ratchet up the quality of food safety audits. The first step was the choice for third-party certification, adding an independent observer to the scene. Despite checks and balances in the system of third-party certification[70] concerns remain. In each updated edition, requirements for audits and auditors were tightened. There have been years of discussing and negotiating the introduction of unannounced audits and requirements related to auditor competence and training. Due to conflicting interests and resistance, several of these changes took a long time before a final decision was made and the adaptation could be implemented. Recently, GFSI concluded that benchmarking of food safety certification programs was not sufficient. "There has been an understandable concern about the efficacy of audits and more specifically the competence of some food safety auditors themselves." GFSI introduced its Race to the Top (RTTT) plan. This plan "is intended to address the specific challenges GFSI has been facing in relation to trust and confidence in GFSI certification outcomes . . .. driving improvements in the food certification system is vital to achieve our mission."[71] In 2021, GFSI introduced its benchmarking and harmonization of professional recognition programs for food safety auditors.[72]

Over time, more detailed requirements were imposed related to the scheme governance and management. For example, the 2020 edition introduces the requirement for CPOs to carry out annual performance reviews of certification bodies. The relation between scheme owner and GFSI is increasingly formalized. Cooperation with the IAF resulted in adaptation of the guidance document. Efsis, a standard that belonged to the first four accepted standards, subsequently declined a new application because the requirements that the program should not be limited to members or own customers and that a scheme owner could not be the organization performing the audits, could not be met.

In addition to benchmarking, the dissemination of knowledge and the exchange of experiences is an important characteristic of GFSI's activities. GFSI provides a global platform for professionalization of food safety experts working at certified food companies, at certification bodies, at certification program owners, at consultancy

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[70] C. Daugbjerg, Accountability and Integrity in Private Food Safety Regulation: Evidence from the Australian Food Sector (2020) *Australian Journal of Public Administration* 1.

[71] GFSI, Stakeholder Engagement Plan. Implementing the GFSI Conceptual Framework The Race to the Top (2020), at 40, 41, 45.

[72] GFSI, GFSI Benchmarking Requirements Professional Recognition Bodies, version 2021.

firms, and at regulatory agencies and departments. To pursue this objective, GFSI organizes annual global food safety conferences, focus days in different continents and countries to promote GFSI, and the system of third-party certification.

The modifications and increase in requirements make it ever more difficult and more expensive for certification programs to meet all requirements. For this reason, one of the first recognized schemes has decided not to register anymore. The organization behind this scheme has split into two systems, FSSC 2000 as a GFSI-recognized system and Dutch HACCP as a local system for traditional production.

9.4.4 *Globalization of Benchmarking Activities*

GFSI started in Europe and it was dominated by Europe-based retailers for a long time, although its ambition always was to be a global initiative. Soon after its launch, some US and Canadian supermarkets joined the taskforce. The first four standards that were recognized by GFSI were European.[73] In January 2004, a US retail standard was approved, SQF 2000. The breakthrough to the United States food industry was in 2007, after Walmart made GFSI certification mandatory for its suppliers.

Not only the member companies and the recognized food safety certification programs but also the other activities employed by GFSI were during the first phase located in Europe only. One of five strategic priorities 2011–2015 was to "continue presence in Europe, build momentum in North America and develop a strategy for APAC."[74] Of the twenty annual global food safety conferences (GFSC), fifteen took place in Europe. It was not until 2011 that the first GFSC outside Europe was held, in Orlando, Florida, in the United States. Four years later, in 2015, the first GFSC was held in Asia.

From 2011, GFSI organized focus days in sourcing countries in Latin America, Asia, and Africa. "GFSI Focus Days and Regional Events aim at raising awareness around the benefits of GFSI in regional markets. They were initiated to provide local stakeholders in the food industry with an opportunity to find out more about the Global Food Safety Initiative. They also serve as a unique opportunity for networking and knowledge exchange."[75] In China and Japan, GFSI organized such a meeting every year. Local groups are regional networks of companies that want to promote GFSI and share knowledge to improve food safety. The first local group was located in Japan (2012). Now there are local groups in Mexico (2013), China

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[73] The first four standards are BRC Global Standard Food (UK retailers), Dutch HACCP Code (Netherlands), EFSIS (UK private auditing company), and International Food Standard (German retailers) (GFSI, Year Book 2004).

[74] GFSI, GFSI & the Consumer Goods Forum (2010).

[75] The first Focus Day was in 2011 in Brasil, Japan (2011), South Africa (2013). From 2011/2012 every year there has been a Focus Day in China and Japan.

(2013), US-Canada (2013), South Latin America (2015), Europe (2016), and Australia-New Zealand (2019).[76]

GFSI also aimed at cooperation with governments and international organizations all over the world. Responding to critics that private food safety standards are a barrier for SMEs and food businesses on non-Western markets, GFSI launched its global markets program in 2011 (manufacturing) and 2012 (primary production). The GFSI Global Markets Programme is designed to assist companies who have under-developed food safety systems to learn and adhere to best food safety practices. It is a systematic continuous improvement process that companies can follow to establish, and achieve recognition for, effective food safety systems. The Programme is "a stepwise pathway towards GFSI-recognised certification for companies that lack or wish to improve their food safety systems."[77]

In 2012, the majority of certifications for most recognized schemes were in Europe, exceptions are SQF (N-America) and FSSC 22000 (more equal distribution).[78] GFSI-recognized certificates have been issued in 162 countries.[79]

9.5 CONSTRUCTING AND MANAGING GFSI'S LEGITIMACY

9.5.1 *Legitimacy Dynamics*

To what extent can the processes that we have highlighted be understood from the perspective of legitimacy? Some of the processes are clearly a response to the criticisms and demands expressed by external or even internal actors. Prominent examples of this are the reliability of food safety certificates, the vulnerability for food fraud, and capacity building in emerging markets. From the very start, the reliability of certification schemes has been the subject of persistent criticism by governments, NGOs, and businesses in the supply chain. GFSI could not simply ignore these critiques, as they go to the core of the organization's regulatory goal, that is, to promote improvement in food safety management systems around the world. To provide these critiques with an answer, bolster its legitimacy, and be resilient, GFSI has sought to make these systems more reliable by promoting third-party certification and by imposing increasingly stringent benchmarking requirements for audits, auditors, and the certification bodies that employ them. The collaboration between GFSI and IAF, and the requirement that certification bodies must be accredited by an accreditation body that is a member of the IAF, are expressly meant to improve credibility. The modernization program, Race to the Top (RTTT), presented in

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[76] GFSI, *supra* note 2.
[77] https://mygfsi.com/how-to-implement/global-markets/.
[78] Verbruggen and Havinga, *supra* note 33.
[79] GFSI, *supra* note 54, at 22.

2020, is an explicit response to systematic doubts about the functioning of the certification system. The program aims at a fundamental shift from compliance being enough to continuous improvement at all touchpoints.[80] Accordingly, it seeks to address the concern among governments, NGOs, and part of the food industry itself regarding poor auditor performance and a lack of a sufficiently strong food safety culture in the industry.

GFSI stresses in its communication the existence and the importance of a GFSI community: "GFSI has grown into a vast, global multi-stakeholder movement."[81] At GFSI conferences and meetings – as one of the authors has observed as an invited speaker and participant – there certainly is a kind of community of global food safety experts.[82] However, within this community, GFSI has to deal with, at least partly, conflicting interests of stakeholder categories. Governments, transnational corporate retailers, transnational top food manufacturers, farmers, SMEs, certification bodies, certification program owners, and economic development organizations all have a certain interest in securing safe food, but they also have different interests. GFSI is finding the middle ground in all of this. The politics involved in global food safety standards can, for example, explain why it took years before some form of mandatory unannounced audits were included in the GFSI benchmark requirements. Also, how to deal with the issue of auditor training and competences is contentious. Some recognized schemes preferred their own existing training program and examinations. Certification bodies feared that auditors would need to pass various exams, resulting in higher costs while no added value is expected. Since 2019, auditors are required to take and pass the GFSI Knowledge Exam. The examinations are provided by the certification programs and the requirements include mutual recognition of exam results between CPOs to assure that an auditor only needs to pass the exam once.[83]

To sum up, the continuous improvement of the quality of the food safety certification programs is associated with GFSI's desire to build and maintain its legitimacy as a transnational private rule-maker. This organizational concern closely aligns with the original regulatory goal of GFSI, namely to enhance global food safety.

Advances in openness and transparency can also be interpreted as reactions to criticism and changing international norms. Transparent procedures and requirements to ensure integrity, independence, as well as checks and balances in the certification system are in line with international authoritative norms and concerns voiced by governments and IGOs.

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[80] GFSI, *supra* note 71, at 45.
[81] https://mygfsi.com/who-we-are/overview/.
[82] GFSC Tokyo March 5–8, 2018.
[83] https://mygfsi.com/news_updates/gfsi-releases-its-new-auditor-knowledge-exam-required-from-july-2019/.

However, the first and foremost driver for the globalization of certification and GFSI's benchmarking activities are the commercial interests of the retailers and manufacturers represented in GFSI. Transnational retailers and manufacturers want to source products and ingredients from all over the world. For that reason, it is important that their suppliers, not only in Europe but also in Asia, Latin America, and Africa, can deliver products from certified firms complying with the GFSI requirements. The Global Markets Programme helps in building and extending this supplier network. At the same time, however, this program also is a response to the concerns that international governmental organizations such as the Codex Alimentarius Commission and the STDF have voiced around the barriers to trade that private food safety standards create for developing countries.[84]

The pluralization of its constituents is more difficult to directly link to GFSI's desire for legitimacy. From the perspective of legitimacy, it would seem wise to include all stakeholders in the decision-making process. However, in GFSI's organizational structure, this is only partly what happened. In the decision-making bodies, the GFSI steering committee/board and the CGF, many categories of stakeholders are not represented. This includes certification program owners, certification bodies, auditors, farmers, SMEs, governments, IGOs, consultants, accreditation bodies, and consumers. Although some of these categories are represented in working groups providing advice to the board/steering committee, they lack formal voting rights. Nevertheless, this degree of pluralization did bolster GFSI's credibility and regulatory clout. GFSI has created a global platform around food safety and succeeded in forming a kind of GFSI community working together to improve food safety and exchanging knowledge and experiences. GFSI also succeeded in establishing partnerships with governmental organizations. Collaboration and partnerships with (international) governmental organizations further add to the legitimacy of GFSI as governments are widely believed to serve the public interest, while industry is believed to put self-interest first.[85]

9.5.2 *Institutionalizing Legitimacy*

To what extent do we observe the three phases in the process of institutionalizing legitimacy as discussed in Section 9.2 in the evolution of GFSI as a transnational private rule-maker? During the first years, it indeed seems that economic reasoning is the most important driver for GFSI's regulatory activities. Other arguments have gradually gained weight. Nevertheless, economic interests remain the most fundamental considerations. The ratchetting up of the benchmarking requirements leads

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[84] Stanton, *supra* note 56; Martens and Swinnen, *supra* note 56.
[85] Verbruggen and Havinga, *supra* note 53.

to higher compliance costs, usually for parties up of the supply chain. These involve the companies that want to obtain a certificate and the firms that conduct audits and carry out certification. Too high costs could drive these actors out of the GFSI system. GFSI therefore treads carefully and proceeds step-by-step in laying down more stringent benchmarking requirements for the certification programs. Also, other actors, including the transnational supermarket chains and food manufacturers that are the driving forces behind the private standards, are sometimes tempted to opt for low costs. Nevertheless, so far GFSI has managed to build a fair degree of legitimacy both in the world of the food industry and food safety experts.

The discussed changes are predominantly gradual. Clearly distinguishable phases as suggested by Bernstein and Cashore are hard to uncover. The same is true for a (causal) link between changes in GFSI's regulatory standards and food safety crises. What is clear in the case of GFSI is that, as Casey has argued for GlobalGAP, the first phase of institutionalization lays down the aims, structure, and power distribution within the transnational private rule-making body. Despite its growth and the inclusion of other participants next to retailers, GFSI stays true to its initial mission: "to enhance food safety, ensure consumer protection, strengthen consumer confidence, benchmark requirements of food safety systems and improve cost efficiency throughout the supply chain."[86] Similarly, GFSI remains an industry-led organization relying on the participation of food safety experts of large food corporations, some of which have been represented from the very start. Also, GFSI's main regulatory activity still is the benchmarking of food safety certification schemes. The ambition "once certified, recognised everywhere" still stands.[87]

At least three changes have brought about change in GFSI's initial organizational structure and regulatory activities: the joining of food manufacturers in the board and retailers losing the majority in board and committees, the introduction of the Global Market Programme, and the introduction of the Technical Equivalence Procedure. The latter implies that government-owned food standards are subjected to assessment by an industry organization such as GFSI. For example, the USDA-harmonized GAP audit was augmented to meet GFSI equivalence standards.[88] This collaboration inevitably lends legitimacy to GFSI as a global private rule-maker.

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[86] GFSI, *supra* note 68, at 3. In 2011 it read: "1. Reduce food safety risks by delivering equivalence and convergence between effective food safety management systems 2. Manage cost in the global food system by eliminating redundancy and improving operational efficiency 3. Develop competencies and capacity building in food safety to create consistent and effective global food systems 4. Provide a unique international stakeholder platform for collaboration, knowledge exchange and networking" (GFSI, An Overview of GFSI and Accredited Certification, March 2011).

[87] GFSI, Once Certified, Accepted Everywhere. Standards, Harmonisation and Co-operation in the Global Food Industry, Position paper (2007?): GFSI, *supra* note 52, at 3

[88] www.ams.usda.gov/services/usda-harmonized-gap-plus-audit-service-questions-and-answers.

To conclude, GFSI has been deeply concerned in constructing and maintaining its legitimacy as a transnational private rule-maker. It has succeeded in gaining acceptance and credibility among major parts of the global food industry and even in governmental circles by being responsive to needs and criticism of various stakeholders. As such, GFSI has shown strong potential for adaptation, nourishing its resilience and dominance. However, responsiveness cannot explain all organizational changes we have discussed. Economic self-interest of the leading constituents of GFSI has initiated some of these changes yet delayed or prevented others.