

Legalization, Transnationalism and Organic Agriculture

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Preface

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Introduction

The complex interdependence and ever more dense networks of interconnections that characterize social living under globalization are transforming local places. As Tomlinson (1999, 9) writes, "Putting it simply, connectivity means changing the nature of localities and not just occasionally lifting some people out of them. ... The paradigmatic experience of global modernity for most people ... is that of staying in one place but experiencing the 'displacement' that global modernity *brings to them*." The consequence of this kind of development, Tomlinson (1999, 12) adds, is that local practices and lifestyles need to be examined and evaluated in terms of their global consequences. These insights provide the initial motivation for a study of growing legalization in one of the most determinedly local sectors of economic activity: organic farming. Organic farmers and the local places in which they work and live have become spliced into a complex system of local, national, and global legalities, a system in turn that is changing how they work.

The organic agricultural movement began as a local response by a small number of farmers primarily in wealthier countries to the "modernization" and "chemicalization" of mainstream agriculture. In challenging these tendencies toward monocropping, growing farm extensity, and expanded use of pesticides, herbicides, and chemical fertilizers, organic farmers favoured polycultural practices, chemical-free farming, and less industrial farming practices. They believed that farming had to function in harmony with its environment and in ways that kept soils rich and animals free of chemicals. The values, norms, and ultimately rules for proceeding in this way were formulated locally, often informally. As social movements, organic producers and their supporters in many countries became strong political critics of dominant approaches in farming.

As environmentalists, consumer advocates for safe and healthy foods, and smaller farmers raised awareness about the effects of monocultural, industrial agriculture, a growing awareness of the organic movement developed. In response to this higher visibility, demand for organic food has risen swiftly over the past fifteen years. This enhanced awareness of organic approaches to farming and increased demand for organic products have begun to change the local practices and commercial networks of organic producers. Some producers have increased the size of their farms and moved to more monocultural growing. The buyers of their products have changed from consumers in local farmers' markets and health food stores to large retail chains, which often distribute their products regionally, if not nationally. Some of the large businesses purchasing organic products now come from other countries as rising consumer demand makes international trade in organic foods more

profitable.

These changes in the political economy of organic production have raised the horizon of local organic farmers to national and global levels. They have also created pressures for a rationalization and legalization of organic farming. Initial efforts at norm production and definition of rules came from private co-operative producers' organizations. These private organizations, in turn, entered into national networks, and eventually international ones. All the while, organic producers have guarded jealously the power to define standards and to certify whether farm products meet these standards. As distribution networks became nationwide and international trade increased, farmers' own private sites of authority were joined by those of states increasingly interested in the legal realms of standard-setting and certification. These changes have sparked divisions within the organic movement over what their core principles should be.

As a consequence, we argue in this chapter that a highly pluralistic, sometimes contradictory, and often chaotic legalization has occurred when it comes to organic production. Legal pluralism and hybrid arrangements involving private and public actors characterize the system. Private regulation has remained an important part of these legal arrangements, but it has expanded from the local level to encompass the national and global levels as well. This pluralization of centres of norm production has fostered an increasing differentiation between the social system of organic farming and its regulation.

We develop our argument in this chapter in the following way. First, we present an overview of the changing political economy of organic production. We then turn to identify the key legal points of reference in organic farming: standard-setting, accreditation, and certification. In moving next to trace the growing transnational legalization in the organic sector, we begin with a case study of nation-state activity in North America, comparing developments in the United States of America and Canada. All the while stressing the *parallelism* in national and global legalization processes, we then examine the growth of legal practices at the global level. In this discussion, we divide the analysis into two periods, legalization before and after 1995, with the creation of the World Trade Organization and the revision of the rules of the international trade regime being the key turning point.

The Political Economy of the Global Organic Movement

Organic farming is not new. Some would say that it refers to the approach to farming followed for millennia. At its most basic level, it refers to commodities that are produced without artificial fertilizers or pesticides, relying instead on organic based fertilizers like manure and vegetable-based compost, and natural pesticides like predator animal species (Jones 2003, 18). In addition, organic agriculture does not permit use of artificially compounded growth regulators, livestock feed and additives, and genetically modified organisms. Behind this basic definition, however, lies a social philosophy for many practitioners and consumers. As the International Federation of Organic Agriculture Movements (IFOAM) states on its website (2004), "Utilizing both traditional and scientific knowledge, organic agricultural systems rely on practices that promote and enhance biodiversity, biological cycles and soil biological activity. It is based on minimal use of off-farm inputs and on management practices that restore, maintain or enhance ecological harmony." The scientist and organic farmer Bill Liebhart (2003, 33-34) expands further on these ideas:

Organic agriculture, I believe, is a holistic way of looking at the world and the role of human activities in it. It is the integration of our responsibilities to others — present and future generations — in the way we produce the food and fibre we all require and our duties to

enhance and maintain the natural environment which is both our resource base and our own personal setting. It extends beyond the farm gate to the community, both local and global. As a movement it is a goal not fully realised and still evolving as the criteria continue to change along with our understanding of human and ecological needs.

Although organic agricultural practices thus defined are by no means new, the founding and growth of social movements promoting these practices are relatively recent events. Many trace the scientific and advocacy roots of the contemporary movement to the work of several pioneers such as Rudolf Steiner, Robert Rodale, Albert Howard, and Eve Balfour who published their work in the 1920s, 1930s, and 1940s. For example, Howard, a British scientist, made the argument for organic methods based on his analysis of experiments in farming practices in India and other parts of Asia. In the introduction to his book, *The Agricultural Testament*, published in 1940, he wrote: "The maintenance of the fertility of the soil is the first condition of any permanent system of agriculture. In the ordinary processes of crop production fertility is steadily lost: its continuous restoration by means of manuring and soil management is therefore imperative"(Howard 1940).

The first label for organically produced goods came from a movement in Germany that grew up around the ideas of Rudolf Steiner in the 1920s. The Demeter movement issued its first label in 1928. The second such label came probably from the Soil Association in the United Kingdom in 1967. In both cases, these labels tended to be based on a set of guiding principles rather than on detailed production rules. Such local standards and labels are not surprising. Differences in soil type, climate, topography, resources, and culture all warrant rules that relate to very specific local conditions.

As the implications of these basic ideas were elaborated, they increasingly contradicted the "modern," productivity and efficiency-focused, practices of agriculture as they had evolved in Europe, North America, Australia, New Zealand, parts of Central and South America, and elsewhere. These practices had moved away from polycultural planting which tended to weaken soil fertility less and toward the use of chemical fertilizers to replenish soils ravaged by monocultural planting. In addition, in efforts to improve yields, these modern practices made increasingly extensive use of synthetically compounded herbicides to control weed growth and pesticides to keep insect populations down. The organic movement gradually became more politically active as it sought alternatives to these perceived destructive practices.

This rapid growth in the use of chemical fertilizers, herbicides, and pesticides became a crucial concern for the ecological social movements that gathered strength in the 1960s and early 1970s. Many farmers in these movements embraced organic agriculture as part of their alternative vision for an ecologically oriented world. Consistent with this holistic focus, organic farming tended initially to be very local. Organic growers set up relatively small operations that were designed to provide alternative foods for the farm owners and their families and for nearby communities. This pattern of development continued through the 1970s and 1980s into the early 1990s.

For reasons that are not completely clear, the very small size of organic farming and the existing pattern of incremental, slow growth changed in the early 1990s. Several events brought more attention to organically grown foods: breakdowns in the systems for food safety in Europe and in North America illustrated best by the repeated crises from mad cow disease, a growing concern about the impact of additives in foods on human and animal health, increasing public debate about patterns of food consumption and health, and worries about genetically modified organisms. Demand

for organic products began to expand rapidly in OECD countries in the 1990s, particularly in the European Union countries and in North America. An estimated 97 percent of revenues in organic product sales come from these two areas (Sahota 2004, 25). In the US, total certified organic acreage grew by 150 percent between 1992 and 2001 (Dimitri and Greene 2002, 1). In the EU, organic hectares grew by 67 percent in the three-year period 1998-2000 alone (Duchateau 2003, 2). The total land area under organic management as a percent of total agricultural area reached 11.6 percent in Austria, 10 percent in Switzerland, 8 percent in Italy, 4.2 percent in the United Kingdom and 4 percent in Germany by 2004 (Yussefi 2004, 16). In the United States, the figure was about 2 percent. Worldwide markets for organic foods are thus expanding rapidly, with annual growth rates of 15 to 30 percent in Europe, the United States, and Japan (the largest markets) in the period 1997 to 2002. By 2002, the total global market for organic food and drink was estimated at USD 23 billion (Sahota 2004, 21). The size of the market is expected to continue to grow to about USD 102 billion by 2010 (Lohr 2001, 68).

This rise in demand, coupled with expectations that growth levels will continue to be high in OECD countries, has led to increasing levels of international trade in organic products. For example, imports have a 30 percent market share of consumption in Austria, 25 percent in Denmark, 40 percent in Germany, 60 percent in The Netherlands, 70 percent in the United Kingdom, and 80 percent in Canada (Lohr 2001, 70). In response to these opportunities, developing countries have taken an increasing interest in organic production. Commercial production has begun in twenty-seven African countries, twenty-five in the Caribbean and Latin America, and fifteen in Asia (Lohr 2001, 77). Corresponding changes have come to the International Federation of Organic Agricultural Movements (IFOAM). In 1990, it had ninety-three members, with 80 percent of these based in the OECD countries. This number increased to 243 by 1995, 462 by 2000, and 724 by 2003. Over the same period, the percentage from non-OECD countries rose to forty-one.¹

The rapid growth in organic production and consumer demand in the OECD countries has brought with it changes to the political economy of the sector. In the United States, there has been movement away from the small farm model. For example, in California, five giant farms control one-half of the USD 400 million organic market (*The New York Times Magazine*, 31 May 2001). These farms are working more frequently with conventional agribusiness firms. The article reports that Gerber's, Heinz, Dole, ConAgra and A.D.M. have all created or acquired organic brands. And some of the original small organic food processors have themselves grown quickly.

Companion changes have taken place on the distribution side. For example, in 1991 in the United States, conventional retailers had about 5 percent of organic sales, compared to 30 percent for direct farm and local market sales, and 65 percent for natural foods and organic specific retailers. A decade later, conventional retailers had 45 percent of the market, natural foods and organic-specific retailers 45 percent, and direct farm and local market sales accounted for only 5 percent of sales (Dimitri and Greene 2002, 3). By this time as well, organic products were being sold in 73 percent of mainstream supermarkets in the United States (Robinson 2004). Similar developments are found in European countries. Conventional supermarkets have 77 percent of organic sales in Austria, 70 percent in Denmark, 45 percent in France, 90 percent in Sweden, 60 percent in Switzerland, and 65 percent in the United Kingdom (Lohr 2001, 74).

These changes in the political economy and structure of the organic sector have two important consequences. First, conventional agribusiness firms and food retailers are tending to wrest the production and distribution of organic foods from members of the holistic social movements that gave life to organic production in the first place. These movements debate, for example, whether an

"organic Twinkie" is a contradiction in terms (*The New York Times Magazine*, 31 May 2001). When they view the 2000-acre industrial organic farms in California, they wonder about the future for the small farmers present at the creation of organic agriculture. Second, proponents of the organic movement query whether international trade in organic foods is consistent with their emphasis on local communities and sustainable environments.

Legalization and the Organic Movement

The numerous changes in the political economy of organic production are accompanied by ever increasing legalization on a global scale. Once organic products enter mainstream production and distribution channels, fundamental questions arise: What does the term "organic" mean? What farming practices are implied? What additives are permitted when it comes to something like an organic TV dinner? Is an organic TV dinner even consistent with the idea of organic production? How do I know whether a product labelled "organic" is actually so? Within countries, is it acceptable that organic products are governed by private and local systems of self-regulation? Is national regulation necessary? And when markets grow to the point that international trade in organic commodities becomes attractive and important, further questions arise. Does the legal meaning of "organic" vary from one country to the next? Are there any global norms guiding the understanding of organic production? Is it possible to agree on global norms and rules to facilitate international trade in organic products? Are emerging countrywide and public regulatory systems acting as barriers to trade?

In order to investigate these kinds of questions, we need to begin with a review of how legalization comes to order organic production. Four interlinked legal processes are involved: standards, certification, accreditation, and enforcement (ITC 1999, 9-11; Meidinger 2006, 60). These processes are becoming common in many fields as international legalization increases. When consumers purchase organically grown coffee, for example, they are normally informed of the quality of the coffee through a label. Of course, there is little to stop a coffee seller from labelling a given stock of beans as "organic." Accordingly, organic producers developed ways to certify that their products are actually produced according to organic farming principles. *Certification*, then, is a procedure for verifying that a product conforms to certain standards. The standards involved may be established by private or by state organizations. Once a given stock of coffee beans has been certified as conforming to a set of standards in this way, they may obtain a certain certification mark (label or seal) to this effect. If the beans are to be certified in this way, it also means that all operators in the production chain — growers, roasters, exporters, importers, wholesalers, retailers — are themselves certified as operating in ways consistent with the standards involved.

Of course, consumers might very well ask how they can be certain that this certification process itself has been followed. To be assured, they would like the procedures of any body involved in certification to be transparent and independent of the producers and other businesses involved. If the certification organization was owned by some of these businesses, then they might have less confidence in the label on their bag of coffee beans. For these reasons, certification bodies themselves can be evaluated according to how well their procedures fit with these ideas of transparency and independence. If a given coffee certifying authority is evaluated well, it may be awarded *accreditation* status. Consumers thus know that the certified label comes from an accredited certifying body.

Enforcement in such systems comes in various forms (Meidinger 2006, 75). Certification can be revoked by an accrediting body. As large retailing firms become more involved in the business and committed to given labels, market pressures make the costs of cheating more significant and activists become highly attentive to the quality of the foods on the shelves as well. In addition, as we see

below, the state can step in to provide legal backup to each of the processes of standards-setting, accreditation, and certification.

Behind these certifying and accrediting aspects of legalization lie a set of *standards* outlining the norms by which organic production, processing, and distribution must be carried out. These standards take both general and more specific forms. For example, at the core of virtually all organic standards is the norm that the fertility and biological activity of the soil must be maintained and increased. Such a general norm would be accompanied by more specific ones addressing how the soil might be fertilized; how pests might be controlled; and how the given commodity is harvested. These standards become the norms which certifying authorities will use in inspecting a coffee farm and upon which they will give the owner of the farm the right to certify the coffee beans grown as organic or not.

The complexity of the legalization process — certification, accreditation, standards — grows once increased amounts of organic commodities are traded. For example, suppose our consumers of organically grown coffee live in Canada, where coffee beans are not produced. Who certifies the beans? Are they certified in the originating country or in the receiving country? If they are certified in the exporting country, will Canada agree that the standards upon which the certification is based are valid ones? Suppose that the certifying authority in the exporting country is itself accredited. Will Canada recognize that accreditation? Or perhaps we should put ourselves in the position of coffee growers in Kenya. Suppose that they want to sell their beans into both EU and US markets. What happens when the standards favoured by these two major economic powers differ or when the processes for accrediting certifying authority are not the same. In the following two sections, we demonstrate that legalization in the organic field has become a complex mixture of public and private systems of certification, accreditation, and standards-making involving multiple, overlapping sites of authority from the most local to the global levels.

National Regulation and Organic Production: The Examples of the United States and Canada

In North America, similar to other developed countries, the organic production chain has grown more complex, involving not only more people in the actual processes of producing and selling organic products but also more people who are willing to buy organic products on a regular basis as part of their daily or weekly shopping routines. In these respects, it has evolved from a small fruit and vegetable co-op run by local farmers and their families to large supermarket chains with entire aisles dedicated solely to organic foods. The web of relationships that tie organic producers, sellers, and buyers together has increasingly become more complicated and dense. The organic production chain that has emerged in recent years can be characterized as being both multinational and global, with fewer and fewer personal or direct contacts established and sustained between organic growers and their buyers. Today, we find Canadian shoppers buying organic carrots from California, and US shoppers buying organic spaghetti from Italy — with both products carrying a different organic seal, but an organic label nonetheless. As the organic movement moves away from its local roots, and becomes something that creates transnational ties between producers, sellers, and buyers from different countries, pressures have increased for nation-states to take a greater role.

In Canada and the United States, similar to most OECD countries, national regulation in the form of a national standards system for organic products is a fairly recent development. The United States has taken an earlier lead than Canada, but both countries had made visible legal attempts to regulate the organic production chain by the 1990s. The US Organic Foods Production Act (OFPA) came into effect in 1990, and the Standards Council of Canada ratified the first version of the National Standard

for Organic Agriculture in 1999. These national organic standards systems put into place a set of requirements which all operators in the organic production chain are expected to follow if they wish to grow, buy, or sell organic products in these countries. Both the US and Canadian national organic standards systems are comprised of three interlinking legal processes — certification, accreditation, and standards. There are differences between the two countries in the actual content of the requirements, but overall the foundations of the system itself are remarkably similar. Governments set national standards for organic production and provide accreditation to organizations that, in turn, certify products as organic. Governments do not, however, actually certify these products. Instead, certification is the domain of private organizations. Thus, the state relies on self-regulation through private bodies for determining whether or not a certain product meets the necessary standards to be labelled organic.

What follows is a general description of the key characteristics of the two national standards systems, which allows us to examine these three interlinking legal processes in closer detail. We see from this analysis that national organic standard-setting in both countries has been driven and sustained in large part by the involvement of private actors whose interests in developing a flexible regulatory framework prompted discussions about national regulation in the first place. In turn, the involvement of these private actors in both the drafting and implementing stages of decision making has fostered the emergence of a public-private partnership in national organic regulation. This partnership also has parallels with the transnational legalization processes that we discuss below.

Comparing National Organic Standards Systems: The United States and Canada

The development of a national standards system in the United States demonstrates the extent to which public and private institutions are involved in the processes of regulating the organic production chain.² When the Organic Foods Production Act passed as part of the 1990 Farm Bill, a regulatory framework was established, which placed the design and implementation of national organic standards firmly in the control of the US Department of Agriculture (USDA). Specifically, the OFPA delegated official responsibility to the Secretary of Agriculture to develop national standards regulating the procedures and methods involved in organic production and the handling of organic products, including, for example, types of approved substances as well as substances that are prohibited in crop and livestock production. The OFPA also recognized the establishment of a National Standards Organic Board (NSOB) whose mandate is to assist and advise the Secretary of Agriculture in implementing a national organic program. The NSOB is made up of fifteen members representing farmers and growers, handlers and processors, retailers, environmentalists, consumer and public interest groups, certifying agents, and scientists.

Over the course of ten years, from 1990 to 2000, the USDA organic regulations underwent two sets of revisions, one in 1997 and the other in March of 2000, before the final version was accepted and published in December of 2000 (Robinson 2004). In effect, national standards are defined so as to ensure that those operators who produce and handle organic products have complied with the provisions outlined in the OFPA. The standards cover three major agricultural operations: crop production, livestock production, and the handling of organic products. Organic crop production standards specify that no prohibited substances are applied to the soil in the three years leading up to the harvest of organic crops and only crop and animal waste materials may be used, soil fertility is maintained and soil erosion minimized, and crop rotation and cover crops are practiced. Organic livestock production standards stipulate that no synthetic (or growth) hormones or antibiotics are given to the animals and that these animals eat only 100 percent organic feed. The origin of the livestock is to be carefully monitored and documented, and the health and safety of the animals are

maintained at all times. Organic handling standards require that under no circumstance should organic products come into contact with non-organic products or any prohibited substances. One of the key roles of the USDA, then, is to ensure compliance with and enforcement of these national standards.

When it comes to enforcement, it is only through the certification process that the USDA can be confident that an operator's compliance with the national organic standards has been achieved and will be maintained over the duration of time that the operator expects to produce or handle organic products. Products may be identified as belonging to one of three groups: "100 percent organic," "organic," or "made with organic ingredients." In order to become a certified organic producer or handler, so that their products may eventually carry the organic label, these operators must provide detailed information demonstrating what efforts they have taken to meet national organic standards. The applicants are subjected to careful scrutiny of their methods and practices in the form of an organic systems plan describing the type of production or handling of products they intend to run as well as a monitoring plan which demonstrates how they intend to implement their organic plan. The USDA, however, does not actually certify the products and is not really involved in the certification process. Rather, it provides the standards upon which certification is based and the organic labels which are attached to the products. By early 2002, certifications had begun, and from this point on then, products would be expected to carry the USDA organic label, thereby verifying to customers buying organic products that these products had met all national organic standards to the USDA's satisfaction (Kortbech-Olesen 2003; Robinson 2004).

The actual responsibility for verification and certification rests with independent organizations that have committed themselves to ensuring any application of the organic plan submitted by an organic operator is absolutely consistent with national organic standards. This independent organization is referred to as an "accredited certifying agent," and only a certifying agent that is recognized by the USDA as an independent and transparent organization can grant certification. These accredited certifying agents are specifically responsible for reviewing applications and their organic systems plans, conducting on-site inspections annually of farms and handling operations, and when the applicant is found to have satisfied all regulations pertaining to organic production or handling, issuing a certificate to the operator so that the product can be marketed and sold as organic. The accredited certifying agent is also responsible for responding to any complaints filed against a certified operation. The National Organic Program (NOP) maintains a close working relationship with the Agricultural Marketing Service (AMS) Compliance Staff, which is part of a larger federal agency that is the arm of the USDA charged with monitoring compliance with national standards throughout the organic production chain. The USDA does not directly deal, however, with complaints that are brought against certifying operators (Robinson 2004).

Since the full implementation of the National Organic Program in late 2002, there have been nearly 100 accredited certifying agents listed with the USDA. Of these independent organizations, more than half are considered "domestic accredited certifying agents," and a great majority of these are private organizations. Public organizations, namely individual state departments of agriculture, make up approximately 25 percent of the domestic certifying agents. The other group listed by the USDA are "foreign accredited certifying agents," which operate in countries other than the United States and are involved in the certification of organic products that are later imported into the United States.

The USDA alone is directly responsible for accrediting organizations as certifying agents. Organizations that seek accreditation with the National Organic Program have to demonstrate to the USDA their expertise, impartiality, and consistency in applying the national standards of certification

to farmers and handlers involved in the organic production chain. Like the application process for certification that organic operators are expected to do, applying for accreditation status is a rigorous and time-consuming process for organizations that want to be recognized by the USDA as an accredited certifying agent of the National Organic Program. Applications are processed first through the Administrator's office of the AMS and provide detailed information about the personnel employed in the organization as well as their ability to adequately monitor and enforce the certification process (Robinson 2004). The USDA is also responsible for conducting on-site inspection of the organization's place of business. Once the USDA has found the organization to be in compliance with all national regulations, then the organization receives accreditation status for a 5-year period and therein agrees to submit annually to USDA evaluations of their certification activities. This process also applies to foreign organizations seeking accreditation with the USDA and its National Organic Program. In the event that complaints are brought up against an accredited certifying agent, the USDA is solely responsible for responding to these charges.

Public legalization has proceeded less quickly in Canada where a national organic standards system is more privately based than the USDA's National Organic Program. Canada's National Standard for Organic Agriculture is best characterized as a private industry standard rather than a government standard. It is voluntary in character, providing guiding principles for organic production and sustainable organic farming systems.³ Similar to the US national organic standards, then, the Canadian National Standard for Organic Agriculture specifies criteria pertaining to crop and livestock production, handling and transportation, and labelling. In order to issue a national voluntary standard, consensus first has to be reached between members of the Canadian General Standards Board (CGSB), a private sector body, and its Standards Committee on Organic Agriculture.

The Standards Committee on Organic Agriculture is made up of members representing producers, users, regulatory, and general interest groups. Of these, only forty-one actually hold voting privileges on the committee. The federal government is represented on the committee, but its representation is much smaller in relationship to all of the other groups present on the committee. As such, the federal government does not dominate the course of the standards development process as it has in the United States. It has, however, consulted with the International Organic Accreditation Service about the conformity of its standards with international private standards, but thus far has not defined its own.

Accordingly, developing and maintaining Canada's national organic standards remain responsibilities of the CSGB. The CSGB must, in turn, follow the criteria for developing national standards which have been set by the Standards Council of Canada (SCC), a federal Crown corporation responsible for coordinating the private standard-setting bodies at the centre of Canada's National Standards System. Because Canada has adopted the general guidelines of the International Standards Organization (ISO) for accreditation and certification, as specified in the ISO-61 and ISO-65 requirements, the SCC is recognized internationally as an accreditation body. As such, it has the capacity to award accreditation status to organizations that demonstrate their compliance with these general principles.

The second key difference, and one that is closely related to the first point, is that the accreditation of certifying bodies in Canada is strictly voluntary at the national level. Only the province of Quebec has implemented a mandatory certification and accreditation system whereby the Conseil d'accréditation du Québec has authority to verify an independent certifying agent's compliance with its provincial organic standards. In the provinces outside of Quebec, certification and the accreditation of certification bodies remain in the hands of private sector organizations. In fact, according to

Agriculture and Agri-food Canada, there were, in 2004, forty-six certifying bodies in Canada, but only two of them had obtained accreditation status from the SCC. As well, the certification of organic products is voluntary under this system because, in effect, Canada does not differentiate between organic and non-organic products. The production and distribution of organic products need only to comply with Canada's specific regulations for food safety, packaging and labelling, health, and phytosanitary requirements for conventional agricultural food products (Storz, Taylor, and Fairchild 2004).

Like many OECD countries, Canada has experienced a rapidly expanding market for organic products, both as an importer and an exporter of these goods. Canada is recognized as the sixth largest market for organic foods and beverages and is ranked as one of the five largest producers of organic grains and oilseeds in the world. In 2003, the Canadian Organic Growers estimated that "imports of organic products represent approximately 70 to 80 percent of Canada's consumption" of organic products. Moreover, figures show that anywhere from 80 to 90 percent of organic imports come from the United States (Kortbech-Olesen 2003; Storz, Taylor, and Fairchild 2004).

This point about international trade in organic products demonstrates the third key difference between national standards systems in Canada and the United States. Unlike in the United States where national regulation requires that foreign certifying bodies seek accreditation status through the USDA and that all organic imports carry the NOP certification label, in Canada foreign certifying bodies need not apply for accreditation with the SCC, nor comply with the Canadian organic standards for certification.⁴ When it comes to exporting organic products and thereby gaining additional access to foreign markets, Canada has taken a particular position that demonstrates its continued support for the concept "equivalence recognition," based on its compliance with ISO guidelines for accreditation and certification. We return to this notion of equivalence in the following section of the chapter on global legalization. In this approach, Canada differs from other governments like the United States, the European Union, and Japan where certification of imported products is publicly regulated.

Most recently, however, a number of private organic organizations — but acting in conjunction with the Organic Sector Development Program of the AAFC as part of a larger pan-Canadian project that has given rise to the Organic Regulatory Committee — launched an attack on this position. They cite the rising costs that individual operators carry because they each must seek separate agreements if they wish to gain access to these foreign markets. In the interests of Canadian consumers of organic imports, these organizations raise the thorny issue of compliance with Canadian national standards, suggesting a general lack of enforcement mechanisms at the national level that would provide the necessary scrutiny and oversight to guarantee an organic product's authenticity, regardless of its place of origin.

Legalization on a Global Scale

By global legalization, we refer to the development of norms and legal rules by private or public bodies, whose domain of activity is broader than the limits of a territorial nation-state and includes more than one major world region. Global legalization in organic production and trade is particularly evident when it comes to the development of standards and the norms and rules for accreditation of certifying organizations. Certifying organizations, themselves, tend to operate within nation-states, as we have illustrated in our case studies of the United States and Canada. Over the past decade, however, the larger of these have taken on a multinational form, that is, they have developed the capacity to certify production as organic in a number of nation-states. Such a capacity, of course, is made possible, in part, by the global legalization in the standards and accreditation areas.

In the areas of standards definition and accreditation, private global organizations tended to be active before nation-states in many parts of the world. With the growth of markets and the more concerted entry of nation-states into the field, parallel public and private systems of rules came to exist. The linkages between these parallel systems became a matter of greater concern as international trade increased. Pressures for coordination intensified following the World Trade Association Agreement in 1994, due to increased importance given to public standards setting organizations in the new Agreement on Sanitary and Phytosanitary Measures and the existing Agreement on Technical Barriers to Trade. To see the importance of the changes that have resulted from the revised trade regime, we begin with a discussion of the situation before 1995.

Global Legalization Prior to 1995

As the organic movement continued to grow in Europe and in North America, the interest in sharing information and experiences across national lines increased. In response to this interest, a number of organizations took the initiative to create the International Federation of Organic Agriculture Movements (IFOAM) in 1972. As part of its mandate, IFOAM began to explore whether there would be any value in coordinating better the increasing number of certifying organizations. In particular, its members asked whether there would be some basic standards common to all organic production that might guide certifying organizations worldwide. This task was given over to IFOAM's Technical Committee and in 1980, it published the first set of basic standards as global guidelines for local and national certifying organizations across the world (Herrmann 2003, 71). IFOAM has continued to nurture and develop these standards through the present day. They are the first comprehensive statement of basic standards and have been influential in all further standards development, whether private or public. The Demeter movement began to publish its own set of global standards beginning in 1992 (www.demeter.net/). Its influence is restricted to those growers and certifiers following the biodynamic ideas of Rudolf Steiner and his associates.

Public rule-making at the global level began to occur in 1992 through the Codex Alimentarius Commission (CAC). Since 1963, the CAC has led efforts to protect the health of consumers and to work towards fair trade in foods by developing international food standards that could then be approved by nation-state governments. In 1991, the European Union approved a comprehensive regulation (2092/91) setting out organic standards, certification processes, and other rules to govern the sector. With the United States and Japan also interested in developing public national regulatory systems, a number of states raised the issue with the Food Labelling Committee of Codex whether a set of public international standards could be defined. The challenge was novel for the Commission because defining standards on the basis of a "production system" was a relatively new area for international standardization (Doyran 2003, 30). The Committee began its deliberations in 1993, finalized them in 1998, and they were adopted formally by the Commission as a whole in 1999 at its 23rd Session (Doyran 2003, 31).

Although the European Union had taken some inspiration from the IFOAM Basic Standards, it also departed from these standards in some ways. Similarly, the Food Labelling Committee drew to a significant extent on the IFOAM standards, but also on the EU and other standards, in devising its own. As a consequence, by 1999, two sets of complementary, but also competing global standards were in play, one private from IFOAM and one public from Codex.⁵ Both sets of standards function as guidance documents for the development of national and local public and private standards. For example, India based its technical organic regulations on IFOAM standards and Japan referenced Codex in its regulatory law (Bowen 2004, 14). The IFOAM standards have an additional function related to accreditation and enforcement not found in the Codex ones.

To the extent that it took place in a formal way, accreditation of certifying organizations occurred at the local levels primarily and to a limited extent nationally. In response to some members, IFOAM's Standards Committee began evaluating certification bodies in 1987 (Herrmann 2003, 71). Evaluation consisted of visiting certification organizations and writing reports and then sharing them with other certifiers participating in the IFOAM system. With the growth in the sector developing rapidly at this time and with increasing interest in regulation being expressed by governments, IFOAM feared that responsibility for the integrity of the organic system might migrate from the private sector, organic growers and their organizations, to the public sector (Commins 2002). Such migration might lead to the involvement of other interests, particularly agribusiness, less concerned with organic principles.

Accordingly, in 1990, IFOAM reorganized itself by creating a Standards Committee to take over the development of basic standards, a Programme Evaluation Committee to conduct evaluations, and an Accreditation Committee to prepare an Accreditation Programme. At its General Assembly in 1992, IFOAM launched an Accreditation Programme to be implemented by a new IFOAM Programme Board. The International Standards Organization (ISO) raised concerns with reference to its standard for accreditation bodies (ISO-65). It argued that standard setting and accreditation responsibilities should lie with separate organizations (Mallett 2003, 89). In response, IFOAM set up a new company, International Organic Accreditation Services Ltd (IOAS) in 1997. IOAS is incorporated and located in the United States.

Global Legalization After 1995

After 1995, the context for legalization changed in two ways. First, developing countries became increasingly interested in gaining access to the growing developed country organic markets. As we saw in our discussion of the NOP in the United States, access to these markets requires that any products exported by developing countries be certified as organic before they can be sold as such in the major importing jurisdictions (United States, European Union, Japan). The governmental regulatory systems in these major jurisdictions differ when it comes to certification requirements. The situation is complicated further by large retailers in the OECD countries also requiring certification to a host of private standards. This legal diversity creates problems for trade even among OECD countries. For example, if organic Swiss chocolate manufacturers want to export their product to the United Kingdom, they need to use UK milk powder. The UK certification standards for organic milk production differ from those in Switzerland and imports must meet the UK standard (Aebi 2003, 204). For developing countries, where certification and accreditation are at more rudimentary levels of development, such barriers are even more difficult to surmount.

As will also be evident from our discussion thus far, most certification procedures have been defined with reference to standards consistent with climatic conditions and soil properties in the OECD countries. With significantly different climatic and soil conditions, however, organic standards are bound to differ in developing countries (Twarog and Vassenaar 2003, 125). To date, developing countries have had rather little input in defining either basic standards or certification procedures. Developing countries have had fewer resources to participate fully at Codex meetings than do OECD countries and historically they were poorly represented in IFOAM. Admittedly, this latter situation is changing as we noted above.

The second change in the overall context for organic legalization relates to the multilateral trade regime. The WTO agreements gave the Codex Alimentarius Commission a new status in the governance of the trading system. Participants in this round of negotiations recognized that measures ostensibly adopted by national governments to protect the health of their consumers, animals, and

plants could become disguised barriers to trade as well as being discriminatory. Consequently, they concluded the Sanitary and Phytosanitary (SPS) and the Technical Barriers to Trade (TBT) agreements in the negotiations which established the World Trade Organization (WTO) in 1995.

The SPS Agreement acknowledges that governments have the right to take sanitary and phytosanitary measures necessary for the protection of human health. The SPS Agreement requires them, however, to apply those measures only to the extent required to protect human health. In its preamble, the Agreement suggests that agreement on harmonized international standards will facilitate these objectives and, in Article 3, enjoins member states to participate fully in the CAC in pursuit of these ends.

The TBT Agreement seeks to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and analytical procedures for assessing conformity with technical regulations and standards do not create unnecessary obstacles to trade. Article 2.6 makes a similar statement to that found in Article 3 of the SPS Agreement on the importance of member-state involvement in international standard setting bodies like CAC. In addition, Article 2.7 asks states to accept "equivalent technical regulations" of other states, even if these differ from their own, provided that they are satisfied that these regulations "adequately fulfil the objectives of their own regulations."

From the perspective of the organic sector, these changes gave added legitimacy to the public standards developed by Codex. They also added to the importance of both the IFOAM and Codex standards. Their legitimacy derives from the fact that states or private organizations could argue that their national or local standards could be seen to be "equivalent" to one another because they meet accepted international standards. Establishing "equivalence" was an important mechanism in the TBT Agreement for overcoming trade barriers. Not surprisingly, then, the number of organizations with IOAS certification grew from thirteen in 1998 to twenty-six by 2003 (Willer and Yussefi 2004, 48).

For developing countries interested in gaining access to OECD countries' organic products markets, this notion of "equivalence" was a crucial one. IFOAM then took the initiative to convene a conference on "International Harmonisation and Equivalence in Agriculture" working in co-operation with the Food and Agriculture Organization (FAO) and the United Nations Conference on Trade and Development (UNCTAD). This conference outlined the problem and recommended that further efforts be made to improve access of developing countries to OECD markets. After the conference, IFOAM, FAO and UNCTAD created an International Task Force on Harmonisation and Equivalence in Organic Agriculture. The task force was asked to review existing organic agriculture standards, regulations, and conformity systems in order to assess their impact on international trade and the degree of harmonization that was present. In addition, it was asked to identify opportunities for harmonization and for assessing equivalence of standards. Proposals for changes were to be submitted to governments, Codex, IFOAM and other appropriate organizations.

As with other aspects of legalization, private sector accreditation and certification bodies have taken some initiative in seeking to facilitate equivalence assessment. Several of the IFOAM Accredited Certification Bodies (ACB) recognized that all their standards were at least equivalent to the IFOAM Basic Standards and that each of their competence as a certification body was ensured by meeting IFOAM accreditation criteria. Beginning in 1997, the idea of a Multilateral Agreement on Equivalence and Mutual Recognition in Certification began to be developed by several of these ACBs taking into account an ISO 9000 report on mutual recognition agreements and model multilateral agreements (MLAs) in other ISO settings. Twenty-two of the twenty-six IFOAM ACBs had signed and these tended to be the larger ones involved in the international trade of organic products (Bowen 2004, 6).

Even with the MLA in place, however, reaching agreement among these certification bodies is still a protracted and complex process.

Conclusion

Brütsch and Lehmkuhl (forthcoming) argue that international legalization does not necessarily emerge through states acting rationally according to predetermined sets of preferences. They also note that legalization is a profoundly social process emerging from practices and beliefs in society and through the interaction among these societies. Accordingly, they add, we must allow for the possibility that the activities of private actors will contribute to the norms and rules that come to influence what states do.

In this chapter, we have described a process of increasing global legalization in organic production and trade that supports these arguments. Organic growing of fruits and vegetables and raising of animals began locally and beyond the gaze of states, if not ignored by them. Firmly committed to supporting a productivist, and increasingly industrial agriculture model and politically beholden to the farmers involved, ministries of agriculture in the developed world were happy to let organic agriculture develop its own norms and rules. Reinforced by strong moral beliefs in nurturing soils and respecting the environment, the small numbers of growers and supporters in the organic movement came to separate understandings about what "growing organic" meant in their respective localities. Gradually, they came together across state boundaries, formed their own international organization and eventually agreed upon a set of basic norms and rules that could be common to all growers in the organic world. In short, private actors in the organic movement were the catalysts for global legalization. States were largely on the sidelines.

Market forces were important in catalyzing global legalization, particularly as international trade in organic products rose in response to consumer demand. Trade also triggered more interest in legal forms by states. They began to pay more attention to enforcement and thus to the processes of accreditation and certification. As states became more interested in what kinds of basic norms distinguished organic from conventional farming and in how organic products might be certified as such, a plurality of legal orders came into place. Private legal arrangements at the local, national, and supranational level were not subsumed by state actions. Private actors were fearful of states' watering down their standards in response to other corporate interests and persisted in asserting their autonomy from state regulation. In each legal domain of the sector — standards, accreditation, certification — private and state/intergovernmental actors coexist. In many areas, they co-operate with one another as developments at Codex and the writing of public international standards illustrate. Over the past twenty years, a series of transnational policy networks involving state and private actors have helped facilitate more complex and globally extensive legalization. Nonetheless, this co-operation should not occlude the fact that these varying sets of standards and approaches to certification are also often in competition with one another.

In the organic sector at least, it is also evident that increasing global legalization is not accompanied by higher levels of rationalization. To the contrary, from the perspective of organic farmers in the less developed countries in the world, the resulting legal arrangements are a financial and political obstacle course. As Bowen (2004, 17) concludes: "the current system is inefficient and some producers undoubtedly face insurmountable obstacles to some international markets because of the high cost of compliance with organic regulations. The long-term stability of the current system is also questionable in the face of rapid growth of organic markets and opportunities worldwide." Nor does legalization necessarily bring harmonization. In fact, the entrenchment of different views of organic standards into hard law by states makes it that much more difficult to reach a common understanding

among private and public actors at all levels of the system on such key issues as organic equivalence and basic standards. The "move to law" has changed the relationships between public and private actors in ways that may frustrate reaching the kind of intersubjective understanding that is necessary for the global organic movement to respond adequately to the consumers who wish to buy their foods. In such circumstances, consumer confidence in enforcement and compliance with organic standards may be fragile.

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Notes

1. Calculated based on information supplied to the authors by IFOAM.
2. Much of the following discussion on standards, certification, and accreditation is drawn from the actual US regulation accessed at <http://www.ams.usda.gov/nop/NOP/standards.html> on 3 March 2004 and at <http://www.ams.usda.gov/nosb/index/html> on 3 March 2004. Current information about the National Organic Program can be found at <http://www.ams.usda.gov/nop>.
3. The following discussion draws on material located on the Canadian General Standards Board website at http://www.pwgsc.gc.ca/cgsb/032_310/faq-e.html in November 2004. Current CGSB information on organic agriculture can be found at http://www.pwgsc.gc.ca/cgsb/on_the_net/032_0310/standard-e.html.
4. Analysis based on information located on the Canadian General Standards Board website at http://www.pwgsc.gc.ca/cgsb/032_310/faq-e.html in November 2004. Current CGSB information on organic agriculture can be found at http://www.pwgsc.gc.ca/cgsb/on_the_net/032_0310/standard-e.html.
5. For a systematic comparison of the EU, Codex, and IFOAM standards, see Schmid (2003).