

WTO

—

TECHNICAL BARRIERS AND SPS MEASURES

Edited by
Rüdiger Wolfrum
Peter-Tobias Stoll
and Anja Seibert-Fohr



Max Planck Institute for
Comparative Public Law and International Law

MARTINUS NIJHOFF PUBLISHERS

WTO – Technical Barriers and SPS Measures

Edited by

Rüdiger Wolfrum
Peter-Tobias Stoll
Anja Seibert-Fohr



LEIDEN • BOSTON
2007

This book is printed on acid-free paper.

A Cataloging-in-Publication record for this book is available from the Library of Congress.

ISSN 1574-907X
ISBN 978-90-04-14564-1

© Copyright 2007 by Koninklijke Brill NV, Leiden, The Netherlands.
Koninklijke Brill NV incorporates the imprints Brill, Hotei Publishing,
IDC Publishers, Martinus Nijhoff Publishers and VSP.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA.
Fees are subject to change.

PRINTED IN THE NETHERLANDS

PREFACE TO THE SERIES

The idea behind the *Max Planck Commentaries on World Trade Law* is to explain the whole range of WTO law in authoritative and practical article-by-article type commentaries. The purpose is to give the reader a comprehensive and concise insight into the meaning of each rule by combining information on its legislative history, its economic and political rationale, its interpretation, existing case law and proposals for reform. Issues which are not explicitly mentioned in the rules but which are relevant for their application, like *e.g.* the question of direct applicability, are also addressed. As far as possible, reference is also made to similar rules of universal and regional economic regimes.

The format of a commentary dates back to the classical period of Roman legal science. Such commentaries were meant to collect together the relevant legal material and to provide assistance for its understanding by referring to relevant case law and by offering interpretations. Such format is well established in the German legal tradition but seems to be less so in the US legal tradition where the closest correlation may be the Restatements.

Rüdiger Wolfrum

Peter-Tobias Stoll

PREFACE TO THIS VOLUME

Given that tariffs are by no means the only restrictions on international trade, non-tariff barriers to trade are important objects of regulation of WTO law. This volume covers some of the most relevant non-tariff barriers, *i.e.* technical barriers to trade and sanitary and phytosanitary measures.

Technical standards are increasingly determining the development, production, trade in and marketing of goods and services. They thus have a considerable impact on international trade. The Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), both negotiated during the Uruguay Round to replace the Standards Code and in force since 1995, reflect this growing importance and regulate their permissibility. The two agreements are a major development in international trade law, as they are not restricted to the prevention of discriminatory measures, but also contribute to harmonization by encouraging Members to base their policies on international standards. In this respect, one particularly interesting aspect is the role of international standardization bodies. Moreover, they emphasize the importance of transparency.

As well as the TBT and the SPS, the present volume also comprises other provisions of WTO law relevant to the subject. As technical barriers to trade also comprise measures that take effect only within the domestic markets of Members, the volume covers the principle of national treatment (Article III GATT 1994). In addition, the prohibition of quantitative restrictions (Article XI GATT 1994) is pertinent, *e.g.* with respect to conformity controls in customs clearance procedures. As Members often try to justify the legality of technical barriers by reference to a general exception, an in-depth treatment of Article XX GATT 1994 has also been included.

The political relevance of the provisions and agreements covered in this volume is underlined by the fact that some of the most controversial dispute settlement proceedings in the history of the WTO have involved either Article XX GATT 1994 (see the *US—Shrimp* case) or the TBT and the SPS (see the *EC—Hormones* case). These decisions are just two examples of the need for international trade law to accommodate other global and national policy and regulatory concerns, such as the protection of the environment, health and food safety. This volume of the Commentary elaborates on the leading cases in their context and covers the most recent developments in the case law of the Dispute Settlement Body. Most importantly, the recent

Panel Report in *EC—Approval and Marketing of Biotech Products* is fully incorporated in the texts.

Last but not least, I would like to acknowledge the help of several people without whom this book would not be in the shape it is now. In particular I would like to thank *Markus Benzing* who was heavily involved in the final editing process. Without him it would have been impossible to deliver the manuscript as planned. Furthermore, thanks are due to *David Diehl* and *Ulrike Deutsch* who formatted the manuscript, checked the footnotes and prepared the index, to *Dr. Karen Kaiser* and *Michael Koebele* for their valuable advice and to *Kate Elliott* who scrupulously checked the language.

Anja Seibert-Fohr

LIST OF CONTRIBUTORS

Arend, Katrin

Dipl. iur., Junior Research Fellow at the Institute for International Public and European Law, Department of International Economic and Environmental Law, University of Göttingen.

Article XX lit. d GATT 1994

Bartels, Lorand

PhD (EUI); Lecturer in International Economic Law, School of Law, University of Edinburgh.

Articles 13, 15 TBT

Böckenförde, Markus

Dr. iur., LL.M. (UMN), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Articles 7, 8 and Annex C SPS

Charnovitz, Steve

B.A., J.D., Yale University; M.P.P., Harvard University, Associate Professor of Law, The George Washington University School of Law, Washington, D.C.

Preamble SPS, Article 1 SPS

Hestermeyer, Holger

Dr. iur., LL.M. (Berkeley), Esq., Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Article III GATT 1994

Koebele, Michael

LL.M. (Michigan); Associate, Latham & Watkins LLP (Brussels); Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg

Preamble TBT, Articles 1 and Annex 1, 4 and Annex 3, 9, 10 TBT

Krajewski, Markus

Dr. iur., Associate Professor for Public, European and International Economic Law, University of Potsdam.

Articles 11, 12 TBT

LaFortune, Gordon

Grey, Clark, Shih and Associates, Limited, Ottawa.

Article 4 and Annex 3 TBT

Landwehr, Oliver

Dr. iur., LL.M.Eur., Legal secretary, Court of Justice of the European Communities, Luxembourg.

Articles 3, 4, 6 SPS

Matz-Lück, Nele

Dr. iur., LL.M. (UWA), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Articles XX lit. c, f, g, h, i, j GATT 1994

Muñoz, Rodolphe

LL.M. (Bruges), *Maître de Conférences*, Institut d'Etudes Juridiques Européennes, University of Liège; *Chargé de cours*, Institut d'Etudes Politiques de Lille.

Articles 5, 6, 7, 8 TBT

Reyes-Knoche, Susanne

Ass. iur., Research Fellow at the Institute for International Public and European Law, Department of International Economic and Environmental Law, University of Göttingen.

Article XX lit. d GATT 1994

Röben, Volker

Dr. iur., LL.M. (Bruges), LL.M. (Berkeley), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg; Professor elect, University of Swansea.

Articles 12, 13, 14 SPS

Schorkopf, Frank

Dr. iur., Senior Research Fellow at the Institute for Public Law, University of Bonn.

Articles 14 and Annex 2 TBT, 11 SPS

Seibert-Fohr, Anja

LL.M., S.J.D. (GWU), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Articles 2, 9, 10 SPS

Stoll, Peter-Tobias

Prof. Dr. iur., Director, Institute for International Public and European Law, Department of International Economic and Environmental Law, University of Göttingen.

Articles XX lit. b GATT 1994, 5 SPS

Strack, Lutz

LL.M. (Tulane), Legal Affairs Officer, State Parliament of the Free and Hanseatic City of Hamburg.

Articles XX lit. b GATT 1994, 5 SPS

Tamiotti, Ludivine

LL.M. (New York), LL.M. (Geneva), LL.M. (Aix-en-Provence), Legal Affairs Officer, World Trade Organization, Trade and Environment Division, Geneva.

Articles 2, 3 TBT

Wenzel, Nicola

Dr. iur., LL.M. (Köln/Paris), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

Article XX lit. a, e GATT 1994

Wolfrum, Rüdiger

Dr. iur., Dr. h.c., Professor of Public Law, University of Heidelberg, Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Honorary Professor, University of Hamburg, Judge at the International Tribunal for the Law of the Sea, Hamburg.

Articles XI, XX GATT 1994 (Introduction, Chapeau, lit. g)

TABLE OF ABBREVIATIONS AND ACRONYMS

ACJ	Andean Court of Justice (Court of Justice of the Cartagena Agreement)
ACJ Agreement	Treaty Creating the Court of Justice of the Cartagena Agreement
ACJ Internal Rules	Internal Rules for the Court of Justice of the Cartagena Agreement
ACJ Statute	Statute of the Court of Justice of the Cartagena Agreement
ACP	African, Caribbean and Pacific Group
ACWL	Advisory Centre of WTO Law
ACWL Agreement	Agreement Establishing the Advisory Centre on WTO Law
AD	Anti-Dumping Agreement
AD Committee	Committee on Anti-Dumping Practices
ADI	Acceptable Daily Intake
Afr. J. Int'l Comp. L.	African Journal of International and Comparative Law
Agric. Econ.	Agricultural Economics
Agriculture Agreement	Agreement on Agriculture
Aircraft Committee	Committee on Trade in Civil Aircraft
AJDA	Actualité Juridique Droit administrative
Am. J. Int'l L.	American Journal of International Law
ALADI	Asociación Latinoamericana de Integración
Am. U. Int'l L. Rev.	American University International Law Review
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
Art.	Article
Arts	Articles
AS	<i>Amtliche Sammlung des Bundesrechts</i> (Official Collection of Swiss Federal Law)
ASEAN	Association of Southeast Asian Nations
ASEAN Enhanced Dispute Settlement Protocol	ASEAN Protocol on Enhanced Dispute Settlement Mechanism
ASEAN FTA	ASEAN Free Trade Area

ASEAN FTA Agreement	Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area
ANSI	American National Standards Institute
ATC	Agreement on Textiles and Clothing
AVR	<i>Archiv des Völkerrechts</i>
AYIL	Australian Yearbook of International Law
B.U. Int'l L. J.	Boston University International Law Journal
BCI	business confidential information
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
BFA Committee	Committee on Budget, Finance and Administration
BGBL	<i>Bundesgesetzblatt</i> (German Federal Law Gazette)
BIPM	<i>Bureau international des poids et mesures</i>
BISD	Basic Instruments and Selected Documents (published by GATT)
BOPs Committee	Committee on Balance-of-Payments Restrictions
Brook. J. Int'l L.	Brooklyn Journal of International Law
Buff. L. Rev.	Buffalo Law Review
BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> (Official Records of the German Federal Constitutional Court)
BYIL	British Yearbook of International Law
CAC	Codex Alimentarius Commission
CAFTA	Central America Free Trade Agreement
CAFTA-DR	Central America-Dominican Republic Free Trade Agreement
CYELS	Cambridge Yearbook of European Legal Studies
CAP	Conformity Assessment Procedures
CASCO	(ISO) Conformity Assessment Committee
CARIBCAN	Caribbean—Canadian Trade Agreement
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CCC (nomenclature)	Customs Co-operation Council (nomenclature)
CCFICS	Food Import and Export Certification and Inspection

CEB	United Nations System Chief Executives Board for Coordination
CEN	European Committee for Standardization (Comité Européen de Normalisation)
CENELEC	European Committee for Electrotechnical Standardization (<i>Comité Européen de Normalisation Electrotechnique</i>)
CFI	Court of First Instance of the European Communities
CG-18	Consultative Group of 18
Ch.	Chapter
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
Civil Aircraft Agreement	Agreement on Trade in Civil Aircraft
CMLRev.	Common Market Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Council for TRIPS	Council for Trade-Related Aspects of Intellectual Property Rights
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CTG	Ministerial Conference and the Council on Trade in Goods
CTS	Canadian Treaty Series
CU(s)	customs union(s)
Customs Valuation Agreement	Agreement on Implementation of Article VII of the GATT 1994
CYIL	Canadian Yearbook of International Law
CYELS	Cambridge Yearbook of European Legal Studies
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
Dep't St. Bull.	Department of State Bulletin
Dick. J. Int'l L.	Dickinson Journal of International Law
DIN	<i>Deutsches Institut für Normung e.V.</i>
Doc.	Document
DSB	Dispute Settlement Body

DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
DVBl.	<i>Deutsches Verwaltungsblatt</i>
<i>e.g.</i>	<i>exempli gratia</i> (for example)
EC	European Community/ies
EC Treaty	Treaty Establishing the European Community
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
ECOSOC	Economic and Social Council
ECSC	European Coal and Steel Community
ECT	Treaty Establishing the European Community
ed.	editor
eds	editors
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
Eur. Envtl. L. Rev.	European Environmental Law Review
EFARev.	European Foreign Affairs Review
EFTA	European Free Trade Association
EJIL	European Journal of International Law
Eur. L. Rev.	European Law Review
EMIT	Working Group on Environmental Measures and International Trade of GATT
Envtl. L. Rep.	Environmental Law Reporter
EPIL	Encyclopedia of Public International Law
<i>et seq.</i>	<i>et sequitur</i> (and the following)
ETS	European Treaty Series
EU	European Union
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
FAO	Food and Agriculture Organization
Fed. Reg.	Federal Register
FMD	Foot and Mouth Disease
FOGS negotiating group	Negotiating group on the Functioning of the GATT System
Fordham Int'l L.J.	Fordham International Law Review
Foreign Pol'y	Foreign Policy

FTA(s)	Free Trade Area(s)
FTAA	Free Trade Areas of the Americas
G-77	Group of 77 at the United Nations
Ga. J. Int'l. & Comp. L.	Georgia Journal of International and Comparative Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
Geo. J. Int'l L.	Georgetown Journal of International Law
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
Global Comm'y, Y.B. Int'l L. & Jurispr.	The Global Community: Yearbook of International Law and Jurisprudence
GMO	Genetically Modified Organisms
GOIC	Gulf Organization for Industrial Consulting
GPA	Agreement on Government Procurement
Gr.Ch.	Grand Chamber
GRUR Int.	<i>Gewerblicher Rechtsschutz und Urheberrecht/ Internationaler Teil</i>
GSP	Generalized System of Preferences
GYIL	German Yearbook of International Law
Harv. Bus. Rev.	Harvard Business Review
Harv. Int'l L.J.	Harvard International Law Journal
Havana Charter	Havana Charter for an International Trade Organization
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
HS (nomenclature)	Harmonized System (nomenclature)
IAF	International Accreditation Forum
ICA(s)	International Commodity Agreements
<i>i.e.</i>	<i>id est</i> (it or that is)
<i>ibid.</i>	<i>ibidem</i> (in the same place)
IBRD	International Bank for Reconstruction and Development
IBRD Articles of Agreement	Articles of Agreement of the International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICITO	Interim Commission for the International Trade Organization
ICJ	International Court of Justice

ICJ Statute	Statute of the International Court of Justice
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IE	Independent Entity
IEC	International Electrotechnical Commission
IF	Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries
IFIA	International Federation of Inspection Agencies
ILAC	International Laboratory Accreditation Cooperation
ILC	International Law Commission
ILC YB	Yearbook of the International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IMF Articles of Agreement	Articles of Agreement of the International Monetary Fund
Int. T. L. R.	International Trade Law and Regulation
Int'l Law.	International Lawyer
Int'l Org.	International Organization
Int'l Stud. Q.	International Studies Quarterly
Int'l Trade Rep.	International Trade Reporter
IPPC	International Plant Protection Convention
IPU	International Parliamentary Union
ISC	International Sugar Council
ISO	International Organization for Standardization
Is. L. Rev.	Israel Law Review
ITC	International Trade Centre UNCTAD/WTO
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
ITTC	Institute for Training and Technical Cooperation
ITU	International Telecommunication Union

J. Confl. Res.	Journal of Conflict Resolution
J. Econ. Lit.	Journal of Economic Literature
J. Econ. Persp.	Journal of Economic Perspectives
J. Envtl. L.	Journal of Environmental Law
J. Legal Stud.	Journal of Legal Studies
J. Confl. Res.	Journal of Conflict Resolution
J. Small & Emerging Bus. L.	Journal of Small and Emerging Business Law
J. World Inv.	Journal of World Investment
JWIP	Journal of World Intellectual Property
JCMS	Journal of Common Market Studies
JIEL	Journal of International Economic Law
JITAP	Joint Integrated Technical Assistance Programme
JWT	Journal of World Trade
JWTL	Journal of World Trade Law
JUTR	Jahrbuch des Umwelt und Technikrechts
LAN	Local Area Network
L. & Bus. Rev. Am.	Law and Business Review of the Americas
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Law & Prac. Int'l Cts & Trib.	The Law and Practice of International Courts and Tribunals
Law and Bus. Rev. Am.	Law and Business Review of the Americas
LDC Sub-Committee	Sub-Committee on Least-Developed Countries
LDC(s)	least-developed country/ies
Licensing Agreement	Agreement on Import Licensing Procedures
LIEI	Legal Issues of Economic Integration
lit.	<i>littera(e)</i> (letter(s))
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
Max Planck CWTl	Max Planck Commentaries on World Trade Law

Max Planck UNYB	Max Planck Yearbook of United Nations Law
Md. J. Int'l L. & Trade	Maryland Journal of International Law and Trade
MEA(s)	Multilateral Environmental Agreement(s)
MERCOSUR	<i>Mercado Común del Sur</i> (Southern Common Market)
MERCOSUR Olivos Protocol	Protocol of Olivos for the Solution of Controversies in MERCOSUR
MFN	Most-Favoured Nation
MFN principle	Most-Favoured Nation principle
Mich. J. Int'l L.	Michigan Journal of International Law
Minn. J. Global Trade	Minnesota Journal of Global Trade
MRA(s)	Mutual Recognition Agreement(s)
MRL(s)	Maximum Residue Level(s)
MTA(s)	Multilateral Trade Agreement(s)
MTN	Multilateral Trade Negotiations
MTO	Multilateral Trade Organization
MTO Agreement	Agreement Establishing the Multilateral Trade Organization
NAFTA	North American Free Trade Agreement
NAM	Non-Aligned Movement
N.D. L. Rev.	North Dakota Law Review
NIEO	New International Economic Order
NILF	<i>Norsk institutt for landbruksøkonomisk forskning</i> (Norwegian Agricultural Economics Research Institute)
NG	Negotiation Group
NGB(s)	National Governing Body/ies
NGO	Non-Governmental Organization
No.	number
NTB(s)	Non-Tariff Barrier(s) to Trade
NVC	Non-Violation Complaint
NVwZ	<i>Neue Zeitschrift für Verwaltungsrecht</i>
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
NYIL	Netherlands Yearbook of International Law
N.Y.U. Env'tl. L.J.	New York University Environmental Law Journal
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N.Y.U. L. Rev.	New York University Law Review