

GLOBAL TRADE LAW SERIES

PRODUCT REGULATIONS AND STANDARDS IN WTO LAW

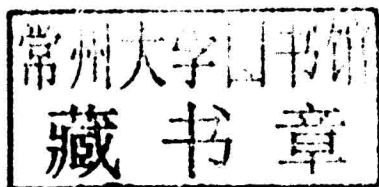
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Product Regulations and Standards in WTO Law

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Product Regulations and Standards in WTO Law

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Preface

Product Regulations and Standards in WTO Law revisits harmonization efforts theoretically and practically by developing the route towards a concept of international harmonization processes. This is done by considering the rules on harmonization within the World Trade Organization (WTO) Agreements on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and on Technical Barriers to Trade (TBT Agreement).

International harmonization processes are in themselves neither positive nor negative: they are whatever we make of them. This simple idea can provide an overall impression of international harmonization processes. To encourage harmonization processes to become widely accepted, the book provides commentary to support a common understanding of the relevant economic, administrative and legal principles and gives practical insight into the usage of harmonization rules for sanitary and technical product regulations and standards under the WTO framework.

In legal practice, harmonization processes provide some helpful regulatory instruments; but they vary widely in their operation. A regulatory instrument by definition requires specification by object, or area of application, and such specific details to meet the stated aims and objectives of the instrument. Whilst very desirable, these aims and objectives are challenging to achieve, even through harmonization. Such a tension was identified in the relationship between some of the different aims and objects within international trade law. For example, many suggest that improving health and minimizing negative effects on trade are conflicting aims. In fact there is a synergy between them: both serve to promote welfare enhancement, but there may be a difference in their emphasis, or their aims may have different priorities.

On the international stage, surprisingly, the limitations of harmonization processes can have both positive and negative effects. Harmonization processes provide a range of common agreements that are limited by the fact that there is always scope for diversification to accommodate a range of objectives such as consumer taste, regional, historical or cultural differences. A weakness of this may be that harmonization processes are never complete.

When I began researching this subject, the term, function and concept of 'harmonization' of product standards and regulations had already received consideration at national and supranational levels. However, harmonization is a wide and growing subject. My aim has been to develop an understanding of the concept of harmonization as established within the SPS Agreements and TBT Agreement under the WTO Agreements to enable an examination of international and multilateral dispute resolution. I hope this book will contribute to the conceptual analysis of harmonization in international trade law and may be practically applied by the interested parties engaged in international law.

This book has been submitted beginning of 2011 as a thesis for the degree of Doctor of Laws at the University of Hanover. The research described herein was conducted under the supervision of Prof. Dr. iur. Bernd Oppermann LL.M. (UCLA) Dr. h.c. (Univ.) Rouen, Prof. h.c. (Lublin), Chair for German, European and International Private Law and Commercial Law, University of Hanover.

I wish to express my gratitude to my supervisor Prof. Dr. iur. Bernd Oppermann LL.M. (UCLA) Dr. h.c. (Univ.) Rouen, Prof. h.c. (Lublin) for his guidance and constant support whilst I have been writing this thesis and conducting my research. I would also like to thank Prof. Dr. iur. Volker Epping for his support and discussion of the conceptual challenges of the subject, and for putting me in contact with a joint programme of the Universities of Münster and Hannover and the University of Applied Sciences Braunschweig/Wolfenbüttel. I should also note the helpful participation of Prof. Dr. iur. Hans-Michael Wolfgang, Prof. Dr. iur. Rogmann LL.M. (Murdoch), and Lothar Ehrling (European Commission, Directorate General Trade). My interest in international trade law dates back to my studies at the University of Nottingham, and I would like to express my gratitude to Prof. Sue Arrowsmith for the introduction to WTO law.

I am also grateful to MinRat Klaus Kehrein, former head of division 'Internationale Handelsangelegenheiten, Grundstoffpolitik, Handelsorganisationen, AKP, Zollpräferenzen, Afrikanische Entwicklungsländer', German Federal Ministry of Food, Agriculture and Consumer Protection and Dr. iur. Michael Tervooren, senior manager in the German Customs Group and the Indirect Tax Group of PricewaterhouseCoopers AG WPG for providing practical experience.

This work was made possible by the considerable support of Melissa Cullen in refining my English and Diana Schröder in refining my Figures. Many thanks go to Tina Jäpel for her support and sometimes patience and to Jan Körtge for his friendship and interest but also to many others.

I would finally like thank my family Bernd and Sandra Struck, and Werner and Thekla Gliese, to whom I dedicate this book.

Christian Struck
Burg

List of Abbreviations

ADI	Acceptable Daily Intake
ALOP	Appropriate level of protection
CAC	Codex Alimentarius Commission
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CFI	Court of First Instance of the European Communities
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECJ	European Court of Justice
ECJ	Court of Justice of the European Communities
ESO	European Standards Organization
ed	Editor
eds	editors
EFTA	European Free Trade Area Association
ETSI	European Telecommunications Standards Institute
EU	European Union (formerly EC)
f., ff.	following page(s)

FAO	Food and Agriculture Organization of the United Nations
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
<i>ibid.</i>	<i>Ibidem</i> (in the same place)
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
ISO	International Standard Organization
ISO	International Organization for Standardization
ITF	International Task Force on Harmonization and Equivalence in Organic Agriculture
Mercosur	<i>Mercado Común del Sur</i> (engl. Southern Common Market)
MFN	Most-Favoured Nation
MRL(s)	Maximum Residue Level(s)
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NTB	Non-Tariff Barrier(s)
OECD	Organisation for Economic Co-operation and Development
OIE	Office International des Epizooties
SPS	Sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TBT Agreement	Agreement on Technical Barriers to Trade
TEC	Treaty Establishing the European Communities
TFEU	Treaty on the Functioning of the European Union
UNEP	United Nations Environment Program

Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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CHAPTER 1

Introduction

International law is a system of interrelated rules, principles, and concepts that governs the relations between nation states and international organizations, but which also increasingly affects economic operators. Many aspects of international markets today can only be fully understood with profound knowledge of international rules and an awareness of how they operate as an integral component of global market affairs.

The exchange of goods has historically been an important factor for the participants – such as manufacturers, consumers, and traders – but also for the wealth of the economies of communities, societies, and states in the modern sense.¹ Trade in the sense of an exchange of goods first began in local areas but increasingly occurred between distant places. Trade between distant places contains the additional element of transport of goods along trade routes that may bring a larger profit but at additional risk. Trade creates a part of profit as well as other values such as connections and interdependencies throughout different people, places, technology, knowledge, and cultures of the world. This simple idea still underlies any trade efforts in modern times. In the first chapter on economic aspects, I will draw attention to this issue to clarify the basic elements of trade efforts.

As trade increasingly changes from a national to an international phenomenon, aspects of public and private choice must in turn take on an international dimension. Public and private persons alike, whose business activities cover international trade and customs, must increasingly take into account international rules, regulations and standards in addition to national and supranational law.

Economic operators are already accustomed to considering national and supranational rules, regulations, and standards, such as those of the European Union, NAFTA, Mercosur, or other multilateral or bilateral trade association agreements. They now face the additional challenge of increasing international regulation of trade and

1. On the history of trade see W Bernstein, *A Splendid Exchange: How Trade Shaped the World from Prehistory to Today* (2008), F Braudel, *Civilization and Capitalism, 15th-18th Century*, Vol. II: *The Wheels of Commerce* (2002).