

GLOBAL TRADE LAW SERIES

HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION OF STANDARDS IN WTO LAW

Humberto Zúñiga Schroder



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1. The opinions expressed in this work do not reflect the official view of the Andean Community General Secretariat or any body of the Andean Integration System.

List of Abbreviations

AB	(WTO) Appellate Body
AFNOR	Association Française de Normalisation (the French Standards Association)
ALOP	Appropriate Level of Protection
ANEC	European Association for the Co-ordination of Consumer Representation in Standardization
ANSI	American National Standards Institute
APEC	Asia-Pacific Economic Cooperation
API	American Petroleum Institute
ARSO	African Organization for Standardization
ASEAN	Association of Southeast Asian Nations
ASME	American Society of Mechanical Engineers
ASTM	American Society for Testing and Materials
BCD Forum	Broadband Content Delivery Forum
BIPM	<i>Bureau International des Poids et Mesures</i> (International Bureau of Weights and Measures)
BSI	British Standards Institution
CAB	Conformity Assessment Body
CAP	Conformity Assessment Procedure(s)
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CIPA	Camera and Imaging Products Association
COPANT	Comisión Panamericana de Normas Técnicas (Pan American Standards Commission)
COPOLCO	ISO's Committee on Consumer Policy
CUP	Cambridge University Press

List of Abbreviations

CUTS	Consumer Unity & Trust Society
DIN	Deutsches Institut für Normung e.V. (German Institute for Standardization)
DLNA	Digital Living Network Alliance
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EEA	European Economic Area
EC	European Community
ECJ	European Court of Justice
ECOS	European Environmental Citizens Organization for Standardization
EFTA	European Free Trade Association
ETSI	European Telecommunications Standards Institute
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FLO	Fairtrade Labelling Organizations
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMCF	Global Mobile Commerce Forum
GPA	Government Procurement Agreement
IAF	International Accreditation Forum
ICSCA	Industry Cooperation on Standards & Conformity Assessment
IEC	International Electrotechnical Commission
IECEE CB	IEC System for Conformity testing and Certification of Electrotechnical Equipment and Components
IFOAM	International Federation of Organic Agriculture Movements
ILAC	International Laboratory Accreditation Cooperation
IMO	International Maritime Organization
IPPC	International Plant Protection Convention
ISO	International Organization for Standardization
ISO/DEVCO	ISO's Committee on Developing Country Matters
ISPM	International Standard for Phytosanitary Measures
ITA	Industry Technical Agreement
ITU	International Telecommunication Union
JAS-ANZ	Joint Accreditation System of Australia and New Zealand
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-Favoured Nation Treatment
MR	Mutual Recognition
MRA	Mutual Recognition Agreement
MRL	Maximum Residue Limit
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organization
NILF	Norwegian Agricultural Economics Research Institute
NIST	National Institute of Standards and Technology

List of Abbreviations

OECD	Organization for Economic Co-operation and Development
OIE	World Organization for Animal Health (formerly known as the International Office of Epizootics)
OIML	International Organization of Legal Metrology
PASC	Pacific Area Standards Congress
PECAS	Protocols to the European Agreements on Conformity Assessment
SPS	Sanitary and Phytosanitary (measures)
STDF	Standards and Trade Development Facility
TBT	Technical Barriers to Trade
TC	Technical Committee
TRIS	Technical Regulations Information System
TTMRA	Trans Tasman Mutual Recognition Arrangement
UK	United Kingdom
UN	United Nations
UN/ECE	UN Economic Commission for Europe
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
US	United States of America
USDA	United States Department of Agriculture
WHO	World Health Organization
WSSN	World Standards Services Network
WTO	World Trade Organization

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Introduction

One of the most important events of the twentieth century, from a trade law perspective, was undoubtedly the establishment of the World Trade Organization (WTO) and the multilateral trading system. This event, intended to secure rules of trade at a global level with the main objective of ensuring that trade flows as predictably and freely as possible, marked the conclusion of years of negotiations between countries.¹ The WTO began life on 1 January 1995 but its trading system is more than sixty years old. Since 1947, the General Agreement on Tariffs and Trade (GATT) had provided rules aimed at facilitating trade and promoting the efficient exchange of goods.²

One of the ways in which this objective can be achieved is through the removal of trade barriers. These comprise any government regulation or policy that restricts international trade. They can take different forms: there are the traditional tariff barriers – which were discussed during the eight GATT Rounds³ – and the increasingly significant non-tariff barriers, including customs formalities, import bans and also technical regulations and standards.

Technical regulations and standards are important and necessary for a variety of reasons, for example, compatibility of products and the protection of human health and safety. However, they can vary from country to country. This is not per se an impediment to trade and in fact is allowed by the multilateral trading system because of the existence of different levels of development and different physical conditions between countries. The problem arises when standards are set arbitrarily, because they can be employed by governments as a ‘disguised’ form of

1. World Trade Organization, ‘The WTO... in Brief’, available at the WTO web page <www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> (accessed 30 Dec. 2010).

2. World Trade Organization, ‘Understanding the WTO’ (Geneva, 2003), 10.

3. Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956), Dillon (1960–1961), Kennedy (1964–1967), Tokyo (1973–1979) and Uruguay (1986–1994).

protectionism, especially when they are introduced with the real purpose of creating an artificial comparative advantage for domestic producers.⁴ The need to avoid scenarios like these is the reason why the WTO has provided a thorough legal regime on standards and conformity assessment procedures, aimed at ensuring that they do not create unnecessary obstacles to trade.

The WTO regime on standards has been the result of an evolutionary process that started during the GATT, thanks to the efforts of its Contracting Parties, who were aware of the need for regulation in order to avoid situations like the ones above mentioned. These efforts bore fruit in the Tokyo Round Standards Code (1979),⁵ which may be regarded as the first official GATT instrument that deals exclusively with standards and with the different scenarios in which they are likely to constitute obstacles to trade. This code paved the way for the subsequent negotiations, during the Uruguay Round, on the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary Measures (SPS) Agreements, which are the main WTO Agreements that deal with standards.

Efforts to regulate in the area of standards, however, began more than a decade before the approval of the Tokyo Round Standards Code. An interesting reference can be traced back to 1969, the year in which the Committee on Trade in Industrial Products⁶ decided to establish a working group with the purpose of examining the diverse scenarios in which standards can act as obstacles to trade and proposing possible solutions.⁷ One of the 'solutions' discussed in this Working Group was a 'Code of Conduct on Preventing Technical Barriers to Trade',⁸ which later developed into the Tokyo Round Standards Code. The objective of this code was to 'ensure that standards, both mandatory and voluntary... are not formulated or applied in such a way as to cause unjustifiable obstacles to international trade'.⁹ To achieve this objective, the Code required adherents to use 'as a basis for their standards relevant international standards'.¹⁰ An initial draft of the proposed Code (concluded in December 1971)¹¹ contained two important definitions: firstly,

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4. World Trade Organization, 'World Trade Report 2005: Exploring the links between Trade, Standards and the WTO', available at the WTO web page <www.wto.org> (accessed 30 Dec. 2010), xxxv.
 5. Agreement on Technical Barriers to Trade, GATT, B.I.S.D. 26S/8 (1980) (entered into force 1 Jan. 1980), reprinted in 18 I.L.M. 1079 (1979) (hereinafter the Tokyo Round Standards Code).
 6. The composition and terms of reference of the Committee appear in GATT Doc. COM.IND/1/Rev.2 (dated 9 Dec. 1969).
 7. GATT Doc. L/3298, *Committee on Trade in Industrial Products, Report to Council*, 22 Dec. 1969, at Annex I.
 8. See GATT Doc. COM.TD/W/191, *Non-Tariff Barriers Arising in the Field of Standards: Note on Implications for Developing Countries of Proposed Solutions*, 28 May 1973, at paragraph 15. It is important to note that by 1973 the Working Group had not taken any decision as to the nature of the code but members of the Group had agreed to work on the draft of a contractual code for reasons of convenience (7, footnote 1).
 9. *Ibid.*, paragraph 17.
 10. *Ibid.*
 11. See GATT Doc. Spec(71)143, *Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade*, Contents of Revised Draft Prepared for Consideration by the Drafting

'harmonization', as the process of making the standards of different countries or organizations 'the same as regards their content although their layout and format may differ'.¹² Secondly, 'equivalence' of test methods (subsequently broadened to SPS measures and TBT technical regulations, standards and conformity assessment procedures), which involved the acceptance of test methods imposed by a particular country, provided that such methods offer an assurance of conformity with applicable standards equivalent to the procedures carried out by the country of destination.¹³ References to these two concepts were also included in the Tokyo Round Standards Code, albeit with some differences regarding the scope of 'equivalence', which now encompasses 'self-certification, test results, certificates or marks of conformity'.¹⁴

The reason this brief reference to the negotiating history of the Tokyo Round Standards Code was made lies in the need to show *how* and *why* the GATT Contracting Parties decided to implement different policy options in cases where standards and conformity assessment procedures differ between countries. Harmonization and equivalence were regulated originally in the Draft Code of Conduct on Preventing Technical Barriers to Trade and subsequently incorporated into the Tokyo Round Standards Code and the TBT and SPS Agreements. Mutual recognition was only *expressly* incorporated with the TBT Agreement, albeit exclusively for conformity assessment procedures.¹⁵

Harmonization is one way of facilitating trade and its goal is uniformity of trade measures. Equivalence, by contrast, is based on the fact that regulatory goals in relation to, for example, safety and health, may be fulfilled by the use of different kinds of measure. Thanks to this tool trade barriers can be removed and products can be accepted on the basis that they fulfil the regulatory objectives of the country of destination. Finally, mutual recognition means that two or more parties mutually accept each others' rules or standards, or the results of conformity assessment procedures.¹⁶ These three concepts have been discussed for many years in both the TBT and SPS Committees, with different results.¹⁷

Group on 11 Jan. 1972, 30 Dec. 1971. Paramount in this regard was the proposal by the United States containing elements of a possible code on standardization (see GATT Doc. Spec(70)122 of 4 Nov. 1970).

12. GATT Doc. Spec(71)143, *supra* n. 11, at Section II, Article 6(a).

13. *Ibid.*, Section III, Article 10(b).

14. See the Tokyo Round Standards Code, Article 5.2.

15. Note that the word 'expressly' has been emphasized because only the TBT Agreement addresses the so-called 'mutual recognition agreements' on Article 6.3.

16. F. Veggeblad & C. Elvestad, 'Equivalence and Mutual Recognition in Trade Arrangements: Relevance for the WTO and the Codex Alimentarius Commission', NILF Report 2004-9 (Oslo: Norwegian Agriculture Economics Research Institute, 2004), 1.

17. Harmonization, equivalence and mutual recognition have been called 'trade-facilitation tools' (See, e.g., *ibid.*) However, for the purposes of the present work, these three concepts will not be treated in such a fashion, given the need to differentiate this term from the current negotiations in the WTO in the area of 'trade facilitation' based on the modalities contained in Annex D of the so-called 'July package'. More information on the concept of 'trade facilitation' can be found in <www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> (accessed 30 Dec. 2010).