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Book Review


Product standards are hugely important for both businesses and consumers. They have an impact on almost every product and service that we come into contact with, from the transport we chose to travel to work, the goods we buy in shops for use at home and the services offered in our communities. Ensuring product safety is further complicated with online shopping and internet connected new technologies such as smart phones, artificial intelligence and 3D printing, requiring software upgrades.

Most of these standards are invisible to us as consumers. We generally take for granted what standards provide and assume the products we buy are safe – because safety will almost certainly be specified in a safety standard. This is in much the same way that we take for granted that electric plugs are a good fit with the corresponding sockets. All of these safety and convenience-driven features are underpinned by the product standards that are constantly being developed, established and amended.

For producers, on the other hand, these standards are palpable and a part of a business strategy. Product standards were originally published to ensure goods and services could be not only manufactured safely but could be interoperable. Today is it better understood that standards significantly impact business competition and efficiency. The use of product standards may be voluntary or, alternatively, governments may require their use by referencing them in regulation. Functional standards have become policy tools. For domestic technical regulations, standards and conformity assessment procedures can all potentially create barriers to international trade with the aim of protecting domestic industry. Some governments, particularly in advanced industrial countries, view standards as a potential form of non-tariff barrier for protecting their business sectors, which lobby for these protections. The use of standards as non-tariff barriers has actually increased due to the success at reducing tariffs in the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) framework. With import tariffs at the lowest level in history, many non-tariff measures such as product standards are seen as protectionist measures in disguise – to be welcomed or condemned, depending on perspective.

The monograph under review, *The Regulation of Product Standards in World Trade Law*, authored by Professor Ming Du, provides the reader with an informative and extremely well supported investigation into the regulation of governmental, private and hybrid product standards within the GATT/WTO legal framework. The years of research contained in this book set out a comprehensive legal overview of how mandatory regulations, voluntary standards and private standards are defined, regulated and impact international trade which will support law students and experts in the field.

The focus on definitions is detailed and rightly so. Beginning with an assessment of the legal definitions set out in the WTO Agreement on Technical Barriers to Trade (TBT), the discussion on concepts and definitions sets out the foundations for Chapter Two’s analysis of the basic legal obligations and principles. This is a significant chapter because an initial legal step when applying the WTO TBT agreement is to determine whether the challenged instrument should be classified as a technical regulation or as a standard, for this determines whether compliance is mandatory.

The case for technical regulations and standards is clear throughout this book. Equally clear, however, are the challenges. While the principle of the WTO TBT agreement is to ensure that Members may apply product regulations to fulfil legitimate policy objectives, this is so provided that these regulations are not ‘more trade restrictive than is necessary’ and do not create ‘unnecessary obstacles to international trade’. Thus, the overall objective of the TBT agreement is to effectively prevent product regulations being implemented for protectionist purposes – and having a negative impact on trade.

Yet alongside the desire to prevent protectionism is the need to assure that Members retain sufficient regulatory autonomy to accomplish domestic policy goals. The WTO TBT obliges governments to use international standards as a basis for regulation yet leaves a degree of flexibility with respect to the choice of standard and the manner of its use. This book spends time reflecting on how domestic regulations can
accomplish several objectives unrelated to protectionism. For example, domestic regulations can serve as a means of protecting consumer health and safety, the environment and national security. Domestic regulations can also further economies of scale, and increase consumer confidence, by assuring uniform technical and production standards. Economic development and the improved education that should result from it can lead to demands from consumers and sometimes the business community for an increase in regulations or standards.

The discussion in Chapter Three continues this analysis by examining the evolution of the necessity test that is set out under the general exceptions to GATT Article XX, to critically compare with the necessity tests in both the TBT Agreement’s control over technical standards and the Sanitary and Phyto-Sanitary Agreement (SPS) regulation of food standards. The discussion focuses on the interplay between obligation and flexibility that has given rise to tension in various fora of the WTO, including in the committees’ work, negotiations and dispute settlement. In this last respect, the author explores the relevant disputes in depth, setting out justifications or otherwise for the legal interpretations set out in the WTO Panel and Appellate Body reports.

The message of the book is clear: domestic product standards and regulations vary throughout the world. If there are too many different standards, lack of interoperability and certainty will affect producers, exporters and consumers and become unnecessary obstacles to trade. Standards can be used to protect local businesses, producers and consumers for both the right and wrong reasons. Whilst they are vital for the important policies of environmental protection, safety, national security and consumer information, for example, they can also be used to protect vested business interests that are not in the public interest domestically, regionally or globally.

The second section of the book therefore focuses, rightly, on the role of cooperation in setting international standards, mutual recognition and equivalence and private standard setting. Partly because of these WTO rules and also because of the general globalisation of trade, standards are now increasingly being written at the international level. Indeed, under the WTO rules, governments are required to base their national regulations on international standards, as much as possible. The WTO therefore promotes existing international standards for Members to use a safe haven while formulating their own domestic legislation. That is, any legislation made in accordance with recognized international standards are automatically presumed not to constitute an unnecessary obstacle to trade. Given the significance of international standards, it is here that more explicit substantive analysis into the membership and decision making processes of standard setting bodies and the obligations and recommendations that are attached to their conduct would have been welcome, particularly from a developing country’s perspective.

The final section of the book presents three case studies to strengthen and illustrate the legal analysis: the business-led International Organization for Standardization (ISO); the European Union’s Ecolabelling Scheme and its consistency with the TBT Agreement obligations; and finally the Forest Stewardship Council (FSC) Certification’s relationship with WTO law and practice. This legal analysis is reassuringly thorough in its comprehensive examination of the development of the rules and their interpretation, through an exhaustive analysis of all the case law relevant to support the discussion, and the use of pertinent case studies to illuminate the complex issues presented. It illuminates these issues in a digestible and sequentially logical style, allowing easy access for both the academic, practitioner and student.

The work presented in this book is clearly the sum of years of methodical and balanced legal analysis of the negotiation and development of products standards in world trade law. As a result, the analysis presented in this book is not seeking to be controversial. Rather, it brings relevant debates up to date with an exhaustive engagement with recent case law and literature, allowing the reader to follow the development of standards and labelling – governmental as well as private. It provides much clarity on the complex hybrid nature of product standards in the 21st century trading system, and the flexible approach that classification takes within WTO disputes. As the classification of the measure indicates the extent to which the TBT
adopts a differentiated approach towards technical regulations and standards in terms of the applicable substantive obligations and the manner of their enforcement.¹

This book is written at a time when the global spotlight on the WTO is fixated on teasing out the causes of its weaknesses, rather than the functional role that it continues to play under the radar in the area of removing unnecessary technical barriers to international trade. I therefore propose in the concluding paragraphs to put Du’s argument within the context of some broader debates.

The book adopts a technocratic perspective, following the general consensus that under the radar of world criticism directed towards the inadequacies of the international trading system, the TBT Committee has rather efficiently fulfilled its key mandate to review measures falling within the scope of the Agreement and address conflicts between Members for a large subset of non-tariff measures. Unlike the Subsidies and Countervailing Measures Agreement (SCM), the transparency mechanisms under the TBT Agreement function well, which results in the Committee being an important ‘clearing house’ for the discussion of trade concerns.² Chapter Three effectively incorporates the role of science in the WTO Committees. These Committee processes are illuminatingly discussed throughout this book. Both the SPS and TBT Committees address a significant number of what are known as ‘specific trade concerns’, and in the majority of instances, these cases do not become formal disputes. Indeed, the Committees’ work on specific trade concerns can significantly help defuse potential trade frictions concerning national policies in the covered areas.³

The absence of discussion of the wider systemic challenges facing the WTO and the multilateral trading system throughout the narrative of this book is both refreshing and unsettling. On the one hand, in jettisoning the broader discussion about developing countries’ interests under the WTO and Bretton Woods system, it does not address substantively the extent to which the WTO system and the TBT Agreement specifically are able to substantively and procedurally maintain a level playing field for the setting of standards in which developing countries’ interests are respected. Neither does it seek to put forward an empirical exploration of the degree to which the TBT Agreement and Committee protect developing countries against discriminatory protectionist standards set by importing countries.⁴

On the other hand, by drowning out the sound of the current stalemate in the WTO with a solid doctrinal and technocratic analysis, this book puts forward a more focused discussion of the impact that WTO disciplines have on the composition, function and decision-making process of standard-setting bodies and schemes such as ISO standards, eco-labelling and private standards. Away from the heated debate about the judicial over-reach of the WTO dispute settlement system, the failure of the Doha Round negotiations and the gaps in the current system, this book analyses what role the WTO may play in providing transparency and procedural fairness in product standards applied in international trade. Getting the doctrine right is the foundation of critical legal reasoning, and this book achieves that commendably.

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¹ Arwel Davies, ‘Technical Regulations and Standards under the WTO Agreement on Technical Barriers to Trade’ (2014) 41 Legal Issues of Economic Integration 37.
⁴ Philip Poppelreuter, ‘Developing Countries’ Participation in the WTO Committee on Technical Barriers to Trade’ CUTS International (2017); Onsando Osiemo, Food Safety Standards in International Trade (Routledge 2018); Kamala Dawar, ‘Product Standards, Competitiveness and Development’ in Hassan Qaqaya and George Lipimile (eds), ‘The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects’ UNCTAD/DITC/CLP/2008/2, 331-356.