

MORITZ J. K. BLENK

Uses and Misuses  
of International  
Economic Law

*Studien zum  
Regulierungsrecht  
19*

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**Mohr Siebeck**

# Studien zum Regulierungsrecht

Edited by

Gabriele Britz, Martin Eifert, Michael Fehling,  
Thorsten Kingreen and Johannes Masing

19





Moritz J. K. Blenk

# Uses and Misuses of International Economic Law

Private Standards and Trade in Goods  
in the WTO and the EU

Mohr Siebeck

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Printed with the support of the Scientific Society of Freiburg

ISBN 978-3-16-161640-2 / eISBN 978-3-16-161679-2

DOI 10.1628/978-3-16-161679-2

ISSN 2191-0464 / eISSN 2569-4448 (Studien zum Regulierungsrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <http://dnb.dnb.de>.

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The book was printed on non-aging paper and bound by Laupp & Göbel in Gomaringen.

Printed in Germany.

*For my beloved wife Lea-Ariane*



## Preface

Standardization is a classic form of rulemaking. Nonetheless, it is notoriously diffuse and gives rise to questions and debate; in particular over the standards' normativity, legitimacy and nature – whether public or private, national or international. In this book, I apply a policy-oriented approach to international law to comparatively analyze the role of private rulemaking within the context of international economic integration in the WTO and the EU. Thereby, I aim to elucidate the opaque phenomenon of private standardization from a legal perspective and, more profoundly, shed new light on economic integration.

The Faculty of Law at the Albert-Ludwigs-Universität Freiburg i. Br. accepted this work as an inaugural dissertation for the attainment of a doctoral degree in the winter semester of 2021/22. I was engaged in researching and writing from March 2016 to November 2019.

I would especially like to thank my supervisor, Professor Dr. Ulrich Haltern LL.M. (Yale) for having been an excellent teacher. He gave me the freedom to explore the ideas presented here, as well as the tools needed to study the complex vastness I soon realized that I had gotten myself into. I also wish to thank Dr. Bjørnstjern Baade for the rapid preparation of the second opinion and the valuable comments.

Further, I would like to thank the editors of the *Studies of Regulatory Law* series, Justice Professor Dr. Gabriele Britz, Professor Dr. Martin Eifert, LL.M. (Berkeley), Professor Dr. Michael Fehling, LL.M., Professor Dr. Thorsten Kingreen, and Professor Dr. Johannes Masing, as well as the publishing house, Mohr Siebeck, for accepting my work.

This project was supported by a scholarship for doctoral students from the Friedrich Naumann Foundation for Freedom with funding from the German Federal Ministry of Education and Research. I wish to thank the Foundation for its support and trust.

Further, I would like to thank the Scientific Society of Freiburg (Wissenschaftliche Gesellschaft Freiburg i. Br. e.V.) which subsidized the printing of this book.

I would also like to thank my friends and colleagues for their support, patience, feedback, and humor. I wish to thank Mary Townswick in particular. The encouraging words I received at the Society of International Economic Law 2016 Johannesburg Global Conference, especially from Professor Ga-

brielle Marceau, Ph.D., and Professor Dr. Junji Nakagawa, inspired me to tackle this lengthy project.

I could not have completed this work without my family. My parents and my daughter Freya-Felicitas' love as well as the joyful anticipation towards the birth of my son kept me going.

My loving wife, Dr. Lea-Ariane Blenk, brought in the sunshine even while I was burning the midnight oil. To her I owe the most and dedicate this book.

Vienna, 27 March 2022

*Moritz Johannes Konrad Blenk*

# Contents

Preface .....	VII
Introduction: Thesis and Delineation of the Task .....	1
<i>A. Private Standards, Economic Integration,         and the Comparative Method</i> .....	7
<i>B. Thesis: Trade and Telos</i> .....	11
<i>C. International Law and Policy</i> .....	14
<i>D. Thumbnail Itinerary</i> .....	21
Part One: The Analytical Framework .....	24
<i>A. Trade: Protectionism, Fair Trade and Trade Liberalization</i> .....	24
<i>B. Law: Cooperation and Telos</i> .....	32
I. International Cooperation .....	33
II. Telos and Trade Liberalization .....	34
1. Free Trade: Maximum Regulatory Competition .....	37
2. Market Building: The Open Level Playing Field .....	42
3. Protectionism-Free Trade: Limited Regulatory Competition .....	48
III. Conclusion: Trade and International Order .....	55
<i>C. Problems and Expectations:         Responsibility, Regulatory Autonomy and Legitimacy</i> .....	57

Part Two: Private Standards and the Problem of Responsibility.....	63
<i>A. The WTO: Protectionism-Free Trade</i> .....	63
I. First Expectations: The GATT 1947 and Public Order Choices.....	64
II. Changing Context: Politics, Standards, Innovation and the Governance Turn.....	72
III. Negotiating New Public Order Choices.....	87
1. Private Choices and Public Interference in Competition Between Products .....	90
2. Private Self-Restrictions and the Pre-Determination of the Commercial Success of Imports .....	99
3. Derogation, Performance Regulations and Private Standards.....	101
4. The Non-Violation Complaint.....	102
IV. Reformulating Public Order Choices: The TBT 1980.....	103
V. A New Old Constitutive Decision: The WTO.....	111
1. The TBT: Old Wine in New Bottles .....	115
2. The SPS: Not a Code of Good Practice for SPS Standards .....	118
3. The Telecoms Reference Paper: Limited Context and Aim .....	125
4. The GATT 1994: True to Purpose.....	129
VI. Changing Context: A Global Value Chain World, Sustainability and Food Management .....	134
1. Global Economic Reorganization.....	134
2. The Politics of Products and Fair-Trade Standards.....	137
3. Food Scares and Retail Standards.....	148
4. Effects on Trading Opportunities .....	156
VII. Negotiating New Policy: The WTO'S TBT and SPS Committees ..	160
1. Confusion Over Community Expectations: A South/North Debate .....	160
2. The Real Issue: The Constitutive Decision for Protectionism-free Trade.....	172
VIII. Conclusion and Summary: Responsible by Choice Only .....	177
<i>B. The EU: Market Building</i> .....	179
I. First Expectations: The Constitutive Decision for the Market and Public Order Choices .....	181
II. Changing Context: Disappointing Functionalism .....	192
III. Considering Constitutive Choices: The "New Legal Order" .....	194
IV. Changing Context: Deadlock.....	198

V.	New Public Order Choices: Experimental Regulation, Market Access and Private Choices.....	200
1.	Private Actors and Expectations Regarding Members' Conduct.....	204
2.	Private Actors and Expectations Regarding their Conduct.....	207
VI.	Changing Context: From Vice to Virtue.....	210
VII.	Reformulating Public Order Choices: Targeting the Private.....	211
1.	Mutual Recognition: Private Standards as a Necessary Infrastructure.....	211
2.	The New Approach: Harmonized Private Standards for Unconditional Mutual Recognition.....	219
VIII.	A New Constitutive Decision: The Single European Act and Private Standards.....	222
IX.	Changing Context: The Market's Limits.....	225
X.	Implementing Constitutive Choice: Market Access and <i>de facto</i> Regulations.....	228
1.	The Real Issue: The Constitutive Decision for the Market-Telos.....	228
2.	The Implication for Private Actors: Protecting the Enjoyment of a Public Good.....	244
3.	Formalizing Informal Governance: Redefining National Private Standards.....	255
4.	Everyday Conditional Mutual Recognition: Strengthening the European Standardization Clubhouse.....	271
XI.	Conclusion and Summary: The Tripartite Responsibility.....	286

Part Three: Private Standards and the Problem of  
Regulatory Autonomy.....291

A.	<i>The WTO: Protectionism-Free Trade</i> .....	291
I.	First Expectations: Regulatory Competition.....	291
II.	The TBT 1980: Not a Choice for Approximation.....	298
III.	The GATT 1947: Not a Choice for Collective Public Interest Protection.....	304
IV.	The Limits of the WTO: Private International Standards and Collective Interests.....	312
1.	Still No Approximation.....	313
2.	Law in the Books: Not Protecting Collective Public Interests.....	319

3.	Law in Action: Working Around Limitations .....	324
V.	Conclusion and Summary: A Strange Marriage Between Law and International Politics .....	340
<i>B.</i>	<i>The EU: Market Building</i> .....	342
I.	First Expectations: A Single Competitive Economy .....	343
II.	New Governance and Approximation: Private Standards as Regulatory Limits .....	346
III.	New Governance and the Protection of Collective Interests .....	349
1.	The Scope of the Collective Economic Interest: Something Else that We Share .....	350
2.	Public and Private Promotion of European Public Interests .....	359
3.	Protecting Collective Interests with Private Standards .....	367
IV.	Conclusion and Summary: The Dual Nature of European Regulatory Autonomy .....	374
	Part Four: Private Standards and the Problem of Legitimacy .....	379
<i>A.</i>	<i>The WTO: Protectionism-Free Trade</i> .....	379
I.	First Expectations: The TBT 1980 and Private Standards as Information .....	379
II.	The WTO: Confusion Over Community Expectations .....	386
1.	The TBT Committee Discusses International Standards .....	387
2.	The Real Issue: The Constitutive Decision for Protectionism-Free Trade .....	400
III.	Conclusion and Summary: Facts and Legitimacy .....	405
<i>B.</i>	<i>The EU: Market Building</i> .....	407
I.	First Expectations: Publicization and the Pareto-Frontier of Legitimacy .....	408
II.	European Harmonized Standards .....	414
1.	Private Harmonized Standards as a Part of European Regulation .....	415
2.	Private Harmonized Standards and Judicial Review .....	420
III.	Broader Issues, New Governance and the Legitimacy of Private Standards .....	443
IV.	Conclusion and Summary: Law and Legitimacy .....	447

Part Five: Comparison .....	450
<i>A. The Problem of Responsibility and Private Standards</i> .....	450
<i>B. The Problem of Regulatory Autonomy and Private Standards</i> .....	455
<i>C. The Problem of Legitimacy and Private Standards</i> .....	459
 Part Six: Appraisal .....	 463
<i>A. The WTO and Private Standards: Pragmatic Cosmopolitanism</i> .....	463
I. A New Mandate: Law-Mediated Global Governance? .....	463
1. Theory: The Global Public Turn .....	466
2. Policy: Responsibility, Regulatory Autonomy and Legitimacy .....	478
II. In Defense: The Strength in the WTO's Weakness .....	491
1. Theory: Democracy, Law and Identity .....	491
2. Policy: Responsibility, Regulatory Autonomy and Legitimacy .....	505
III. Re-Defining Disallowed Protectionism within a Limited Mandate? .....	510
<i>B. The EU and Private Standards: The Market Citizen</i> .....	518
<i>C. Conclusion and Summary</i> .....	526
 Part Seven: Conclusion and Summary .....	 529
 Epilog: Ergebnis und Zusammenfassung der Thesen .....	 538
 Bibliography .....	 549
 Index .....	 573



## Introduction

### Thesis and Delineation of the Task

What is the relationship between international economic law and private standards? Recently, the debate on the relationship between private conduct and international economic integration has prominently reemerged within the World Trade Organization (WTO) and the European Union (EU). It is generally acknowledged that today private standards play a significant role in determining the nature and terms of international trade.<sup>1</sup> Some authors describe standards as pervasive mechanisms of international governance.<sup>2</sup> There is a heated debate over the status of many private standards under WTO law, and there is a longstanding discussion over the implications of the EU's fundamental freedoms for private actors and the role of private standards in EU policies. The debates concur with the ongoing discussion surrounding privatization and the role and meaning of the law.<sup>3</sup> It has been lamented, to give one example, that

“the EU Commission and Member States have developed an extra-WTO Precautionary Principle-based [...] policy framework that is implemented indirectly through the ostensibly private activities of [...] private standards bodies that promote EU cultural preferences favourable to EU industry.”<sup>4</sup>

The following study offers a principled analysis of the engagement of the WTO and the EU with the phenomenon of private conduct – especially standardization. It will build on a contextual comparative inquiry. The interaction of economic integration covenants with private standards offers a unique look into the heart of public international economic law. By comparatively exa-

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<sup>1</sup> *Du*, The Regulation of Private Standards in the World Trade Organization, Food and Drug Law Journal (2018), 432 (433).

<sup>2</sup> *Abbott/Snidal*, International ‘Standards’ and International Governance, Journal of European Public Policy (2001), 345 (345).

<sup>3</sup> See only *Dickinson*, Public Law Values in a Privatized World, Yale Journal of International Law (2006), 383–426 with further sources.

<sup>4</sup> *Kogan*, Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability, Global Trade and Customs Journal (2007), 319 (331). See also *Kogan*, The Extra-WTO Precautionary Principle: One European “Fashion” Export the United States Can Do Without, Temple Political & Civil Rights Law Review (2007), 491–604.

vating key concepts in international economic law, the aim is to provide deeper insights for both WTO and EU law that surpass the threshold issue of private standards – hence the broader title of this study.<sup>5</sup>

The relation between private standards and trade-liberalization efforts also offers a unique look into the heart of contemporary international and European law, as discussions over private standards feature in debates about the role of law in both European and global governance.<sup>6</sup> Indeed, some authors put forward private standards as a means of achieving law-mediated governance and propose a transnational version of what has been termed New Governance at the domestic level – a regulatory strategy relying on hybridization; soft law and co- and (orchestrated<sup>7</sup>) self-regulation. The very description of

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<sup>5</sup> The title borrows from *Kahn-Freund*, *On Uses and Misuses of Comparative Law*, *The Modern Law Review* (1974), 1–27.

<sup>6</sup> For examples of recent general discussions on global governance, see *Khanna*, *Connectography: Mapping the Future of Global Civilization*, New York 2016; *Mazower*, *Governing the World, The History of an Idea*, New York 2012. For an overview of the literature on global private governance see *Bartley*, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, *Theoretical Inquiries in Law* (2012), 517–542; *Wai*, *The Interlegality of Transnational Private Law, Law and Contemporary Problems* (2008), 107–127. For an overview of the governance literature, see *Fukuyama*, *Governance: What Do We Know, and How Do We Know It?*, *Annual Review of Political Science* (2016), 89–105, who finds that “[t]oday ‘governance’ is applied promiscuously to a whole range of activities that have in common the act of steering or regulating social behavior” (*Ibid.*, 90). Some authors define Global Governance as “the transnational regulation of transnational policy problems, by either governmental, intergovernmental, or non-governmental actors” (see *Marx/Martens/Swinnen/Wouters*, *Conclusion: Private Standards – A Global Governance Tool?*, in: *Marx/Martens/Swinnen/Wouters*, *Private Standards and Global Governance, Economic, Legal and Political Perspectives*, Cheltenham [UK] and Northampton [MA, USA] 2012, 295). See also *Hoffmann-Riem*, *Die Governance-Perspektive in der rechtswissenschaftlichen Innovationsforschung*, Baden-Baden 2011.

<sup>7</sup> On this approach, see *Abbott/Genschel/Snidal/Zangl*, *Orchestration: Global Governance Through Intermediaries*, in: *Abbott/Genschel/Snidal/Zangl* (eds.), *International Organizations as Orchestrators*, Cambridge 2015, 3 et seq. The gist of the orchestration literature is to observe, in a first step, that “IGO’s ability to govern state and non-state behavior in pursuit of these goals [‘containing the use of violence, facilitating free trade, advancing economic development, fighting crime, promoting human rights, improving labor standards, defending biodiversity and providing relief after natural disasters and armed conflicts’] is contained by restrictive treaty mandates, close member state oversight and limited financial and administrative resources. In brief, IGOs often lack the capabilities to perform the roles they have been nominally allocated.” In a second step, this line of inquiry observes that international organizations are relying on “orchestration as a mode of governance” (governing through intermediaries) to overcome these limits. In a further step, some authors propose that international organizations should overcome these limits by orchestrating (see *Abbott/Snidal*, *Strengthening International Regulation Through Transna-*

the phenomenon and definition of private standardization is a question of ideology.<sup>8</sup>

Some authors suggest defining *regulation* as “the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome, which may involve mechanisms of standard-setting, information-gathering and behavioral modifications”<sup>9</sup>.

*Command-and-control regulations* can be legally mandatory specific means-based regulation (design-based). This mode of regulation implies that the regulator dictates the particular activities in which businesses must engage. It imposes the same required measure or technology on the regulated entities, even if they are not the most cost effective for firms.<sup>10</sup> The process of development of the contents of means-based regulations can be delegated to both parties “internal” to the regulator – such as governmental bureaucracies – or “external”, in which case the state endorses non-governmental standards, i.e., documents that are not legally mandatory.<sup>11</sup> These policies do not necessarily imply a specific form of market surveillance.

*Surveillance techniques* can range from the prohibitions of market placement for products not certified by an accredited certification body, to spot tests, which might ensue the prohibition of further operation. A conformity assessment process to determine compliance is usually obligatory and involves testing, inspection, and finally, certification, which can be linked to labeling.<sup>12</sup> Certification can be outsourced. An industry might be allowed to make self-declarations regarding compliance, or private actors can be accredited to certify compliance while being themselves surveilled by the state. A “strict reference” to a private

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tional New Governance: Overcoming the Orchestration Deficit, *Vanderbilt Journal of Transnational Law* [2009], 501–578). See also *Elsig*, Orchestration on a Tight Leash: State Oversight of the WTO, in: *Abbott/Genschel/Snidal/Zangl* (eds.), *International Organizations as Orchestrators*, Cambridge 2015, 65 et seqq.

<sup>8</sup> Indeed, “international trade and globalization are not just economic issues, and [...] the various facts and figures and theoretical arguments that get thrown around have to be set in a broader intellectual and ideological context” (*Horwitz*, *Spontaneous Order, Free Trade and Globalization*, in: *Garrison/Barry* (eds.), *Elgar Companion to Hayekian Economics*, Cheltenham [UK] and Northampton [MA, USA] 2014, 309). For an example, see *Teubner*, *Quod omnes tangit: Transnationale Verfassungen ohne Demokratie?*, *Der Staat* (2018), 171–194 (in English: *Teubner*, *Quod omnes tangit: Transnational Constitutions Without Democracy?* *Journal of Law and Society* [2018], 5–29).

<sup>9</sup> *Black*, Critical reflections on regulation, *Australian Journal of Legal Philosophy* (2002), 1 (1). For a discussion about the difference between law and regulation, see *Kingsford Smith*, *What is Regulation? A Reply to Julia Black*, *Australian Journal of Legal Philosophy* (2002), 37–46.

<sup>10</sup> *Carrigan/Coglianesi*, *The Politics of Regulation: From New Institutionalism to New Governance*, *Annual Review of Political Science* (2011), 107 (114).

<sup>11</sup> See *Abbott/Genschel/Snidal/Zangl*, *Two Logics of Indirect Governance: Delegation and Orchestration*, *British Journal of Political Science* (2015), 719–729.

<sup>12</sup> See *Egan*, *Constructing a European Market, Standards, Regulation, and Governance*, Oxford 2001, 57.

standard can incorporate it into a regulation.<sup>13</sup> Such a reference can be static or dynamic, although dynamic references tend to be constitutionally problematic.<sup>14</sup> Regulations can also require that goods bear labels transporting specific information, ranging from product contents and origin, the environmental friendliness and social equity of the production process to the full life-cycle impact of the product.<sup>15</sup> Regulations can define how the right to apply a specific “information shortcut” (label) may be won, i.e., what the criteria would be in order for a product to be lawfully marketed as, e.g., “child labor free”).

*Performance-based or ends-based regulations* regulate targets by granting them the flexibility to find the best or most cost-effective steps to take to meet the performance limit.<sup>16</sup> This mode of regulation reduces the information costs for governments because they are no longer required to “understand how business operations contribute to the policy issue and what specific actions should be required in order to alleviate the problem”<sup>17</sup>. Performance-based regulations can be specific or general and explicitly or implicitly refer to private standards. In contrast to means-based regulations, performance regulations imply a much larger role for private standards. The “protection of public interests by private” actors is usually “under some kind of surveillance by government agencies [...] [and] there is often implicit threat of imposed government regulation in case this ‘associational’ self-regulation becomes derailed”.<sup>18</sup>

The OECD – Regulatory Policy Division, 2006, *Alternatives to Traditional Regulation*, 137, defines *co-regulation* as a situation in which “[t]he regulatory role is shared between government and industry. Typically (a large proportion of) industry participants formulate a code of practice in consultation with the government. The code of practice is usually effected through legislative reference or endorsement of a code of practice. Breaches of the code are usually enforceable via sanctions imposed by the industry or professional organisations rather than the government directly.”

*Self-regulation* is “the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines [...] (particularly codes of practice or sectoral agreements)”<sup>19</sup>.

The bottom line is that standards are “a guide for behavior and for judging behavior”.<sup>20</sup> The ISO/IEC Guide 2 defines standardization as an

<sup>13</sup> See *Bremer*, *American and European Perspectives on Private Standards in Public Law*, *Tulane Law Review* (2016), 325 (346).

<sup>14</sup> *Schepel*, *The Constitution of Private Governance, Product Standards in the Regulation of Integrating Markets*, Oxford and Portland (Oregon) 2005, 119.

<sup>15</sup> *Karbowski*, *Grocery Store Activism: A WTO Compliant Mechanism to Incentivize Social Responsibility*, *Virginia Journal of International Law* (2009), 727 (739).

<sup>16</sup> *Carrigan/Coglianesse*, *The Politics of Regulation: From New Institutionalism to New Governance*, *Annual Review of Political Science* (2011), 107 (114).

<sup>17</sup> *Ibid.*, 115.

<sup>18</sup> *Havinga*, *Private Regulation of Food Safety by Supermarkets*, *Law & Policy* (2006), 515 (517).

<sup>19</sup> See the *Interinstitutional Agreement on Better Law Making*, OJ C 321/01 2003, para. 22.

<sup>20</sup> *Abbott/Snidal*, *International ‘Standards’ and International Governance*, *Journal of European Public Policy* (2001), 345 (345). “Standards are a form of codified technical knowledge that enables the development of products and processes. While voluntary,

“activity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context”.

Without prejudice to their legal status in trade covenants, standards are private if they are “set (created) by commercial or non-commercial private entities, including firms, industry organisations, [and] nongovernmental organisations”; usually they are “owned and implemented by nongovernmental entities”.<sup>21</sup> “Agreements to set standards [...] may be either concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the operation of services of general economic interests such as” recognized standards bodies.<sup>22</sup> According to the Organisation for Economic Cooperation and Development (OECD), the standardization of products

“often promotes economies of scale in production, interchangeability between products of different manufacture, higher quality, complementarity between different products, and diffusion of technology. Standards may also reduce product heterogeneity and facilitate collusion and/or act as a non-tariff barrier to trade. Standards may also be used by incumbent firms in favour of their own products and processes and raise barriers to entry.”<sup>23</sup>

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standards regularize and constrain behavior (regulative function), lend a taken-for-granted quality to certain technologies and *modi operandi* (cognitive function), and favor cooperative strategies over adversarial ones (normative function)” (*Delimatsis*, Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process, *Duke Journal of Comparative & International Law* [2018], 273 [275]). See also U.S. Congress, Office of Technology Assessment, *Global Standards: Building Blocks for the Future*, TCT-512 (Washington D.C., DC: U.S. Government Printing Office, March 1992), 3.

<sup>21</sup> See *Chea/Piérola*, The Question of Private Standards in World Trade Organization Law, *Global Trade and Customs Journal* (2016), 388 (389 et seq.), who also offer an overview of definitions (including those cited here) coined by public organizations. For a good overview, see also *Henson/Humphrey*, Understanding the Complexities of Private Standard in Global Agri-Food Chains as They Impact Developing Countries, *Journal of Development Studies* (2010), 1628 (1630 et seq.); *Du*, The Regulation of Private Standards in the World Trade Organization, *Food and Drug Law Journal* (2018), 432 (437), who finds that “[t]hese entities include companies such as transnational corporations and big supermarkets, sectoral trade associations, non-governmental standardizing bodies and other non-governmental organizations.”

<sup>22</sup> Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001/C 3/02, para 162. See also *Charnovitz*, International Standards and the WTO, *GW Law Faculty Publications & Other Works*, Paper 394 (2005), 2.

<sup>23</sup> Glossary of Industrial Organisation Economics and Competition Law, OECD 2006 (available at <http://www.oecd.org/regreform/sectors/2376087.pdf>, last visited 7 April 2022), 80 et seq. See also 2011/C 11/01, Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paras 263 et seq.: “Standardisation agree-

In other words, private standards have it all; they can facilitate trade, be expressions of anticompetitive practices, or generally create market access barriers. They provide standardized solutions in almost all imaginable areas; from product safety (e.g., CEN, ISO, DIN or ASTM International<sup>24</sup>) and food safety (e.g., GlobalGAP or GFSI<sup>25</sup>) to environmental sustainability (e.g., FSC, MSC or ISO 14000<sup>26</sup>) and social issues (e.g., Rugmark, Fair Trade, SA 8000, or ISO 26000<sup>27</sup>).<sup>28</sup> Sometimes we consume them as labels; sometimes we take for granted a product's high standard of quality or safety, without knowledge of the standards involved.

In what follows, this introduction will briefly point out the relevance of private standards in the WTO and the EU and describe the limits of the comparative method (A). Next, it will outline the core thesis of the present study (B). This overview will be followed by a methodological justification for the policy-oriented approach of this study (C). Building on these insights, the path that the study will take will be portrayed in a reflection of the policy orientation sought (D).

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ments usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers). [...] Standard-setting can, however, in specific circumstances, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard.”

<sup>24</sup> CEN: European Committee for Standardization; ISO: International Organization for Standardization; DIN: German Institute for Standardization; ASTM International: American Society for Testing and Materials International.

<sup>25</sup> GlobalGAP: Global Good Agricultural Practices; GFSI: Global Food Safety Initiative.

<sup>26</sup> FSC: Forest Stewardship Council; MSC: Marine Stewardship Council; ISO 14000 series on environmental management.

<sup>27</sup> SA: Social Accountability; ISO 26000: Guidance on social responsibility.

<sup>28</sup> Concerning these latter aims and especially where governments rely on New Governance, one commentator has lamented that “such countries may have more than acquiesced in the development of ‘private’ environmental and corporate social responsibility (CSR) certification and labelling standards regimes that have had the effect of denying market access to a host of foreign products and services” (*Kogan, Discerning the Forest from the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability*, *Global Trade and Customs Journal* (2007), 319 (319)).

## A. Private Standards, Economic Integration, and the Comparative Method

How should the positive and negative potential of private standards play out in international economic integration? This inquiry proposes that looking at how a trade-liberalization covenant integrates private standards – as both trade restrictions and facilitators – is an extraordinarily potent method of digging into the heart of international economic law and thereby increases our knowledge about the subject more generally.<sup>29</sup> Highlighting the policy implications proposed by contemporary international legal theory concerning private standards – such as the International Public Law, Global Administrative Law and Transnational Law approaches – is an excellent way to understand and eventually evaluate these theories. In this vein, the WTO is seen as the focal point that would bridge the gap between trade liberalization and global governance – especially by relying on “publicized”, or “constitutionalized”, private standards. In the GATT/WTO context, private standards have featured in debates about treaty reform. One early example is the 1980’s Agreement on Technical Barriers to Trade (TBT 1980) – the so-called Tokyo Standards Code. The contemporary debate about the relationship between GATT/WTO obligations and private food and sustainability standards began in 2005 – also as a development issue<sup>30</sup> – and has re-enthused proposals to introduce competition rules into WTO law. Such rules exist in the EU. There, private standards now play an essential role in efforts to approximate Member States’ regulatory market interventions to create a single competitive environment. Especially since the 1980s, the New Approach to Technical Harmonization and Standardization tackled the problem of divergent domestic private standards by building a private European standardization system, involving national actors. Given that transnational governance structures that build on a trade-liberalization covenant exist in the EU, many see it as an avant-guard or believe that “[t]he E.U. [...] is particularly instructive for

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<sup>29</sup> *Enchelmaier*, Horizontalty: The Application of the Four Freedoms to Restrictions imposed by Private Parties, in: Koutrakos/Snell (eds.), *Research Handbook on the EU’s Internal Market*, Cheltenham (UK) and Northampton (MA, USA) 2017, 54, refers to the problem of private activities as “empirically relevant and dogmatically intriguing.”

<sup>30</sup> The trade concern was raised in the WTO by Saint Vincent and the Grenadines (and since then echoed by many developing countries and China) against the effect of the good agricultural practice private standards EurepGAP – of European origin – on export opportunities regarding fresh fruit and vegetables to the United Kingdom (see G/SPS/R/37 [11 Aug. 2005], para. 16.). See also *Du*, *The Regulation of Private Standards in the World Trade Organization*, *Food and Drug Law Journal* (2018), 432 (433).

anyone considering the future growth of transnational or international regulation and its concomitant administrative law”<sup>31, 32</sup>

Many authors assume that the WTO and the EU can be meaningfully compared.<sup>33</sup> Some claim, for example, that the “WTO membership basically believes that the two organizations are manifestations, at different levels of governance, of a common legal tradition”<sup>34</sup> and are built on the same economic theory foundations “that mutual welfare gains accrue to both parties in cross-border exchanges based on comparative advantage.”<sup>35</sup> In this vein, some observe that Member States of both the WTO and the EU tied their hands in matters of trade policy and extended this constraint to domestic policies that affect trade.<sup>36</sup> In addition, some observe that WTO’s “Panels and Appellate Body fulfill the same function and cover the same issue based on similar norms that national courts and the ECJ [CJEU] are fulfilling in the European Union.”<sup>37</sup> It may be easy to conclude that the function fulfilled by the EU and the WTO (trade liberalization) is the same and “as long as in law things fulfil the same function, they are normally comparable”<sup>38</sup>. Indeed, it

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<sup>31</sup> *M. Shapiro*, “Deliberative”, “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E.U.? *Law and Contemporary Problems* (2005). 341 (347), referring to the comitology process. See also *Rodrik*, *The Globalization Paradox: Democracy and the Future of the World Economy*, New York and London 2012, 220: “Anyone who thinks global governance is a plausible path for the world economy at large would do well to consider Europe’s experience.”

<sup>32</sup> For an example, see *Rifkin*, *The European Dream: How Europe’s Vision of the Future Is Quietly Eclipsing the American Dream*, Cambridge 2005; *Bogdandy*, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, *European Journal of International Law* (2012), 315–334.

<sup>33</sup> See only *Ortino*, *Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law*, Oxford and Portland (Oregon), 2004.

<sup>34</sup> *Gaines/Olsen/Sørensen*, *Comparing Two Trade Liberalisation Regimes*, in: *Gaines/Olsen/Sørensen* (eds.), *Liberalising Trade in the EU and the WTO*, Cambridge 2012, 6. See also *Weiler*, *Epilogue: Towards a Common Law of International Trade*, in: *Weiler* (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade*, Oxford 2000, 201–232.

<sup>35</sup> *Gaines/Olsen/Sørensen*, *Comparing Two Trade Liberalisation Regimes*, in: *Gaines/Olsen/Sørensen* (eds.), *Liberalising Trade in the EU and the WTO*, Cambridge 2012. 6. *Shapiro*, “Deliberative”, “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E.U.? *Law and Contemporary Problems* (2005). 341 (341), holds that the “WTO and NAFTA [...] share the free trade aspects of the E.U.”

<sup>36</sup> See *Holmes*, *The WTO and the EU: Some Constitutional Comparisons*, in: *de Búrca/Scott* (eds.), *The EU and the WTO, Legal and Constitutional Issues*, Oxford and Portland (Oregon) 2001, 62.

<sup>37</sup> See *Ibid.*, 79.

<sup>38</sup> *Platas*, *The Functional and Dysfunctional in the Comparative Method of Law: Some Critical Remarks*, *Electronic Journal of Comparative Law* (2008), 1 (2). See also

can be argued that while “the EU is a different animal, it is worth reminding ourselves that [the] GATT itself is a form of preferential trading agreement for goods [and that] [w]e can compare the EU and the GATT/WTO in the same way that we can make comparisons with and between other bigger or smaller regional groupings such as NAFTA and Mercosur.”<sup>39</sup> In this vein, some describe the EU as an ideal-type economic integrator, which can serve as a “blueprint”<sup>40</sup>. Comparative studies on the EU and the WTO have appeared in two waves.<sup>41</sup> The first came at the turn of the millennium following the substantial institutional changes in Europe and the GATT/WTO. These studies “explored the divergent and then re-convergent trajectories of the EU and the WTO”<sup>42</sup>. The second appeared roughly ten years later and, with “dimmed hopes for convergence”, paid more attention to persistent differences.<sup>43</sup> One can describe all of these studies as broadly pursuing a functional approach to comparative law.<sup>44</sup> The essence of functional comparison is a comparison of problem solving, rather than a comparison of concepts.<sup>45</sup> The

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*Zweigert/Kötz*, An Introduction to Comparative Law, 3<sup>rd</sup> ed. Oxford 1998, 34; *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, 5.

<sup>39</sup> *Holmes*, The WTO and the EU: Some Constitutional Comparisons, in: de Búrca/Scott (eds.), The EU and the WTO, Legal and Constitutional Issues, Oxford and Portland (Oregon) 2001, 68.

<sup>40</sup> *Gestel/Micklitz*, European Integration Through Standardization: How Judicial Review is Breaking Down the Club House of Private Standardization Bodies, CMLRev (2013), 145 (155).

<sup>41</sup> *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 4.

<sup>42</sup> *Ibid.*, 4. See *Ortino*, Basic Legal Instruments for the Liberalization of Trade, A Comparative Analysis of EC and WTO Law, Oxford and Portland (Oregon), 2004, who provides further sources (*Ibid.*, 6).

<sup>43</sup> See *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 5. Examples of literature from this time include *Reid*, Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience. Northampton (UK) and Portland (Oregon) 2015; *Lianos/Odudu* (eds.), Regulating Trade in Services in the EU and the WTO, Trust, Distrust and Economic Integration, Cambridge 2012.

<sup>44</sup> See *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: Gaines/Olsen/Sørensen (edit), Liberalising Trade in the EU and the WTO, Cambridge 2012, 8. On comparative law generally, see *Kischel*, Rechtsvergleichung, Munich 2015; *Ogus*, Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, The International and Comparative Law Quarterly (1999), 405–418.

<sup>45</sup> *Kischel*, Rechtsvergleichung, Munich 2015, 183.

aim is not to compare two sets of norms but to compare how a legal order resolves specific real or imagined problems.<sup>46</sup>

Any research agenda that goes beyond description and hopes to “identify what each [legal order] might take from the approach or experience of the other”<sup>47</sup> has to acknowledge the limits of comparative law as a tool of law reform.<sup>48</sup> “Any attempt to use a pattern of law outside the environment of its origin [...] [entails] the risk of rejection.”<sup>49</sup> Therefore, the use of the comparative method “requires a knowledge not only of the foreign law, but also of its social, and above all its political contexts”.<sup>50</sup> In this vein, some find that “[t]he EU has evolved into a much broader and more integrated internal market regime than the WTO, which expressly maintains its focus on international trade issues”<sup>51</sup>, and that the two organizations are “fundamentally different in their essential structure and ambition and relationship with constituent national governments that define their legal and political cultures.”<sup>52</sup> Some authors recognize that “[...] specific values are inevitably crystallised in international trade rules, and in our ideas about the meaning and purpose of international trade regulation.”<sup>53</sup> Others observe that “[t]he idea that the WTO could look to, and even learn from – the EU may seem counter-intuitive; so different are these two organizations in terms of scale and ambition.”<sup>54</sup>

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<sup>46</sup> *Ibid.*, 180.

<sup>47</sup> *Reid*, Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits, *Journal of World Trade* (2010), 877 (878).

<sup>48</sup> See *Kahn-Freund*, On Uses and Misuses of Comparative Law, *The Modern Law Review* (1974), 1 (2), who describes “three purposes pursued by those who use foreign legal patterns of law in the process of law-making. Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one’s own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce.”

<sup>49</sup> *Ibid.*, 27; for a critique of the “legal transplant” metaphor, see *Teubner*, Legal Irritants: How Unifying Law Ends up in New Divergences, in: Hall/Soskice (eds.), *Varieties of Capitalism, The Institutional Foundations of Comparative Advantage*, Oxford and New York 2001, 417 et seqq., who prefers the concept of “social irritants”.

<sup>50</sup> *Kahn-Freund*, On Uses and Misuses of Comparative Law, *The Modern Law Review* (1974), 1 (27); See also *Kischel*, *Rechtsvergleichung*, Munich 2015, 164 et seqq., 187 et seqq.

<sup>51</sup> *Gaines/Olsen/Sørensen*, Comparing Two Trade Liberalisation Regimes, in: *Gaines/Olsen/Sørensen* (edit), *Liberalising Trade in the EU and the WTO, A Legal Comparison*, Cambridge 2012, 7.

<sup>52</sup> *Ibid.*, 6.

<sup>53</sup> *Snyder*, The EU, The WTO and China, *Legal Pluralism and International Trade Regulation*, Oxford and Portland (Oregon) 2010, 285.

<sup>54</sup> *Scott*, International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO, *EJIL* (2004) 307 (352).

# Index

- AFNOR 85, 218
- Agenda 21 144, 304
- agricultural products 118, 193, 248 et seq., 264, 308
  - Codex Alimentarius Commission 78, 150, 385, 387, 396
  - food management 134
  - food safety 6, 119, 143, 172, 261, 289, 349, 511
  - food scares 148
  - food standards 148 et seqq., 178, 260 et seq., 446, 516
  - GlobalGAP 6, 152 et seqq., 261 et seq., 447, 518
  - private SPS standards 155, 164 et seqq., 268, 289, 511
- approximation 45, 86, 180 et seqq., 210, 220, 255, 262, 271 et seqq., 292, 298, 313, 344, 346, 401, 421, 455, 457, 485, 506
  - *de facto* harmonization 80, 349, 485
  - harmonization 13, 21, 38, 45, 50, 74 et seqq., 103, 164, 166, 180 et seqq., 256, 271, et seqq., 318, 328, 340 et seqq., 381, 406 et seq., 455, 460, 506, 520
  - horizontal standardization agreements 103, 176, 212 et seq., 259, 264, 405, 451
  - standardization 1, 4, 76, 81, 117, 201, 256 et seqq., 265 et seqq., 279 et seqq., 382, 411, 445, 491
- ASTM International 6, 382 et seqq.
- bilateral relations 56
  - inter-state normative pattern, *see* law BIT 76
- Blauer Engel 142
- BRC 148, 151, 167, 260 et seqq.
- Bretton-Woods 65
- BSI 80, 106, 218, 269 et seq.
- capitalism 16, 31, 296, 321, 484, 517
  - caring 176
  - collective 517
  - early 486
- capture 382, 390, 400, 410, 416, 443, 460, 496, 500
- cartel 212, 266, 431, 433, 443
- CEN 6, 85, 87, 216 et seqq., 259, 270 et seq., 389, 395, 416 et seqq., 495, 497
- CENELEC 85, 87, 210, 216, 219 et seq., 270 et seq., 389, 395, 416 et seqq., 438, 440, 495, 497
- certain selling arrangements, *see* TFEU choice
  - architecture 30, 91, 116, 131, 132
  - individual 15, 515
  - private 90 et seqq., 116, 131 et seq., 200 et seqq.
  - production site 76
  - social 28, 40, 42, 53, 59, 136, 225, 296, 374, 465
- citizenship 467, 476, 504, 517, 521 et seqq., 536
  - European 523 et seqq.
  - market 523, 536
- civil society 137, 142, 145, 155, 165, 173, 304
- CJEU
  - C-1/58, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community 199
  - C-1/96, The Queen v Minister of Agriculture, Fisheries and Food, *ex parte* Compassion in World Farming 364, 365
  - C-100/13, Commission v Germany 348

- C-102/86, Apple and Pear Development Council/Commissioners of Customs and Excise 207
- C-108/09, Ker-Optika 240
- C-110/0, Commission v Italy 242
- C-112/00, Schmidberger 250
- C-120/78, Rewe v Bundesmonopolverwaltung für Branntwein 214, 346, 360
- C-13/77, INNO v ATAB 204
- C-137/09, Josemans 365
- C-142/05, Mickelsson und Roos 243
- C-145/88, Torfaen Borough Council v B & Q PLC 51, 204, 229, 236, 240
- C-15/81, Schul 204
- C-158/04, Alfa Vita Vassilopoulos 238 et seq.
- C-159/00, Sapod Audic 192, 343, 253 et seq.
- C-16/94, Dubois and Cargo v Garonor 205, 252
- C-169/89, Van Den Burg 364
- C-171/11, Fra.bo 277 et seqq.
- C-177 & 178/82, Officer Van Justitie v. Jan Van de Haar & Aveka de Meern B.V. 232
- C-185/08, Latchways and Eurosafe Solutions 434
- C-192/73, Van Zuylen v Hag AG 202
- C-194/94, CIA Security International v Signalson and Securitel 273
- C-2/90, Commission v Belgium 362
- C-20/03, Burmanjer and Others 240
- C-227/06, Commission v Belgium 275
- C-24/68, Commission v Italy 203
- C-240/83, Procureur de la République/ADBHU 357
- C-25/62, Plaumann v Commission of the EEC 424
- C-26/62, Van Gend en Loos/Administratie der Belastingen 1, 195, 199
- C-260/89, ERT v DEP 226
- C-265/95, Kommission/Frankreich 249
- C-266/87, Pharmaceutical Importers 281
- C-267/91, Keck and Mithouard 231 et seqq., 288
- C-270/12, United Kingdom v Parliament and Council 423
- C-281/98, Angonese 248, 366
- C-29/69, Stauder v Stadt Ulm 199
- C-300/89, Commission v Council 350
- C-309/99, Wouters and Others 213, 246, 268, 278
- C-314/85, Foto-Frost v Hauptzollamt Lübeck-Ost 434
- C-34/95, Konsumentombudsmannen v De Agostini and TV-Shop 239
- C-36/59, C-37/59, C-38/59, C-40/59, Ruhrkohlenverkaufsgesellschaften 199
- C-36/74, Walrave and Koch v Association Union Cycliste Internationale and Others 207
- C-367/10 P – EMC Development v Commission 419
- C-367/10 P, EMC Development v Commission 434
- C-376/98, Germany v Parliament and Council 240
- C-379/98, PreussenElektra 362
- C-380/03, Germany v Parliament and Council 345
- C-384/93, Alpine Investments/Minister van Financiën 364
- C-398/13 P – Inuit Tapiriit Kanatami and Others v Commission 355
- C-412/93, Leclerc-Siplec v TF1 and M6 239
- C-415/93, Bosman 208, 244
- C-415/93, Union royale belge des sociétés de football association and Others v Bosman and Others 366
- C-416/00, Morellato 238
- C-428/12, Commission v Spain 244
- C-43/75, Defrenne 209
- C-438/05, The International Transport Workers' Federation und The Finnish Seamen's Union 366
- C-470/03, AGM-COS.MET 348
- C-5/94, The Queen/Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) 363
- C-56/64, Consten and Grundig v Commission of the EEC 203
- C-58/80, Dansk Supermarked 205
- C-6/64, Costa/E.N.E.L. 66, 195

- C-60/84, Cinéthèque 237
- C-613/14, James Elliott Construction 435
- C-630/16, Anstar 436
- C-69/88, H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State 230
- C-74/76, Ianelli v Meroni 203
- C-75/81, Blesgen 229
- C-8/74, Dassonville 202, 234
- C-815/79, Cremoni and Vrankovich 347
- C-83/78, Redmond 203
- C-9/56, Meroni v Haute autorité 422
- C-90/63, Commission of the EEC v Luxembourg and Belgium 195, 363
- Opinion of GA Van Gerven, Case C-145/88, Torfaen Borough Council v B & Q PLC 187
- Club of Rome 145
- code
  - of conduct 88, 140, 371, 385
  - of practice 4
- Commission Green Paper 143 et seq., 215, 222, 256 et seq.
- common interest 13, 14, 21, 59, 62, 468, 486, 498, 500
  - normative pattern, *see* law
- community expectations 14, 21, 57 et seq., 64, 92, 102, 116, 119, 132, 134, 174 et seq., 204, 255, 286 et seq., 291, 310, 321, 340, 342, 379, 381 et seq., 508 et seq.
- comparative advantage 8, 12, 26 et seq., 31, 56, 111, 201, 292, 294, 340
- comparative method 6, 10, 527
- competences 225 et seq., 233, 285, 288, 343 et seq., 456, 483
- competition
  - between firms 294
  - between jurisdictions 13, 23, 36 et seq., 274, 289 et seq., 340 et seq., 401, 457 et seq., 486, 500 et seq., 525
  - between transnational private standards 517
  - competitive economy 43
  - competitive environment as a public good 23, 28, 43, 44, 50, 58, 93, 138, 153, 181 et seq., 204, 227 et seq., 248, 251 et seq., 283 et seq., 343, 350, 358, 450 et seq., 481
  - distortion of 28, 44 et seq., 185, 188, 217, 229 et seq., 242, 285, 287, 343, 345, 351, 356, 373, 456, et seq.,
  - equity in 45, 182 et seq., 189, 209, 212, 229, 237, 358
  - European competitive environment 181 et seq., 226 et seq., 247, et seq., 283 et seq., 352, 358, 376, 450 et seq.
  - fair 57
  - freedom in 46 et seq., 183, 185, 209, 229, 320, 346, 358, 450, 456, 465, 532
  - horizontal 74, 294
  - interference in 90
  - inter-technology 74
  - law 30, 43 et seq., 49, 84, 125 et seq., 180, 191, 212, 235, 259 et seq., 278, 366, 405, 411, 418, 436, 443, 451, 487
  - market economy 48, 188, 346, 353, 528
  - monopoly 74, 105, 128, 222, 254, 285 et seq., 386, 403, 453, 494
  - regulatory, *see* competition – between jurisdictions
- competitive economy, *see* competition
- Conflict of Law, *see* law
- consensus
  - oriented 14, 16, 468, 490 et seq.
  - principle 113, 201, 225, 229, 493, 497
- constitutionalization 56, 196, 226, 325, 470 et seq., 483, 488, 520
- consumer
  - -ism 30, 98, 137, 142 et seq., 287, 304, 501, 514 et seq., 522, 526
  - sovereignty 55
- consumption skills 517
- coordination 16, 75, 84, 86, 126, 176, 219, 353, 373, 385, 389, 394, 402, 416, 419, 462, *see also* approximation
- Open Method of 42, 255, 257, 353 et seq., 367, 568
- corporate social responsibility 447
- corporations 5, 31, 84, 94, 139
- cosmopolitanism 31, 504, 514, 526
  - pragmatic, 514
- de minimis* test 231 et seq., 237

- decision
  - authoritative 14, 20 et seq., 57, 61, 475
  - constitutive 22, 35, 57, 64, 67, 128, 176 et seqq., 195, 225, 233, 286 et seqq., 379, 401
  - public order 22, 58, 61 et seqq., 185
- Demeter 155
- democracy 13, 17, 60 et seq., 223, 466 et seqq., 525 et seqq.
  - constitutional 492
  - deliberative 496
  - developmental 489
  - externalities 467
  - transnational 499, 501
  - vote 409, 496
- democratic legitimacy, *see* legitimacy
- de-regulation 50
- desire 15, 17, 320, 450, 514 et seq.
- developing countries 7, 65, 104, 113, 121, 126, 136, 140, 145, 157, 162 et seqq., 264, 296, 321, 387 et seqq.
- DIN 6, 78, 79, 106, 108, 218, 277, 281, 384, 414
- direct effect 56, 198, 236, 310, 356, 364, 453, 506, 534
- discrimination 6, 11, 36 et seqq., 67 et seqq., 147, 184 et seqq., 230 et seqq., 245, 248, 287, 295, 305, 315, 337, 345, 361 et seqq., 393 et seqq., 402, 451, 525
  - national treatment 68, 128, 330
- dissent 475, 477, 524
- DSU 93, 102, 113 et seq., 298, 314 et seq., 325, 337
  - flexibility 325
- dumping 27, 54, 137, 294
  
- East Asia 134 et seq.
- efficiency 17, 28, 32, 38, 47, 61, 194, 197, 296 et seq., 377 et seq.
- EFTA 85, 86, 177, 210, 220, 270, 287
- environment
  - issues 146, 266, 373
  - protection 138, 145, 155, 259, 327, 350 et seqq., 373, 376, 448, 457, 459, 498, 519, 524
- erga omnes partes* 57, 530, 539
- ESOs 106, 416, 418, 428, 436, 439
- extraterritoriality 52 et seqq., 327, 363 et seqq., 374, 456, 484, 524
  
- fair trade, *see* trade
- federalism 32, 47, 83, 466, 500
- foreign direct investments 76
- Foundation for Food Safety 152
- FRAND 259, 404, 441
- free trade, *see* trade
- FSC 6, 146, 175 et seq., 371, 474
- Functionalism 32, 48, 192
  - neo- 32
- fundamental
  - freedoms 1, 184 et seqq., 236, 244, et seqq., 346, 356 et seqq., 452, 530, 533, *see also* TFEU
  - rights 180, 199, 226 et seq., 252, 357, 360 et seq., 376, 456, 519, *see also* human rights
  
- GATS, *see* WTO
- GATT
  - Ad Note Art. III GATT 68, 71, 305
  - Annex 1.4 TBT 1980 381
  - Art. 1.1 TBT 1980 383
  - Art. 14.24 TBT 1980 105, et seqq., 307
  - Art. 2.2 TBT 1980 299 et seqq., 313, 380 et seqq.
  - Art. 3.1 TBT 1980 109
  - Art. 4.1 TBT 1980 109
  - Art. III GATT 68 et seqq., 121 et seqq., 130 et seqq., 177, 185, 295, 303 et seqq., 329 et seqq., 513
  - Art. XI GATT 67 et seqq., 99 et seqq., 122, 133, 177, 185, 303, 305, 326
  - Art. XX GATT 71 et seq., 102, 119, 177, 295, 297, 305, 310 et seqq., 326 et seqq., 457 et seqq., 507
  - Art. XXIV GATT 1947 83, 90, 108, 109
  - Doha Round 126
  - EEC – Apples 101
  - ITO 65 et seq., 125
  - Japan – Semiconductors 99 et seqq.
  - like products 67 et seqq., 116, 130 et seqq., 303, 313, 329, 331, 391
  - MFN 65
  - motives of a regulator 49
  - non-violation complaint 92, 102 et seq., 298
  - TBT 1980 111

- Tokyo Round 88, 103, 111, 118, 141, 303
- US – Tuna I (EEC) 306, 311
- US – Tuna I (Mexico) 97, 304, 306
- GATT 1994, *see* WTO
- General Program 211
- geographic arbitrage 76
- GFSI 6, 151 et seqq., 167, 265, 268, 518
- Global Administrative Law, *see* law
- Global Approach 269, 273
- global consumerism 517
- Global Ecolabelling Network 145
- global economic reorganization 135 et seq.
- Global Legal Pluralism *see* law
- Global Red Meat Standards 152
- global value chains 78, 135 et seqq., 157, 159, 516
- GlobalGAP *see* agricultural products
- globalization 3, 24 et seq., 31, 76, 161, 174, 293, 313, 320 et seq., 341, 374, 464, 466, 471, 495, 499
  - anti-, 136
- governance 2, 73, 98
  - global 2, 7 et seq., 14, 23, 31, 319 et seq., 342, 463 et seqq., 497 et seqq., 537
  - informal 255, 483
  - New 2 et seqq., 34, 73 et seqq., 139, 142, 174 et seqq., 255 et seqq., 288 et seqq., 346, 349, 353 et seq., 367 et seqq., 409, 443 et seqq., 484, 506
  - private 2, 64, 173 et seqq., 407, 411, 488, 520 et seq.
- governmentality 98
  
- HACCP 151, 261
- heroic outlets 517
- horizontal effect 186, 191
- human rights 2, 29 et seqq., 183, 251, 324, 477, 485, 524
- hybridization 2, 156
  
- identity 14, 17 et seqq., 331, 492 et seq., 501, 504, 517 et seq., 536
- ideology 3, 99, 145, 182
- IEC 4, 77, 116 et seq., 257, 270, 299, 383 et seqq.
- IFS 151, 260 et seqq.
  
- ILC Draft Articles 56 et seq., 92 et seqq., 123 et seqq., 205, 246, 275, 453, 513, 531
- ILO 139, 147, 296
- imagination 503
  - communities 18
- IMF 65
- inclusive patriotism 504
- Information Directive 217 et seqq., 288
- innovation 6, 73 et seqq., 84, 96, 115, 120, 194, 213, 222 et seq., 322, 390, 394, 403, 413 et seqq., 441, 447, 524
- institutionalism 32, 410
- integration
  - economic 7 et seqq.
  - deep 35, 63
  - shallow 11, 35
- international
  - order 55, 470, 489, 509
  - public authority 466, 469, 471, 475, 479, 482, 486 et seq., 491
- International Public Law, *see* law
- inter-state paternalism 29
- ISO 4 et seqq., 25, 50, 77 et seqq., 111 et seqq., 146 et seqq., 257, 269 et seq., 299 et seqq., 372, 382 et seqq., 445, 447, 549, 551 et seqq.
- ITO, *see* GATT
  
- judicial review 210, 241, 408, 420 et seqq., 433, 442, 446, 448, 471
- juridifying 34, 66
- jurisdiction characteristics 501, 516, 533
- juris-generative 489
- justice 15 et seqq., 27, et seq., 53, 293, 296, 370 et seq., 468, 487, 489, 502 et seqq., 518
  
- laissez-faire* 38 et seq., 44, 63
- law
  - and policy 15
  - belief 20, 501 et seqq., 522, 527
  - common-interest normative pattern 57
  - cooperation 32 et seqq.
  - customary international 91 et seqq., 100, 105, 131, 177, 454
  - Global Administrative 7, 23, 301, 338 et seqq., 469 et seqq., 478 et seqq., 535, 545, 550, 559, 562, 567

- Global Legal Pluralism 23, 472, 477, 491, 563
- inter-state normative pattern 13, 56, 59, 62, 379, 482, 486, 505, 530
- International Public 7, 19, 23, 56 et seq., 379, 409, 466 et seq., 503, 535, 545, 550, 558
- rule of 17 et seq., 195, 198, 287, 412, 471, 480, 491, 495, 502, 518, 534
- soft 2, 98, 112 et seq., 142, 180, 258, 353 et seq., 367 et seq., 377 et seq., 474, 477, 531
- Transnational 3, 7, 368, 480, 484, 488, 503, 535, 545, 549
- universality 17
- legitimacy
  - deficit 470
  - democratic 61, 408, 449, 460, 496 et seq., 520 et seq.
  - input 409 et seq., 497
  - output 60 et seq., 289, 410, 460, 462, 485, 492, 498, 503, 535
  - Pareto-frontier 411
  - phenomenological perspective 501
  - social 61, 324, 379, 519, 526 et seq., 536
- level playing field 12, 26, 44 et seq., 127, 181, 225, 252, 274, 287, 297, 343, 345, 350, 359, 373, 452 et seq., 486, 529, et seq.
- liberalism
  - embedded 30, 293 et seq., 349
  - neo- 32, 63
  - ordo- 63, 83 et seq., 293, 296
- liberty 16, 28, 522
- limitations, working around 324
- love 492, 502, 505, 519
- Low Voltage Directive 86 et seq., 200, 210, 216, 287 et seq., 347, 421
- loyalty 15, 20, 156, 502, 505, 521, 523, 527
  
- Malthusian 145
- market
  - building 42, 180, 342, 407, *see also* telos
  - citizen, *see* citizenship
  - distortion, *see* competition
  - economy, *see* competition
  - fragmentation 185, 267, 401
  - network 74, 82
  - open 119, 181, 185, 450
  - single 13, 41 et seq., 56, 182, 184, 188, 189, 190, 202 et seq., 222 et seq., 245, 256, 263 et seq., 284 et seq., 343 et seq., 450 et seq., 464, 519
- market access 6, 12 et seq., 35 et seq., 4 et seq., 82, 93, 96, 103, 119 et seq., 156, 164 et seq., 203, 221, 231 et seq., 254, 286, 292, 296, 303, 312, 328 et seq., 369, 414, 450 et seq., 481, 512
- *de facto* 50
- *de jure* 128
- effective 50, 63, 128 et seq., 178, 454, 455
- Marxism 16, 137, 467, 468, 490, 498, 561
  - Dependency Theory 137
  - Labor Theory of Value 137
- mercantilism 25, 63, 233
- monopoly *see competition*
- morality 335, 505
- MRA 41
- MSC 6, 146, 155, 266
- multilateralism 65, 293
- mutual recognition
  - conditional 180 et seq., 197, 214 et seq., 219, 225, 286 et seq., 525
  - unconditional 38 et seq., 211, 259, 433
- myth 504
  
- NAFTA 9, 113, 214, 232
- Nazi marketplace 99
- network market, *see* market
- Neuland 155
- New Approach 7, 38, 87, 180, 194 et seq., 210 et seq., 220 et seq., 255 et seq., 269 et seq., 280, 288, 345 et seq., 368, 393, 414, 416, 420 et seq., 433 et seq., 498, 520
- New International Economic Order 141
- NGOs 146, 304, 340 et seq., 368
- non-traditional private standards, *see* standards
- non-violation complaint, *see* GATT
- Northern markets 156

- OECD 5, 139 et seqq., 307, 354, 387, 391  
Oil Crisis 200  
Open Method of Co-ordination 42, 255,  
257, 353 et seqq., 367, 373, 569  
orchestration, *see* *regulation*  
outsourcing 27, 76, 78, 135, 154, 159, 172  
et seqq., 261, 295, 561
- patterned distribution 28  
PEFC 146, 174, 371  
politicized 19, 99, 411  
post-national identities 517  
preferential trade agreements 404  
Principles of Forest Management 146  
private  
– *de facto* standardization, *see* standards  
– international standards, *see* standards  
– responsibility, *see* responsibility  
– standardization bodies, *see* standards  
– standards, *see* standards  
– privatization 1, 72, 464, 473  
process and production methods 29, 110,  
304 et seqq., 321 et seqq., 458, 511 et  
seqq.  
– product-related 29, 238, 304, 306, 330,  
339, 511, 525  
– product-unrelated 29, 41, 154, 304 et  
seqq., 321 et seqq., 330 et seqq.  
production factor 26  
proportionality 192, 214, 225 et seqq., 255,  
266, 288, 355, 362, 409, 507  
protectionism 24 et seqq.  
– disallowed 13, 48, 54, 58, 62 et seqq.,  
90, 104 et seqq., 119, 176, 178, 186,  
313, 321, 340, 342, 406, 452 et seqq.,  
463, 481, 506 et seqq., 527 et seqq.  
– -free trade 48, 63, 291, 379, 400  
– intent 12 et seqq., 49, 51, 58, 67 et seqq.,  
93, 98, 104, 133, 174, 179, 185, 232,  
299, 303, 312 et seqq., 328, 338, 340 et  
seqq., 380, 403, 407, 452 et seqq., 531  
et seqq.  
– legal 53, 293  
public  
– choice 16, 29  
– Choice Theory 183  
– good, *see* competition  
– Turn 466, 470, 545
- quantitative restrictions, *see* trade  
race-to-the-bottom 28  
Realism 32, 42  
– neo 32  
REFIT 257 et seqq.  
regulation 3  
– co- 4, 255, 258, 299, 371, 513  
– command-and-control 3  
– domestic 71, 140, 295, 297, 344  
– *ex-ante/ex-post* 39  
– inward-looking 51 et seqq., 339, 458  
– meta- 448, 479  
– orchestration 2, 131, 368, 494  
– outward-looking 51, 52  
– performance-based 4  
– risk 50, 71, 349, 412, 413  
– self- 2, 4, 74, 75, 98, 144 et seqq., 174,  
177, 181, 258 et seqq., 452, 472 et  
seqq., 490, 494, 513, 524  
– surveillance techniques 3  
regulatory autonomy 13, 22, 52 et seqq.,  
58, 62, 104, 116, 138 et seqq., 185,  
215, 291, 293, 305, 313, 324, 340 et  
seqq., 360 et seqq., 455 et seqq., 478,  
482 et seqq., 506, 518 et seqq.  
responsibility  
– private 101, 180 et seqq., 190, 374,  
452  
– state 56, 57, 91, 131, 181 et seqq., 451  
– European Union 181 et seqq., 451  
rights talk 509  
Rio Declaration 144  
risk 39, *see also* regulation  
– socially adequate 374, 407, 412 et  
seqq., 438, 462
- sacrifice 20, 495, 522  
safeguard clauses 347, 349, 425, 442  
shelf access 36  
Single European Act 47, 180, 222 et seqq.,  
288, 344, 352, 359, 361, 457, 570  
single market, *see* market  
Social Accountability Accreditation  
Services 147  
Social Accountability International 147  
Socialism 16, 31, 65  
sociological thinking 471 et seqq.  
Southern exporters 156

- sovereignty 32, 35, 319, 360 et seqq., 375, 456, 501, 525, 532 et seqq.
- spontaneous order 15, 190, 377, 409, 473, 515
- standards
- battle 73
  - consortia 149, 212 et seqq., 382 et seq.
  - *de facto* private standardization 349
  - European 85, 89, 197, 201 et seqq., 216 et seqq., 256, 260, 271, 285 et seqq., 408, 415, 420 et seqq., 433 et seqq., 447, 456, 461, 520
  - European standardization 7, 181, 219, 224, 255, 257, 270 et seqq., 285 et seqq., 347, 414 et seqq. 434 et seqq., 456, 459, 461
  - fair trade 137
  - food, *see* agricultural products
  - infrastructure 134, 219, 288, 290, 452
  - international 59, 83 et seqq., 123, 161, et seqq., 175, 211, 214, 269 et seqq., 291, 301 et seqq., 314, et seqq., 338, et seqq., 379, et seqq., 444, 457 et seqq., 479, 485 et seqq., 507
  - lead 213
  - meta- 80, 151, 263, 265, 272
  - non-traditional private 160, 173 et seqq., 264, 481, 513, 518, 528
  - private 5, 7, 58, 76, 78, 123, 154, 160, 179, 181, 212, 281, 347, 367, 407, 421, 448, 473, 510, 520
  - private food, *see* agricultural products
  - private international 175, 291, 340, 379, 482, 506, 507, 509
  - private standardization bodies 86, 105, 178, 212, 282 et seqq., 386, 413 et seqq., 445, 448, 474, 480, 490, 497, 506, 510
  - public, 96, 275, 372
  - retail 148
  - sustainability 7, 177, 267 et seqq., 289, 291, 304, 341 et seqq., 371, 378, 508 et seqq.
- subsidiarity 227, 255 et seqq., 266, 355, 409, 465, 477,
- supremacy 56, 195, 477
- TBT, *see* WTO
- TBT 1980, *see* GATT
- technocracy 13, 523, 526
- deliberative 499
- Telecommunications Reference Paper, *see* WTO
- telos
- and trade 11
  - of free trade 11 et seqq., 37 et seqq., 50, 63, 186, 293, 349
  - of market building 11 et seqq., 42 et seqq., 127, 129, 172 et seqq., 343 et seqq., 409, 440 et seqq., 505 et seqq.
  - of non-protectionism 11 et seqq., 48 et seqq., 53, 56, 97, 172, 292, 297, 342, 457 et seqq., 508, 529
- TFEU
- Art. 101 TFEU 183, 246, 278, 286
  - Art. 110 TFEU 233
  - Art. 113 TFEU 233
  - Art. 114 TFEU 223, 240, 252, 285, 288, 344, 350, 355 et seqq., 456
  - Art. 267 TFEU 195, 428 et seqq., 460
  - Art. 30 EEC 183 et seqq., 250 et seqq., 281 et seqq., 345 et seqq., 359, 361
  - Art. 34 TFEU 22, 69, 180 et seqq., 231 et seqq., 268, 275 et seqq., 345, 359 et seqq., 365, 440, 450 et seqq., 481, 506, 530, 532, 534, 545
  - Art. 36 EEC 186, 202, 210 et seqq., 225, 281, 288, 344, 346, 359 et seqq.
  - Art. 36 TFEU 186, 285, 288, 344, 349, 359 et seqq., 452 et seqq.
  - certain selling arrangements 231, 238 et seqq.
- the Political 522
- Tokyo Round, *see* GATT
- trade
- fair 21, 26, 29, 30 et seqq., 40, 46 et seqq., 71, 137 et seqq., 173, 263 et seqq., 304, 312 et seqq., 324, 338 et seqq., 458 et seqq., 507, 518, 529, 533, 536, 543, *see* standards
  - free 12, 26 et seqq., 37 et seqq., 47 et seqq., 55 et seqq., 86, 134, 142, 217, 342, 349, 359
  - liberalization 2, 7 et seqq., 22, 30 et seqq., 41, 57 et seqq., 136, 292, 296, 312, 320, 375, 380, 450, 464 et seqq., 519, 527 et seqq.
  - non-fiscal measures 68, 233

- non-tariff barriers 5, 66, 87, 88, 118, 142, 183, 193, 199, 529
- obstacles to 22, 36, 40, 88, 204, 208, 241 et seq., 275 et seq., 303, 344, 356, 450
- policy approach 56
- quantitative restrictions of 25, 38, 118, 136, 193, 196 et seq., 202, 204, 243
- strategic policy 25, 51
- terms of 25, 52, 70, 88, 119, 233, 303
- Transnational Law, *see* law
- UN 78, 89, 126, 140, 145, 147, 150, 352, 387, 444, 554
- Codex Alimentarius Commission, *see* agricultural products
- uncertainty 39
- UNCTAD 141, 166
- UNFSS 518
- unilateralism 55
- Uruguay Round, *see* WTO
- Vademecum on European Standardisation 415 et seq., 424
- World Bank 65
- World War II 65, 77, 83
- World Wildlife Fund 146
- WTO
  - Annex 1.2 TBT 339, 382, 386, 396, 402, 404
  - Annex 1.4 TBT 381, 386
  - Annex A 1 SPS 121
  - Argentina – Hides and Leather 133 et seq.
  - Art. 12 SPS 160
  - Art. 13 SPS 22, 120 et seq., 164 et seq., 171 et seq.
  - Art. 13 TBT 160
  - Art. 14.4 TBT 115, 120, 453
  - Art. 2.3 SPS 119
  - Art. 2.4 TBT 160, 307, 314 et seq., 339, 393, 396 et seq., 457, 485, 490
  - Art. 2.5 TBT 104, 314, 321, 339, 386 et seq., 407, 457, 485
  - Art. 4.1 TBT 22, 109, 115, 162, 174
  - Art. XX (b) GATT 1994 119
  - Australia – Appels 124
  - Australia – Salmon (Art. 21.5) 125
  - Canada – Autos 132
  - Canada – Periodicals 131
  - Chile – Price Band 114
  - China – Auto Parts 133
  - Clove – Cigarettes 402
  - EC – Asbestos 331
  - EC – Biotech 124
  - EC – Sardines (AB) 315, 396
  - EC – Sardines (P) 113, 315, 396
  - EC – Seals 329 et seq.
  - GATS 64, 70, 126 et seq., 178, 306, 563
  - GATT 1994 129 et seq.
  - India – Measures Affecting the Automotive Sector 69
  - Japan – Film 130
  - Korea – Beef 131
  - Korea – Government Procurement 92
  - SPS, 118
  - SPS Committee 163 et seq.
  - TBT, 115
  - TBT Committee 160 et seq.
  - Telecommunications Reference Paper 64, 125, 129, 178, 480, 559
  - Turkey – Rice 132
  - Uruguay Round 111 et seq., 122, 126, 305, 313 et seq., 321, 550
  - US – Anti-Dumping and Countervailing Duties (China) 298
  - US – COOL (AB) 318
  - US – COOL (P) 318
  - US – Section 301 Trade Act 129
  - US – Shirts and Blouses 114
  - US – Shrimp (AB) 326 et seq.
  - US – Shrimp (P) 326
  - US – Tuna II (Mexico) 116, 117, 234 et seq., 397 et seq.