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Uses and Misuses of International Economic Law

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Edited by

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

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

Mohr Siebeck

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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. Björnstjern Baade for the rapid preparation of the second opinion and the valuable comments.

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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

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.[1] Some authors describe standards as pervasive mechanisms of international governance.[2] 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.[3] 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."[4]

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 exca-

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

[2] *Abbott/Snidal*, International 'Standards' and International Governance, Journal of European Public Policy (2001), 345 (345).

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

[4] *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.[5]

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.[6] 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[7]) self-regulation. The very description of

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

[6] 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.

[7] 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 seqq. 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.[8]

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"[9].

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.[10] 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.[11] 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.[12] 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.

[8] 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).

[9] *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.

[10] *Carrigan/Coglianese*, The Politics of Regulation: From New Institutionalism to New Governance, Annual Review of Political Science (2011), 107 (114).

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

[12] See *Egan*, Constructing a European Market, Standards, Regulation, and Governance, Oxford 2001, 57.

standard can incorporate it into a regulation.[13] Such a reference can be static or dynamic, although dynamic references tend to be constitutionally problematic.[14] 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.[15] 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.[16] 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"[17]. 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".[18]

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)"[19].

The bottom line is that standards are "a guide for behavior and for judging behavior".[20] The ISO/IEC Guide 2 defines standardization as an

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[13] See *Bremer*, American and European Perspectives on Private Standards in Public Law, Tulane Law Review (2016), 325 (346).

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

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

[16] *Carrigan/Coglianese*, The Politics of Regulation: From New Institutionalism to New Governance, Annual Review of Political Science (2011), 107 (114).

[17] *Ibid*., 115.

[18] *Havinga*, Private Regulation of Food Safety by Supermarkets, Law & Policy (2006), 515 (517).

[19] See the Interinstitutional Agreement on Better Law Making, OJ C 321/01 2003, para. 22.

[20] *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".[21] "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.[22] According to the Organisation for Economic Co-operation 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."[23]

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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.

[21] 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 seqq.); *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."

[22] 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.

[23] 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[24]) and food safety (e.g., GlobalGAP or GFSI[25]) to environmental sustainability (e.g., FSC, MSC or ISO 14000[26]) and social issues (e.g., Rugmark, Fair Trade, SA 8000, or ISO 26000[27]).[28] 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."

[24] CEN: European Committee for Standardization; ISO: International Organization for Standardization; DIN: German Institute for Standardization; ASTM International: American Society for Testing and Materials International.

[25] GlobalGAP: Global Good Agricultural Practices; GFSI: Global Food Safety Initiative.

[26] FSC: Forest Stewardship Council; MSC: Marine Stewardship Council; ISO 14000 series on environmental management.

[27] SA: Social Accountability; ISO 26000: Guidance on social responsibility.

[28] 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.[29] 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[30] – 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

[29] *Enchelmaier*, Horizontality: 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."

[30] 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"[31].[32]

Many authors assume that the WTO and the EU can be meaningfully compared.[33] 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"[34] 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."[35] 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.[36] 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."[37] 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"[38]. Indeed, it

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[31] *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."

[32] 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.

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

[34] *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.

[35] *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."

[36] 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.

[37] See *Ibid*., 79.

[38] *Platsas*, 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."[39] In this vein, some describe the EU as an ideal-type economic integrator, which can serve as a "blueprint"[40]. Comparative studies on the EU and the WTO have appeared in two waves.[41] 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"[42]. The second appeared roughly ten years later and, with "dimmed hopes for convergence", paid more attention to persistent differences.[43] One can describe all of these studies as broadly pursuing a functional approach to comparative law.[44] The essence of functional comparison is a comparison of problem solving, rather than a comparison of concepts.[45] The

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Zweigert/Kötz, An Introduction to Comparative Law, 3rd 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.

[39] *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.

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

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

[42] *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).

[43] 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.

[44] 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.

[45] *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.[46]

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"[47] has to acknowledge the limits of comparative law as a tool of law reform.[48] "Any attempt to use a pattern of law outside the environment of its origin […] [entails] the risk of rejection."[49] 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".[50] 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"[51], 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."[52] 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."[53] 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."[54]

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[46] *Ibid*., 180.

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

[48] 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."

[49] *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".

[50] *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.

[51] *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.

[52] *Ibid*., 6.

[53] *Snyder*, The EU, The WTO and China, Legal Pluralism and International Trade Regulation, Oxford and Portland (Oregon) 2010, 285.

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

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