

Standards, Regulations, and the Global Trading System

Global Business Dialogue Seminar Outline

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I. *Scope of Discussion:*

Limited to the findings of two documents:

- a recently released NFTC study entitled “Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science”
- a new NFTC paper based on that study that will be published by the Washington Legal Foundation later this month entitled, “EU Regulation, Standardization and the Precautionary Principle: The Art of Crafting a Three Dimensional Trade Strategy That Ignores Sound Science”

II. *Impetus for, Objective of and Findings from the NFTC study:*

- The experiences of our U.S. member companies reflected that separate industry sectors were waging their own individual battles against an increasing array of foreign country non-tariff technical barriers to trade seemingly based on principles other than ‘sound science’. In an increasing number of these battles the barriers encountered were national and regional health and safety, animal welfare and environmental regulations. While the expressed aim of such regulations was to protect important state interests, their actual purpose and/or ultimate effect was to block access of U.S. exports to foreign markets.
- The study’s **objective** was to find evidence that these industry encounters were not isolated occurrences and were not related only to industry-specific, technical conformity assessment issues. The goal of the study was also to highlight examples of particular legislation that broadly impacted many industry sectors, and if possible, to discern a pattern from their usage.
- The study **found** that while several countries had enacted overly stringent technical regulations and standards concerning food safety and environmental issues, including Korea and Japan, the most developed and coordinated regulatory and standardization system appeared within the EU.

- the EU regulations and standards addressed issues broader than the technical conformity assessment issues which deal primarily with accreditation, testing and certification – both agricultural and industrial sectors were affected. The EU grounded its regulatory and standards practices in the precautionary principle, an inherently unscientific touchstone.
- Yet Korea has itself adopted strict quarantine measures on fruits deemed infected with bacteria and these regs do not meet int'l established guidelines;
- Yet Korea, has imposed stringent regulations on food additives and nutrients and certain food production processes b/c they are essentially deemed unnatural and inconsistent with Korea practice;
- Yet Korea has recently enacted regulations to implement the Biosafety Protocol – these regulations are reportedly of concern to the U.S. gov't considering their stringency and potential to violate WTO principles.
- Korea is an important trading partner of the EU – for that trade to grow EU and Korea regulatory and standardization cooperation will also have to grow – if a stringent form of regulation and standardization results, it will interfere with other countries' bilateral trade with those two parties.

III. *Importance of Standards to the WTO Rules-Based System*

The provisions of the SPS and TBT Agreements (a/k/a the Standards Code) specifically refer to the need of national/regional legislatures to rely upon international standards formed through consensus at internationally recognized bodies pursuant to principles of sound science. In their absence, legislatures are to look at 'substantially equivalent regulations/ standards promulgated by other countries.

The WTO rules-based system seeks to harmonize rules for global trade. In the area of standardization this means generally the creation of one standard for each aspect of a product in each sector.

WTO rules as set forth in the SPS & TBT Agreements (and in Arts. III and XX of the GATT, the following principles:

1. National treatment must be ensured for exports of other countries – such products may not be discriminated against or otherwise treated differently merely b/c of place of origin;
2. Products, whether domestic or from other countries, must be evaluated on how they actually perform, how they are actually used or intended to be used, RATHER than based on how they are made – regulatory treatment of goods should NOT be based solely on process and production methods (PPMs) where such process has *no* bearing on the performance of the product.

3. National sovereignty is respected so that when governments are faced with a significant threat or emergency to their legitimate state interests, such as risks to human health and safety, the environment or national security, they may take limited provisional measures to respond and mitigate said threat or emergency.
 - HOWEVER: The threat / risk must be objectively ascertainable via a science-based risk assessment and must be posed by specific products or activities.
 - If so established, then and only then, may governments take LIMITED, PROVISIONSAL MEASURES TO mitigate such threat / risk.
4. In the event such measures are adopted in the face of serious threats to legitimate state interests, those measures MUST REFLECT THE LEAST TRADE RESTRICTIVE ALTERNATIVE AVAILABLE.
 - the purpose of the SPS & TBT Agmnts is to facilitate trade flow and to minimize the use of national standards and regulations as barriers to trade
5. There are a number of international standards bodies operating in the area of international trade such as the Int'l Standards Org, International EC, IEO, ITU, IPPC and the Codex Alimentarius, etc.
 - these bodies are supplemented by standards bodies at the national and regional levels.
- IV. *The Use of Standards and Regulations to Define Other Than Technical Conformity Assessment – The EU's Use of Standards as an Interface Between Public Policy and Industry Governance*
- V. *The EU's Use of the Precautionary Principle*