

GRIFFIN'S VIEW Volume 7, Number 2

June 2006, volume 7, number 2

Social responsibility

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Griffin's View <http://www.rechten.vu.nl/urlsearchresults.asp?itemnumber=2004>

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THE ADOPTION OF TECHNICAL REGULATIONS AND PRODUCTS STANDARDS TO IMPROVE ENVIRONMENTAL PROTECTION - A EUROPEAN, INTERNATIONAL AND COMPARATIVE PERSPECTIVE

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...The question the author would like to address is: what is the legal and institutional framework for the development of environmental product standards in the European Union, in Australia, in the United States of America and at international level?

The first section provides an analysis of the legal principles upon which voluntary standards and technical regulations to improve environmental protection and to avoid barriers in the internal market are adopted in the European Union.⁵ Differently from other countries where standards are mainly developed by the private sectors,⁶ the European institutions frequently issue binding regulations to set harmonised technical requirements.

Sections two and three examine the legal and institutional framework adopted in Australia and United States of America to improve environmental protection through product standards, also offering a comparative analysis.

...I.3 The Integration of Environmental Considerations in the Standardisation Process

In recent years there has been an increased focus on the role that standardisation, as a voluntary or binding tool, can play in protecting the environment and supporting sustainable development. Through the adoption of technical regulations and standards for products, it is possible to reduce environmental impacts by taking action on quality of the products rather than on the quantity of consumption. Standards can deal with the technical aspects of almost any product, service or process. They can play a crucial role in the design, manufacturing, packaging, end-of-life stages and with the efficient use of energy and natural resources.

The European Commission has highlighted the role of standardisation for an effective Integrated Product Policy (IPP)¹⁶ and has specifically proposed the promotion of the integration of environmental protection

requirements in standardisation activities in the Sixth Community Environment Action Programme adopted by the Council and the European Parliament in 2002.¹⁷ In February 2004, the Commission adopted its Communication on “Integration of Environmental Aspects into European Standardisation”.¹⁸

..._International environmental law has particularly affected Australian environmental law, introducing fundamental principles such as sustainable development and precautionary action, which now play a key role in the planning and ratification process of national legislations. Public participation is also a fundamental element in the environmental management system.

..._Differently from the eco-design requirement which consists in a positive obligation and leaves opportunity to industries to adapt their products, the restriction of use of hazardous substances consists of a prohibition, and imposes the strictest negative obligation and the most trade restrictive measure. The European Union has claimed the necessity of the measure to achieve specific environmental purposes. The WTO Panels tend to interpret the “necessity” as the obligation to choose the “least restrictive alternative” which meets the policy objectives. The body has established that

“a contracting party cannot justify a measure inconsistent with other GATT provisions as “necessary” in terms of article XX (d) if an alternative measure which it could be reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it”.⁹⁷

“Thus, can the EU demonstrate that the risks posed to human health and the environment by the substances under ban, are so significant that no other options, no less restrictive alternatives, except for the complete substance ban can sufficiently mitigate these risks?”⁹⁸

In particular the European bodies are supposed to prove first the objective of the regulation (limitation of the environmental impact of electrical and electronic equipments when they reach the end of life stage) and then that there are no other tools to reach it.

Regarding the European regulation, other doubts might arise. One is related to the effectiveness of the measures. The EU legislation addresses the ban only to electrical and electronic equipment. It might be argued that the restrictive measure turns to be just a protectionist discriminatory measure and unnecessary obstacle to free trade, because it is not effective enough to achieve the environmental purposes.

Secondly, in order to comply with international trade rules the European regulation must be supported by scientific evidence and must prove that the use of the prohibited substances in the electronics industry gives rise to a higher or different risk than in other industries. The preamble to the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) explicitly recognizes the right of each government to establish its own appropriate level of protection against risk. In case of non-scientific evidence the EU might invoke the precautionary principle, a non-scientific touchstone, to justify its measure and assessment of such risks.

..._The lack of scientific evidence in the development of national technical regulations, standards and procedures proposed or implemented for promoting human health and safety, animal welfare, and environmental protection, has been critically pointed out by foreign countries.¹⁰⁰ It has been argued that the lack of scientific evidence cannot be justified by the precautionary principle which is adopted in the European environmental policy as one of the key elements in developing an ecologically sustainable economy.

“We believe that when these regulations and standards are not based on sound science or international standards formed through consensus, they violate the terms of WTO [...] Agreements that serve as part of the foundation of the multilateral trading system, namely, the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement. Furthermore, when regulations and standards are not based on sound science they serve as de facto trade barriers and have a negative impact on a wide variety of U.S. export sectors, as well as those of developing countries”.¹⁰¹

100 A paper issued by the US Mission in Europe *Foreign Trade Standards Often Ignore Science* 2003.
<http://www.useu.be/Categories/Trade/May0603StandardsTradeBarriers.html> .

101 *Supra.*

[FNs 100 and 101 cite to a press release “Foreign Standards Often Ignore Science” carried on the website of the U.S. Mission to the European Union, relating to a white paper released by the National Foreign Trade Council entitled, *Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science*
<http://useu.usmission.gov/Article.asp?ID=6A2B54FD-14B1-41F4-BC6E-02933BCB4DAF>]