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Full Length Research Paper

Harmonization as an Effective Tool Facilitating Synchrony Laws Governing International Trade

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Abstract

Trade is one of the major reasons for transboundary relationships. It fosters cooperation among nations, encourages wealth, developments, technological advancement, among others. Yet, such relationship breeds conflict that could lead to countless court cases, war, poverty and other forms of negativity where the rules of trade are not robust to accommodate the needs of the trading parties. In view of the above, this paper seeks to contribute towards demonstrating the effectiveness of harmonization as a tool in the regulation of transnational trade activities.

Keywords: Harmonization, international trade, conventions, and soft laws.

INTRODUCTION

International trade has a protracted history, shaped by numerous transformations that aim at simplifying business transactions and reducing controversies for the benefit of both the buyer and seller across the globe. Unwritten customs, usages of merchants and general principles of law known as *Lex Mercatoria* regulated early transnational trade (Goode *et al.*, 2007). However, the complexities of modern trade and divergences of national laws may not be resolved by these old customs and usages because of regulatory variations and contradictions that discourage the growth of international commerce (Cremades and Plehn, 1983-1984). Therefore, contemporary transnational commerce, seek harmonization to reduce encumbrances in international transactions, perceived inefficiencies and entrenched conflict of laws.

Harmonization also aids the avoidance of economic, political and military conflicts, as well as enhances their solution of perceived problems in law and the role of legal advisors in international business (Pate, 2009 and Gopalan, 2003). In order to achieve these goals, harmonization adopts a different technique which

involves both hard and soft laws. However, these techniques may be encumbered with inconsistent interpretations or wrong applications which may affect its inability to remove national/regional barriers in international trade. Despite these challenges, international transactions have recorded successes through harmonization.

This paper explores the diverse understanding of harmonization and demonstrates its influence on national laws by examining various techniques such as conventions and other soft laws to analyze its process. Also, the approach and scope of harmonization are considered, as well as the extent to which it has changed national laws and areas it has faced challenges in this domain. Impediments to harmonization are examined and finally, recommendations to enhance its processes are made.

DEFINITION OF HARMONIZATION

According to Ziegel, 'Harmonization in this field of law is a

word with considerable elasticity. In its most complete sense, it means absolute uniformity of legislation among the adopting jurisdiction' (Ziegel in Gopalan, 2002). According to Leebron, 'harmonization can be loosely defined as making the regulatory requirements or government policies of different jurisdictions identical, or at least more similar' (Leebron in Gopalan, 2002). In these two definitions, harmonization is carefully illustrated as a flexible term without rigidity of meaning. Application can be stretched following the use of the words "elasticity and loosely" respectively. The definitions give power to national, regional or international instrument as unifying means which can be adopted by a state or jurisdiction. In the adoption of these policies, regulations or legislations, there are similarities and uniformities. However, the use of the construction 'absolute uniformity' is too strong and unlikely to be true of the reality of international law. This is because; states have interpreted international conventions differently. Also, states have sometimes ratified conventions or treaties to a limited extent which could create variations among adopting parties. This is because states protect their sovereignty and therefore reluctant to adopt foreign laws (Faria, 2002).

Furthermore, Glenn defines harmonization as an evolutionary process that results in ever 'greater levels of uniformity and correspondingly greater levels of supranational governance'(Glenn in Gopalan, 2002). This is a more flexible understanding of harmonization which allows the harmonizing instruments to pass various stages which could lead to amendments to a better law to serve an intended purpose. The concept of harmonization passing through stages supports the opinion of Rosett, who argues that harmonization runs through three distinct stages with different problems that need different solutions. Firstly, harmonization must draw together international issues and even controversial disputes. When a document has been established, there is the opportunity to put down one solution. In that sense, uniformity or harmonization has taken place. It is a way of cutting off 'the messy ends'.

A diplomatic conference will rarely reach a 'perfect' consensus, as factional interests seldom allow the production of such a solution. He argues that the second and third stages are crucial in determining the utility of harmonization. This is because at the second stage, practical problems emerge leading to litigations in courts and tribunals. At the third stage, which is the telling one, the solutions of the courts are analyzed and compared. This results to 'theoretical harmonization or unification'. If harmony occurs, the unification of law has been successful. But if there is disharmony, then the unification process is a failure. Part of this process is whether a 'critical mass' of application has been achieved (Zeller, 2002). However, it is argued that the result is not always as intended because, sometimes, the surrounding background law and different legal traditions do not always support a uniform application of different formal

instruments. Furthermore, party autonomy plays an important role, for example, by way of choice of law and jurisdiction, as well as implementing principles or model contracts into contracts. International contract practices, usages and standard terms also play an important role as 'informal instruments' in the development of uniform or harmonized international commercial law, simply by way of formation of an informal uniform or harmonized practice (Fogt, 2012).

According to Zamora,

Harmonization does not entail the adoption of a single, model set of rules, but instead implies a wide range of ways in which differences in legal concepts in different jurisdictions are accommodated. This accommodation can take place in many ways: by a process of law reform in one or more countries, reflecting influences beyond the jurisdiction's borders; by the mediation of private law concepts adopted by parties caught between two legal systems; or by a myriad of other contact points between legal regimes; from academic writings, the conceits of law professors, to visits by government officials to neighboring countries (Zamora in Gopalan, 2002).

This elaborate definition allows flexibility and accommodation of one or more methods of harmonization in a legal system. However, Zamora warns that 'harmonization should not be confused with the unification of laws or with the imposition of one legal model on all jurisdictions' (Gopalan, 2002).

Boodman states that legally, harmonization is 'merely synonymous with the process of problem solving and is as infinite in its configuration as being problems in law (Boodman, 1991). Goode goes further to present harmonization with two distinct objectives which is to create a special regime for international transactions while retaining national laws for purely domestic transactions, and secondly, to facilitate a common market, political or economic grouping by harmonizing the national laws governing domestic transactions, so that state boundaries do not affect commerce within the grouping (Goode, 1991).

Some authors, however, have tried to differentiate unification from harmonization, though they appreciate that they are closely related. According to Mancuso, harmonization is a less radical technique than unification (Mancuso, 2007). It basically changes domestic provisions from various countries that are similar in order to make a coherent or update with a reform. While unification is a more radical form of legal integration aimed at eliminating the differences between national provisions by replacing them with a unique and identical text for all the states involved in the legal integration

process (Mancuso, 2007). Although each of the definitions has its strengths and weaknesses, they are geared towards the elimination of barriers to promote international trade. It is in this context that this paper discusses further some instruments of harmonization

TECHNIQUES OF HARMONISATION

There are different types of harmonizing instruments such as conventions, model law, legislative guides and recommendation, model provisions, contractual technique, explanatory technique, restatements, International Chamber of Commerce and European Union. The importance of these instruments is to provide solutions to practical transnational commercial problems where domestic laws have failed to fill gaps (Cranston, 2007). These instruments are discussed below.

Conventions

This is a 'multilateral treaty designed to unify the states parties to it by establishing international obligations that a state adhering to the convention must observe' (Faria, 2002). The objective is to achieve a high degree of uniformity of law among signatory states, therefore reducing the need for a party to undertake law research of another state party. The obligation is assumed by a state upon adoption of the convention, which is intended to provide assurance that the law in that state is in line with the terms of the convention. States adopting a convention are required to formally deposit a binding instrument of ratification or accession with the depository (for conventions prepared by UNCITRAL-United Nations Commission on International Trade Law) (Faria, 2002).

Conventions are formal, binding and determine specific liabilities. They involve lengthy negotiation processes and compromise; require greater consensus and ratification by specifying the number of countries before coming into force (Gopalan, 2003-2004). However, the mere adoption of a convention does not achieve harmonization despite the many years expended in creating these conventions since sovereign states show reluctance to the ratification of the conventions. UNCITRAL has the best record of adoption with regard to its international conventions. The 1958 New York Convention on the Recognition of Foreign Arbitral Awards is one of the most successful conventions with 134 ratifications (Gopalan, 2002).

In discussing conventions, the United Nations on the International Sale of Goods (CISG) is used here as an illustration of a harmonizing instrument. The harmonization of laws on the international sale of goods presumes that there are differences in the domestic legal techniques of states such as the common law, civil law, socialist, western and developing countries. For example, while contracts require consideration to be enforced in common law systems, it is not in civil law systems. Also,

western systems do not generally require a contract to be in writing, while the socialist systems generally require a contract to be in writing (Keller, 2003).

Compromise on Harmony under the Ciscg

The formation and adoption of a multinational treaty such as the CISG involves political processes that require a compromise as a necessity. Rosett argues that compromise creates additional complications, stating that:

The difficulty with many of these apparent compromises is that they simply do not resolve the problem they purport to address. They do not reflect two parties having yielded part of their position to each other for the sake of agreement, but rather two sides agreeing to give the appearance by a verbal formula which does not provide meaningful guidance in concrete situations (Rosett in Keller, 2003).

The significance of compromise for the promotion of international trade is through the creation of uniform law. This is emphasized in article 7 of the CISG, that regard must be had to the need to promote uniformity in the application of the CISG. Uniform application is treated as fundamental in the success of harmonization of laws by international treaty. Accordingly, compromises within the text of the CISG derogate from its uniform application; they also detract from the success of the CISG as an exercise in harmonization (Keller, 2003).

The Scope of the Ciscg

A clear definition of the jurisdictional scope of the CISG is crucial to both its understanding and success. However, the ambiguity of the jurisdictional scope of the CISG is faced with criticism (Keller, 2003). Despite its success, the CISG does not constitute a 'universal or global' law, therefore, not all states are bound by its provisions and accordingly these non-contracting states are free to unify sales law on any level they wish, including the regional level, without worrying about potential conflicts with the CISG (Ferrari, 2003).

Good Faith

This is one of the fiercest controversial issues. Article 7 (1) of the CISG states that: 'in the interpretation of this Convention, regarding its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. The approach to good faith in common law countries is not homogenous. There was the opposition to the inclusion of good faith in the CISG, but, the civil law countries supported the principle of good faith directed at governing

the conduct of contracting parties. However, a compromise was reached and good faith was 'shifted to the provisions on interpretation of the Convention'.

Revocation

Legal systems differ in the process of forming a legally binding agreement. One of the differences is the stage of a transaction in which the parties are free to withdraw. At one point, the parties are free to terminate negotiations up to the point when the contract is concluded. At the opposite end, the view that after entering negotiations, it would be an act of bad faith to revoke an offer until the other side has had a chance to respond. Article 16 of the CISG tries to settle this issue by laying down when an offer can be revoked (Keller, 2003).

Model Laws

This is a legislative text that is recommended to states for enactment as part of their national law. It is described as a suitable instrument for modernization and unification of national laws when it is expected that states wish or need to make adjustments to the text model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. This flexibility makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered and promotes greater acceptance of a model law than of a convention dealing with the same subject matter. However, in the midst of this flexibility, to achieve certainty on the extent of unification, states are encouraged (for instance, by a resolution of General Assembly) to make as few changes as possible when incorporating a model law into their domestic legal system (Faria, 2002).

Generally, model laws are finalized and adopted by UNCITRAL, whereas a convention requires the convening of a diplomatic conference. This factor may be seen as an advantage of model law as the preparation of a model law is cheaper than a convention, unless the convention is adopted by the United Nations General Assembly (as in the case of some conventions prepared by UNCITRAL). An example of model law is the UNCITRAL Model Law on Electronic Commerce. This is a very important law in contemporary time for the development of electronic commerce. Diverse countries have different laws guiding electronic commerce on the issue of electronic signature as some countries accept electronic signatures while others reject it. This causes problems between countries with opposing legislations. This is one of the variations that the Model Law tries to harmonize. According to article 7(1) of the UNCITRAL Model law on Electronic Commerce:

Where the law requires a signature of a person, that requirement is met in relation to a data message if:

- a). A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
- b). That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

The above article creates flexibility and several notions are left open to interpretation such as the method, circumstances and any relevant agreement. Therefore, article 7 may be regarded as establishing a basic standard of authentication for data messages that might be exchanged in the absence of a prior contractual relationship. At the same time, it provides guidance as to what might constitute an appropriate alternative for a signature if the parties used electronic communication in the context of a communication agreement (Vilus, 2003). However, there is the controversy whether its functional equivalence confers validity on the document (Vilus, 2003).

Article 2 of the UNCITRAL Model law defines 'electronic signature' as 'data in electronic form in, or affixed to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory approval of the information contained in the data message'. Acknowledging that the form of a signature is vital for the development of electronic commerce and some international, regional and many countries have adopted the electronic signature. For example, the European Union adopted Directive 1999/93/EC on a Community framework for electronic signatures in 1999. Article 2 of the Directive provides that 'electronic signatures' means data in electronic form, which are attached to or logically associated with other electronic data and serve as a method of authentication (Vilus, 2003).

Although model laws may not be used exclusively in the framework of state legislation, their main application is the harmonization of national laws through the issuance of new laws or amendment of existing ones. This is usually on the harmonization of rules of specific contractual transactions or specific problems of contract law and therefore serves as a vehicle for the harmonization of specific parts of contract law (Calus, 2003).

Legislative Guides and Recommendations

Drafting of specific provisions suitable or discrete form such as a convention or a model law for incorporation into national legal systems are not always easy because of the disparity of legislative techniques and approaches for solving a given issue. There might be a lack of consensus on the need to find a uniform solution to a specific issue and how they should be addressed. In such

situations, UNCITRAL finds it appropriate not to attempt to formulate a uniform text, but to limit its action to a set of principles or legislative recommendations. In furtherance of this objective of harmonization, the text would typically provide a set of possible legislative solutions for those issues. To evaluate the different approaches and choose the most suitable in a particular national context, the advantages and disadvantages of the different policies are discussed. This method may also be used to provide a standard against which governments and legislative bodies could review and update existing laws, regulations, decrees and similar legislative texts in a particular field. The first legislative recommendation of UNCITRAL was adopted in 1985 to stimulate review of legislative provisions on the legal value of computer records. Also, in 2000, UNCITRAL adopted the Legislative Guide on Privately Financed Infrastructure Projects (Faria, 2002).

Model Provisions

Model provisions are developed and recommended for use in future conventions and revisions of existing ones, when a number of conventions deal with a particular question in a way that is considered to require unification or modernization. For example, in 1982, UNCITRAL created a model provision establishing a universal unit of account of constant value that can be used in international transport and liability conventions, for expressing amounts in monetary terms. It is observed that model provisions may also assist in supplementing a provision of a convention. This is evidenced in the United Nations Convention on the Assignment of Receivables in International Trade (2001) contains an annex of optional substantive law provisions supplementing the conflicts of laws rules of the Convention that deal with priority issues.

Contractual Technique

During the drafting of contracts, there are issues which can be resolved by reference to a standard, uniform clause, set of clauses, or rules. It is advantageous to standardize these clauses or rules. This is because it can identify all the issues that parties should address in such clauses or rules; ensure that clauses are effective and provide internationally recognized and up-to-date solutions to specific issues. For example, in the field of dispute resolution clause referring to the use of internationally recognized rules for conduct of dispute resolution proceedings could be included in a contract. Examples of such internationally recognized uniform rules are the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980) (Faria, 2002).

Explanatory Technique

A legal guide giving explanations concerning contract drafting when it is not feasible or necessary to develop a standard or model set of contract rules. Model contract clauses may also be included in such a legal guide to illustrate some solutions. Example is the UNCITRAL Legal Guide on Drawing up international contracts for the construction of industrial works (1978). The focus of the legal guide may not be exclusively on contract drafting, but may have a broader purpose of discussing issues that would also be of interest to legislators and regulators (Faria, 2002).

Restatements

Scholarly publications play important role in influencing harmonization. Examples are the various UNCITRAL Legal Guides and two projects on principles of contract law undertaken by UNDRIT and the Commission on European Contract law respectively. The later principles are to provide solutions to typical problems in contracts. It is expected that these statements of principles will over time influence national courts by persuading them to look beyond their own, or indeed any one legal system, particularly where the dispute is international and thus does not readily respond to national laws designed primarily for domestic transactions (Goode, 1991). For example, the UNDRIT Principles have served as a guide for the reform of the laws of some countries such as the drafting of the Russian Civil Code, the Estonia Law of Obligations and the Civil Code of the Republic of Lithuania (Gopalan, 2003-2004). It is important to note that restatements are flexible and capable of modification, unlike an international convention. Countries can choose rules within a restatement depending on their comfort level (Gopalan, 2003-2004).

International Chamber Of Commerce (ICC)

The ICC is a harmonizing instrument described as the 'voice of international business', founded in 1919 comprising companies and associations such as national chambers of commerce and national committees, in about 130 countries. Experts work in specialized fields of concern in international business aimed at standards and rules setting comprising of what could be referred to as the 'creeping codification of the Lex Mercatoria'-especially in the areas of sales and banking transactions. However, the ICC has refused to incorporate into the Uniform Customs and Practice for Documentary Credits rules as to the effect of forgery or other fraud (Goode, 1991). Also, the ICC Court of International Arbitration is helping to resolve international trade disputes (Goode *et al.*, 2007).

European Union (EU)

Harmonization attempts in the EU have been relatively successful in the area of choice of law issues and the

recognition and enforcement of judgments in civil and commercial matters (Zeller, 2003). However, the EU provides regional harmonization avenue which is expected to be binding among its members (Faria, 2002). Finally, it has been argued that no single technique is used in the harmonization process. This is because of the type of rules of contract law to be harmonized (mandatory rules, non-mandatory rules and special kind of mandatory rules which is often of a non-private law matter). Others include the economic rational underpinning a given set of legal rules and the relationship of harmonized rules of the system of national law; the scale of harmonization which could be world-wide or regional; and the legal goal of a given harmonization (Calus, 2003).

THE SCOPE HARMONIZATION

The scope of harmonizing technique is determined by the nature and extent of the problem to be tackled, the function of the particular body undertaking the measure, and the feasibility of the project in terms of ability to reach agreement within a reasonable time-frame. For example, a minimum of ten years is required to bring to fruition an initial proposal for an international convention, though there may be exceptions. The ICC usually finishes quicker because they are less formal (Goode, 1991).

However, the scope is not always determined by feasibility but also limited by its fundamental objectives. For example, the UNIDROIT Leasing Convention faced pressure to extend the scope of the Convention to cover operating leases in which equipment is let at its market use-value to several lessees in succession apart from financial leasing it was confined to. It was opposed on the ground that whilst some provisions of the Convention would appropriate for both types of leases, the primary function of the Convention was to recognize the particular financial nature of a finance lease by giving a substantive degree of immunity to the lessor and transferring liability to the supplier. Though, this immunity has been criticized to be inappropriate (Goode, 1991).

There is also a question of whether harmonizing measure should be confined to business transactions or embrace consumer transactions as well. This presents a distinction between the European Communities and conventional laws. Consumer protection is important in the evolving structure of Community law several Directives relating to consumer credit and doorstep transactions. Also, whether the scope of a Convention should be limited to transactions in which there is some connection with a contracting state, and if so what is the connecting factor? This has raised some controversies, but the Vienna Sales Convention prescribes two alternatives which are: that both parties to the contract have to carry on business in a contracting state and that the rules of private international law lead to the application of the law of a contracting state. These are

criticized on the ground questioning why parties are to be governed by the law which they have not chosen (Goode, 1991).

Impact of Harmonization Techniques on National Laws

It is argued that the achievement of total harmonization is unrealistic no matter how carefully drafted, uniform law is not comprehensive. It needs development and application by municipal courts, but the risk of such a process is that the unified law diverges on the local level. The introduction of 'supranationalist are decisis' might preserve harmonization. However, this rigid hierarchical structure of the court system is unworkable at the international level (Zeller, 2003).

The application of the UNIDROIT Principles is growing, especially where the contract leads to the application of the 'general principles of law'. In *Andersen Consulting Bus. Unit Member Firms v. Arthur Andersen Bus. Unit Member Firms*, (Case 9797, ICC Int'l Ct. Arb., Geneva, 20/07/2000), the Tribunal held that the UNIDROIT Principles are a reliable source of international commercial law in international arbitration because they 'contain in essence a restatement of those "principle directeurs" that have enjoyed universal acceptance, and moreover, are at the heart of those fundamental notions which have consistently been applied in arbitral practice (Gopalan, 2002). Also, in a Russian arbitration where there were conflicting choices of law clauses, the Tribunal held that it would apply the general principles of law and further held that the UNIDROIT Principles were an expression of the general principles of the *Lex Mercatoria* (Gopalan, 2002).

Harmonization process also made progress before the ICC International Court of Arbitration in Paris, where the parties agreed to the Tribunal's proposal to apply 'the general standards and rules of international contracts,' and the Tribunal also applied along the CISG 'other recent documents that express the general standards and rules of commercial law' such as the UNIDROIT Principles of International Contracts and the Principles of European Contract Law. Also, in Australian case of *GEC Marconi Systems Ltd v. BHP Information Technology Ltd*, the court ruled that the duty of good faith and fair dealing was to be considered an implied term of all contracts, relying on such expressions in the UNIDROIT Principles and the PECL, despite the absence of such rule in Australian law (Gopalan, 2002).

The Convention of Cape Town Interests in Mobile Equipment is seen as a success with ratification from the entire EU, United States and other countries. Its success is associated with the creation of international interest that ensured enforcement and priority ranking without depending on any national law (Honnerbier, 2002). However, Davies argues that this convention is not a harmonization process, but unification because

harmonization preserves diversity (Davies, 2003).

The incorporation of CISG into national laws has varying impacts on legislators. Within the EU, its impact on legislators seems more homogenous. It has entered into force in about 24 member states, thus giving shape to a set of common set of rules and principles in the field of cross-border sales transactions throughout the EU (Ferrari, 2010). However, some countries like Argentina make no reference to CISG. For example, the courts ruled that lack of description of goods should be proved by expert's arbitrators under article 476 of the Argentina Commercial Code, considered applicable owing to a legal loophole in the CISG on this issue (Taquela, 2008). Furthermore, national mandatory rules limit the impact of international laws in the harmonization process as countries make some reservation because of public policies and other reasons (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome 10).

Impediments To Harmonization

Harmonization efforts have faced legal, technical and organizational problems and dangers of regional harmonization (Goode *et al.*, 2007). These are evidenced in the reluctance of national governments to give up their current systems, believing it is the relinquishing of a portion of national sovereignty for the sake of a global system (Sabatelli, 1994-1995), which sometimes might not favor their interests. The differences in legal concepts, drafting and language barriers, interpretation and various applications of international convention and principles (Goode *et al.*, 2007) and the reconciliation of the different national interests of the developing countries and the developed countries further create difficulties towards harmonization processes (Sabatelli, 1994-1995).

Harmonization techniques also are criticized as factors slowing down its processes. For example, the international conventions are difficult to amend in instances requiring accommodation to economic change or evolution of practice or technology. Even where amendments have been agreed upon, there is the risk that amending protocols may be ratified by all the original signatory states, resulting in a complex patchwork of Contracting Parties sometimes. The rigidity of the treaty-making process and the lack of flexibility discourage states from adhering to international conventions. The instruments are also criticized for producing 'sub-optimal', vaguely drafted rules for the purpose of achieving a political compromise (Faria, 2009). Further criticisms of conventions are lack of coherence and consistence, duplicity, creation of problem with their scope and introduction of uncertainty where none existed. These led to the description of harmonization and uniformity as utopian and not practical concepts (Hobhouse, 1990).

RECOMMENDATION

To avoid duplication of efforts and conflicts between texts, UNCITRAL periodically publishes a comprehensive co-ordination report; however, there are other ways to avoid duplicity. For instance, international formulating agencies and regional organizations such as the EU could inform each other of their work and co-operate more closely, possibly through the holding of meetings (Bazinas, 2003). To avoid interpretation of conventions differently, Lord Diplock stated that they should be interpreted in an international spirit with general acceptance (Gopalan, 2003).

CONCLUSION

The importance of ease of transnational commerce cannot be over-emphasized. The above techniques create this easiness and certainty through harmonization processes. This paper discussed the meaning of harmonization, various techniques, scope and the extent it has influenced national laws. The paper also pointed out some criticisms in harmonization process such as duplicity and interpretation problem and made some recommendations to enhance harmonization processes.

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