

Climate change, labelling, international standards and the Technical Barriers to Trade Agreement: Are they in (dis)harmony?

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Abstract

Climate change and trade are two separate realms that inevitably interact with each other. Trade, representing more than half of global GDP by some accounts, may play a pivotal role in efforts to combat climate change and to reduce greenhouse gas emissions. The WTO Agreements were not specifically composed for climate change purposes. Labelling and international standards may be used as a trade tool whose application may influence consumer preferences and shift markets. In the context of climate change, labelling may effectively inform consumers about international standards and, in particular, the carbon footprint of products. In the context of WTO Agreements, labelling is governed by the Agreement on Technical Barriers to Trade (TBT Agreement). This article investigates the compatibility of the TBT Agreement in governing labelling aimed at mitigating climate change and it elaborates tensions at the nexus between climate change and trade in the context of labelling. This article eventually argues that climate change, labelling, international standards and the TBT Agreement can be in harmony. Further arrangements, which will close more gaps in the relation between the TBT Agreement and measures aimed at combating climate change, are required to alleviate (possible) tensions in practice.

Keywords: Climate change, labelling, international standards, World Trade Organization, Agreement on Technical Barriers to Trade.

A. INTRODUCTION

Labelling and international standards play an important role in promoting energy efficiency, reducing emissions levels, and mitigating climate change. Labelling may be employed to inform consumers about international standards constituted in products, to communicate carbon footprint data and to gauge energy efficiency performance and the level of emission reduction. Besides, labelling can facilitate trade, spread knowledge, disseminate innovative advances in technology and foster the sharing of good management and conformity assessment practices.

The application of labelling and international standards may in turn raise awareness of consumers on their greenhouse gas emissions, which consequently is meant to shift consumers and manufacturers' behaviour. A study conducted in 2014 by Vincenzina Caputo, Rodolfo M. Nayga Jr and Riccardo Scarpa reveals that consumers tend to value the CO² label at least as much and sometimes even more than the food miles label.¹

¹ Vincenzina Caputo, Rodolfo M. Nayga Jr and Riccardo Scarpa. "Food miles or carbón emissions? Exploring labelling preference for food

Labelling and international standards are important for climate action and their significance may increase in the future. For example, the total projected CO² emissions from the residential sector in the United States would have been 8 per cent higher by 2020 if the energy-efficiency standards for household appliances had not been put in place.

Climate change and trade are two distinct realms that inevitably interact with each other. As unilateral and multilateral trade liberalization has brought down tariffs, the market access effects of labelling and international standards as a part of climate change law and policy can have competitiveness impacts on trade and investment.²

The WTO provides a framework of disciplines to facilitate global trade and serves as a forum to negotiate further trade openness under the architecture of multilateral trade cooperation.³ The WTO plays accordingly an important role in bridging climate policy and trade

policy.⁴ Considering the importance of labelling for informing international standards aimed at reducing greenhouse gas emissions, this article analyses how the WTO covers the dynamic nexus between climate change, international standards and labelling. From the outset, the WTO recognizes the rights and the sovereignty of its members to set diverse levels of policies to reach their respective legitimate objectives as long as they do not constitute a means of arbitrary or unjustifiable discrimination between countries. In the context of setting international standards, WTO members may therefore set distinct levels of international standards in order to achieve their respective legitimate objectives. However, this discretion to determine various levels of legitimate objectives on international standards may possibly be harnessed to veil protectionist measures that have discriminatory consequences.⁵

In the context of the WTO, the TBT Agreement has become a main legal instrument when it comes to labelling and international standards.⁶ In the TBT Agreement, labelling may be classified either as technical regulation or as stan-

transport footprint with a stated choice study." *Australian Journal of Agricultural and Resource Economics* 57, no. 4 (2013), p. 465.

² World Trade Organization. *World Trade Report 2005: Exploring the links between trade, standards and the WTO*. Geneva: World Trade Organization, 2005. Accessed July 30, 2015. https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf, p. 29. For instances, there are 14,900 international standards published by the ISO and a database of around 650,000 standards (national, regional and international) from about 21 countries is maintained by Perinom, a consortium of European standards organizations.

³ World Trade Organization. "The multilateral trading system and climate change: Introduction." Accessed July 19, 2014. http://www.wto.org/english/tratop_e/envir_e/climate_intro_e.htm.

⁴ Ludivine Tamiotti, *et. al. Trade and Climate Change: A report by the United Nations Environment Programme and the World Trade Organization*. Geneva: World Trade Organization, 2009. Accessed July 30, 2015. http://www.wto.org/english/res_e/publications_e/trade_climate_change_e.htm, p. 124.

⁵ Please note that how a measure is justified in the WTO framework as protectionist will not be discussed in this article.

⁶ The WTO is a treaty consisting of the umbrella agreement, the Marrakesh Agreement Establishing the World Trade Organization, and its subsidiary agreements, containing of detailed rules. The TBT Agreement is one of its subsidiary agreement.

dard. The TBT Agreement is aimed to guarantee that the technical regulations, standards and conformity assessment procedures⁷ do not constitute unnecessary barriers to international trade while recognizing the right of WTO members to take regulatory measures to achieve their legitimate objective. Among other legitimate objectives, according to Article XX of the General Agreement on Tariffs and Trade (GATT), the legitimate objectives may be: protection of the environment, protection of human health of safety, protection of animal or plant life or health, prevention of deceptive practices, national security requirements and quality requirements.⁸

The aim of this article is to clarify the governance of labelling and international standards in the TBT Agreement. This article presents the nexus of technical regulations, standards and labelling under the TBT Agreement and (possible) tensions of technical regulation, standards and labelling particularly in the context of climate change and the TBT Agreement. The wider purpose of this article is to point out the tensions between climate policies and trade policies in the context of labelling and the related important considerations for policy makers.

⁷ International Organization for Standardization. "What is conformity assessment?" Accessed May 15, 2014. <http://www.iso.org/iso/home/about/conformity-assessment.htm>.

⁸ Article XX, the General Agreement on Tariffs and Trade 1994. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf and must be read with https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

B. THE NEXUS BETWEEN THE TERMS 'TECHNICAL REGULATIONS', 'STANDARDS' AND 'LABELLING'

As explicitly mentioned in Annex 1.1 and 1.2 of the TBT Agreement, the TBT Agreement establishes a clear distinction between the terms 'technical regulations' and 'standards'.⁹ According to the definition, the main and essential distinction between the terms 'technical regulations' and 'standards' is its compliance.

Technical regulations require mandatory compliance. On the other hand, the compliance of standards is not mandatory. In addition, standards have to be approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods.

⁹ The TBT Agreement defines the following terms: i) 'technical regulation': Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method; and ii) 'standard': Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. See further: Annex 1, Technical Barriers to Trade Agreement. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

The definitions of both technical regulations and standards in Annex 1 of the TBT Agreement identically mention the term ‘labelling requirements.’ Therefore, labelling requirements may accordingly fall under either technical regulations or standards.

Whether a labelling scheme falls under the technical regulation or standards may be ambiguous. The criteria employed to classify whether labelling requirements are a technical regulation or a standard relate to the fact whether compliance is mandatory or not. The finding brought in a new perspective on how technical regulation is identified and how labelling is classified. The finding brought in the panel report of United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))¹⁰, which was subsequently affirmed by the Appellate Body report of the US –Tuna II (Mexico), stated:¹¹

“Compliance ... is ‘mandatory’ ... if the document in which [the regulations] are contained has the effect of regulating in a legally binding or compulsory fashion the characteristic at issue, and if it thus prescribes

or imposes in a binding or compulsory fashion that a certain product must or must not possess certain characteristics, terminology, symbols, packaging, marking or labels or that it must or must not be produced by using certain processes and production methods. By contrast, compliance with the characteristics or other features laid out in the document would not be ‘mandatory’ if compliance with them was discretionary or ‘voluntary’”.

Conversely, the dissenting opinion expressed at the Panel of the US – Tuna II case may be worth considering. The dissenting opinion mentioned:

“Both Annex 1.1 and Annex 1.2 refer to labelling requirements. Labelling requirements can thus be technical regulations or standards. The criteria whether labelling requirements are a technical regulation or a standard relates to the fact whether compliance is mandatory or not. In order to give any sense to the term ‘labelling requirement’ as used both in Annex 1.1. and 1.2, **the requirement that compliance is mandatory cannot relate to the obligation to meet certain requirements to be allowed to use the label, but to the question whether a labelling scheme is compulsory – i.e. whether products must use a label in order to be marketed – or voluntary – i.e. products may be marketed with or without the label.** As indicated by the Appellate Body in EC – Asbestos, a technical regulation must “regulate the characteristics of products in a binding or compulsory fashion” and “a ‘technical regulation’ has the effect of prescribing or imposing

¹⁰ Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico)), WT/DS381/R (September 15, 2011).

¹¹ Para. 7.111, Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico)), WT/DS381/R (September 15, 2011). The labelling requirement in the US – Tuna II (Mexico) case leaves no discretion to resort to any other standard to inform consumers about the dolphin-safety of tuna than to meet the specific requirements of the measure and is the only standard available to address the issue.

one or more ‘characteristics’ – ‘features’, ‘qualities’, ‘attributes’, or other ‘distinguishing mark’”.³¹⁵ A labelling requirement which is a technical regulation would thus impose to a product the obligation to use the label and to fulfil the related labelling requirements. If however compliance with the labelling requirement and use of the label is not mandatory, the labelling requirement has to be seen as a standard. Arguing that the mere fact that a product is prohibited from using a label if it does not fulfil these standards makes compliance compulsory would leave no space for voluntary labelling schemes as standards.”¹² (emphasis added)

Despite having been affirmed by the Appellate Body report, the opaque nature of the distinction between technical regulations and standards in the TBT Agreement remains disputable.

The labelling requirements, whose compliance is mandatory, are classified under the technical regulations. Conversely, the labelling requirements, whose compliance is voluntary, may be categorized under standards. The distinctive compliance nature between technical regulations and standards burdens dissimilar notification obligations between both categories. Measures considered as technical regulations have to be notified to the WTO Secretariat, while measures deemed as standards may be notified on a voluntary basis.

¹² Para. 7.151, Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico)), WT/DS381/R (September 15, 2011).

C. TENSIONS: CLIMATE CHANGE, LABELLING AND THE TBT AGREEMENT

Although the WTO recognizes sustainable development as its central principle¹³, the WTO Agreements were not designed to specifically tackle the issue of climate change. Consequently, the interplay between the WTO and climate change regimes may result some tensions.

Labelling schemes are used as a means to gauge environmental effectiveness and to promote energy-efficiency policy. Their application may inevitably build up consumer awareness, acceptance of labels (credibility and understanding) and changes in consumer and manufacturer behaviour.¹⁴ Hence, the application of labelling schemes may impact competitiveness of a market.

This article attempts to compile

¹³ The term ‘sustainable development’ is explicitly mentioned in the preamble of the Marrakesh Agreement establishing the World Trade Organization: “*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.” (Emphasis added)

¹⁴ Ludivine Tamiotti, *et. al, op. cit.*, p.124.

tensions that emerged or may occur between the applications of labelling, international standards, in particular for the purpose of climate change, and the TBT Agreement. These tensions may become useful information as well as considerations for policy-makers.

1. Non-product-related process and production methods and the TBT Agreement

Processes and production methods (PPMs) refer to criteria of governing international trade in goods and services according to the inputs and process technologies utilised in their production.¹⁵ PPMs play a pivotal role for the environmental impacts and the emission of the GHGs. For example, the use of energy-efficient technology in the production method of a product directly affects emissions reduction. Therefore, PPMs are important criteria which may bring essential environmental benefits.

In the debate over trade and environment, PPMs are the subject of many controversies.¹⁶ The applicability of environmental PPMs creates controversy

due to the following reasons:¹⁷

“First, a PPM can restrict trade or make it harder and costlier for an exporter to supply a foreign market. Second, PPMs are a signal from importing countries to exporting countries about the environmental practices and laws that the importing country thinks the exporting country should have.”

PPMs are classified according to how the products were produced.¹⁸ PPMs are categorized as product-related PPMs (pr-PPMs) and non-product-related PPMs (npr-PPMs). The key issue of these two categories is the influence of process and production methods on final products. If a process and production method will affect the final product to be treated differently in its use, handling or disposal, this is pr-PPMs. Conversely, if the final products will appear the same despite its process and production method and, thus, no different treatment on the final products are needed, this is npr-PPMs.

The PPMs are explicitly pronounced by several WTO Agreements. Several WTO Agreements confirm that PPMs affect trade.¹⁹ PPMs related technical regulations, standards and labels fall explicit-

¹⁵ Robert Read, “Process and Production Methods and the Regulations of International Trade.” In *The WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States*, edited by Nicholas Perdakis and Robert Read, 239 – 267. Cheltenham: Edward Elgar Publishing Limited, 2005. Accessed July 30, 2015. <http://www.oas.org/dsd/Tool-kit/Documentos/ModuleIII/doc/Read%20Article%20on%20PPMs.pdf>, p.239.

¹⁶ Steve Charnovitz, “The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality.” *Yale Journal of International Law* 27, no. 1 (2002), p. 59.

¹⁷ Steve Charnovitz, *op. cit.*, p. 62.

¹⁸ Laurens J. Ankersmit and Jessica C. Lawrence, “The Future of Environmental Labelling: *US – Tuna II* and the Scope of the TBT.” *Legal Issues of Economic Integration* 39, no. 1 (2012), p. 135.

¹⁹ Aaron Cosbey in ICTSD Bridges: Between trade and sustainable development. “The WTO and PPMs: Time to Drop a Taboo.” Accessed February 3, 2014. <http://www.ictsd.org/downloads/bridges/bridges5-1.pdf>, p. 11.

ly under the TBT Agreement.²⁰ PPMs that fall outside the scope of the TBT Agreement may fall either in the Agreement in the Application of Sanitary and Phytosanitary Measures (SPS Agreement) or in the GATT.²¹

In general, the WTO Agreements distinguished between pr-PPMs and npr-PPMs; discriminatory treatment on the basis of pr-PPMs, which have different physical characteristic as the final result of the product, is permissible in WTO law.²²

In connection to the issue of pr-PPM in the GATT, the Appellate Body in Japan – Alcoholic Beverages II stipulated that likeness may be determined by comparing products on the basis of (i) product characteristics, (ii) end-uses, (iii) consumer preferences and (iv) tariff classification.²³ Moreover, the Appellate Body in the EC – Asbestos case added

the competitive relationship between imported and domestic products as a determinant to justify likeness of products.²⁴ A PPM can affect the like product determination if it affects a competitive relationship.²⁵ Therefore, the comparison of products on the basis of product-related PPMs may simply be determined as unlike due to its distinct product characteristics. Conclusively, there will be no conflict created concerning the likeness justification for pr-PPMs, provided that the final products will be distinctive.

The issue of npr-PPMs is essential in the context of climate change and the reduction of greenhouse gases emissions. The npr-PPMs base a number of energy-efficiency and emission-reduction standards and labelling schemes.²⁶ In the WTO Agreements, there are no explicit reference to the issue of npr-PPMs.

Unlike the pr-PPMs, the issue of npr-PPMs may be problematic. In the WTO context, discriminatory treatment is not allowed for products which are considered like products. Products included in the npr-PPMs will remain like products and cannot in turn be treated differently. Under the category of npr-PPMs, there will be no traceable distinction resulting from the process and production method of products. Although products have different processes and production methods and may have dif-

²⁰ Patrick Low, Gabrielle Marceau and Julia Reinaud. "The Interface between the Trade and Climate Change Regimes: Scoping the Issues." *Journal of World Trade* 46, no. 3 (2012), p. 523.

²¹ This article will not discuss the issue of PPMs which fall under the SPS Agreement. Note that the preamble of the SPS Agreement explicitly pronounced that the GATT provisions related to the use of sanitary or phytosanitary measures, particularly Article XX(b) GATT regarding the general exception clause, apply to the SPS Agreement.

²² The United Nations Environment Programme Division of Technology, Industry and Economics, Economics and Trade Branch; and the International Institute for Sustainable Development. *Environment and Trade: A handbook - 2nd edition*. Manitoba: International Institute for Sustainable Development, 2005. Accessed July 30, 2015. http://www.unep.ch/etb/areas/pdf/envirotrade_handbook_2005.pdf, p. 54.

²³ Patrick Low, Gabrielle Marceau and Julia Reinaud, *loc. cit.*, p. 494.

²⁴ Para. 101, Appellate Body Report, European Communities – Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos), WT/DS135/AB/R (March 12, 2001).

²⁵ Inside U.S. Trade. "Experts sees possible opening in WTO rules for certain PPMs" Accessed January 29, 2014. <http://www.agritrade.org/pressroom/documents/IUSTarticle.pdf>, p. 1.

²⁶ Ludivine Tamiotti, *et. al, op. cit.*, p.126.

ferent environmental impacts, there are no traceable product characteristics that may justify the products to be treated differently.

In the context of GATT, harnessing the npr-PPMs as a factor to treat product differently will consequently infringe the non-discrimination principle under the GATT.²⁷ Nevertheless, the infringement accorded to the issue of the npr-PPMs may be justified by referring to the general exception clause provided by the GATT.

Article XX of the GATT refers to the general exception clause. Two-tier analysis requirements are required to justify GATT-inconsistent environmental measures through the general exception clause. The measure has to firstly fall under at least one of the exception listed under Article XX. Secondly, the measure has to satisfy the requirements of the chapeau, of Article XX. The chapeau of Article XX requires that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and is not a disguised restriction on international trade.

In conjunction with the issue of climate change, Article XX of the GATT provides two relevant exceptions to not complying with GATT obligations, *i.e.* point (b) and (g) of Article XX of the

²⁷ The non-discrimination principle is particularly pronounced under Article I of the GATT, which entails the Most-Favoured-Nation (MFN) treatment obligation, and Article III of the GATT, which pertains to the national treatment obligation.

GATT. WTO members may seek exceptions from GATT provisions on the basis that the measures taken are “necessary to protect human, animal or plant life or health”²⁸; and measures which are “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”²⁹

Unlike the GATT, the application of the npr-PPMs under the TBT Agreement has been a matter of controversy among academics and practitioners.³⁰ The TBT Agreement has a different approach than the GATT in providing spaces to obtain various level of legitimate objectives, including climate change. The GATT provides an exhaustive list of general exceptions in Article XX accommodating various legitimate objectives. As an exception, the application of the general exception depends whether an infringement against GATT obligations exists. Unlike the GATT, the TBT Agreement provides a non-exhaustive list of various legitimate objectives. The TBT Agreement does not place targeting a legitimate objective as an exception of infringing any TBT Agreement obligations. In conclusion, in the framework of the TBT Agreement, pursuing a legitimate

²⁸ Article XX (b), the General Agreement on Tariffs and Trade 1994. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf and must be read with https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

²⁹ Article XX (g), the General Agreement on Tariffs and Trade 1994, *ibid*.

³⁰ Johannes Norpoth. “Mysteries of the TBT Agreement Resolved? Lessons to Learn for Climate Policies and Developing Country Exporters from Recent TBT Disputes.” *Journal of World Trade* 47, no. 3 (2013), p. 577.

objective is a rights and not an exception.

The development of treaty interpretations of WTO Agreements, including the GATT and the TBT Agreement, has to be managed in a harmonious way in order to obtain consistent interpretations. Regardless the different application on how the GATT and the TBT Agreement provide a space to pursue a legitimate objective, the GATT and the TBT Agreement have to accordingly be interpreted in a consistent way.

In the Annex 1.1 of the TBT Agreement, the words “their related” confine the scope of the TBT Agreement only to pr-PPMs.³¹ Meanwhile, the US – Tuna I case resumed that the npr-PPMs may solely be examined under the GATT.³² It seems to be inefficient if the npr-PPMs are possibly justifiable under the GATT, while the more transparent pr-PPMs are subject to the more stringent requirements of the TBT Agreement.³³

The US – Tuna II (Mexico) case is important for the nexus between npr-PPMs and the TBT Agreement. Notwithstanding the finding of the US – Tuna I, the Panel of US – Tuna II came to a contradictory finding. In its finding, the npr-PPM measures may fall under the TBT Agreement based on the second

sentence of Annex 1.1 of the TBT Agreement. The second sentence of Annex 1.1 of the TBT Agreement clearly indicates that labelling including its application to a product, process or production method falls under the scope of the TBT Agreement. This sentence does not establish the division of PPMs.

Considering that there was no particular appeal on the coverage of the npr-PPM in the TBT Agreement brought by the US to the Appellate Body in the US – Tuna II (Mexico) case, there may be a differing finding pertaining to the applicability of the npr-PPM measures in the TBT Agreement in the future. Nevertheless, the Appellate Body report in the US – Tuna II (Mexico) seemingly accepted that labelling is covered by TBT Agreement. If the Appellate Body had the opposite view pertaining to the coverage of the TBT Agreement on labelling, the dispute would not make further findings about labelling in the framework of the TBT Agreement.

Accordingly, the US Tuna II (Mexico) case seemingly clarified the TBT Agreement coverage on the npr-PPMs that fall under the categories explicitly mentioned by the second sentence of Annex 1.1 of the TBT Agreement, *i.e.* terminology, symbols, packaging, marking or labelling requirements. Nonetheless, the categories outside what are explicitly mentioned in the second sentence of the Annex 1.1 of the TBT Agreement, *i.e.* outside terminology, symbols, packaging, marking or labelling requirements, remain unresolved. Accordingly, the issue of the TBT Agreement coverage on the npr-PPMs remains debatable and has no definite clarity yet among WTO members.

Despite the fact that the npr-PPMs may contribute to mitigate GHG emis-

³¹ Laurens J. Ankersmit and Jessica C. Lawrence, *op. cit.*, p. 136. In addition, Annex 1.1 of the TBT Agreement states “Document which lays down product characteristics or *their related* processes and production methods, including the applicable administrative provisions, with which compliance is mandatory”(emphasis added).

³² Laurens J. Ankersmit and Jessica C. Lawrence, *ibid.*

³³ Patrick Low, Gabrielle Marceau and Julia Reinaud, *op. cit.*, p. 522.

sions, many countries argue that discriminatory measures based on npr-PPMs are inconsistent with the WTO.³⁴ Should the discriminatory measures accorded to the npr-PPMs be justifiable, it is envisaged to create challenges and complexities. For instance, in reference to the justification whether a measure is necessary to pursue a legitimate objective or is a disguised protectionism.

2. International standards governance: The interplay between obligations and flexibility

In line with the growing economic interdependence that results from international trade, the function of international standards is increasingly important. International standards are an essential means of facilitating compatibility and interoperability for intermediate products as they zigzag their way to the final consumer in a globalized world where value chains are increasingly prevalent.³⁵

In general, the TBT Agreement strongly encourages WTO members to use relevant international standards as the basis for their technical regulations. In the context of WTO Agreements, such

international standards are mentioned in particular in Article 2.4³⁶, 2.5³⁷ and 5.4³⁸ of the TBT Agreement. The TBT Agreement provides WTO members flexibilities to set standards and to em-

³⁶ Article 2.4, Technical Barriers to Trade Agreement. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf. Article 2.4 states: "Where technical regulations are required and relevant international standards exists or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems".

³⁷ Article 2.5, Technical Barriers to Trade Agreement. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf. Article 2.5 mentions: "Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade".

³⁸ Article 5.4, Technical Barriers to Trade Agreement. Accessed July 30, 2015. https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf. Article 5.4 says: "In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems".

³⁴ World Trade Organization: The WTO Institute for Training and Technical Cooperation. "Detailed Presentation of Environmental Requirements and Market Access, including Labelling for Environmental Purposes." Accessed July 30, 2015. https://ecampus.wto.org/admin/files/Course_385/Module_2423/ModuleDocuments/TE_Req-L2-R2-E.pdf, p. 23.

³⁵ Erik Wijkstrom and Devin McDaniels. "Improving regulatory governance: International standards and the WTO TBT Agreement." *Journal of World Trade* 47, no. 5 (2013), p. 1014.

ploy relevant international standards on the appointed standards. Article 2.2 of the TBT Agreement mentions the term '*inter alia*' twice, *i.e.* pertaining to the list of legitimate objectives as well as relevant elements of consideration for risk assessment. The term '*inter alia*' indicates the open list of both the legitimate objectives and considerations for risk assessment. Furthermore, Article 2.2 of the TBT Agreement states that a technical regulation set for a legitimate objective by a member will be presumed not to create an unnecessary obstacle to international trade as long as it is in accordance with relevant international standards. In the panel report of the US-Tuna II (Mexico) case, the panel defined an international standard as a standard that is adopted by an international standardizing body and is made to the public.³⁹

Nevertheless, WTO members are allowed not to use relevant international standards when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of their respective legitimate objectives pursued. Furthermore, the TBT Agreement obliges WTO members

to notify whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards.

Governing international standards is a complex issue. Each WTO member has the sovereignty to set the subject and the level of legitimate objectives. Each member may choose its relevant international standard applied in a particular goods or service. Consequently, the standards governance differs from member to member. Concerning the use of relevant international standards as stipulated in Article 2.4 of the TBT Agreement, the following three-step analysis may resume a measure to be in violation of Article 2.4 of the TBT Agreement: (i) the existence or imminent completion of a relevant international standard; (ii) whether the international standard has been used as a basis for the technical regulation; and (iii) whether the international standard is an effective or inappropriate means for the fulfilment of the legitimate objectives pursued, taking into account fundamental climatic or geographical factors or fundamental technological problems.⁴⁰

The non-harmonized governance of international standards setting may constitute inevitable-international-trade barriers, among other possible tensions:

1. The more-stringent governance of standards and choice of relevant

³⁹ Para. 7.663, Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico)), WT/DS381/R (September 15, 2011). The panel added that it must constitute a document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context (paras. 7.666-672, 6.36-38) and be 'open on a non-discriminatory basis to the relevant bodies of at least all WTO members in accordance with the principle of openness as described in the TBT Committee Decision' (paras. 7.687-691).

⁴⁰ Para. 48, the TBT Agreement, World Trade Organization. "WTO Analytical Index: Guide to WTO Law and Practice." Accessed January 17, 2015. https://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm.

international standards are trade barriers for some WTO members which set more-lenient standard governance. The more-stringent standards, which are in accordance with relevant international standards, are rebuttably presumed not to create an unnecessary obstacle to international trade. Therefore, the more-stringent standards may not be fulfilled by some members and hamper international trade.

2. There is no consensus and precise methods on how to quantify a carbon-footprint.⁴¹ The proliferation of carbon-footprint standards may raise a question how the carbon content is evaluated. Furthermore, the lack of having a uniformed means in evaluating carbon content and in applying a particular carbon-footprint standard globally add the tension on a carbon-footprint.
3. The TBT Agreement does not name particular international standardizing bodies to set international standards. Ensuring international standards, which are in consonant with the objectives of the TBT Agreement, may be challenging since the nature of every international standardizing body may (not) be in line with the objectives of the TBT Agreement.
4. The tension of having duplication of relevant international standards in particular goods and services may be undeniable due to flexibilities given by the TBT Agreement. The TBT Agreement has not pronounced

⁴¹ Olga Nartova. "Carbon labelling: Moral, economic and legal implication in a world trade environment." NCCR Trade Regulation Working Paper no. 2009/5 (February 2009), p. 4.

particular international standardizing body. In consequence, there is a growing competitiveness among international standardizing bodies.

In the context of setting climate change as a legitimate objective, it still remains unclear which climate change standards could be regarded as 'international standards' in line with the objective of the TBT Agreement.⁴² On one hand, the non-harmonized governance of international standards may be used to set protectionist policies covered as climate change objectives. On the other hand, there should be discretion for putting legitimate, non-discriminatory and effective measures in place for addressing climate change.

3. The WTO coverage on private standards

The TBT Agreement disciplines standardizing bodies and principles for international standardizing bodies. Nevertheless, the TBT Agreement's main focus is on technical regulations instead of standards.⁴³ In this regard, the TBT Agreement treats standards separately.⁴⁴ The TBT Agreement is restrictive in accommodating the issue of private standards.

⁴² Joost Pauwelyn, "Carbon Leakage Measures and Border Tax Adjustments under WTO law" In Research Handbook on Environment, Health, and the WTO, edited by Geert Van Calster and Denise Prévost, 448 – 506. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 481.

⁴³ Erik Wijkstrom. "TBT and "Private Standards"" Accessed July 30, 2015. https://www.wto.org/english/tratop_e/sps_e/private_standards_june07_e/wijkstrom_e.ppt.

⁴⁴ Erik Wijkstrom, TBT and Private Standards, *ibid*.

Appleton opined that⁴⁵

“Private labelling schemes fall outside the Agreement because (i) they are not promulgated by recognised standardising bodies; (ii) they do not rely on ‘standards’ as defined in Annex 1; (iii) the non-governmental bodies in question may not satisfy the conditions of Annex 1.8 of the TBT Agreement; and (iv) the TBT probably does not apply to standards governing npr-PPMs.”

In connection with private standards⁴⁶, the TBT Agreement does not specifically mention the term ‘private standardisation organizations’. Annex 1 of the TBT Agreement only explicitly defines the terms ‘technical regulation’, ‘standards’, ‘conformity assessment procedures’, ‘international body or system’, ‘regional body or system’, ‘central government body’, ‘local government body’ and ‘non-governmental body’. In this regard, the question may be whether private standardisation organizations may be incorporated in one of the specific definitions under Annex 1 of the TBT Agreement.

Private standards and private labelling schemes are discerned as a response to consumer demand and perhaps even as a means of creating demand.⁴⁷ Private

parties may be construed into two categories, *i.e.* entities which are not organs of the State but which nevertheless exercise elements of governmental authority and private corporations or individuals that are not organs of State under internal law and that do not exercise elements of governmental authority.⁴⁸ Private standards and private labelling schemes are operated on a voluntary basis.

There is a debate whether the TBT Agreement may govern the proliferation of private standards and private labelling schemes. Appleton argued that:⁴⁹

“The definition of standard in Annex 1.2 uses the phrase ‘document approved by a ‘recognized body’. The phrase ‘recognized body’ is undefined and the TBT Agreement does not state who must recognize such bodies. For an entity not identified in the WTO Agreement, a panel is likely to determine whether the entity is: (i) recognized by one or more WTO

⁴⁵ Arthur E. Appleton. “Linking Energy, Climate Change and WTO Law: The Role of the WTO in the Energy and Climate Change Debate.” Accessed February 30, 2014. https://www.iisd.org/pdf/2009/climate_change_labeling.pdf.

⁴⁶ Note that private standards are set by private standardizing organizations.

⁴⁷ Arthur E. Appleton. “Private climate change standards and labelling schemes under the WTO Agreement on Technical Barriers to Trade.” In

International Trade Regulation and the Mitigation of Climate Change: World Trade Forum, edited by Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, 131 - 152. Cambridge: Cambridge University Press, 2009, p. 150.

⁴⁸ Samir R. Gandhi. “Voluntary Environmental Standards: The Interplay between Private Initiatives, Trade Rules and the Global Decision-Making Processes.” Paper presented at the third global administrative law seminar, Viterbo, June 15 - 16, 2007. Accessed July 30, 2015. <http://www.iilj.org/gal/documents/Ghandienviroment.pdf>, p. 13. See also: The GATT Panel decision in the Japan=Restrictions on the Import of Certain Agricultural Products case, BISD 35S/163, adopted 2 February 1988 (Japan Agricultural Products), at para. 5.2.2.2.

⁴⁹ Arthur E. Appleton. “Supermarket labels and the TBT Agreement: Mind the gap.” Accessed February 30, 2014. <http://www.wcl.american.edu/blr/04/1appleton.pdf>.

members as a standardization body, (ii) involved with the activities of international standardization organizations (ISO, IEC, etc.), (iii) open to involvement from other WTO members, and (iv) has accepted the Code, (v) whether any WTO Members apply 'standards' promulgated by the entity, and (vi) if the aim of its 'standards' further a legitimate objective within TBT Article 2.2."

If private standards and private labelling schemes are deemed to fall under the TBT Agreement, Article 4 of the TBT Agreement (Preparation, Adoption and Application of Standards) as well as Annex 3 of the TBT Agreement (Code of Good Practice for the Preparation, Adoption and Application of Standards) will be applicable. In his article, Appleton elaborates further governance of private standards and private labelling according to the TBT Agreement as follows:⁵⁰

"Standardizing bodies that are bound by the Code or have accepted its obligations are required to accord most-favoured-nation and national treatment to like products. Their standards must not create unnecessary obstacles to international trade, and they are required to use relevant international standards when they exist or their completion is imminent."

Nevertheless, should private standards and private labelling scheme not be covered and fall outside the purview of the TBT Agreement, the inability of the TBT Agreement to cover private

standards and the proliferation of private standards in itself may result *de facto* non-tariff barriers to trade. Manufacturers will face various private standards that act as trade barriers, in particular for smaller suppliers that may find it challenging to comply with the standard. Due to the absence of WTO coverage of private standards, there will be little room to bring the issue to the WTO dispute settlement should a dispute emerges. Private schemes may disadvantage exports from smaller producers in developing countries without necessarily bringing the environmental benefits that such schemes are expected to deliver.⁵¹

D. CASE STUDY: THE EUROPEAN UNION AND CERTAIN MEMBER STATES – CERTAIN MEASURES ON THE IMPORTATION AND MARKETING OF BIODIESEL AND MEASURES SUPPORTING THE BIODIESEL INDUSTRY (WT/DS459/1)⁵²

This article refers to a WTO dispute "The European Union and certain member states – certain measures on the importation and marketing of biodiesel and measures supporting the biodiesel industry (WT/DS459/1) as a case study. This dispute reveals an example of pos-

⁵⁰ Arthur E. Appleton. "Supermarket labels and the TBT Agreement: Mind the gap," *op. cit.*

⁵¹ Arthur E. Appleton. "Private climate change standards and labelling schemes under the WTO Agreement on Technical Barriers to Trade," *op. cit.*, p. 150.

⁵² Request for Consultations, European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures supporting the Biodiesel Industry, WT/DS459/1 (May 15, 2013).

sible tensions between climate change and trade realms.

The European Union (EU) adopted Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC which are subsequently applied on various policies by the EU members. In the field of renewable energy, the Directive set a sustainability criterion with which biofuels and bioliquids have to comply in order to be taken into account when measuring compliance with the targets of the EU members. The biofuels and bioliquids which fulfilled this criterion may benefit from (financial) incentives for their use. The EU regulation is based on concerns over the real benefits that biofuels can deliver in terms of GHG savings once the indirect land use change (ILUC) impacts of biofuels are taken into account.

The sustainability criteria set, among other criteria, by the EU require: (i) biofuels must produce in the saving of at least 35% of greenhouse gas emissions with respect to fossil fuels; and (ii) biofuels feedstock production cannot occur on certain types of land with a specific function or status before 2008.

Argentina, the complainant in the dispute, has no objection to the use of sustainability criteria and a calculation method of greenhouse gas emissions savings. Argentina questions the threshold of 35% of greenhouse gas emissions with respect to fossil fuels. The soybean biodiesel produced in Argentina has only 31% of the default value. Hence, the soybean biodiesel of Argentina cannot fulfil the sustainability criteria set by the EU. Argentina argues that the threshold

is arbitrary, not based on scientific justifications, and not based on a recognized international norm or standard.

The dispute is still at the consultation stage in the WTO dispute settlement process upon the submission of this article.⁵³ Any developments and possible resulted findings from this dispute will be important in projecting the interface between climate and trade regimes.

E. CONCLUSION

The nexus between trade, in the context of multilateral trading system, and climate change regimes, labelling and international standards may be used as effective instruments in reducing greenhouse gas emissions. Furthermore, the relation may facilitate as a tool to measure the level of carbon emitted in products. However, the relevant WTO Agreement covering the issue of labelling and international standards, the TBT Agreement, is not particularly aimed at governing climate change. Therefore, the compatibility of the TBT Agreement with measures to combat climate change in the form of labelling and international standards becomes increasingly important.

The findings of related cases adjudicated by Panel or Appellate Body of the WTO dispute settlement and special trade concerns raised by WTO members on the trade and environment and the TBT committee meetings (are meant to) close some gaps between the area of standards covered by the TBT Agreement and climate change policies.

⁵³ This article is submitted on July 30th, 2015.

Nevertheless, noting the distinct governance of technical regulations, standards and labels among countries may still bring along ambiguities for the trade community and be used as a tool for disguised protectionism. Moreover, the uncertainty whether the TBT Agreement accommodates the issue of npr-PPMs outside the terminologies explicitly mentioned in Annex 1 of the TBT Agreement and the issue of private standards governance may result trade barriers and unresolved tensions.

Climate change, labelling, international standards and the TBT Agreement are not yet in an absolute harmony. Further arrangements are needed for making the TBT Agreement more compatible and accommodative with various measures aimed at combating climate change, including the application of labelling and international standards.

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