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Technical regulations based on international standards to mitigate climate change*

Achieving the Paris Agreement's long term temperature goal will require Parties to make rapid, deep and economy-wide GHG emission reductions.¹ One mechanism through which this can be done is domestic technical regulations.² In very general terms, these are government imposed technical specifications, processes and other requirements for the manufacture, import, marketing or use of products. Technical regulations in many countries, for example, set mandatory emission standards for vehicles, electrical goods or buildings.

Mandatory domestic technical regulations can deliver faster and deeper GHG emission reductions than

voluntary or market based approaches. Many governments have already taken major steps down this path. Domestic technical regulations which affect imports too can, however, raise compliance problems with World Trade Organisation (WTO) law.

This briefing explores options to foster the development of new regulations at the international level in a fair and equitable manner. First, it examines the legal tension between such regulations and WTO law. It then outlines potential avenues for the international community to promote domestic regulatory interventions and describes the role the Paris Agreement could play in this context.

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¹ J Rogelj et al, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development', in V Masson-Delmotte et al (eds), Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, (IPCC 2018), 148 [2.5.1].

² Technical regulations are part of a category of mechanisms referred to by the IPCC as "regulatory approaches" – domestic technical regulations or standards, restrictions, labelling and reporting or verification systems: IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC 2014), 108, Table 4.7.

WTO law and technical regulations

When a country becomes a Member of the WTO, it automatically becomes a party to, and is bound by, all of the WTO agreements.³ WTO law tightly regulates the use of any obstacles to imports other than border duties (tariffs). All Members of the WTO, except Taiwan, are signatories to the Paris Agreement. Not all Paris Agreement Parties are Members of the WTO.

A country's domestic technical regulations can impede or prevent the entry of imports into that country's market. The WTO agreement which sets out the rules applying to domestic technical regulations is called the 'Agreement on Technical Barriers to Trade' (TBTA).⁴ The TBTA does not oppose domestic technical regulations in principle, but it does strictly ensure they are used sparingly, soundly based and in good faith.

The TBTA expressly recognises that Members have the right to adopt the technical regulations they consider appropriate for the level of protection they choose⁵, but technical regulations must not discriminate against or between 'like' imports.⁶

So the first question for TBTA purposes is whether products which are differentiated solely on the basis of technical characteristics, such as their emission levels, are 'like' products. Where the basis for technical differentiation between the products relates to a physical characteristic, such as the vehicle's emission technology, it is probable that the differentiation would be considered legitimate under the TBTA. Moreover, even where the vehicles are 'like', there is some flexibility under the TBTA where the less favourable treatment between the like products 'stems exclusively from a legitimate regulatory distinction'.⁷

The second question for TBTA purposes is whether a technical regulation creates an unnecessary obstacle to trade.⁸ Importantly, however, where a technical regulation is in accordance with a 'relevant international standard' developed by a recognised international standard-setting organisation, the regulation is 'rebuttably presumed not to create an unnecessary obstacle to international trade'.⁹

This presumption, however, will not assist a Party that decides to adopt a technical regulation for vehicle emissions which sets a more ambitious standard than the international one. While the TBTA permits this, it is suspicious of such regulations and, if they are challenged, they will be very closely scrutinized as to discrimination and necessity. In practice, tensions between WTO Members are reduced and legal challenge is made less likely by the operation of provisions in the TBTA which encourage equivalence and mutual recognition of each other's technical regulations.¹⁰

WTO law challenges are more likely where a Party wishes, for emissions related reasons, to differentiate between products on the basis of characteristics which are extrinsic to the products in question. For example, a technical regulation might impose a phased-in requirement that a minimum proportion of the energy used in the manufacture of steel (a high energy process) must be derived from renewable sources.¹¹ The technical regulation might also phase in a prohibition on the placing of non-complying steel from any country on the domestic market, thus creating an obstacle to steel imports. Unlike the example of vehicle emissions, this technical regulation differentiates between otherwise like products on the basis of a characteristic which is extrinsic to the product (not a physical characteristic).

Measures of this kind are governed by a different WTO agreement, the General Agreement on Tariffs and Trade (GATT), as the TBTA does not apply to technical

³ Some special flexibilities are available to developing countries. Anomalously, Annex 4 to the WTO Agreement contains four plurilateral agreements, accession to which is optional. Two were terminated in 1997. In addition, the General Agreement on Trade in Services is an 'opt-in' agreement: WTO, General Agreement on Trade in Services, 1869 UNTS 183, 15 Apr 1994, in force 1 Jan 1995 (GATS).

⁴ WTO, Agreement on Technical Barriers to Trade, 1868 UNTS 120, 15 Apr 1994, in force 1 Jan 1995, ('TBTA'), Annex 1A.

⁵ TBTA, Preamble, sixth recital; WTO Appellate Body, United States – Certain Country of Origin Labelling (COOL) Requirements ('US-COOL'), WTO Docs WT/DS384/AB/R, WT/DS386/AB/R, (23 July 2012), [445-453].

⁶ TBTA, Article 2.1

⁷ WTO Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WTO Doc WT/DS406/AB/R (4 April 2012) ('US-Clove Cigarettes'), [174-5]. Followed in, for example, WTO Appellate Body, United States Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO Doc WT/DS381/AB/R, (16 May 2012) ('US-Tuna II (Mexico)'); WTO Appellate Body, US-COOL (n 41).

⁸ TBTA, Article 2.2.

⁹ TBTA, Article 2.5. There is no WTO jurisprudence yet as to what is required to rebut the presumption in Article 2.5. Bodies which develop international standards must accept and comply with the 'Code of Good Practice for the Preparation, Adoption and Application of Standards' in Annex 3 and must adopt the WTO TBT Committee's six 'Principles for the Development of International Standards, Guides and Recommendations': WTO TBT Committee, 'Principles for the Development of International Standards, Guides and Recommendations', WTO Doc G/TBT/9, November 2000.

¹⁰ TBTA, Articles 2.7 and 6.

¹¹ See C Bataille, 'Low and zero emissions in the steel and cement industries' (OECD Issue Paper, 2018), 20.

¹² The prohibition on discrimination between like imports is known as the 'Most-Favoured Nation' rule.

regulations dealing with extrinsic characteristics of products. GATT prohibits discrimination between ‘like’ products and the prevailing view is that it does not recognise extrinsic characteristics as a legitimate basis for differentiation. As a result, the steel technical measure would confer more favourable treatment on complying steel imports than on like, non-complying steel imports, in contravention of GATT Article I.¹²

A Member defending a GATT-based challenge in the WTO to a discriminatory steel technical measure would likely be forced to rely on the general exceptions in GATT Article XX. It is certainly possible to defend a regulation under this Article successfully, but it would have to be an extremely carefully crafted and balanced measure.¹³

Fortunately, many of the legal difficulties and uncertainties may be reduced through developing a larger role for international standards in underpinning domestic technical regulations.¹⁴

Moving forward - international standards

‘International standards’ are technical standards which are developed at the international level (often on terms negotiated between industries and governments) by authorized organisations, such as the International Organization for Standardization (ISO). There are many potential benefits of widespread adoption of domestic technical regulations based on international standards, including that it offers increased and more affordable access for developing countries to standardized technologies, bringing with it the prospect of broader acceptance of their exports.

A Party which bases its domestic technical regulations on relevant international standards will be in a much stronger position to defend the regulations in the WTO as being necessary, even-handed and proportionate under the TBTA or GATT. At present, the extent and adequacy of coverage by existing emission-related international standards are not clear, nor is the nature of gaps in the

portfolio of international standards which will be needed to support the global transition to net zero emissions.

Embracing the domestic adoption of ambitious GHG technical regulations and measures, based on a comprehensive portfolio of relevant international standards, has the potential to progress the aims of both WTO law and the Paris Agreement. It would reduce the risk of compliance tensions with WTO law and also consumer confusion.¹⁵ It promises to reduce compliance costs for exporting manufacturers and producers (including those in developing countries), supporting fairer access to commercial opportunities.

In contrast, global web of diverse domestic emission regulations and measures could see exporting countries having to manufacture products to multiple different specifications, creating a heavy drag on the transition to net zero carbon, particularly for developing countries. At present, for example, some do not have the accredited laboratories to undertake the required product certification and testing in order to demonstrate that their products meet various market entry requirements.

Harmonization of technical regulations based on international standards could ensure that the principle of common but differentiated responsibilities and respective capabilities is integrated and existing trade barriers for developing countries reduced. International standards could, amongst other things, provide for exceptions for least-developed countries, phased-in application of new rules, technical assistance and capacity building.

Fora to develop international GHG emission standards

Work to develop new GHG emission international standards is already underway in different international fora. One success has been the negotiation of a new GHG emission international standard through the mechanism of an amendment to the 1987 Montreal Protocol: the 2019 Kigali Amendment to phase down the use of HFCs.¹⁶

The International Maritime Organization (IMO) has

¹³ For a detailed discussion, see R Harris and G Moon, ‘GATT Article xx and human rights: What do we know from the first 20 years?’ (2015), 16(2) Melbourne Journal of International Law, 1.

¹⁴ See above FN 9.

¹⁵ K Holzer and A Hoe Lim, ‘Trade and carbon standards: Why greater regulatory cooperation is needed’, https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_Holzer.pdf, 10-11.

¹⁶ Montreal Protocol on Substances that Deplete the Ozone Layer (1987), ‘Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer’ (‘Kigali Amendment’), 15 October 2016, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-f&chapter=27&clang=_en

¹⁷ International Maritime Organization (IMO), ‘IMO Action to Reduce Greenhouse Gas Emissions from International Shipping’, Around 80% of global trade by volume is carried by sea: UNCTAD, Review of Maritime Transport 2018, p. 23.

¹⁸ The measures are part of the First Edition of Annex 16, Volume IV to the Convention on International Civil Aviation (Chicago Convention).

¹⁹ See ICAO, ‘Climate Change’, <https://www.icao.int/environmental-protection/pages/climate-change.aspx>

developed a Strategy on Reduction of Greenhouse Gas Emissions from International Shipping.¹⁷ The Strategy sets out a methodology using phased average carbon intensity reduction across all international shipping, as well as phased reduction of total annual GHG emissions from international shipping.

A set of Standards and Recommended Practices has also been developed and adopted by the International Civil Aviation Organization (ICAO). The Standards provide mandatory actions by States and airline operators to implement the Organization's Carbon Offsetting and Reduction Scheme for International Aviation.¹⁸ The Standards provide an agreed basis for emission baselines and for measuring and reporting emission reductions.¹⁹

While there is no particular forum or body designated to lead a process of auditing and developing the required GHG international standards, it seems logical to consider the ISO for the task. The ISO is effectively the parent body of international standardizing organizations, being the largest developer and publisher of international standards (including of the guidelines for establishing standards). The ISO has already developed and produced hundreds of environmental international standards, for general use as well as for individual project or product use.²⁰

A new series, ISO 19694, is in the process of being developed specifically for quantifying and monitoring GHG emissions by the very high energy industries – aluminium, iron and steel, cement, lime and ferroalloys, semi-conductors and displays.²¹ Importantly, the ISO Task Force on Climate Change Coordination is in the final

stages of developing a new 'ISO Guide 84: Guidelines for Addressing Climate Change in Standards'.²² Were the ISO to undertake the project, it is essential that it works closely with the UNFCCC and the WTO (international bodies with which the ISO already cooperates at multiple levels) and with developing countries.

The Paris Agreement (in Article 6 paragraphs 8 and 9) recognises that Parties will use non-market approaches (NMAs) in the implementation of their NDCs and defines a framework for NMAs. For the time being, the scope, purpose and functions of the framework remains an open question. A UNFCCC technical paper of 2014 describes NMAs as “any actions that drive cost-effective mitigation without relying on market approaches or mechanisms (i.e. without resulting in transferable or tradable units)”.²³ Examples listed in the paper include fiscal instruments (such as taxes or financial subsidies), education and awareness raising as well as technical regulations.

The language in Article 6 appears wide enough to cover collective approaches by Parties under the NMAs framework and, therefore, potentially the development of international standards on GHG emissions (in areas not covered by the IMO and ICAO). So, even if the ISO leads the standard development process, it should do so in collaboration with both the UNFCCC and the WTO. Relevant UNFCCC bodies with important expertise in this context include, for example, the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the forum on the impact of the implementation of response measures, or, in the WTO, the Committee on Technical Barriers to Trade (TBT Committee) and the Committee on Trade and Environment (CTE).

²⁰ ISO, Climate Change Mitigation (ISO, 2019), www.iso.org/publication/PUB100271.html, 4.

²¹ ISO 'Focus # 128: Climate Action', May-June 2018, [www.iso.org/files/live/sites/isoorg/files/news/magazine/ISOfocus%20\(2013-NOW\)/en/2018/ISOfocus_128/ISOfocus_128_en.pdf](http://www.iso.org/files/live/sites/isoorg/files/news/magazine/ISOfocus%20(2013-NOW)/en/2018/ISOfocus_128/ISOfocus_128_en.pdf), 26.

²² See ISO, www.iso.org/standard/72496.html.

²³ UNFCCC, “Non-market-based approaches”, Technical Paper, FCCC/TP/2014/10, 24 November 2014, p 4, para 10.

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