

ORIGINAL ARTICLE

Free Trade Agreements as Sites of Economic Diplomacy: Agreeing Common Standards for Sustainable Development

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Abstract

In the face of ongoing disruptions to the multilateral trade regime, from deadlock at the WTO to the rise in unilateralism, this contribution examines the role that free trade agreements (FTAs) can play in supporting the adoption of common standards for sustainable development. It does this in three moves: first, it reframes the role of FTAs from sources of obligation and mechanisms of compliance to sites of economic diplomacy where governments can shape international standards through FTA structures; second, it unpacks the relationship between regulation and standards through three case studies (dolphin-safe labelling, automotive standards, and nutrient profiling), identifying means through which FTAs can be leveraged by trade policy actors; third, it draws on these lessons to examine how FTAs can support the uptake of key new standards and quasi-standards for sustainability, in this case, the ISO Net Zero Guidelines. Finally, this contribution reflects on the implications of reappraising the development of world trade law as part of the practice of economic diplomacy.

Keywords: Sustainable development; TBT; economic diplomacy; free trade agreements; net zero; standards

1. Introduction

The World Trade Organization (WTO) has had a long, at times fraught, relationship with commitments that make explicit reference to sustainable development. For all the fanfare of the inclusion of sustainable development in the preamble to the WTO Agreement,¹ most notably by the Appellate Body in its seminal *US–Shrimp* report,² explicit commitments to support sustainable development through trade policy have been lacking.³ While the WTO (principally the Secretariat) has actively supported links to the UN Sustainable Development Goals in its engagement activities (whether at Ministerial Conferences or the Public Forum), and WTO committees (particularly the Committee on Trade and Environment) hold issues relating to sustainable development on their agendas or host thematic sessions, commitments in relation to sustainable development at the WTO lack specificity or ambition. Outside of the (unratified) Agreement on

¹Marrakesh Agreement Establishing the World Trade Organization (15 April 1994).

²Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para. 129ff.

³The recent conclusion of the (partial) Agreement on Fisheries Subsidies at the 12th Ministerial Conference in Geneva in 2022 marks a potential turning point in this regard as the first set of commitments at the WTO directly concerned with environmental rather than economic harm or disadvantage: Agreement on Fisheries Subsidies (17 June 2022) WT/MIN (22)/W/22.

Fisheries Subsidies, the principal ‘entry point’ for sustainable development in WTO law has historically been seen through the application of exceptions rather than positive rights or duties.⁴

Free trade agreements (FTAs) have customarily filled the gaps left by the WTO, whether through greater liberalization, increased scope of commitments, or additional topics not yet covered in Geneva.⁵ In the field of sustainable development, FTAs have long been receptive to the inclusion of provisions that relate to sustainable development: from dedicated sustainability chapters in European Union agreements,⁶ labour and forestry provisions in United States agreements,⁷ gender provisions in Chile agreements,⁸ or fossil fuel provisions in New Zealand’s recent agreements,⁹ FTAs have constituted a fertile source for those seeking mutual supportiveness between commitments in trade and sustainability. Though at times welcome, many of these commitments are either lacking in detail or effective enforcement mechanisms (or both).¹⁰

In the face of ongoing disruptions to the multilateral trade regime, from deadlock at the WTO to the rise in unilateralism, this contribution reframes the role of FTAs in pursuing sustainable development. Instead of examining them as sources of obligations and compliance mechanisms, here we examine them as sites of economic diplomacy where policy actors can experiment in innovative modes of trade governance. As governments increasingly instrumentalize trade policy as a key lever in the pursuit of other policy aims – not least of all the pursuit of sustainable development – this contribution focuses on the role that FTAs can play. By examining FTAs as sites of economic diplomacy, this contribution looks to how they are used to leverage ongoing novel developments in the world of standards and quasi-standards, with a focus on those used in relation to climate policy. This is of critical importance, not only in the face of the climate crisis and the increased demand for new approaches to trade policy, but also because the climate crisis is increasingly used as a defence for new measures that challenge the foundations of the multilateral trade regime – from multi-billion-dollar subsidies programmes to expansive carbon-based border measures and supply chain due diligence requirements. As such, the practice (and scope for future expansion) of FTAs as sites of economic diplomacy is fundamentally related to the reorientation of today’s trade regime.

This article proceeds as follows: Section 2 sets out the contours of the practice of economic diplomacy, and, in particular, the form of most interest to this contribution: regulatory diplomacy. Section 3 presents the relationship between standards and regulation in world trade law, with a particular focus on the liminal space between binding and non-binding instruments in trade policy (framed as the standards-regulation nexus) where regulatory diplomacy is especially active. Section 4 examines the standards-regulation nexus through three case studies (dolphin-safe labelling, motor vehicle standards, and nutrient profiles), before turning, in Section 5, to the specific case of the ISO Net Zero Guidelines, introducing their history and purpose and including elements from all three case studies. Section 6 draws on these lessons to identify levers within FTAs to support the uptake of the ISO Net Zero Guidelines and thereby contribute to the adoption of standards for sustainable development. Section 7 concludes, noting the critically important role that FTAs can play, not only as sources of obligation, but as creators of diplomatic and social spaces essential for the effective pursuit of climate-sensitive trade policies. Finally, it reflects

⁴Paradigmatically, Article XX(g), General Agreement on Tariffs and Trade 1994 (GATT).

⁵For a useful typology of the means through which FTAs are used to build on a WTO baseline: C. Hofmann, A. Osnago, and M. Ruta (2019) ‘The Content of Preferential Trade Agreements’, *World Trade Review* 18(3), 365–398.

⁶A tradition beginning with the EU–Korea Free Trade Agreement.

⁷See US–Mexico–Canada Agreement (USMCA) and US–Peru Trade Promotion Agreement, respectively.

⁸See Uruguay–Chile Free Trade Agreement, Canada–Chile Free Trade Agreement, Argentina–Chile Free Trade Agreement.

⁹E.g., New Zealand–UK Free Trade Agreement.

¹⁰For a criticism of the limited effectiveness of pre-Trade and Cooperation Agreement (TCA) EU mechanisms, see M. Bronckers and G. Gruni (2021) ‘Retooling the Sustainability Standards in EU Free Trade Agreements’, *Journal of International Economic Law* 24, 25–51.

on the importance of re-integrating practices of economic diplomacy in wider studies on the development of world trade law.

2. The Practice of Economic Diplomacy

The exact content of the practice of ‘economic diplomacy’ is largely undefined or contested.¹¹ For the purposes of this contribution, economic diplomacy is understood as the diplomatic practice of subjects of public international law in pursuing their own economic interests. Such practice includes: trade diplomacy, the intergovernmental pursuit of economic diplomacy through institutions of international governance, including the WTO, FTAs, the G7, G20, ongoing bilateral relations, and so on; commercial diplomacy, the practice of governments supporting the economic interests of private actors by directly engaging with them on a firm or sector-specific level (e.g., export financing or trade promotion);¹² and regulatory diplomacy, the practice of working with standards bodies or schemes, or regulators, to shape the regulatory foundations of the global trading system. A distinguishing feature of economic diplomacy is that it is fundamentally concerned (to a large extent) with the interests of private actors – that is, the interests of commercial actors (producers or, more rarely, consumers) within a State.¹³ Much of economic diplomacy cuts across the traditional legal categories of public and private and national and international as it involves transnational commercial actors, government officials, agencies, regulators, capitals, and overseas posts. As we will see, the liminal spaces between these categories, challenged by the realities of the multilateral trade regime, become fertile spaces of activity by practitioners of economic diplomacy (diplomats and government officials certainly, but also standards bodies representatives, businesses, civil society, industry groups, and so on).

This contribution pays particular attention to the implications of one type of economic diplomacy, regulatory diplomacy, and the development of standards which play a critically important role in supporting environmentally sound trade policies. The potential of FTAs to be leveraged as sites of economic diplomacy in the pursuit of sustainable development is of keen relevance as governments increasingly turn to unilateral measures, such as supply chain due diligence requirements or the application of carbon adjustment measures.¹⁴ Such policy tools have their appeal: they can be effective and are easier to agree or implement than multilateral or bilateral commitments. While such measures may well be more effective than sustainability commitments under FTAs, their effectiveness is predicated on leveraging market size. As trade policy instruments, unilateral measures necessarily pose a higher risk for international partners and businesses, especially (though not exclusively) from developing countries, to be disadvantaged unreasonably or without appropriate consideration.¹⁵

The potential negative impact of unilateral policies can be mitigated, in part, through the reliance on internationally agreed standards (for example on carbon accounting or eco-labelling

¹¹For a helpful discussion, see M. Okano-Heijmans (2011) ‘Conceptualizing Economic Diplomacy: The Crossroads of International Relations, Economics, IPE and Diplomatic Studies’, in P.A.G. Van Bergeijk, M. Okano-Heijmans, and J. Melissen (eds.), *Economic Diplomacy: Economic and Political Perspectives*. Brill.

¹²Sometimes referred to as ‘business-supporting’ activities. See M. Kostecki and O. Naray (2007) ‘Commercial Diplomacy and International Business’, Discussion Papers in Diplomacy No. 107, Netherlands Institute of International Relations.

¹³For an illustrative example on the extent to which economic diplomacy involves a greater selection of actors beyond the State, see T. Heron (2007) ‘European Trade Diplomacy and the Politics of Global Development: Reflections on the EU–China “Bra Wars” Dispute’, *Government and Opposition* 42(2), 190–214. In a larger ‘governance’ context: B. Hocking (2004) ‘Changing the Terms of Trade Policy Making: From the “Club” to the “Multistakeholder” Model’, *World Trade Review* 3(1), 3–26.

¹⁴In the context of forestry management, for example, see the EU’s Deforestation Regulation (EUDR) or the US FOREST Act (building on the Lacey Act) both of which place obligations on businesses in relation to the sourcing of their products across their whole supply chain. See further, G. Messenger (forthcoming) ‘Mitigating the Rise of Unilateralism: Lessons from Forestry Management’, *Journal of International Economic Law*.

¹⁵Indeed, this is the underlying rationale for a range of commitments under WTO law in relation to transparency obligations, the ability to raise concerns, and the requirement for inclusion in rule- and standard-making.

requirements). However, progress at the International Organization for Standardization (ISO) and other (public) international standards bodies has been slow.¹⁶ In response, commercial standards have filled the gap with some (such as the Greenhouse Gas Protocol) shaping the work of all standards bodies.¹⁷

Commercial standards (sometimes referred to as private standards),¹⁸ can be firm-level, national, or international. Some may bridge different levels: for example, the Programme for the Endorsement of Forest Certification (PEFC) acts as an umbrella organization, collecting a range of different national schemes under a single programme.¹⁹ Though commercial standards are influential, often responding to immediate demand from business or consumers, they suffer from significant weaknesses, not least the lack of inclusion in their design and application. Thus, while they can be helpful, they do not replace demand for *public* standards. In all instances, standards are critically important to provide the appropriate frameworks for governments and commercial actors to pursue both legitimate policy objectives (such as sustainable development) and encourage free(er) trade.²⁰

This contribution draws on three examples of standardizing activities (in relation to dolphin-safe labelling, trade in motor vehicles and parts, and nutrient profiles in public health regulation) and considers the role that economic diplomacy can play by leveraging FTAs as tools for regulatory cooperation. By drawing on these examples of international commercial standards, internationalized regional standards, and ‘quasi-standards’, respectively, it analyses ways in which FTAs can be used to support regulatory cooperation in standards development for sustainable development, specifically in relation to climate policy and ISO’s (non-binding) Net Zero Guidelines. While much attention is paid to the role of the WTO as a forum for norm-development and contestation,²¹ this article instead focusses on FTAs as potentially more fruitful, though underutilized, forums through which governments can pursue policies that support both trade and sustainable development. This piece thus reframes discussions around FTAs to help respond to a current challenge (the demand for rapid standards development for climate policy) but also introduces a larger claim: that the development of trade law is increasingly best understood through the lens of diplomatic processes of trade, commercial, and regulatory diplomacy acted out through institutions of national and international trade law governance.

3. Standards in World Trade Law: From Soft Law to Hard Law (and in between)

Standards play a crucial role in the pursuit of climate goals as economic actors across the globe seek to improve their practice to align with both commercial pressures and legal obligations to meet environmental targets. For example, businesses that need to ensure that their products are ‘deforestation free’, for the purposes of EU Deforestation Regulation (EUDR), turn to private

¹⁶‘Public’ in contrast to ‘commercial’ standards: those from bodies constituted exclusively or primarily by non-governmental actors such as businesses or civil society.

¹⁷Note the inclusion of the Greenhouse Gas (GHG) Protocol’s concepts of Scope 1, 2, and 3 in relation to emissions in the ISO Net Zero Guidelines (IWA 42:2022), 3.2.3–5. GHG Protocol standards are available at <https://ghgprotocol.org/standards>.

¹⁸See J. Wouters and D. Geraets (2012) ‘Private Food Standards and the World Trade Organization: Some Legal Considerations’, *World Trade Review* 11(3), 479; G. Messenger (2016) *The Development of World Trade Organization Law*. Oxford University Press, 150–158; P. Mavroidis and R. Wolfe (2017) ‘Private Standards and the WTO: Reclusive No More’, *World Trade Review* 16(1), 1–24.

¹⁹Information on PEFC, including its member bodies, is available at <https://www.pefc.org/>.

²⁰On the potential benefits from a legal perspective: M. Du (2010) ‘Reducing Product Standards Heterogeneity through International Standards in the WTO: How Far Across the River?’, *Journal of World Trade* 44(2), 295; and a cautionary account, G. Mayeda (2004) ‘Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries’, *Journal of International Economic Law* 7(4), 737.

²¹Particularly the work of committees: e.g., A. Lang and J. Scott (2009) ‘The Hidden World of WTO Governance’, *European Journal of International Law* 20(3), 575; H. Horn, P. Mavroidis, and E. Wijkstrom (2013) ‘In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees’, *Journal of World Trade* 47(4), 729–760.

voluntary standards schemes such as the Forest Stewardship Council (FSC) to help them meet such obligations (even if the EUDR does not formally recognize FSC certification). For other businesses, concerned with their ability to meet (and demonstrate) their progress to net zero, the Science Based Targets Initiative (SBTi)'s Corporate Net-Zero Standard forms a central part of their practice. And as carbon border adjustment measures are introduced globally, commonly agreed standards around methodologies for calculating carbon content become increasingly important.

It is telling that of the standards noted none are traditional 'standards' that world trade law customarily accepts. As this section shows, the traditional standards development process is facing multiple challenges, as does its interface with multilateral institutions such as the WTO. As a consequence, FTAs become important as spaces of collective experimentation and alternative governance in developing standards for climate policy.

3.1 Standards and Standardizing Bodies and Climate Policy

A standard is defined by ISO as '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'.²² In the WTO, Annex 1 of the TBT Agreement draws on this definition, adjusting it to accommodate the Agreement's focus on products or processes and production methods. It also creates a distinction lacking in the ISO/IEC context between (voluntary) standards and (mandatory) technical regulations – something that the ISO/IEC definition elides.

The economic benefit of standards in improving productivity, efficiency, and facilitating trade is well documented.²³ Standards underpin the global trade system, from the largest multinational businesses to the smallest micro enterprise. Standards can work in two ways to support businesses as they pursue climate goals: first, to provide support in the development of climate policies (such as helping a business meet net zero targets by a set date); second, by supporting trade which is considered beneficial for climate policies (for example, the provision of environmental services). The lack of mainstreamed climate factors in standards is, as in trade law, a concern. We note that the 'carbon blindness' of world trade law is well-documented, noting how, for example, WTO rules on agricultural subsidies do not consider emissions within their calculation.²⁴ In the case of many standards, this is similarly true. To combat this failing, in 2021 the ISO General Assembly (constituted of all national standards bodies – NSBs) agreed the London Declaration committing to:

Foster the active consideration of climate science and associated transitions in the development of all new and revised International Standards and publications,

Facilitate the involvement of civil society and those most vulnerable to climate change in the development of International Standards and publications,

Develop and publish an Action Plan and Measurement Framework detailing concrete actions and initiatives and a reporting mechanism to track progress.²⁵

²²ISO/IEC Guide 2:2004.

²³See ISO (2014) 'Economic Benefits of Standards', www.iso.org/publication/PUB100403.html; CEBR (2015) 'The Economic Contribution of Standards to the UK Economy', www.bsigroup.com/LocalFiles/en-GB/standards/BSI-standards-research-report-The-Economic-Contribution-of-Standards-to-the-UK-Economy-UK-EN.pdf.

²⁴See International Law Association (2022) 'Final Report of the Committee on Sustainable Development and the Green Economy in International Trade Law', Part II. Similarly, as a non-product related process and production method, carbon content falls outside of the traditionally understood criteria for examining 'likeness'.

²⁵ISO General Assembly (2021), *London Declaration*.

The revision of over 20,000 ISO standards is a large task but necessary: standards are critical to support climate policies and to meet the Paris Agreement's net zero targets, whether in the case of environmental management, carbon accounting, targeting setting and monitoring, or others. However, the process of standardization can be slow, and currently ISO is already behind in updating its existing standards. These challenges in relation to (public) standards development are not unusual.

The standards development process differs depending on different bodies and different levels. It is useful to categorize them across two axes: national–international and commercial–public. These categories are, however, less clear than we might expect. Commercial actors are the principal participants in most standardizing processes under ‘public’ national standardizing bodies.²⁶ While NSBs will (in varying degrees of success) make efforts to ensure as wide a participation as possible in the creation of standards, non-commercial actors (e.g., civil society) are neither sufficiently resourced nor do they necessarily have the desire to remain part of a process that may entail significant compromises in relation to their core brief.

Just as the public–private divide can mislead, so too can the national–international division. First, some of the most influential standardizing bodies are in truth regional: we see this practice in relation to European standardization, a practice formalized through agreements whereby International Electrotechnical Commission (IEC) standards become European Committee for Electrotechnical Standardization (CENELEC) standards and, ultimately, are adopted as national standards by NSBs.²⁷ In practice, the direction of influence is often reversed, with the European Committee for Standardization (CEN), for example, proposing standards that are subsequently adopted in the ISO.²⁸ Additionally, while international standards are formally developed through a standardizing process, which includes the NSBs of all WTO Members (for our purposes), the process is dominated by NSBs from the Global North.²⁹

To further add complexity, standards in each space, public–private–national–international, are shaped by an awareness of their analogues. That is to say, standards development takes place in the shadow of their competitors or fellow travellers in standardization. We see this in the case of the GHG Protocol which is, by any measure, the most influential and widely adopted standard in its field, and shapes the development of new standards in the public space that acknowledge the existing dominance of the GHG Protocol – a dynamic most clearly played out in relation to the ISO Net Zero Guidelines that engage with GHG Protocol terminology, which had previously not been widely used in the NSB arena.³⁰

This presentation and problematization of the description of standards is important for our purposes: world trade law, specifically obligations under the TBT Agreement, presuppose a neat categorization – one that is not borne out in practice. An important implication of the analysis presented here is that the liminal spaces between regulation and standards, binding and non-binding, at times uncomfortable for lawyers, are fertile spaces for economic diplomacy. Thus, while we may have examples of commercial standards that do not formally constitute ‘standards’ for the purposes of the TBT Agreement, they may yet have an important influence (including through the legal structures of FTAs). This is similarly true of quasi-standards or regionalized standards. This is not to say that the formal legal categorization of what constitutes a ‘standard’ or a ‘standardizing body’ is irrelevant: on the contrary, these practices *play* with the formal definition, leverage their benefits, and drawing on the advantages offered under the TBT Agreement

²⁶For a recent analysis of the participation of actors: T. Rühlig (2023) ‘Chinese Influence through Technical Standardization Power’, *Journal of Contemporary China* 32(139), 54–72.

²⁷Specifically, through the ISO-CEN Vienna Agreement and IEC-CENELEC Dresden Agreement.

²⁸For a wider account, see J.-C. Graz (2019) *The Power of Standards: Hybrid Authority and the Globalisation of Services*. Cambridge University Press.

²⁹China constitutes an interesting exception to this. See the developments in China's engagement with international standardizing bodies. For a balanced account, see T. Rühlig (2023), ‘Chinese Influence through Technical Standardization Power’, *Journal of Contemporary China* 32(139), 54–72.

³⁰See below, Section 5.

by governments introducing new regulation. FTAs are of central importance here as institutions that allow the creation of simulacra of the WTO, adjusted to cater to the parties' needs, including in relation to standardization – and it is proposed here – climate policy.

The remainder of this Section outlines these formal requirements and then contrasts them in Section 4 with three examples of (non)standards that have been, or could be, supported through FTAs.

3.2 Standards and Standardizing Bodies under WTO Law

The TBT Agreement draws on the ISO definition of a standard to provide a definition for the purposes of the Agreement (Annex 1). While using a pre-existing template, its focus is on trade in goods. In the WTO context, this is unsurprising as a conceptual distinction is drawn between trade in goods and services and their respective commitments. A distinction that is mostly continued in FTA practice (albeit with different contours).³¹

The focus on trade in goods underpins the core bargain of the TBT Agreement: while acknowledging the importance of legitimate policy objectives (such as protecting the environment, supporting climate policy, supporting biodiversity), also recognizing the risk that Members will either regulate in a discriminatory or overly burdensome manner. Thus, to balance the recognition of a legitimate objective with a desire to minimize costs for traders or the risk of concealed barriers to trade, a key tool of the TBT Agreement is the importance given to internationally recognized standards. This is done in two moves: a requirement to base mandatory technical regulations on existing standards and benefits that accrue to Members where their technical regulations conform to international standards. This is at the heart of the standards-regulation nexus – the ways in which their interaction, through legal obligation, shapes behaviour.

Under Article 2.4 TBT Agreement '[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations' unless such standards would be 'ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued'. The analysis of the provision has been conducted thoroughly elsewhere,³² but for our purposes there are three elements of particular importance.

First, the scope of this obligation is significant: it applies to all technical regulations of Members, not only the development of *new* mandatory requirements.³³ This increases the attention given to the creation or updating of international standards. This is critical since as we have seen, the ISO is currently undertaking a review of its standards to ensure they are aligned with climate goals: an updated standard not only shapes new technical regulations but all existing regulations, subject to limited exclusions.³⁴

Second, unlike the SPS Agreement,³⁵ the TBT Agreement provides no specific list of standardizing bodies. Fortunately, the Appellate Body has provided guidance: the body must be open to the relevant bodies of all WTO Members at every stage of the standard's development and on a non-discriminatory basis.³⁶

³¹For example, the EU's idiosyncratic approach to liberalization of services under its FTAs, distinguishing between both modes and services in separate chapters (e.g., the EU–UK Trade and Cooperation Agreement, and more recently, the Chile–EU Interim Trade Agreement).

³²E.g., R. Tamiotti (2023) 'Article 2 TBT', in M. Wagner (ed.), *Volume 4: Technical Barriers and SPS Measures*, in P.-T. Stoll and H. Hestermeyer (eds.), *Commentaries on World Trade Law*. Brill.

³³Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 205.

³⁴Where the standard 'would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued' (Art 2.4 TBT Agreement).

³⁵Agreement on Sanitary and Phytosanitary Measures, Annex A.3.

³⁶Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 359ff. This echoes the language used in the TBT Committee Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations in relation to Articles 2, 5, and Annex 3 of the Agreement, which was drawn upon as constituting subsequent agreement under Article 31(1)(3)(a),

Third, the international standards, ‘or the relevant parts of them’, must be sufficiently clear and precise to be able to perform the function of a standard,³⁷ that is, it ‘provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory’.³⁸ When Members seek to expand the definition of standards to include other instruments which may have a comparable appearance, this hurdle can become a concern. This, as we will see, plays a particular role in relation to the ISO Net Zero Guidelines which are, definitionally, not standards from the ISO perspective.

The requirements of Article 2.4 are important for WTO Members, not only as discrete legal obligations but also as they are necessary preconditions for the incentive of the TBT Agreement’s requirements to base technical regulations on international standards: a rebuttable presumption of conformity with the obligation that a measure ‘does not create an unnecessary obstacle to international trade’. This requires not only basing the measure on the relevant international standard but ensuring that it is ‘in accordance’ with the standard, a higher threshold for conformity.³⁹

Why is this such a valuable incentive? After all, the presumption does not apply to other obligations under the TBT Agreement, including national treatment and most-favoured nation commitments.⁴⁰ And it is not without its hurdles (to meet the requirements of Article 2.4 and then, additionally, align more closely with the relevant international standard). Here, reframing the legal commitments within the practice of economic diplomacy is useful: when Members’ measures are subject to a Specific Trade Concern (STC) at the TBT Committee, they are required to provide responses to questions from other Members.⁴¹ In practice, most Members raise concerns that have been flagged to them by industry as governments tend not to have banks of officials examining the regulatory activity of all other WTO Members.⁴² Instead, they depend on information from potentially affected businesses (sometimes through posts – embassies, consulates, and missions – and other times through stakeholder engagement within the home State).

The STC Committee dynamic raises concerns around ‘regulatory chill’ in many quarters, with Members delaying, watering down, or withdrawing technical regulations which are intended to serve an important public policy objective.⁴³ The nature of the questions is important as part of this process. Note, the most common question is a request for further information.⁴⁴ The second most common, however, does not relate to non-discrimination (the core pillar of trade law): it is instead a concern related to the trade-restrictiveness of the measure. This is a much harder challenge to face: discrimination, whether *de facto* or *de jure* can be identified and

Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 *International Legal Materials* 679.

³⁷Panel Report, *Australia – Tobacco Plain Packaging*, WT/DS434/R, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, para. 7.327ff.

³⁸TBT Agreement Annex 1(2).

³⁹One echoing a similar dynamic under the SPS Agreement, albeit absent the scope of allowing for a higher appropriate level of protection, which, it is possible, in turn reduces the influence of regulatory diplomacy in the context of SPS measures as compared to TBT where divergence from standards is more restrained.

⁴⁰Art 2.1 TBT Agreement.

⁴¹For an overview of their use and practice: R. Wolfe (2020) ‘Reforming WTO Conflict Management: Why and How to Improve the Use of “Specific Trade Concerns”’, *Journal of International Economic Law* 23(4), 817–839.

⁴²Though this has traditionally been through well-documented processes of lobbying, today online platforms also play a role: the EU uses a ‘Single Entry Point for Trade Barriers’, <https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0>. The UK uses a ‘report a trade barrier’ system that allows businesses to check whether a barrier has already been reported or to report any new barriers. Importantly, it also provides contact details for the relevant overseas posts in case of emergency, www.great.gov.uk/report-trade-barrier/. The US also maintains an online platform through the International Trade Administration, www.export.gov/report-a-trade-barrier.

⁴³E.g., P. Barlow and A.M. Thow (2021) ‘Neoliberal Discourse, Actor Power, and the Politics of Nutrition Policy: A Qualitative Analysis of Informal Challenges to Nutrition Labelling Regulations at the World Trade Organization, 2007–2019’, *Social Science & Medicine*, 273.

⁴⁴K. Possada, E. Ganne, and R. Piermartini (2022) ‘The Role of WTO Committees through the Lens of Specific Trade Concerns Raised in the TBT Committee’, *World Trade Review* 21(4), 411–431, 423.

discussed. It is, at its heart, a binary choice (there is discrimination, or there is not). Trade-restrictiveness is necessarily a scale and while the Appellate Body has provided guidance, it is through institutions of economic diplomacy (such as the TBT Committee) that the tests are applied. Importantly we see in the practice of the TBT Committee that the Members raising concerns are more conservative interpreters of WTO law (understandably given their position as challengers). Such grey spaces for debate and analysis constitute fertile ground for the exercise of power dynamics and, therefore, the ability to rely on a standard as a shield from such claims is of great value to Members – particularly, but not only, for developing country Members.⁴⁵

3.3 Finding Liminal Spaces in WTO Rules on the Standards–Regulation Nexus

The structure of the standards-regulation nexus under the TBT Agreement would encourage Members to consider the use of standards to support policies aimed toward sustainable development. An internationally agreed standard on, for example, sustainable fishery management certification would have both an indirect harmonizing influence (through Article 2.4) as well as active incentives (through Article 2.5). However, as we have seen, international standards are not easily agreed upon. Fortunately, as we have also seen, the world of standardization is more complex and diverse than a reading of the TBT Agreement might suggest, and the world of trade law is not limited only to the law of the WTO. As the multiplicity of actors engaged in trade policy work through partners in government as part of their diplomatic function, they shape standards across institutions, whether public, private, national, or international.

The following section repositions the desire to use standards to support sustainable development in a wider context, and examines three case studies which offer important lessons for the future use of FTAs to drive the adoption of international standards or standards-like instruments in the pursuit of sustainable development.

4. Unpacking Standardizing Practices: Dolphins, Autos, and Public Health

It is one thing to note the benefits of using internationally agreed standards, whether from a legal perspective and the presumption of compliance (important not only in litigation but also in the critically important Committee stage),⁴⁶ economically for businesses and the reduction of transaction costs, or in terms of inclusivity of decision making.⁴⁷ However, it is not always a given that international standards will be agreed, that they will be influential, or that the bodies that adopt them are recognized in a way that gives them the TBT ‘hook’.

Three examples help to unpack this challenge and provide some useful insights: first, in relation to the nature of the standardizing body, second in the buttressing of support for specific standards, and third using standard-like instruments. Each is important – while they have had limited impact in terms of WTO law, they are (or can be) given greater influence through FTAs.

4.1 Determining What Constitutes an International Standardizing Body: The Agreement on the International Dolphin Conservation Program (AIDCP)

The AIDCP has its origins in the increasing public concern around the killing of dolphins in tuna fishing, particularly in the Eastern Pacific Ocean as a result of the prevalent fishing practice in the

⁴⁵NB Australia’s attempt to frame elements of the Framework Convention on Tobacco Control in *Australia–Plain Packaging* as a relevant international standard. See below at n 73 and corresponding text.

⁴⁶And indeed, prior to the Committee, including enquiry points, and after. For a more detailed picture, see R. Wolfe, ‘Reforming WTO Conflict Management: Why and How to Improve the Use of “Specific Trade Concerns”’, supra n. 41.

⁴⁷See the importance given to this in 6 Principles: TBT Committee, ‘Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement (2000).

region (setting large purse-seine nets around schools of tuna which can cause high dolphin mortality). There had been prior efforts made in this respect, most notably the La Jolla Agreement 1992 which was formed through the Inter-American Tropical Tuna Commission (IATTC).⁴⁸ The La Jolla Agreement was considered successful in reducing rates of dolphin mortality; however, it faced challenges, especially in the face of more stringent unilateral US measures on dolphin-safe labelling and the threat of withdrawal by parties to the agreement. This was exacerbated by its non-binding status. It was not until 1999 that the AIDCP came into force as a revival of an international agreement to tackle this challenge without deferring solely to unilateral measures of the largest regional market.⁴⁹ Unlike the La Jolla Agreement, the AIDCP is binding on the parties.

As is typical in cases of fisheries governance, agreements are often regional, and indeed species specific. It should be noted that while regional, these need not be geographic in the sense of limiting membership only to coastal states; instead, they are often open to those with an interest in the region (including the flag States of vessels that actively fish in the area).⁵⁰

The AIDCP has multiple functions in relation to dolphin conservation, only one part of which relates to certification and standards. Building on the successful elements of the La Jolla Agreement it determines dolphin mortality limits to incentivize responsible fishing. All purse-seine vessels in the region must carry an observer who ensures compliance with the AIDCP and records all interactions with dolphins. Additionally, vessels are required to use specific equipment and techniques to ensure dolphin safety, and crews must undergo training in dolphin-friendly/safe fishing methods.

The AIDCP applies to Belize, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, and Venezuela. In the case of Bolivia and Vanuatu, the Agreement applies provisionally. The IATTC, the Agreement's parent organization also includes a number of 'cooperating non-members', some of which are non-government organizations with a particular interest, such as the World Wildlife Fund, Greenpeace, and the Marine Stewardship Council (MSC).⁵¹

Importantly, AIDCP establishes a system for tracking and verifying tuna caught in line with AIDCP requirements, leading to 'Dolphin Safe' labels on tuna products. It was this element that brought the AIDCP to the attention of the WTO in the *US–Tuna II*.⁵² The US maintains its own definition for 'dolphin safe' labelling of tuna. Mexico, in part, claimed that the US had failed to use the relevant international standard as the basis of its own technical regulations as it had not used the AIDCP requirements. The US was successful on appeal on this point: the Appellate Body rejected the status of the AIDCP as an international standardizing body. It noted that to accede to the Agreement a Member had to be invited, and such invitation was decided by consensus of the existing membership.⁵³

The stringent requirements set out in *US–Tuna II* for a body to be recognized as an international standardizing body, and therefore capable of generating standards that can be relied upon by Members, limits the number of bodies available. At the same time, a constant tension over the lower ambition or stringency of international standards over national measures may see advantages in this situation (and this was certainly part of the US view in this dispute).

⁴⁸Itself established under the Convention for the Establishment of an Inter-American Tropical Tuna Commission (1949).

⁴⁹On the influence of the US domestic measures and the development of the AIDCP: C. Hedley (2001) 'The 1998 Agreement on the International Dolphin Conservation Program: Recent Developments in the Tuna–Dolphin Controversy in the Eastern Pacific Ocean', *Ocean Development & International Law* 32, 71–92.

⁵⁰For example, the North-East Atlantic Fisheries Commission and the Indian Ocean Tuna Commission.

⁵¹It is noteworthy that some of these NGO, such as the MSC have their own (commercial or private) standards programmes. In the case of the MSC, 'Certified Sustainable Seafood'.

⁵²The successor to a prior GATT dispute, *US–Restrictions on Imports of Tuna*. See Report of the Panel, DS21/R-39S/155 (3 September 1991).

⁵³Appellate Body Report, *US–Tuna II (Mexico)*, para. 398.

And, as we have seen, in the climate sphere (as elsewhere) commercial standards are wide-spread and influential, and the bodies that create them would not fall within this definition.

How might this blockage be rectified? One way is to ensure that the body in question does meet the requirements of the TBT Agreement by ‘opening’ itself up in this sense. If the AIDCP were to *automatically* allow new applicants to enter (subject to reasonable conditions, which apply in many international standardizing bodies), the situation would have been quite different. Openness and inclusion become strategic tools of standardization to export approaches to regulation. These are not strategic tools in the abstract, they can be leveraged by the actors involved: in the case of national standards bodies, this is principally businesses; in the case of international standards bodies, these are commonly government representatives (e.g., at Codex) or national standards bodies (e.g., ISO). A core objective of regulatory diplomacy is to extend influence and reach of approaches to (inter alia) standards. Improving openness of standards bodies is one tool, but this does not necessarily ensure reach (that is, uptake by businesses of the standard in question). In the next example, we see how openness and reach have been pursued by industry and government in the EU’s regulatory diplomacy in relation to motor vehicle standards and the United Nations Economic Commission for Europe (UNECE).

4.2 Internationalizing and Cross-Referencing Standards in FTAs

The UNECE was an early example of how standard setting could be used to respond to public policy challenges. While the earliest standard setting practices were focused on business interests and improving efficiency for producers (for example, in relation to engineering projects in nineteenth century England), in this case the increase in the use of automobiles and the attendant risks that their use entailed meant that there was an interest to agree certain common standards. The World Forum for Harmonization of Vehicle Regulations (a working party known as WP.29) developed a range of standards covering numerous issues, including child restraints, electrical safety and fire risks, braking systems, and noise emissions. Though initially conceived of as a regional organization, the interest in ensuring that standards were able to support trade in motor vehicles within Europe necessarily entailed trade with non-European markets, and the United States was a founding member of the organization. Today the organization, and in particular WP.29, has a global reach.⁵⁴

Despite the potential positive influence of an international standardizing body such as UNECE, different standards nonetheless developed in different markets. Most notably in the United States, the standards environment is largely unshaped by governmental influence and includes considerable *internal* divergence where different standards apply not only at a national level but also at a state level.⁵⁵

As the cost of regulatory divergence between Europe and the United States increased, supply chains became more integrated at a continental level and positions became more entrenched. The EU doubled down on its prioritization of the UNECE. The most significant development became the interest in using FTAs to support this objective, turning the EU’s active FTA programme to its advantage in trade in motor vehicles. The FTA was to draw on European successes in regulatory diplomacy at the UNECE.⁵⁶

The EU–Korea FTA was the first transcontinental agreement to include specific reference to UNECE standards. This has been followed up in different ways by the EU with Canada,

⁵⁴On the historical development of WP.29 and its principal agreements: UNECE (2022) *Blue Book* (4th edn), <https://unece.org/transport/publications/world-forum-harmonization-vehicle-regulations-wp29-how-it-works-how-join-1>.

⁵⁵And, at times, multiple different standards within the same state and sector. For their wider positioning with the global system: T. Büthe and W. Mattli (2011) *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press.

⁵⁶Of course, it is not only standards that FTAs support: rules of origin are designed to shape supply chains in such ways that are beneficial for specific firms within sectors, though this part of the picture falls outside of the scope of this article.

Japan, Singapore, and the UK. In the case of the latter, its own trade agreements with Canada, Japan, Singapore also mirrors the EU text. In each agreement, a dedicated annex covers motor vehicles and parts. The approach taken can be divided into three strands: recognition, alignment, and cooperation.

In each agreement, the parties agree to recognize WP.29 as the relevant international standardizing body for motor vehicles and parts (in some cases with politically sensitive exclusions, such as tractors).⁵⁷ Additionally, some include recognition of specific sets of standards that come from the WP.29 system – notably, the UN Regulations and the Global Technical Regulations (GTRs).⁵⁸ Thus, the parties agree to recognize a specific body as the *relevant* standard setter, excluding the potential for any other bodies to be created or identified where there might otherwise be overlapping standards (such as from the IEC or ISO).

Beyond recognizing a specific body and, in some cases, also specific standards, these FTAs also contain provisions concerned with alignment around specific approaches to regulation: specifically, type approval (where a vehicle can be approved as a whole rather than each individual part). The lack of type approval for motor vehicles that EU exporters could access is a long-running concern for European auto producers. In this regard, the TCA has the most explicit commitments with the parties agreeing to (continue to) accept ‘valid UN type-approval certificate as compliant with its domestic technical regulations, markings and conformity assessment procedures, without requiring any further testing or marking to verify or attest compliance with any requirement covered by the UN type-approval certificate concerned’.⁵⁹ In the case of Japan and Singapore, these commitments are softer, but also seek to align the partners approach through a standards system (in the case of the former through cooperation on approvals and in the case of the latter, a commitment to consider becoming a signatory to the relevant UNECE agreement).⁶⁰ Commitments also exist to require justification for deviation from WP.29 standards, such as in the Singapore agreement in relation to the GTRs.⁶¹

Finally, all provide for mechanisms and commitments of cooperation on the development of standards and to discuss any deviations. All agreements include provision for meetings whether through formal standing committees or ‘meetings held on the margins of WP.29 Sessions’ as spaces to identify issues relating to implementation of the agreements and discuss future cooperation or coordination.⁶² Such cooperation also extends to developments in relation to third parties; CETA, given its specific North American context, includes provision for future ‘agreement or an arrangement on the harmonisation of their respective technical regulations related to motor vehicles’ should the EU and US negotiate such an agreement.⁶³ Unusually for many TBT commitments under FTAs, some annexes are formally subject to expedited dispute settlement.⁶⁴

The use of FTAs to build common positions is not widely noted but not uncommon. We can see how the US and CPTPP parties have replicated commitments, progressively increasing their depth, on prohibitions or limitations in relation to subsidies to illegal, unreported, and unregulated fishing well before the conclusion of the Agreement on Fisheries Subsidies.⁶⁵ Rather than

⁵⁷EU–Korea FTA Annex 2-C, Art 2; EU–Japan FTA Annex 2-C, Art 4; EU–Singapore Annex 2-B, Art 2.1; TCA Annex 11, Art 4. CETA is the exception which does not explicitly include a recognition but does implicitly, e.g., Annex 4-A Art 5 ‘When a Party develops a new technical regulation for motor vehicles and their parts, or when it modifies an existing one, it shall consider the technical regulations of the other Party, *including those established under the framework of the ... WP.29*’ (emphasis added).

⁵⁸EU–Japan FTA Annex 2-C, Art 4; TCA Annex 11, Art 4.

⁵⁹TCA Annex 11, Art 6.

⁶⁰EU–Japan FTA Annex 2-C, Art 10 and EU–Singapore Annex 2-B, Art 2.2, respectively.

⁶¹EU–Singapore Annex 2-B, Art 2.3.

⁶²CETA Annex 4-A Art 3(a).

⁶³Ibid, Art 6.

⁶⁴EU–Korea FTA Annex 2-C, Art 10; EU–Japan FTA Annex 2-C, Art 19.

⁶⁵See CPTPP, Article 20.16. Indeed, it can be argued that the conclusion of the Agreement on Fisheries Subsidies was in part motivated by such provisions.

focusing on additional commitments, we can also see a similar practice in relation to liberalization commitments: the UK's MFN tariff after withdrawal from the EU prioritized elimination of tariffs on lines for 100 environmental goods but also through specific commitments in its FTAs with Australia and New Zealand while supporting liberalization of environmental goods at the multilateral level.⁶⁶

The EU's model of using its FTAs to export its preferred standard-setting body (and both directly and indirectly, its preferred standards) in motor vehicles and parts provides useful possibilities for supporting the uptake of standards in relation to climate policy. Thus, using a FTA as an instrument of regulatory diplomacy can be useful to harden certain standards or improve recognition of certain standardizing bodies, where their status may be legally or politically unclear. Perhaps easy to miss is the importance of the commitments related to meetings, the development of institutions that in turn develop relationships, through which further cooperation can take place.

Nonetheless, in this case, we have clearly identified standards (those produced by WP.29). This is something that we do not necessarily have in the climate space, where commercial standards are prevalent and the international standardizing bodies are slow. The third and final example comes from the influence and potential use of a non-standard: nutrient profiles in public health.

4.3 Testing the Limits of 'Standards' and the use of Nutrient Profiles

Nutrient profiles have long served an important role in identifying whether foods can be considered 'unhealthy' or not. In a context where noncommunicable diseases (NCDs) such as cardiovascular diseases, cancers, chronic respiratory diseases, and diabetes account for around two-thirds of deaths worldwide, tackling their risk factors has become a priority.⁶⁷ Not only is combatting NCDs a national challenge, governments have committed to international action also, as reiterated in a record number of commitments at the 75th World Health Assembly in May 2022. Of the most important modifiable risk factors, the WHO has identified unhealthy eating as a priority.

Reducing levels of obesity and overweight is key for governments in terms of economic interests (that is, to reduce the costs resulting from widespread NCDs) but also constitutes a specific legal obligation arising from multiple human rights commitments.⁶⁸

To be able to introduce measures that tackle these risk factors (whether through taxation, regulation, product requirements, and so on) distinguishing between products that are high in salt, sugar, or fat and those that are not depends on an effective evidence base. While guidance from the Codex Alimentarius Commission exists in relation to nutrient content for some claims (specifically, what constitutes 'low fat' or 'fat free'), they apply to 'positive' claims rather than warnings.⁶⁹

Whether a product is 'unhealthy' in this sense will depend in part on the composition of local diets. For example, the level of salt in bread that can be considered unhealthy will depend to a degree on the amount of bread that is customarily consumed, and the levels of salt customarily found in bread of the region. For this reason, nutrient profiles have been developed at a national level.⁷⁰ More

⁶⁶See ILA, *Final Report*, supra n. 24, pp. 17–18.

⁶⁷WHO, 'Noncommunicable Diseases' (16 September 2023), www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases.

⁶⁸For an overview: A. Garde, J. Curtis, and O. De Schutter (eds.) (2020) *Ending Childhood Obesity: A Challenge at the Crossroads of International Economic and Human Rights Law*. Edward Elgar.

⁶⁹See Codex Alimentarius Commission (1997) *Guidelines for the Use of Nutrition and Health Claims*. Other relevant instruments include Codex Alimentarius Commission, *General Standard for the Labelling of Prepackaged Foods* (2010) and *Guidelines on Nutrition Labelling* (2013).

⁷⁰For example, the UK Food Standards Agency (FSA) nutrient profiling model was developed in 2004 to help the national media regulator (Ofcom) differentiate foods, which was of particular importance given later advertising restrictions placed on products high in fat, salt, and sugar to children. The FSA nutrient profiling model was also used by the government of France

recently, the World Health Organization's regional offices have created nutrient profiles for use by governments in their regions.⁷¹

For governments, a nutrient profile can serve as an important evidence base for any measure that seeks to distinguish healthy from unhealthy foods. For example, for warning labels on foods that are high in sugar, it is necessary to ensure that we base any such distinction on evidence that will tailor the measure to its objective, that is reducing the consumption of unhealthy foods, and, in doing so, contributing to the reduction in the levels of obesity. As we have seen with the decades-long process of introducing plain packaging and warning labels on tobacco, this is a challenge that faces all governments. For some, particularly developing country Members, these challenges are particularly acute: of all NCD deaths, 77% are in low- and middle-income countries.⁷² Many of these governments will have resource constraints and limitations. Thus, for them, a nutrient profile developed by international organizations, such as the WHO, can serve as an important evidence base and, indirectly, as a means of defending their measure when it is invariably raised for discussion at the WTO. One can see why there would be demand from some quarters to recognize nutrient profiles as 'standards' for the purposes of the TBT Agreement. This would put them in a stronger position to counter the most difficult of challenges relating to the trade-restrictiveness of a proposed public health measure.

The ability to rely on a nutrient profile as a standard for the purposes of Article 2 TBT Agreement is hampered in two regards. First, the source of nutrient profiles is not, to date, international standardizing bodies. As we have seen above, there are requirements for an institution to be identified as such, and though the WHO is actively engaged in areas of importance, it does not act as a standardizing body, and it is not open to the standardizing bodies of WTO Members. This is not to say that this could not happen; one of the most influential international standardizing organizations, the Codex Alimentarius Commission, is a joint WHO and Food and Agriculture Organization. The method and process of decision making, the practice of the body, and its constitution of the WHO, however, are all distinct from a standardizing body. Second, the form of nutrient profiles is not such that they meet the requirements of a standard as they do not customarily provide sufficiently specific guidance for repeated use that would serve in the mode of a standard. In this regard, useful inspiration can be taken from the *Australia–Tobacco Plain Packaging* dispute.⁷³

Here, Australia (in part) relied on elements of the Framework Convention on Tobacco Control (FCTC) Guidelines as relevant international standards for the purpose of the TBT Agreement.⁷⁴ As the Appellate Body had done in *US–Tuna II*, here the Panel drew on the component parts of the definition of an international standard. Of particular interest was the attention on whether Arts 11 and 13 of the FCTC constituted standards, not on the body that promulgated them or on their relevance (*per se*).⁷⁵ While the Guidelines were useful to parties, they were considered insufficiently precise or directive to be able to provide for their 'common and repeated use'.⁷⁶

Questions have been raised around how specific or directive an instrument needs to be to constitute a standard in light of this test.⁷⁷ This presents a challenge as an instrument may lack

to develop its own *Nutri-Score* system. See the *Nutri-Score* three-year follow up report: Ministère de la Santé, *Assessment Report: After Three-Year of Nutri-Score Implementation* (February 2021).

⁷¹For a reflection on their use: WHO Europe Region (2022) 'Use of Nutrient Profile Models for Nutrition and Health Policies: Meeting Report on the Use of Nutrient Profile Models in the WHO European Region, September 2021'.

⁷²WHO, 'Noncommunicable Diseases' (16 September 2023), www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases.

⁷³Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (*Australia – Tobacco Plain Packaging*), WT/DS434/R, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.

⁷⁴WHO Framework Convention on Tobacco Control (2003).

⁷⁵*Ibid.*, paras. 7.278ff.

⁷⁶*Ibid.*, para. 7.330.

⁷⁷See R. Tamiotti (2023) 'Article 2 TBT', in M. Wagner (ed.), *Volume 4: Technical Barriers and SPS Measures*. Brill in P.-T. Stoll and H. Hestermeyer (eds.), *Commentaries on World Trade Law*. Brill.

precision as a consequence of the standard-setting process where consensus is the order of the day.⁷⁸ The Panel did note that *elements* of a document could well constitute a relevant international standard, and thus indicated a preference for effect rather than form. This gives Members a wider range of possible options that might otherwise be expected.⁷⁹ Additionally, in the case of nutrient profiles, we might focus not on the profile itself but rather on technical guidance that gives instruction on how best to produce such a profile.⁸⁰

While a nutrient profile itself may not be quite a silver bullet, there are two important possibilities from which we can draw important lessons as we reflect on the role of standards, and standard-like instruments to support sustainable development, most notably through FTAs. First, guidelines on how to develop nutrient profiles may well constitute standards if they come from appropriately open organizations. Second, and most importantly, a quasi-standard can play an extremely important role, albeit not meeting the legal requirements of Article 2 TBT Agreement. That is to say, the benefit of nutrient profiles, such as those designed by the WHO on a regional basis, is that they follow best practice in relation to their development: use of evidence base, communication, inclusion, and implementation. This is of particular interest for our purposes as one of the most innovative and potentially fruitful developments in relation to standardization in the climate space in recent years has come not from a standard, formally understood, but rather from guidelines (the Net Zero Guidelines).

In the following section, we will examine how the Net Zero Guidelines were developed, the value that they add, and the ways in which we can draw on our case studies to leverage FTAs as sites of regulatory diplomacy, and in doing so support the pursuit of sustainable development.

5. The Net Zero Guidelines: Creating a Common Grammar

The ISO Net Zero Guidelines are formally known as International Workshop Agreement (IWA) 42. An IWA is an instrument of the ISO that is developed in a different manner to ISO standards. Specifically, to avoid the limitations of international standard setting in relation to speed and, at times, inclusivity, an IWA is produced through workshop meetings, rather than through the full ISO technical committee process. While in the technical committee process, all NSBs participate (themselves having worked through the same issues in the shadow technical committees that engage with stakeholders at the national level). Instead, an IWA is developed to respond to urgent market requirements and, unlike the normal committee process, stakeholders participate directly, rather than going through NSBs. The advantage of the IWA process is its speed: the process usually takes less than 12 months.⁸¹

The Net Zero Guidelines were launched at COP 27. Their development was driven by Our 2050 World, a collaboration between ISO, the UN Race to Zero, and the UNFCCC Global Innovation Hub. It is convened by the UK's NSB, the BSI. More than 1200 experts from over 100 countries contributed, and (through the creation of a High-Level Expert Group at the request of the UN Secretary General) the Guidelines were designed in concert with the key non-state actors that also make net zero pledges, including businesses, investors, cities, and regions.

The Guidelines are intended to confirm a common language and shared definitions around net zero, providing 'guiding principles and recommendations to enable a common approach with a high level of ambition, to drive organizations to achieve net zero GHGs as soon as possible and by 2050 at the latest. [The Guidelines are] ... intended to be a common reference for

⁷⁸Ibid.

⁷⁹n. 77 and Panel Report, *Australia – Tobacco Plain Packaging*, WT/DS434/R, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 7.331.

⁸⁰E.g., UK Department of Health (2011) 'Nutrient Profiling Technical Guidance', https://assets.publishing.service.gov.uk/media/5a7cdac7e5274a2c9a484867/dh_123492.pdf.

⁸¹After its publication, an IWA can be further developed to become a publicly available specification (PAS), technical specification, or international standard according to demand.

governance organizations (including voluntary initiatives, adoption of standards, policy and national and international regulation), and can help organizations taking action to contribute to achieving global net zero.’⁸²

These definitions of key terms not only ensure common understandings but also allow governments and non-governmental actors to take decisions on a consistent basis. This becomes of increasing importance in relation to reporting requirements or accounting practices. These definitions are important not only for companies or governments setting their own targets or designing mitigation strategies but also for those that need to measure the practices of others (e.g., accounting firms) or set rules or condition access to funding (such as governments).

Among the definitions, the Net Zero Guidelines make a novel move, adopting terminology that has not been part of the ISO’s corpus but instead comes from widespread commercial standards (specifically, the GHG Protocol). In this regard, the distinction between Scope 1, 2, and 3 emissions is especially important as a way through which the (public) international standardizing body aligns with, and thereby incorporates concepts from private standards. This openness (inclusion rather than exclusion of ‘competing’ standards) is important as the Guidelines have been designed to be used by governmental and non-governmental actors alike: indeed, a core challenge has been conflicting positions or claims made not only between States or between companies but also between all economic actors across the public and private divide.

Along with the definitions, the Guidelines set out guiding principles to meet Net Zero (whether actors are public or private). These include ‘urgency’, ‘ambition’, ‘prioritisation’, ‘decision-making based on scientific evidence and indigenous knowledge’, ‘a risk-based approach’, ‘credibility’, ‘equity and justice’, and transparency.⁸³ Best practice in relation to target setting, mitigation, counterbalancing residual emissions, measurement and monitoring, communication, reporting, transparency are all included. Finally, unlike ISO standards, which are only accessible for a fee, the Net Zero Guidelines are freely available online to support their proliferation and uptake by all relevant actors.

For all the benefits of the adoption of the Net Zero Guidelines, the speed of their creation, the (comparatively) inclusive development process, and their broad appeal cutting across public and private actors at all levels, it is not guaranteed that the Guidelines will be widely used. Indeed, we see this trend in the UK where evidence indicates that awareness of net zero targets and their importance in businesses has doubled in the last two years, however a far lower number of businesses have clear and consistent plans to meet net zero targets, a worry that is exacerbated by ongoing economic challenges which can pull attention from net zero as a commercial priority.⁸⁴ As we have seen in other areas of trade policy, for developing country Members, concerns around climate equity are especially acute.⁸⁵ Standards (and quasi-standards) can provide economic incentives to pursue certain aims and reduce costs (in this case both for businesses but also for Members that may wish to rely on Guidelines for the basis of their own distinctions in relation to scope 1 or 2 emissions, for example).

The demand to strengthen the Net Zero Guidelines, therefore, comes from multiple angles: there is a desire to improve their ‘status’ under world trade law to support their uptake and encourage Members to be able to rely on them with confidence, a lesson learnt from the appeal of drawing on nutrient profiles in the case of public health measures (even if they might not constitute ‘standards’ for the purposes of the TBT Agreement). There is an economic imperative where certain governments (and their businesses) can see a benefit from effective standardization

⁸²ISO Net Zero Guidelines, para. 0.1.

⁸³Ibid, 5.2–5.11.

⁸⁴BSI (2023) *Net Zero Barometer*, www.bsigroup.com/en-GB/topics/sustainable-resilience/net-zero/NetZeroBarometer/.

⁸⁵For example, see the 7 September 2023 joint letter from the governments of Argentina, Brazil, Bolivia, Colombia, Dominican Republic, Ecuador, Ghana, Guatemala, Honduras, Indonesia, Ivory Coast, Malaysia, Mexico, Nigeria, Paraguay, Peru, and Thailand to the European Union in relation to its new Deforestation Regulation, www.atibt.org/files/upload/news/RDUE/Trading_partners_joint_letter_on_EUDR_7_September_2023.pdf.

as we have seen in the automotive sector. Additionally, the Net Zero Guidelines can also provide an evidence base and confidence boosting measure in an area where there is significant public interest in the policy aim (climate policy) and yet there is disquiet or nervousness around the quality of the standards being relied upon (a dynamic we saw in relation to dolphin safe labelling).

Cutting across these examples is the importance of inclusion: the obligation to include developing country Members in decision-making. The standardization process is not simply desirable, it constitutes a specific legal obligation under the TBT Agreement, and indeed elsewhere in international law, not least in the form of ‘common but differentiated responsibilities’ in international environmental law.⁸⁶

6. Leveraging FTAs for Standardization in Climate Policy

What role then for FTAs? The easiest response might well be to turn the Guidelines from an IWA document into an ISO standard. However, this is time consuming, does not have the advantage of the direct engagement with business in further development, and runs the risk of losing momentum and ambition as the Net Zero Guidelines were launched to coincide with COP27. Another option might be to seek agreement at the WTO to recognize Net Zero Guidelines as a relevant standard, possibly through a committee decision. Yet, finding agreement at the WTO is notoriously challenging, and even the decisions of committees are (comparatively) sparse given the life of the institution. This is not to say that these options could not or should not be pursued. It is not a binary choice. Instead, it is argued here that the likelihood of success is lower (at the WTO) and outcomes are slower (at the ISO) than could be achieved with FTAs. Meanwhile success under FTAs in supporting uptake of the Net Zero Guidelines would in turn increase the likelihood of further advances at the multilateral level.⁸⁷

We have seen how FTAs can be used to encourage partners to coalesce around specific choices in relation to standards, and we have noted how they can be used to confirm positions, support ongoing work programmes, and act as spaces for economic diplomacy, increasing (if not determining) the ability of interested parties to pursue further regulatory cooperation. This activity can take place elsewhere: the WTO Committee on Trade and Environment, the G20, the G7, and elsewhere can plan important roles. However, FTAs provide far more options that have been used. The purpose of this article has been to identify possible avenues of future cooperation on the basis of existing legal structures: by prioritizing the institutional relationships that FTAs develop, that is the law’s role in building social spaces, rather than creating obligations, some suggestions can be made. Indeed, this applies across the three areas of economic diplomacy identified in the introduction: trade diplomacy, commercial diplomacy, and regulatory diplomacy.

To ‘harden’ the ISO Net Zero Guidelines, an FTA could make specific reference to them in its text, as between the parties. This would be a similar to practice as we have seen in FTAs in relation to standards in automotive trade, and also used in other sectors (e.g., medical or electrical devices). That the Guidelines do not constitute ‘standards’ for the purpose of the TBT Agreement does not prevent them from being recognized as such between the parties.

While such an inclusion could take place during the drafting phase (that is, during FTA negotiations) either in new agreements or during renegotiations of existing agreements,⁸⁸ there are

⁸⁶On the interplay between trade law and CBDR: M. Hertel (2011) ‘Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities’, *Journal of World Trade* 45, 653.

⁸⁷As was proposed above at note 65 and related text, in relation to fisheries subsidies and liberalization of environmental goods.

⁸⁸A wave of new FTAs build on pre-existing agreements, rather than negotiating from an MFN basis: examples include the EU’s ‘modernization’ process with partners such as Chile; the UK’s ‘upgrade’ negotiations with Canada; and the US, Mexico, and Canada renegotiation of NAFTA resulting in USMCA. Formally, these agreements are distinct FTAs, though the

other legal options. The relevant FTA committee could take a ‘decision’ to include the standards within the agreement (depending on the powers delegated to them under the agreement).⁸⁹ This follows the common practice of geographical indication (GI) listing under FTAs (note the addition of a further 42 GIs to the EU–Japan EPA in 2023, building on the previous addition of 56 in 2022 and 56 in 2021).⁹⁰ The existence of mechanisms under FTAs is not determinative of their use: CETA has long had a means to recognize mutual recognition of professional qualifications (MPRQ) between the parties, but it is only in 2023 (some nine years since it was first provisionally applied) that agreement has been reached on architectural qualifications. In the case of MPRQ, a key challenge is that recognition bodies are often independent of government, and indeed also at a sub-national level (e.g., provincial in the case of Canada). Securing buy-in from participants (both public and private) and maintaining momentum is the key challenge. The IWA process has already engaged with a wide range of stakeholders, in a way that the customary standardizing process would not necessarily have done (only at a remove, via NSBs, which in turn depends on each NSB’s interest and capacity in wider stakeholder engagements). Additionally, the legal requirements for FTA committees to meet periodically can serve as a potential hook to support target-setting and maintaining momentum.

Alternatively, the parties could choose to adopt a statement in the relevant trade committee (potentially termed a Decision): a formally ‘softer’ option, but if it is understood (and indeed could be drafted explicitly to state) that it constitutes subsequent agreement of the parties, this too would be influential, and in keeping with existing practice within world trade law.⁹¹

Beyond indirect amendment, decisions, or statements to recognize the Net Zero Guidelines as a relevant international standard between the parties, they could also seek to multiply the influence of the Guidelines through their FTAs *vis-à-vis* third parties. The FTA parties could agree (either in the treaty text or through subsequent agreement whether evidenced in committee minutes or other forms) that they will pursue the recognition of the Net Zero Guidelines through declarations in *other* forums, whether FTAs or multilaterally. This also follows existing practice where obligations to cooperate can be found in FTAs: the UK–New Zealand FTA, for example, includes significant commitments to cooperate outside of the FTA in relation to fossil fuel subsidies.⁹² CPTPP includes similar commitments in relation to fisheries subsidies, as do a wide number of additional FTAs.⁹³

For effective uptake of Guidelines, the parties need to engage effectively with a wide range of stakeholders. Greater work to integrate elements of the GHG Protocols within public standards, or to more closely align and support SBTi corporate standards, would meet the aims of the Guidelines and communicate their importance as a baseline and driver for climate policy. There are existing FTA structures which can be leveraged to support this end: many FTAs, in particular those concluded with the European Union and UK, include Domestic Advisory

existence of a structured pre-existing relationship at all levels of economic diplomatic governance makes them ripe for identifying common interests and projects.

⁸⁹The status, name, and powers of such bodies vary between FTAs but in nearly all cases there is a body that oversees the effective implementation and running of the agreement (whether a general Trade Committee or a more specialized TBT working group, etc.).

⁹⁰See D.G. Agri, ‘List of additional 42 geographical indications registered under the EU–Japan Economic Partnership Agreement in September 2023’, https://agriculture.ec.europa.eu/system/files/2023-09/list-additional-42-gi-registered-epa_en.pdf.

⁹¹In relation to the Doha Ministerial Decision as subsequent agreement: Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paras. 260–268. See also the proposals made in C. Delev (2022) ‘Ratcheting up Environmental Protection Standards: What are the Opportunities for Improving the EU–Andes Trade Agreement?’, www.cisdl.org/wp-content/uploads/2022/11/EU-Andes-Agreement-Legal-Brief-Nov-2022.pdf.

⁹²New Zealand–UK FTA, Article 22.8: ‘The Parties shall cooperate bilaterally and in relevant international fora such as the WTO, UNFCCC, and G20 in relation to fossil fuel subsidy reform and the transition to clean energy.’

⁹³Inter alia: USMCA, Article 24.20(10); EU–UK TCA, Article 404; Moldova–UK FTA, Article 66; Australia–UK FTA, Article 22.12.

Groups which provide a space through which governments can engage more closely with business and civil society, again to promote the uptake and spread of Net Zero Guidelines.⁹⁴ Additionally, Domestic Advisory Groups of the parties commonly meet every two years or more frequently (at times in meetings open to the public) to share views and raise concerns or questions for the governments involved (though Civil Society Forums). Domestic Advisory Groups have the additional advantage of already being tasked with examining the effective implementation of the sustainable development commitments under the agreements to which they are assigned: thus little, if any, additional changes to treaty text would be needed. Also, it is not only EU or UK agreements that include such structures: under USMCA, for example, Expert Advisory Groups are established, ‘the function of which includes providing advice or recommendations, including of a scientific or technical nature, to a regulatory authority of the Party with respect to the preparation or implementation of regulations’.⁹⁵

7. Conclusions

This contribution has sought to identify ways in which FTAs can play a more active role in supporting climate policy. In examining three examples that test the contours of the standards-regulation nexus under WTO law, it has drawn on these lessons to see how FTAs could be more effectively used as one piece of a larger climate friendly trade policy. In doing so, it has tried to focus attention, not only to legal questions around what standards are and how they are used, but also the process through which standards are made and relied upon, ultimately by businesses but through governments. It has framed this analysis not through the law *qua* law but the law as part of a process – in this context, a process of economic diplomacy of which law is one structuring part.

In Rosalind Higgins seminal work, *Problems and Process*, she presented an account of international law, not only as the product of an exercise of norm identification and interpretation but as a process of claim and counterclaim.⁹⁶ This paper takes her claim one step further: if international law is best understood as a legal process that includes bodies other than courts as interpreters of the law, then world trade law is a process of economic diplomacy exercised through legal instruments, but most importantly acted out in institutions of law. Yes (quasi) judicialized panels but also in committees, dialogues, working groups, and, indeed, meeting rooms and alcoves around international organizations such as the WTO. The actors of world trade law are not only WTO Members at the WTO, but they are also governmental and private, acting at international organizations, standard setting bodies, acting in capitals, missions, embassies, and consulates. FTAs provide a valuable, flexible but structured set of institutions through which such practices can take place.

In the climate space, this means reframing FTAs not only as sources of obligation but as institutions, social spaces, through which legal obligations become the tools and drivers of diplomatic efforts, which in turn draw on, and build, new legal obligations to further the agenda.⁹⁷ International governance is not fast, the system is slow and indeed processes of (international) standardization are often even slower. The ISO Net Zero Guidelines provide a pleasantly surprising counter example to this expectation. Their uptake both by governments and standardizing bodies will not solve climate change but it can support further action downstream and ensure

⁹⁴The EU has established Domestic Advisory Groups under FTAs with the following partners: Andean (Colombia, Ecuador, Peru), Canada, Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama), EEA EFTA (Iceland, Liechtenstein, Norway), Georgia, Japan, Moldova, Singapore, South Korea, Vietnam, Ukraine, and the UK. The UK has done so also, with the addition of Australia and New Zealand.

⁹⁵USMCA Article 28.10:2(c).

⁹⁶R. Higgins (1996) *Problems and Process: International Law and How We Use It*. Clarendon Press.

⁹⁷Including, but not limited to learning, which plays an important role: R. Wolfe (2021) ‘Informal Learning and WTO Renewal: Using Thematic Sessions to Create More Opportunities for Dialogue’, *Glob Policy* 12, 30–40.

that decisions are taken on as an evidence-based and inclusive basis as possible. FTAs provide an exciting and underutilized space in which such activity can take place, in many cases opening the possibility to multiply the impact of bilateral relations as governments may pursue the same objective with multiple partners at once as a cross-cutting priority.

The ISO Net Zero Guidelines are unlikely to constitute standards for the purposes of WTO law. FTAs can, however, serve to support their uptake by encouraging their recognition as standards in world trade law outside of the WTO, and beyond that, by drawing on legal institutions to give them an effect that is as powerful or greater, should governments wish to shape their trade policy accordingly.

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