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# Economic Development and Climate Protection: Coloring, Texturing and Shading of Response Measures in Sustainable Development

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The *Paris Agreement* recognizes that countries may be affected not only by climate change, but also by impacts of measures taken in response to it. The *Agreement* also requires parties to address the adverse implications arising from the use of response measures, particularly on developing countries. Parties' tool-kit of response measures to meet their pre-2020 actions and post-2020 intended nationally determined contributions (INDCs) could include trade measures such as carbon taxes, cap-and-trade schemes and related offsets, carbon border tax adjustments, carbon standards and labelling, and subsidies for low carbon goods. Aside from parties, international organizations are also developing response measures such as the ISO's carbon footprint standards (CFPs). These measures could have economic and trade implications and may possibly modify the conditions of competition in various sectors. Depending on how these measures are designed and applied, they can also be incompatible with WTO law. The inter-linkages between trade and climate response measures will become more pronounced as parties implement their pre-2020 climate actions and post-2020 INDCs. Trade disputes are more likely in a world of uncoordinated and conflicting national responses to climate challenge. What should be done to foster coherence between the WTO and UNFCCC regimes, and prevent legal inconsistencies from arising? This calls for the governance of response measures — the need for pre-emptive cooperation at the national and international levels supplemented by ex-ante and ex-post transparency and guided by parameters to foster coherence between the trade and climate regimes. While this paper discusses response measures and their implications from the trade-climate lens, the approach adopted in the paper would also be applicable in the interaction of response measures with other policy areas such as economic diversification, just transition in the workforce and development issues. In sum, as the paper highlights, from the perspective of the *Paris Agreement*'s mandate that climate protection should be enhanced in the context of sustainable development, and response measures must also colored, textured and shaded in sustainable development.

*Keywords*: Response measures; carbon footprint standards; sustainable development.

> "Green mountains and clear water are as good as mountains of gold and silver. To protect the environment is to protect productivity and to improve the environment is to boost productivity".
>
> President Xi Jinping, G20 Summit,
> Hangzhou, China,
> September 2016

## 1. Introduction

The colorful imagery in President Xi's comments is a timely reminder that economic development and environmental protection are integral for sustainable development. Twenty years ago, WTO Members agreed that these "two policy-making areas are important and they should be mutually supportive in order to promote sustainable development."[1] If economic development and environmental protection were key considerations in 1996, they are critical today in the international community's efforts to address climate change — "the greatest sustainable development challenge of our age" in the words of United Nations Secretary-General (UNSG) Ban Kim Moon.

Climate change is an extreme case of market failure - the failure of the market to incorporate the damage done by greenhouse gas emissions into prices of goods and services. As parties adopt measures, through their pre-2020 climate actions and post-2020 nationally determined contributions, to correct market failures, they would want to have policy flexibility to meet economic development and climate protection priorities (Stern, 2007). Art. 3:4 of the *UN Framework Convention on Climate Change* (UNFCCC, or the *Convention*) recognizes that parties have a right to, and should, promote sustainable development, and that economic development is essential for the adopting measures to address climate change. International organizations having competence for climate response measures must also play their part in supporting these objectives. This also applies to carbon footprint standards, a cluster of response measures being developed at the International Standardization Organization (ISO).

The Appellate Body characterized sustainable development as providing "color, texture and shading to the rights and obligations of Members under the WTO Agreement".[2] Likewise, from the perspective of the *Paris Agreement*'s mandate that climate protection should be enhanced in the context of sustainable development,[3] and response measures must be colored, textured and shaded in sustainable development.

## 2. The WTO and Trade's Role in Sustainable Development

Parties agree that a supportive and open international economic system would lead to sustainable economic growth and development, hence enabling them to better address the problems of climate change. At the Rio+20 Summit, the UN affirmed trade's role as an enabler for sustainable development.

> "We reaffirm that international trade is an engine for development and sustained economic growth, and also reaffirm the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide, thereby

[1] WTO, Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996.
[2] WTO, Appellate Body Report, US-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998 – available at http://www.wto.org/english/tratop_e/dispu_e/database_e.htm.
[3] Article 2:1 of the *Paris Agreement*.

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> benefiting all countries at all stages of development, as they advance towards sustainable development."
>
> "The Future We Want", Outcome document of Rio+20

A strong multilateral trading system embodied in the WTO is necessary to foster unfettered international trade flows. Such a system is the best safeguard against protectionism. Since its establishment in 1995, the WTO's rules-based system has provided certainty and predictability to the conduct of international trade. Most notably, the WTO performed its role as a systemic regulator in stemming protectionist pressures during the financial crisis in 2008. However, the organization faces a number of challenges. A new negotiating agenda is needed to maintain the momentum of multilateral trade liberalization. More immediately, the organization is grappling with slower trade growth arising from the global economic slowdown. In a press release issued on 12 April, 2017, the WTO projected that world trade would grow at 2.4% in 2017. Though higher than the 1.7% growth in 2016, trade growth is below 3% for the fifth consecutive year.

Against the global economic slowdown, the number of trade restrictive measures remains high. Between October 2016 and May 2017, G20 economies applied 42 trade-restrictive measures such as increased tariffs, customs regulations and rules of origin restrictions (WTO, 2017). This is a despite to the annual pledges made by the G20 on standing still and rolling back on trade restrictive measures. Of the 1583 trade restrictive measures taken by G20 economies since 2008, only 387 measures had been removed. 1196 trade restrictive measures remain in place.

How effectively the WTO can continue to be a bulwark against protectionism depends on the actions of its Members. WTO Members must not raise trade barriers. They must also ensure that their measures are consistent with WTO rules. In Hangzou, China in September 2016, G20 leaders committed to work towards a more open and inclusive global economy, including by strengthening the multilateral trading system. More recently, in Hamburg, Germany in July 2017, G20 leaders pledged to keep markets open, noting the importance of reciprocal and mutually advantageous trade and investment frameworks and the principle of non-discrimination. They also pledged to continue to fight protectionism including all unfair trade practices. Members must also heed the call of Director-General Roberto Azevedo for the continual strengthening of the WTO system, and to keep delivering new trade agreements (Azevedo, 2016). An environmental goods agreement, complemented by agreements on environmental and energy services, and strengthened rules on non-tariff barriers will contribute to WTO's trade, economic and environmental objectives.

## 3. The Climate Challenge and the *Paris Agreement*

Against the backdrop of the sluggish world economy, the landmark global agreement on climate change was adopted by the 21st Conference of Parties (COP21) in Paris in December 2015. The *Agreement* is significant on a number of counts.

First, it is the first comprehensive climate agreement encompassing contributions from all countries. The *Paris Agreement* is a boost for multilateralism. This is significant as risks

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of unilateral actions will be high without a robust multilateral system. The *Agreement* also demonstrated that multilateral environmental agreements based on international consensus are the best way of coordinating policy action to tackle issues of global commons such as climate change.

Second, the *Agreement* is founded on national circumstances. The *Agreement* mandates that in pursuing the Convention's objectives, parties should be guided by the recognition that countries have varying national circumstances. Geography and natural endowment would have a bearing on countries' approach to climate mitigation and adaptation. The *Convention* states that climate response measures must be "appropriate for the specific conditions of each party".[4] Christiana Figueres (Executive-Director of the UNFCCC during the Paris COP21) put it well, "the strength of the *Paris Agreement* is that it builds a broad highway and allows countries to choose their lane of choice."

Third, complementing the WTO's objective of keeping markets open, the *Paris Agreement* reinforced the *Convention*'s requirement on parties to cooperate to promote a supportive and open international economic system, in recognition that such a system would lead to sustainable economic growth and development in all parties.[5]

The conclusion of the *Paris Agreement* was a momentous event. However, the *Agreement* represents the beginning of a process. Parties have to fulfil the various implementation mandates. Known as *Modalities, Procedures and Guidelines* (MPGs) or Paris rule-book, MPGs have to be developed on the features of subsequent nationally determined contributions; transparency framework for action and support; the implementation of commitments and promotion and compliance; common international accounting framework to prevent double counting; market mechanisms; and on addressing the economic and social consequences of response measures. As Christiana Figueres said, "everyone has agreed on the direction of travel so that the next battle is to speed up along that direction of travel."

The elements mentioned above, and other bottom up aspects of the *Paris Agreement* provided the incentive for parties to expeditiously bring the *Agreement* into force. The dual threshold, encompassing 50 parties making up 50% of global emissions, for the entry into force of the *Paris Agreement* was met on 5 October, 2016. The *Agreement* entered into force on 4 November, 2016. The first session of the Conference of Parties serving as the Meeting of the Parties to the *Paris Agreement* (CMA 1) took place in Marrakesh, Morocco from November 15 to 18, 2016.[6]

[4] Article 3.4 of the *Convention* which in full reads "The parties have a right to, and should, promote sustainable development. Policies and Measures to protect the climate system against human induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for the adopting measures to address climate change"

[5] Article 3.5 of the Convention reads "The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

[6] See http://ww.unfccc.int accessed 11 January, 2017.

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Since Marrakesh, Parties have made slow but steady process towards developing rules related to the implementation of the *Paris Agreement*, which are due to be concluded by the 24th meeting of the Conference of Parties (COP24) in December 2018 in Poland. At the session in May 2017 in Bonn, the chairpersons circulated texts containing chapter headings, sub-headings and initial elements on various aspects of the Paris rule-book. The circulation of these texts represents a transition of the process from conceptual discussions to the next step of developing negotiating texts.

## 4. Trade and Climate Interactions and Responses, and the Promotion of Sustainable Development

The *Paris Agreement* recognizes that parties "may be affected not only by climate change, but also by impacts of measures taken in response to it". Parties' tool-kit of responses include trade measures such as carbon taxes, cap-and-trade schemes and related offsets, carbon border tax adjustments, carbon standards and labelling, and subsidies for low carbon goods. These measures would have economic and trade implications and may possibly modify the conditions of competition in various sectors. An UNFCCC paper notes that these measures are most likely to impact developing countries.[7] Depending on how these measures are designed and applied, they can be incompatible with WTO law.[8]

The inter-linkages between response measures and WTO law will become more pronounced as parties implement their pre-2020 climate actions and post-2020 nationally determined contributions. Trade disputes are more likely in a world of uncoordinated and conflicting national responses to climate challenge. A proxy for the trade-climate conflict is the number of disputes relating to the trade and energy-climate interface at the WTO. Though numbering less than twenty, the disputes may grow as parties implement their post-2020 NDCs.[9] What should be done to foster coherence between the WTO and UNFCCC regimes, and prevent legal inconsistencies from arising? The Intergovernmental Panel on Climate Change's 5th Assessment Report calls for "pre-emptive cooperation" between the trade and climate regimes, "there are numerous and diverse explored opportunities for greater international cooperation in trade-climate interactions. While mutually destructive conflicts between the two systems have thus far been largely avoided, pre-emptive cooperation could protect against such developments in the future."

The "pre-emptive" cooperation need to take place at three levels: first, at the national level between economic, environment and energy ministries; second, at the multilateral level at organizations dealing with response measures such as WTO's Committee on Trade

[7] UNFCCC, Note by the Secretariat, "Information Note to facilitate deliberations on potential environmental, economic and social consequences, including spill-over effects, and implementing tools, policies, measures and methodologies", (2009).

[8] There is extensive literature on the on trade-related response measures and WTO law. See for example, UNEP and WTO, "Trade and Climate Change: A Report by the United Nations Environment Programme and the World Trade organisation", (2009).

[9] See pp. 29–32, "Compilation Report, E15 Expert Group on Clean Energy Technologies and the Trade System", December 2013 for an overview of prominent clean energy trade disputes.

and Environment[10] (CTE) for trade-related measures, and UNFCCC's Forum on Response Measures[11]; and third, between the CTE and the Forum for trade-related response measures. This cooperation must be guided by the following parameters.

First, response measures must be adopted within the multilateral framework of the UNFCCC, and other relevant international organizations such as the WTO. Without a strong multilateral system, the risks of unilateral actions are high, which will have serious distortive effects.

Second, the right of parties should be recognized to establish their national policies in accordance with their respective environment and development conditions, needs and priorities.

Third, the national circumstances of developing countries identified in Articles 4.8, 4.9 and 4.10 of the *Convention*, such as those which are least developed, alternative energy disadvantaged and small island developing countries, should be taken into consideration.

Fourth, the platform provided by the Forum is an avenue for discussions of the impacts of response measures. It is not intended to serves as a basis for the interpretation or enforcement of specific provisions of the Convention or to impose new commitments on parties.

Fifth, response measures in sectors with distinct multilateral rules must be implemented respecting the mandate and longstanding competence of relevant international organizations dealing with such sectors, and be consistent with relevant and applicable international law.

Transparency of response measures is a key aspect of pre-emptive cooperation. Transparency entails (i) ex-ante notification — providing opportunities for parties to comment on proposed response measures before they are implemented; and (ii) ex-post assessment for the purposes of evaluating the actual impact of responses measures, and removing these impacts.

## 5. Development in the UNFCCC's Work on Addressing the Impact on Response Measures and Promoting Sustainable Development

At COP21 in Paris, parties constituted an ad-hoc technical experts group (TEG) to elaborate on technical work on the two areas of the work programme, namely economic diversification and transformation in the context of sustainable development, and just transition of the workforce and creation of the decent work and quality of jobs. The TEG had its first meeting in Bonn, Germany on 9–10 May, 2017. Among other issues, the meeting noted that trade-restrictive response measures could undermine the efforts of countries to diversify their economies and build resilience in a carbon constrained world resulting from the implementation of the *Paris Agreement*.[12] The meeting noted the

[10] Established by WTO's General Council in 1995, the CTE was mandated to coordinate trade and environment policies but limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its Members.

[11] The Forum envisaged in the Paris Agreement mandates cooperation among parties on the understanding of the impacts of mitigation actions through the exchange of information, experiences, and best practices to raise their resilience to these impacts — See 1/CP.21 para 34, can be obtained from http://ww.unfccc.int.

[12] UNFCCC, Note by the Secretariat, "Meeting of the *ad hoc* technical expert group on response measures – report by co-chairs of the *ad hoc* technical expert group" in August 2017.

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comments from the delegate from Singapore that while responses measures are ordinarily enacted at the national level, international organizations are also developing response measures such as the ISO's carbon standards (see Secs. 6–8 beneath for discussions on these standards) to support the objectives of the *Paris Agreement*.

The meeting also noted the Singapore delegate's comments that answers to response measures need to be tailored to the unique national circumstances of countries and that governments know best what is suited in the national contexts. However, support from international organizations and international cooperation is important ingredients in supporting actions at the national level. For example, through the sharing of best practices and experiences, and identifying and addressing non-domestic barriers to economic diversification with a view to mitigating their adverse impacts using qualitative and quantitative economic modelling studies, the Singapore delegate diagrammatically represented his above-mentioned comments in the following manner.

**Framework on Response Measures**[13]

| |
|---|
| National Measures – International Measures |
| Actual Impact – Potential Impact |
| Domestic Impact – Transbondary Impact |
| Solutions at the national level – International Cooperation |
| Qualitative Study – Quantitative Assessment |

The meeting noted that that in terms of the way forward, the starting point would be to draw up an inventory of response measures, with which potential and actual economic and social consequences of the response measures could be investigated. Lessons could be learned from successful diversification strategies, from which guidelines for economic diversification initiatives could be developed.

## 6. ISO's Complementary Efforts at Climate Protection and Sustainable Development[14]

Beyond the WTO and the UNFCCC, other international organizations are also working on measures to respond to the climate challenge. The ISO is one clear example of an organization involved in climate protection related work. The ISO is supporting efforts to meet the climate challenge through development of standards on the quantification, monitoring, reporting and verification of emissions and/or removals of greenhouse gases (GHGs). The ISO highlights that there is a need for an effective and progressive response to the urgent threat of climate change on the basis of best available scientific knowledge, and that its standards are documents that support the transformation of scientific knowledge into tools

[13] See http://unfccc.int/10142.php.

[14] This section is drawn from the introduction section of ISO/CD14067:2017, N094, draft dated 12 June 2017.

that will help address climate change. In this connection, ISO14060 cluster of standards specifically seek to enhance the environmental integrity of parties' actions to address climate change by providing frameworks to enhance the credibility, consistency and transparency of GHG quantification, monitoring, reporting, validation and verification.

The ISO highlights that the ISO14060 series could be applied to

(i) Corporate decisions through identification of emission reduction opportunities and increasing the profitability of efficient energy consumption.
(ii) Carbon risk management through the identification and management of risks.
(iii) Voluntary initiatives such as companies' participation in voluntary GHG registry or sustainability reporting initiatives.
(iv) GHG markets in the buying of GHG allowances and credits.
(v) Regulatory/government programmes such as credit for early action and national/local reporting initiatives.

## 7. Implications of ISO Carbon Footprint Standard 14067

Using the specific example of carbon footprint standard 14067,[15] this section discusses the economic and trade implications arising from the design and application of ISO's carbon standards.

International standards are generally preferable to fragmented national and regional standards as they can address rent-seeking behavior from domestic lobby group.[16] The WTO encourages the use of international standards through Articles 2.4 and 2.5 of its *Agreement on Technical Barriers to Trade* (TBT). Art. 2.5 states that "whenever a technical regulation is prepared, adopted or applied for one the legitimate objectives (environmental protection is one of these objectives), and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to trade". However, Art. 2.5 should also be read in conjunction with

(i) Art. 2.4 which recognizes that international standards could be an "ineffective or inappropriate means" for the fulfilment of legitimate objectives due to "fundamental climatic or geographical factors or fundamental technological problems".
(ii) Art. 2.1 which requires that with respect to technical regulations, Members shall ensure that "products" imported form the territory of any member shall be accorded "treatment no less favorable" than that accorded to "like products" of national origin and to "like products" originating in any other country. "Like products" must not be discriminated, including on any form of criteria based on process and production methods not related to products.[17]

[15] ISO/TS 14067: Carbon footprint of products — Requirements and guidelines for quantification.
[16] There is extensive literature discussing international standards. See for example, Charnovitz, Steve, "International Standards and the WTO," SSRN Electronic Journal, March 2005.
[17] The CTE reported the view of many delegations that the negotiating history of the TBT Agreement indicates that there was no intention of legitimizing the use of measures based on non-product related process and production methods under the TBT Agreement. See WTO, "Report (1996) of the Committee on Trade and Environment", WT/CTE/1, 12 November, 1996.

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(iii) Decision of the TBT Committee which requires that the forum where international standards are developed provide transparency, openness, impartiality, consensus, effectiveness, relevance and coherence, including take account of the concerns of developing countries.[18]

The recognition of countries' different climatic and geographical factors and technological problems in the *TBT Agreement* is also an integral aspect of the *Convention* and the *Paris Agreement*. For example, Art. 4.10 of the *Convention* mandates that parties take into consideration the national circumstances of countries which have serious difficulties in switching to alternatives. These countries known as "Alternative Energy Dis-advantaged" (AED) do not have access to renewable energy options such as hydro, wind, geothermal, and tidal power due to their very small size and lack of natural geographical endowments. With no mountains, no rivers, and no access to the open seas, the AEDs have to rely on fossil fuels in their energy mix. AEDs which are small island city states with high population densities may not be able to deploy solar panels on a scale that can meet their energy needs even if they are located in the tropics. Energy efficiency, not by choice but by necessity, would be the AEDs' core mitigation strategy given their limited access to renewable energy options.

While the energy efficiency measures of the AEDs would reduce their carbon footprint, it could be greater than the footprint of countries that have renewable energy options by virtue of their size and natural geographical endowments. The ISO should take account of the reality of the AEDs in the development of standards such as 14067. However, draft text 14067 as it stands today does not take account of national circumstances of the AED nor other category of countries envisaged in the *Convention* articles 4.8, 4.9 and 4.10. A shortcoming of 14067 is its statement that it "does not address any social or economic aspects or impacts.., and that a carbon footprint assessed in accordance with the standard does not provide an indicator of any social or economic impact. . ." The fact that 14067 does not address social or economic aspects makes this standard contrary to the *Convention* and the *Paris Agreement* which require parties to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of response measures.

## 8. Fostering Coherence of ISO Standards with WTO and UNFCCC Objectives and Provisions

What should be done to address potential adverse implications that could arise from ISO14067? Developing on the theme of pre-emptive cooperation and fostering coherence between international organizations in mooted in Sec. 4, there should be effort upstream at the ISO to ensure that its carbon footprint standards are consistent with the *Convention* and the *Paris Agreement*. This would go in the direction of reducing the prospects of carbon

[18] WTO, "Decision of the Committee on Principles for the Development of International Standards and Recommendations in Relation to Articles 2 and 5, and Annex 3 of the Agreement", G/TBT/9, 13 November, 2000.

related disputes at the WTO. With a view to addressing the gap with respect to the specific national circumstances of AEDs, Singapore tabled the following textual proposal relating to 14067 in April 2016.

> "In countries where economies are highly dependent on consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such countries have serious difficulties in switching to alternatives, electricity generated in these countries shall be included in the mix at a concessionary rate."

This proposal would also be applicable to other standards such as 14026.

Earlier in 2011, Singapore proposed the following disclaimer text to 14067 given that it is not consistent with the *Convention*.

> "For the purposes of the Marrakesh Agreement Establishing the World Trade Organization and other relevant international agreements, ISO 14067 is not to be interpreted as an "International Standard" or "guideline" or "recommendation" nor is it to provide a basis for any presumption or finding that a measure is consistent with obligations under the relevant agreements. Neither may ISO 14067 be used as a basis for mandatory technical regulations."

At the point of writing of this article in August 2017, the convenor of 14067 had written to ISO members to obtain their responses on including the disclaimer text in 14067.[19] The convenor's document contains the statement by the delegate of Singapore wherein the latter highlighted that ISO standards must account for the national circumstances of countries. This will provide international legitimacy to ISO's standardization activities. ISO standards

(i) Must be documents which every ISO member can meet and own
(ii) Must not be used to justify trade restrictions, but support international trade which is necessary for economic development which in turn is essential for sustainable development and addressing the climate challenge.
(iii) In the specific case of carbon footprint standard 14067, it must be consistent with the Convention and the *Paris Agreement* which accommodates the different national circumstances of countries, including their different natural and energy endowments, and lack of access to alternative energy options.

The proposal whether or not to include the disclaimer will then be presented to the ISO's Technical Management Board. Following which, ISO members will have to decide by voting whether to elevate draft 14067 to the status of a draft international standard. If the draft international standard garners two-thirds positive votes from members in the working group developing 14067 and if not more than 25% of all voting ISO members cast negative votes, 14067 will become an international standard. It will then enjoy the presumption of

[19] ISO, ISO-TC207-SC7 N0445 TC207 SC7 CIB of WG8 request for the TMB for an exception to include the disclaimer in Clause 4 of 14067 (replaces N444), 27 June 2017.

consistency with the WTO's TBT Agreement with adverse consequences for countries such as the AED which do not have ready access to and/or difficulties switching to renewable energy options.

## 9. Conclusion

The inter-linkages between economic, trade and climate response measures require the WTO, UNFCCC and other relevant international organizations to follow consistent and mutually supportive policies while respecting their respective mandates and competence. The WTO's CTE and the UNFCCC's Forum on response measures have a role in fostering coherence between the trade and climate regimes. The ISO must also play its part in ensuring that the standards that it is developing are consistent with the WTO, the *Convention* and the *Paris Agreement* in supporting economic and climate objectives. Then only can parties give substance to what they agreed when they adopted the WTO Agreements in Marrakesh, Morocco in 1994 that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and action for the protection of the environment, and promotion of sustainable development on the other".

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