

World Trade Organization Rules and Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution



TECHNICAL NOTE



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Ahead of the second session of the Intergovernmental Negotiating Committee (INC-2) to develop an international legally binding instrument on plastic pollution, including in the marine environment (plastics treaty), there are clear indications that trade restrictions¹ and requirements are to be part of the discussions, as indicated by many pre-INC-2 State submissions, including non-party trade provisions (see CIEL's brief on [non-party trade provisions](#)).²

Concurrently, some States have raised the question of compatibility between possible provisions of the future plastics treaty and World Trade Organization (WTO) rules.³ Since the inception of the WTO, a number of principles have become part of the core of international trade law under its jurisdiction. Critical elements of these rules include: (i) the non-discrimination principle;⁴ (ii) the most-favored-nation (MFN) principle⁵ and (iii) the national treatment principle.⁶ However, those principles do not preclude or impede States from prohibiting, restricting, or conditioning trade within the plastics treaty. Many multilateral environmental agreements (MEAs) have included trade and trade-related provisions,⁷ including trade restrictions, and none have triggered WTO disputes.⁸ In fact, MEAs that contain trade provisions harmonize the approach to an environmental problem, avoiding legal fragmentation and plausible WTO challenges.

Trade is an essential aspect of the plastic crisis that led to the adoption of a mandate to develop an international legally binding instrument to end plastic pollution. Plastic feedstocks, polymers, additives, plastic pellets, plastic products, and waste are largely traded internationally⁹ and the liberalization of trade in those products supports the rise in production and consumption of plastics, accelerating the plastic crisis. Additionally, trade in plastics acts as a conveyor belt for plastic pollution, including micro- and nanoplastic pollution around the world.¹⁰ The need to address the trade-related aspects of plastic pollution has been recognized by WTO members of the Dialogue on Plastic Pollution at the WTO.¹¹ The Dialogue on Plastic Pollution has incorporated the reduction of plastics trade as one of its main work streams.¹² This brief examines the question of consistency or compatibility of the incoming plastics treaty with WTO rules, with the understanding that the treaty negotiation process is still very much ongoing. It also provides key recommendations for future framing of the plastic treaty's terms to address the essential interlinkages between plastic pollution and international trade in advance of INC-2.

¹ Bans, phase outs, prohibitions, restrictions, reductions, or moratoriums to be applied upstream, midstream, or downstream, have been discussed by the submissions of for e.g. African Group, Australia, Brazil, Cambodia, Colombia, Ecuador, EU, HAC, Nigeria, Morocco, New Zealand, Philippines, Peru, Rwanda, Sierra Leone, Sri Lanka, Switzerland, Thailand, Tonga, UK, Uruguay.

² See for e.g., pre-session submissions for INC 2 of Cook Islands, Ecuador, Georgia, EU, HAC, Monaco, Norway.

³ See pre-session submission for INC 2 of Uruguay and Argentina.

⁴ See GATT Article III, VIII, XI, XIII.

⁵ GATT 1994 contains a number of other provisions requiring MFN or MFN-like treatment such as Art.III:7 regarding local content requirements, Article V freedom of transit, Article IX:1 marks of origin, Art. XIII:1 non-discriminatory administration of quantitative restrictions, Art. XVII state trading enterprise, and Article XX general exceptions.

⁶ GATT, Article III requires that a WTO Member shall not discriminate between its own and like/directly competitive/substitutable foreign products, i.e., it shall give them "national treatment." Also contained in other agreements as for e.g. the Technical Barriers to Trade (TBT) Agreement, or the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

⁷ See for e.g. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Article X; Basel Convention, Article 4.5; Montreal Protocol on Substances that Deplete the Ozone Layer, Article 4. For more information, see also the WTO Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements (MEAs) accessible at https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm.

⁸ See WTO, *Trade and Environment at the WTO: The Relationship between MEAs and the WTO*, p. 4, accessible at <http://www.oas.org/dsd/tool-kit/Documentos/Module1/The%20Relationship%20between%20MEAs%20and%20the%20WTO.pdf>.

⁹ Diana Barrowclough, Carolyn Deere Birkbeck, Julien Christen, *Global trade in plastics: insights from the first life-cycle trade database*, (December 2020), pp. 19-23, accessible at https://unctad.org/system/files/official-document/ser-rp-2020d12_en.pdf.

¹⁰ Diana Barrowclough, Carolyn Deere Birkbeck, Julien Christen, *Global trade in plastics: insights from the first life-cycle trade database*, (December 2020), pp. 5-6.

¹¹ Informal Dialogue on Plastic Pollution and Environmentally Sustainable Plastic Trade, *Ministerial Statement on Plastic Pollution and Environmentally Sustainable Plastic Trade*, WT/MIN(21)/8/Rev.2 (10 December 2021), accessible at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/8R2.pdf&Open=True>, and WT/MIN(22)/12 (12-15 June 2022), accessible at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/12.pdf&Open=True>.

¹² Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastic Trade, *IDP Plan 2022*, INF/TE/IDP/W/5 (21 February 2022), accessible at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/TEIDP/W5.pdf&Open=True>.

WTO Rules Do Not Prevent Governments from Agreeing to and Implementing an Ambitious Treaty to End Plastic Pollution

There are over 250 MEAs dealing with various environmental issues currently in force, many of which include provisions that can affect, prohibit, or condition the international trade of products or substances.¹³ Including trade provisions in MEAs has proven to be an effective tool to operationalize and ensure the realization of environmental agreements (see CIEL's brief '*Trade Provisions in Multilateral Environmental Agreements: Key Elements for Consideration in the Context of a Treaty to End Plastic Pollution*'; IUCN WCEL '*Brief for Negotiators on Treaty Regime Interactions*').¹⁴ In fact, many WTO members have already taken trade bans or prohibitions of different types of plastics at the domestic level.¹⁵

As of May 2023, no actions of a WTO member to comply with the trade measures of an MEAs have ever been challenged by another WTO member.¹⁶ This includes instances where only some WTO Member States have chosen to become Parties to these MEAs and others not. While the potential for conflict has been raised on various occasions,¹⁷ it is widely recognized that MEAs can restrict or prohibit trade without running against WTO rules.¹⁸

WTO rules have sufficient scope to accommodate trade-related measures pursuant to MEAs.¹⁹ WTO rules impose three primary requirements: (i) countries must treat foreign products the same way that similar domestic products are treated (that is, national treatment); (ii) countries must treat products from all countries equally; and (iii) countries cannot impose other types of restrictions on products (like quotas and licensing schemes) that would change the conditions of competition. What is needed in the context of the plastics treaty is a set of precise obligations at the global level, combined with multilateral rules to guide countries in formulating their own environmental policies that also accommodate the need for flexibility at the domestic level. Regardless of the nature of an environmental problem, the contribution of multilateral cooperation is to address problems which no countries can address or protect itself from on its own. Importantly, it creates cohesion on the regulatory approach to a specific topic at the international level. An attempt by countries to manage these issues alone would sooner or later lead to friction with trading partners and most likely to unilateral trade action and complaints at the WTO level where the States involved could invoke jurisdiction.²⁰

¹³ See for e.g., CITES, Arts.II, III, IV, V, X; Montreal Protocol, Arts. 4 and 4 A; Basel Convention, Preamble, Arts. 4 and 4 A; Minamata Convention, Art. 3.

¹⁴ Economic and Trade Branch, Division of Technology, Industry and Economics, United Nations Environmental Programme, *Trade-related measures and Multilateral Environmental Agreements*, (2007), p. 27, accessible at <https://wedocs.unep.org/handle/20.500.11822/25944>; IUCN WCEL, *Briefing for Negotiators on Treaty Regime Interactions*, (2023), pp. 18-27, accessible at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwim_txmIYF_AhVCQ0EAH5BAWUQFnoECAoQAO&url=https%3A%2F%2Fwww.iucn.org%2Fsites%2Fdefault%2Ffiles%2F2023-01%2Fiucn-wcel-briefings-inc2-compilation-of-six-briefings.pdf&usg=AoVaw0XWPDljkZVcd7kgClu7_Kz.

¹⁵ See IISD presentation, Trade-related measures employed in the fight against plastic pollution: What Do We Know? (19 April 2023), pp. 6-7, accessible at https://www.iisd.org/system/files/2023-04/fighting_plastic_pollution_taking_the_first_step_taking_the_next_step.pdf.

¹⁶ See WTO, *Trade and Environment at the WTO: The Relationship between MEAs and the WTO*, p. 37, accessible at <http://www.oas.org/dsd/toolkit/Documentos/ModuleII/The%20Relationship%20between%20MEAs%20and%20the%20WTO.pdf>.

¹⁷ See e.g. WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, (14 November 2001), para. 31, accessible at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009.aspx?language=E&CatalogueIdList=37246&CurrentCatalogueIdIndex=0&FullTextSearch=; WTO, *The Montreal Protocol and trade measures*, WT/CTE/W/57, (28 August 1997), Part VII, accessible at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009.aspx?language=E&CatalogueIdList=107385,39992,21284,3239,38917,7781,18685,7517&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True; WTO and CITES, *Enhancing Cooperation for Sustainable Development*, (2015), accessible at https://cites.org/sites/default/files/i/news/2015/CITES_WTO_Brochure_72.pdf.

¹⁸ The first paragraph of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) even states that sustainable development and the protection of the environment are central objectives of the multilateral trading system, Recital 1, accessible at https://www.wto.org/english/docs_e/legal_e/04_wto_e.htm.

¹⁹ Singh, Nidhi. *Trade Related Environmental Measures in Multilateral Environmental Agreements and the WTO: Irreconcilable Differences?*. American Journal of Economics and Business Administration, 1, no. 3 (2009), p. 252.

²⁰ GATT, *Secretariat's annual report on international trade*, 90-91, Volume 1, pp. 20-21.

MEAs provide a coherent and harmonized approach to an environmental problem, avoiding legal fragmentation while also seeking to provide uniform protections for the environment and human health. Thus, carefully crafted provisions in the plastics treaty, as well as their national level codifications, will provide uniform requirements for plastics products, plastic-containing products and constituent elements of plastic products that achieve the underlying goals of the proposed treaty, putting all actors at the same competitive level, while also ensuring uniform treatment of products regardless the place of origin.

Should a question be raised about the compatibility of a specific provision with WTO rules, trade-related measures could largely be permitted under Article XX of the General Agreement on Tariffs and Trade (GATT). GATT Article XX establishes a series of general exceptions, “subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”²¹ Included in these allowable exceptions are measures “(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”²² Given the nature and underlying purpose of the plastics treaty, clearly drafted explanations regarding the connections to human, animal and plant health under the preamble or relevant treaty provisions - often under environmental or human health rubrics - as well as the protection of natural resources and the protection of UNESCO and nationally designated marine conservation areas, would make sure to bring all treaty provisions under the umbrella of the Article XX exceptions.

²¹ GATT, Article XX.

²² GATT, Article XX.

But There Are Some Key Elements That Need to Be Kept in Mind When Developing Treaty Provisions

At the core, there is no conflict between the WTO system and possible provisions of the future Plastic Treaty, as outlined in UNEP's [option paper](#). However, WTO rules are an important safeguard against domestic arbitrary or unjustifiable discriminatory measures. As mentioned above, domestic approaches instead of international ones can sooner or later lead to friction with trading partners and most likely to unilateral trade actions.²³ When it comes to the environment, "the basic thrust of WTO rules is that environmental objectives should not be used as an excuse to protect domestic producers".²⁴

First, **National Action Plans (NAPs) or Nationally Determined Contributions (NDCs) could potentially lead to fragmentation and lead to trade challenges depending on how they are designed.** NAPs or NDCs are implementation tools used to communicate and inform about the way in which States are to implement policies domestically to fulfill their international obligations arising from a treaty. In the context of the plastics treaty, while some INC pre-submissions have mentioned NAPs or NDCs and references were made to them by States during INC 1,²⁵ the exact role and contents of NAP or NDCs or other implementation tools for the treaty is in discussion. However, there are examples of similar systems in the Paris Agreement regime through NDCs and the Convention on Biological Diversity (CBD) regime through the National Biodiversity Strategy and Action Plans (NBSAPs). In each of these systems, there is a requirement that State Parties provide periodic reports on compliance with treaty commitments and intended legal and regulatory policies to advance compliance in the future.

In the past, national determination, shaped by national priorities and weak language in the treaty text (e.g., targets and associated goals framed in the language of normative expectations ('will') and recommendations ('should') rather than obligations ('shall'), constraints, and politics, have demonstrated to be insufficient or incompatible with ambitious targets and associated goals of a treaty.²⁶ As an example, as Parties began to submit their NDCs in the lead up to the Paris negotiations, it became rapidly clear that the sum of NDCs missed by a significant margin, the emissions reduction pathway consistent with plausible limitation of the temperature increase to below 2°C, let alone 1.5°C.²⁷ To provide clear, enforceable, transparent, and uniform evaluation of State Party compliance, compliance mechanisms should be narrowly tailored to elicit information that is quantifiable and can be used for benchmarking current and future accomplishments. They will also require clear overall provisions that go beyond the general objectives, such as prohibitions, restrictions, and control measures.

²³ GATT, *Secretariat's annual report on international trade*, 90-91, Volume 1, pp. 20-21.

²⁴ WTO, *Short answers to big questions on the WTO and the environment*, (2020), p. 9, accessible at https://www.wto.org/english/res_e/booksp_e/envrgapublication_e.pdf.

²⁵ See for e.g. pre-session submissions for INC 2 of the African Group, Alliance of Small Island States (AOSIS), Australia, Brazil, China, Colombia, EU, Japan, Peru, Russia, Switzerland, UK, and USA.

²⁶ Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer and Andrew Higham, *The Paris Agreement on Climate Change, Analysis and commentary*, Oxford University Press, (2017), pp. 78-79.

²⁷ Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer and Andrew Higham, *The Paris Agreement on Climate Change, Analysis and commentary*, Oxford University Press. (2017), pp. 78-79.

Additionally, environment-related disputes at the WTO have helped clarify that there are several useful checks to ensure that, when enacting measures to protect the environment at the domestic level, there is no protectionist intent or misuse for protectionist purposes.²⁸ This could be quite useful in envisioning compliance mechanisms as assisting in understanding the laws and rules used by States where they have trade implications. For example, clearly stating the rationale for a national set of policies and implementing laws and rules on plastic use and composition would allow a State to provide evidence of the links between biodiversity health, human health, natural resources and environmental protection that then would support the invocation of an Article XX exception if challenged. Further, assuming a periodic reporting requirement for NAP, NDCs or other implementation mechanisms, well-explained reports could provide significant evidence to support the validity of Article XX assertions.

Second, **non-Party trade measures shall mirror trade measures applicable between Parties**. Previous MEAs have often adopted non-Party trade measures. These provisions typically set out how a party to a treaty should interact with 'non-Party' States, promote the ratification of the agreement and deal with the specific challenges presented by non-Parties. WTO members have previously entered into international agreements containing non-party trade provisions (i.e., all the MEAs mentioned above include WTO members). The GATT or other WTO Agreements do not prohibit the possibility of MEAs including non-Party trade provisions. However, it is important to note that non-Party trade provisions must mirror trade measures applicable between Parties (i.e., expand trade bans or restrictions applicable between Parties, to Parties and non-Parties). The contrary could lead to implementing measures being considered discriminatory or protectionist, which is prohibited under the GATT. Additionally, non-Party trade measures will need to be precise, clear and tailored to the core obligations of the treaty.

Third, **WTO members can differentiate between polluting and greener products but must avoid unjustifiable or arbitrary discrimination**. Pursuant to Articles I and XIII of the GATT, there are obligations to treat "like" products in the same way, no matter what their country of origin. For instance, Article XIII permits application of (otherwise legitimate) quantitative import restrictions to the product of one Party only if the restriction is applied also to the "like products" of other Parties. The question of whether, for example, plastic materials or products are "like" their substitutes or alternatives could be of potential relevance in any situation where a State applied trade restrictions on imports to the former. This may also be an issue that is relevant in the case of prohibitions or restrictions applied differently to different materials or products (i.e., split listings). The key element here would be to establish clearly defined and articulated criteria that are supported by scientific and technical information which proves the non-discriminatory nature of the listings.

²⁸ WTO, *Short answers to big questions on the WTO and the environment*, (2020), p. 9, accessible at https://www.wto.org/english/res_e/booksp_e/envirqapublication_e.pdf.

Fourth, **WTO has the ability to agree upon the issuance of waivers that authorize activities and restrictions which are likely to come into conflict with the terms of WTO law in extreme circumstances.**²⁹ The primary example of this had been the series of waivers granted and renewed to facilitate the Kimberley Process for conflict diamonds until, in the wake of the Covid-19 pandemic, limited and short-term waivers were authorized.³⁰ Because procedures and precedents exist for long-term waiver processes to be used in conjunction with international and national efforts at addressing urgent issues that have the potential to impact on WTO law. The Kimberley Process waivers were granted for finite periods of time and have subsequently been renewed, while during Covid the WTO granted allowances for Member States seeking to impose trade restrictive measures in key areas such as health care and supplies, food stuffs, and personal protective equipment. The Plastic Treaty can benefit from these precedents, should there be a question of compatibility with the WTO system, by seeking a short-term waiver if necessary.

²⁹ See e.g. WTO, *Waiver concerning Kimberly process certification scheme for rough diamonds*, WT/L/518 (27 May 2003), accessible at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32765&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

³⁰ WTO defines waiver as permission granted by the WTO member not to comply with normal commitments. Waivers have time limits and extensions have to be justified, according to the WTO Glossary website on “waiver”, accessible at https://www.wto.org/english/thewto_e/glossary_e/waiver_e.htm.

Recommendations / Conclusion

In conclusion, as mentioned by the WTO Secretariat in a recent publication: “WTO members are free to adopt environmental policies, such as environmental requirements and taxes, at the level they choose, even if they significantly restrict trade, as long as they do not introduce unjustifiable or arbitrary discrimination or disguised protectionism through the back door”.³¹ In that sense, **trade rules are no excuse for inaction**.³² This is an important point in the context of the Plastic Treaty, which bridges between human health, environmental, trade and human rights issues, and demonstrates the ways that international treaties can and need to address global problems through cross-sectoral approaches. The WTO Secretariat’s statements support what the above discussion has highlighted, namely that control measures currently being discussed as part of the options to be implemented by the Plastic Treaty, including restrictions and bans on the production, use and trade of plastic precursors, chemicals, plastic materials or plastic products, would not inherently be in contradiction with WTO laws. Additionally, based on the above, several recommendations can be made for the Plastic treaty negotiations at INC 2 and beyond:

- First, it will be important to ensure that nexuses between plastic pollution, environmental protection, climate change, biodiversity, environmental heritage (such as Natural World Heritage Sites protected through UNESCO) and public health are articulated throughout the plastics treaty. This includes the structuring of proposed implementation mechanisms, including NAPs or NDCs.
- Second, the plastics treaty should explicitly apply equally to all members to avoid potential challenges based on discrimination, equally including non-Party provisions. Those should mirror trade bans or prohibitions applicable between Parties.
- Third, the plastics treaty should ensure that prohibitions on process and production, use or trade of a product containing plastic or plastic elements are coherent and equally applied. In this way, issues regarding discrimination and also policy coherence will be addressed in a way that is informed by science and technological knowledge and is therefore verifiable.
- Fourth, it must be remembered that international trade law includes the WTO legal and dispute settlement system as well as Regional Trade Agreements and Free Trade Agreements to which States are Parties. While these will necessarily apply at differing bi-lateral or multilateral levels based on the terms of the agreements, they nevertheless should be taken into account since they are increasingly accommodating of environmental, sustainable development and human rights concerns. Thus, these forms of agreements can be seen as supporting laws and rules that address these areas in the trade context.
- Finally, it should be remembered that if, despite the points raised above, concerns over the relationship between the Plastic Treaty and the WTO law systems persist, it would be possible to make express references to this in the treaty preamble or other appropriate sections to avoid any future doubts or challenges.

³¹ WTO, *Short answers to big questions on the WTO and the environment*, (2020), p. 7, accessible at https://www.wto.org/english/res_e/booksp_e/envirgapublication_e.pdf.

³² WTO, *Short answers to big questions on the WTO and the environment*, (2020), p. 7.



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