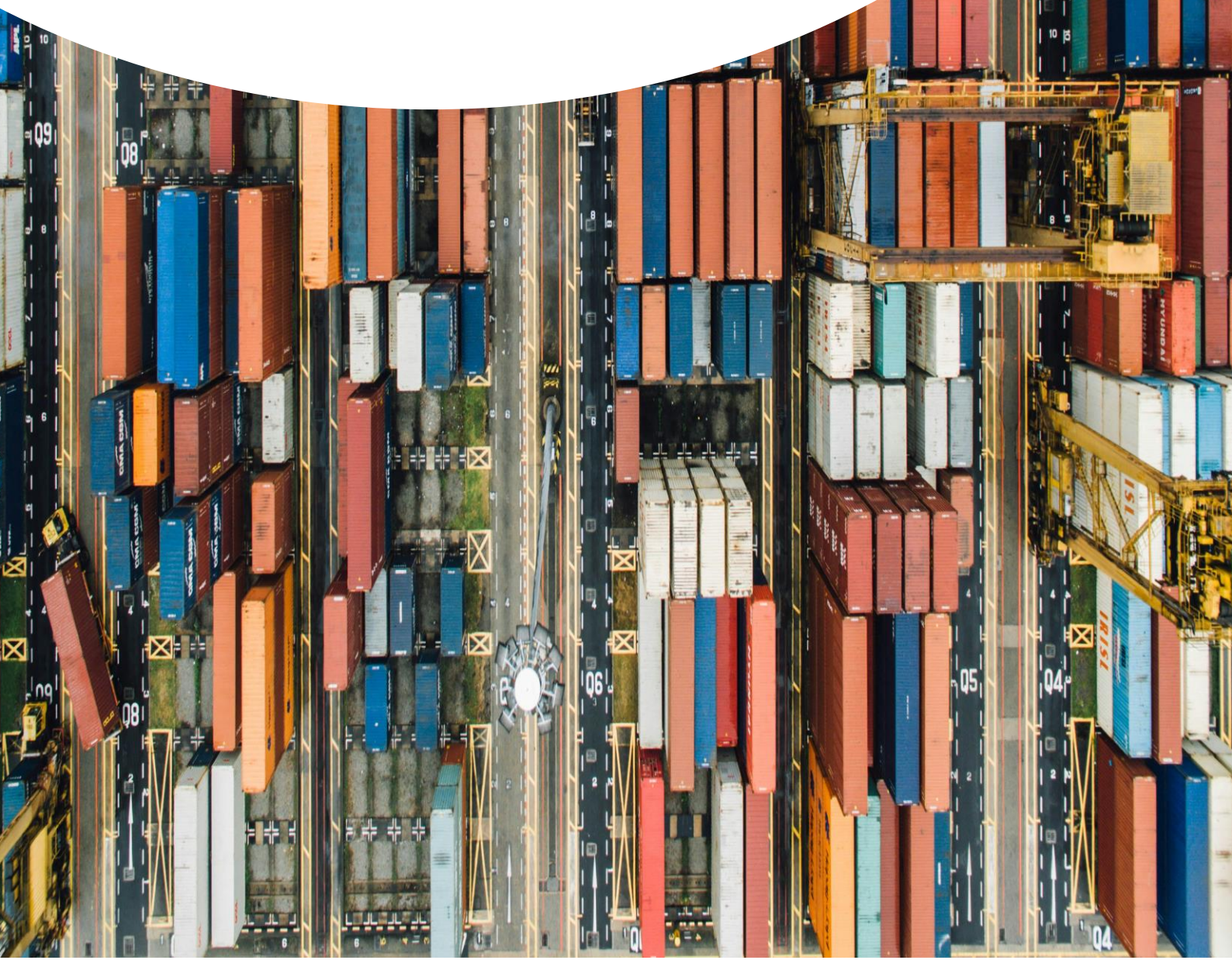
QUNO
Quaker United Nations Office

Trade Issues and the International Legally Binding Instrument on Plastic Pollution: A Legal Analysis

Prepared September 2024



Project Team

Author

Dr. Alexandra Harrington

Editors

Ronald Steenblik

Andrés Naranjo

QUNO

Quaker United Nations Office Geneva Association

Avenue du Mervelet 13

1209

Geneva, Switzerland

Tel +41 22 748 4800
Fax +41 22 748 4819
Web www.quno.org

Approved By

Andrés Naranjo (Project Manager – QUNO)

About QUNO

The Quaker United Nations Office (QUNO) works to promote peace and justice at the international level, focusing on areas such as human rights, peacebuilding, and climate change. Through its engagement with rights-holders, United Nations agencies, governments, and non-governmental organizations, QUNO seeks to build collaborative solutions to global challenges. Guided by Quaker principles, QUNO's Sustainable and Just Economic Systems programme addresses the systemic issues driving economic inequality and environmental degradation. QUNO's work on plastic subsidies is part of its broader commitment to fostering economic systems that are both sustainable and just. This work builds on QUNO's recent report, "Plastic Money: Turning Off the Subsidies Tap (Phase 1)," which represents the first comprehensive attempt to quantify the subsidies received by producers of primary plastics polymers.

Acknowledgements

This initiative is supported by Dalberg Catalyst through grant funding from The Rockefeller Foundation. The findings and conclusions contained within are those of the authors and do not necessarily reflect positions or policies of The Rockefeller Foundation or Dalberg Catalyst.

The authors would also like to express their gratitude to Hélionor de Anzizu and Amelia Porges for helpful information they have provided, and in some cases reviewing text. The project also benefitted from the insights, ideas, and encouragement from participants in the Bellagio convening on plastics subsidies (26–30 March 2024). Any errors or omissions remain the sole responsibility of the report's authors.

I. Introduction

Pollution resulting from the production, use, and ultimate disposal of plastics has come to affect all regions of the Earth and all States. To address this global problem, in March 2022 the United Nations Environment Assembly (UNEA), in Resolution 5/14 (2022), agreed to launch negotiations to develop an international, legally binding instrument (ILBI) on plastic pollution, including in the marine environment. The same resolution also requested the Executive Director of the UN Environment Programme (UNEP) to convene an Intergovernmental Negotiating Committee (INC) to develop the ILBI, "which is to be based on a comprehensive approach that addresses the full life cycle of plastic, including its production, design, and disposal".

As of September 2024, four sessions of the INC have taken place: in Punta del Este, Uruguay from 28 November to 2 December 2022 (INC-1); in Paris, France from 29 May to 2 June 2023 (INC-2); in Nairobi, Kenya from 13 to 19 November 2023 (INC-3); and in Ottawa, Canada from 23 to 29 April 2024 (INC-4). Further, at INC-4, the Committee established two *ad hoc* intersessional open-ended expert groups. Expert Group 1 examined issues related to finance, and Expert Group 2 issues related to plastic products and chemicals related to plastic products. These expert groups met virtually from mid-July through mid-August 2024, and in person in Bangkok, Thailand, from 24–28 August 2024. The fifth and final scheduled negotiating session (INC-5) will take place from 24 November through 1 December 2024 in Busan, Republic of Korea.

These negotiations and expert-group discussions have shown that regulating pollution across the entire lifecycle of plastics will, necessarily, touch upon multiple facets of international trade law and practice. Indeed, since the beginning of the negotiations, issues regarding the potential for convergence between the terms of the future ILBI and existing commitments in World Trade Organization (WTO) Agreement have been raised as a point of concern by some States participating in the INC process. These issues have remained unresolved and, based on the Bangkok Intersessional Meeting, they seem likely to be raised during INC-5 as well.

This brief is intended to fill an existing analytical gap by addressing the relationship between various aspects of international trade law, such as subsidies, import and export licensing and compliance, as proposed in the Compilation Document[1] that will form the basis for the ILBI and applicable WTO Agreements. It is not intended to provide arguments for or against any positions *per se*, but rather to highlight the areas where convergence can occur, drawing especially on precedents from existing multilateral environmental agreements (MEAs), and addressing concerns for the compatibility of the future ILBI and WTO Agreements.

This analysis concludes that text in the Compilation Document proposed for inclusion in the ILBI to limit, phase out or ban certain subsidies related to plastics would not give rise to a conflict with any WTO Agreements, nor would any of the proposed import and export licensing provisions. Similarly, given the general nature of the proposals for packaging, labelling and marking requirements under Part II of the Compilation Document, there is no evidence to suggest that these elements would be applied in contravention of WTO law. Finally, past

[1] UNEP, Compilation of draft text of the international legally binding instrument on plastic pollution, including in the marine environment, Doc. UNEP/PP/INC.5/4 of 1 July 2024, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/45858/Compilation_Text.pdf.

precedent and WTO law provides no basis for the WTO's Dispute Settlement Body to exert jurisdiction over the trade provisions of any multilateral environmental agreement, including an eventual international legally binding instrument on plastic pollution.

II. Subsidies

A. References to subsidies in the Compilation Document

Limited measures relating to subsidies have been present in the draft texts used for ILBI negotiations at INC-3[2] and INC-4[3] and are still included in the Compilation Document to be used as the basis of negotiations during INC-5.[4]

During the preparatory meetings for the Ad Hoc Open-ended Intersessional Expert Groups, some States referred to subsidies as a potential tool for encouraging the development of plastics alternatives and substitutes (positive subsidies), while others instead stressed the need to phase out and eliminate subsidies associated with the production of plastics covered by the ILBI (negative subsidies). Participants also raised concerns that measures in the ILBI that relate to subsidies be structured in a way that is consistent with existing WTO rules.[5] These arguments reflect the positions that have been consistently voiced throughout the INC meetings to date.

Significantly, the Co-Chairs' Synthesis Paper on Finance, circulated in advance of the Bangkok Intersessional Expert Group meeting, included references to subsidies in potential measures that would allow for the alignment of both public and private financial flows that advance the terms of the ILBI, though they are identified as being geared toward public measures.[6] This Synthesis Paper also highlighted the potential connections between "elimination, phase out or reform incentives, including subsidies" and existing State commitments under the Kunming Montreal Global Biodiversity Framework to phase out certain forms of subsidies that harm biodiversity.[7]

During the Intersessional Expert Group meetings, the primary focus of the Finance Expert Group was on the potential creation of a dedicated financial mechanism to support the implementation of the ILBI. While subsidies were not the subject of significant discussion at these meetings, they remain very much a part of the Compilation Document that will form the basis for negotiations during INC-5.

---

[2] UNEP, Zero draft text of the international legally binding instrument on plastic pollution, including in the marine environment, Doc. UNEP/PP/INC.3/4 of 4 September 2023, available at available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43239/ZERODRAFT.pdf.

[3] UNEP, Revised draft text of the international legally binding instrument on plastic pollution, including in the marine environment, Doc. UNEP/PP/INC.4/3 of 28 December 2023, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/44526/RevisedZeroDraftText.pdf.

[4] UNEP, *supra* note 1.

[5] For more information on the Ad Hoc Intersessional Open-ended Expert Groups, visit https://www.unep.org/inc-plastic-pollution/ioeeg.

[6] UNEP, INC Co-Chairs' Synthesis Paper on Finance, 7 August 2024, https://wedocs.unep.org/bitstream/handle/20.500.11822/46049/EG1_Synthesis_Paper.pdf

[7] Ibid.

In the main text, there is a proposal to include references to subsidies in the binding control measures on regulating primary or secondary plastic polymers, or both, in Part II.1. The proposal is for either mandatory or voluntary commitments by State Parties to either not grant or maintain, or to remove, subsidies for primary or secondary plastics, or both. In Part II.13 on transparency, tracking, monitoring and labelling, there is a proposal that State Parties be required to include information on subsidies use, phase-outs and related measures in their national monitoring obligations. Additionally, proposed Annex X to the ILBI, which would contain "effective measures at each stage of the plastic lifecycle", includes references to State Parties providing information on subsidies and subsidy reform under the heading of the "distribution/sale/consumption stage" of the full plastic lifecycle.

B. Applicable WTO law

Under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), a subsidy is deemed to exist where:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred.[8]

If there is no "benefit" that makes the subsidy recipient better off than it would be in a free-market situation, there is no subsidy.

Nothing in the WTO Agreement obligates a WTO Member to refrain from granting subsidies generally. However, Article 3 of the SCM Agreement singles out export subsidies and import substitution subsidies and prohibits their use if the subsidies are contingent:

> (a) . . ., in law or in fact, whether solely or as one of several other conditions, upon export performance, . . .;
>
> (b) . . ., whether solely or as one of several other conditions, upon the use of domestic over imported goods.[9]

[8] WTO, Agreement on Subsidies and Countervailing Measures, Article 1, available at: https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.
[9] Ibid., at Article 3.

Article 3 provides that WTO Members shall "neither grant nor maintain" these prohibited subsidies as part of the SCM Agreement.[10] There is an explicit carve-out for subsidies in the agriculture context, which are instead governed by the WTO Agreement on Agriculture.[11]

Articles 5 and 6 of the SCM Agreement deal with subsidies that are not *per se* prohibited. They ban adverse effects caused by these subsidies, including "injury" (where a foreign subsidy injures a domestic industry), "nullification or impairment" (for instance where a subsidy in a country makes market access concessions meaningless), or "serious prejudice" (for instance where a subsidy lets an industry displace its competitors in markets abroad)

A subsidy is considered "actionable" under the SCM Agreement only if it is "specific" — i.e., it is limited to particular companies or industries or regions. Any prohibited subsidy falling under the provisions of Article 3 is deemed to be specific.[12]

C. Conclusions

The options currently presented by the Compilation Document on an ILBI on limiting, phasing out or banning subsidy measures would not give rise to conflict with WTO Agreements. The proposals contained in the Compilation Document reflect the views of many participants in the negotiations that subsidies should be phased out and removed in the plastics sphere so as to promote a shift away from patterns of production that give rise to plastic pollution. These have been framed in a way that is compatible with the SCM Agreement. Indeed, some of the proposals contained in the Compilation Document directly mirror the language used in the SCM Agreement, especially in terms of State commitments to "neither grant nor maintain" covered subsidies. This highlights the ways in which subsidies provisions can be incorporated into a future ILBI as a means of advancing the SCM Agreement and WTO law rather than hindering it.

III. Trade issues and WTO convergence

A. Trade provisions in the Compilation Document

Preambular text

References to trade issues in the Compilation Document begin with the preamble, in which a proposal from INC-4 would include references to the connections between plastics and international trade practices. Additionally, proposals for expanding the Principles section in Part I.4 of the Compilation Document include:

> the Parties must ensure measures taken to combat plastic pollution, including unilateral ones, must not introduce trade distortions and constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

[10] Ibid.
[11] Ibid, at Article 5.
[12] Ibid., at Article 5.

Direct connections between international trade and the ILBI come from Part II.10 of the Compilation Document. Notably, from the outset, each proposed sub-section of this Part contains a zero-text option, indicating that at least one State as proposed that the topic not be included in the ILBI text.

Trade provisions

Part II.10 on trade includes two alternative Options. Option 1 covers (a) trade in listed chemicals, polymers and products, and (b) transboundary movement of plastic waste. Each of these two topics has multiple alternative sub-options, which differ in the extent to which they would require State Parties to take action. The text includes many brackets throughout. It would call for the harmonization or coordination of trade measures as discussed below. By contrast, Option 2 would provide no mandate to enact trade measures or to harmonize trade measures on plastics or plastic waste. Rather, it would restrict the measures that State Parties could take, by requiring that these measures conform to WTO rules. In this respect, it would in effect subordinate the trade provisions of the ILBI to the WTO regime.

(a) Trade in listed chemicals, polymers and products

This section of the text includes three Sub-Options. Sub-Option 1 would require State Parties to ban exports of (a) chemicals, groups of chemicals or polymers referenced in Part II.2 when they would be used in plastic production or incorporated into plastic products; (b) plastic products containing any such chemicals or polymers; or (c) a microplastic or a product under Part II.3 on problematic and avoidable plastic products, including short-lived plastics, single-use plastics and intentionally added microplastics. This prohibition would be subject to an exception wherein the production and/or use is allowed under the ILBI and done with prior informed consent of the importing State.

State Parties would be required to create an export permit requirement for covered exports, potentially including elements to track the types, volumes and destination of these exports, and for obtaining written prior informed consent from the importing State, as well as assurances on how the chemical, polymer, microplastic, plastic or plastic product will be used. Exporting State Parties would be obligated to require exporters within their jurisdiction to (a) provide complete and harmonized information about the composition of the covered item exported and its associated risks to the environment and human health, in accordance with the information in Annex A; (b) mark and label the covered item in conformity with Annex A; and (c) comply with accepted rules, standards and practices at the international level regarding packaging, labelling and transport of the covered item.

Related import bans: this proposal would also obligate State Parties to prohibit importation of: (a) chemicals, groups of chemicals or polymers under Part II.2 when they would be used in plastic production or incorporated into plastic products; (b) a plastic containing covered chemicals or polymers under (a); or (c) a microplastic or a product under Part II.3 on problematic and avoidable plastic products, including short-lived plastics, single-use plastics and

intentionally added microplastics; (c bis) products that fail to meet the product design requirements under Part II.5 of the ILBI.

A secondary proposal would require State Parties to apply these on a non-discriminatory basis.

To ensure harmonization of information, this proposal would require exporting Parties to use applicable Harmonized Commodity Description and Coding System (HS) codes as part of their reporting and licensing terms.

Sub-Option 2 would include no export or import prohibitions, merely an obligation to "cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties".

Obligation to obey WTO law: Sub-Option 3 would require State Parties to generally act in conformity with their obligations under WTO laws and other applicable multilateral trading system elements while regulating the trade of chemicals, polymers and products listed in the ILBI.

(b) Regulation of trade in plastic waste

Part II.10(b) of the Compilation Document would regulate the transboundary movement of plastic waste, potentially including non-hazardous plastic waste. The Compilation Document includes four alternative sub-options, in declining order of stringency

In Sub-Option 1, State Parties would be required to disallow transboundary movement of plastic waste, except for the purpose of its safe and environmentally sound management, in conformity with the terms of the ILBI and other applicable international agreements, and to obtain the prior informed consent of the importing State. This sub-option would also require State Parties to establish and implement an export permitting requirement and track the types, volumes and destinations of all of its plastic waste exports. Exporting State Parties would also be required to:

> (a) not allow transboundary movement to commence until they have received written consent and assurances from the importing State; and
>
> (b) require the exporter to provide the importing State and the importer with information on the composition of the exported waste and its risks to the environment and human health; mark and label the exported waste consistent with harmonized labeling standards established in Annex A; and comply with generally accepted and recognized international rules, standards and practices for packaging, labeling and transport of the plastic waste.

Under Sub-Option 1, the governing body would adopt implementation guidance for these requirements. State Parties could also be required to take effective measures to prevent and eliminate illegal trade in plastic waste and potentially also the dumping of plastic waste. They would also be required to promote complementarity and cooperate with other treaty regimes and international organizations towards adoption and implementation of effective measures to prevent and eliminate illegal trade and dumping of plastic waste.

Sub-Option 2 would require each State Party to take measures ensuring that transboundary movements of plastic waste follow the mandates of the Basel Convention as applicable. Where the Basel Convention does not apply, a State Party would be obliged to ensure that transboundary movement complies with relevant domestic and international rules, standards and guidelines.

Sub-Option 3 would simply require State Parties to prevent and eliminate illegal trade, traffic and dumping of plastic waste as set forth in the Basel Convention, while avoiding duplication of efforts and obligations under regional and international conventions and promoting cooperation in their implementation.

In Sub-Option 4, State Parties would only be obligated to "cooperate towards the adoption and implementation of effective measures to prevent and eliminate illegal exports and dumping of plastic waste." Additionally, Option 2 overall would address the areas of potential overlap with WTO law and make the ILBI's application contingent on conformity with WTO law, especially the Marrakesh Agreement.

Outside of Part II.10, strong connections between international trade law and the ILBI can be found in Part II:13, has a potential nexus with some aspects of the WTO TBT Agreement. It includes one Option (plus the zero option of no text at all).In Option 1, State Parties would be required — potentially in line with national circumstances and capabilities, national action plan contents and/or national laws and regulatory systems, and their status as developing or developed countries — to:

> (a) require and/or encourage primary and secondary plastics producers, importers, exporters and/or businesses throughout the supply chain to disclose, communicate and/or provide harmonized information on hazardous chemicals in plastics and plastic products throughout their lifecycles, potentially including the use of guidelines from the governing body, and to make this information publicly available on an accessible database;
>
> (b) take measures to ensure and/or improve the traceability of chemicals, polymers and plastic contents of products, potentially including feedstocks, across the full lifecycle and in compliance with guidance from the governing body and potentially the WTO regulatory system and other MEAs, including measures such as safe and environmentally sound use, recycling, recovery and disposal, confidential business information, human health impacts and the availability of technologies in developing countries; and
>
> (c) establish methods of digital tracking, traceability, marking and eco-labelling for plastic products, for the purposes of safe and environmentally sound use, recycling and disposal of plastics and plastic products, the protection of human health and the environment across the plastics lifecycle, and the promotion of circularity and informed decision-making, potentially with an explicit reference to WTO agreement consistency and based on guidance from the governing body and information contained in the annexes.

Part II.2 of the Compilation Document, relating to chemicals and polymers of concern in the plastics context, proposes generally that restrictions and/or prohibitions of certain chemicals and/or polymers and/or plastic products be done in a way that does not "create unnecessary obstacles to international trade and does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." A proposed alternative version of this option in the Compilation Document would require that the provisions of Part II.2 be in conformity with the WTO Technical Barriers to Trade Agreement and the Marrakesh Agreement. Further, among the proposals for Part II.2 (2), there are two sub-sections that would potentially connect to trade law measures regarding the provision of information on qualifying products and materials through the use of a harmonized system of information gathering and connect to Part II.13 in terms of marking and labelling of products.

Part II.3(b) of the Compilation Document relating to microplastics, including potentially added microplastics, sets out options for terms that would include oblige State Parties not to allow the sale, distribution, import or export of plastic products that contain intentionally added microplastics. Aspects of these provisions could tie into regulatory processes for international trade, although there is nothing to suggest that they would not be in conformity with existing WTO laws.

(c) Product-design aspects

Part II.5 (a) of the Compilation Document relates to product-design aspects of plastics and could potentially require State Parties to establish and implement minimum design requirements and/or criteria for products produced in their territories and made available on their markets. These measures could, depending on the iteration of bracketed text used, potentially include packaging restrictions and requirements as well as obligations for standards to be used in public-procurement practices.

To facilitate implementation of these provisions, State Parties would be required to monitor and/or establish national monitoring systems, tracking systems and/or publications and updates on the types and/or volumes or quantities of their production, import and export of chemicals and/or polymers used and/or employed in the production and/or manufacturing of plastic polymers, plastics, and/or plastic products throughout the full lifecycle. This information would include subsidies and financial incentives that are related to the production, import and export of primary plastic polymers. Further, State Parties would be required to take legal, administrative or policy measures to ensure the use of mandatory disclosures from "large and transnational businesses" and the financial sector regarding "activities undertaken, risks, opportunities, dependencies and impacts," as well as financial flows across the value chain. Additional proposed elements would include information generated under this Part in the databases intended to be made publicly available as part of the ILBI structure and would allow qualifying State Parties to receive financial and technical assistance in implementing their trade and reporting obligations.

Other proposed elements of the ILBI would include trade measures in the reporting requirements for State Parties to file, as set out in Part IV.1. In terms of compliance measures, the Compilation Document would potentially create a dedicated Committee, under the auspices of the governing

body, to review implementation and compliance with the ILBI's terms. In some iterations, this would have various forms of punitive or non-punitive capabilities and jurisdiction over multiple forms of actors in the ILBI system. Regardless of the form used, it is clear that the majority of States involved in the INC process intend for all aspects of the ILBI to be overseen by this Committee.

In the preliminary meetings of the Intersessional Expert Groups prior to the Bangkok Intersessional Meeting and again during this meeting, some participants argued that the trade aspects of the future ILBI should be expressly subject to dispute settlement under WTO procedures, not subject to the jurisdiction of the governing bodies of the ILBI. But the WTO only regulates trade effects of measures that are taken by governments and it only enforces WTO rules. If the ILBI requires Parties to take trade measures, only the ILBI governing bodies could enforce that obligation. Moreover, the WTO dispute settlement function no longer has binding force (due to ongoing vacancies on the Appellate Body) and it is not clear whether or when WTO dispute settlement will be brought back to life.

B. Applicable WTO agreements

The umbrella agreement for WTO law, the Agreement Establishing the WTO, opens with a preambular statement highlighting that one of the goals of the international trading system is "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[13] Thus, there is nothing within foundational documents of the WTO that would seek to preclude the use of trade measures to further international environmental laws.

The General Agreement on Tariffs and Trade (GATT 1994) generally prohibits import and export restrictions, and requires that internal regulations be non-discriminatory.[14] These provisions are subject to broad exceptions, which have been interpreted to permit environmentally motivated trade regulations such as the Basel Convention.

The WTO Agreement on Technical Barriers to Trade (TBT Agreement) further includes a preambular understanding that:

> no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or

[13] WTO, Marrakesh Agreement Establishing the World Trade Organization, available at https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

[14] See the General Agreement on Tariffs and Trade (GATT 1947), especially Articles XI-XIII, available at https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

> a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.[15]

To reflect this balance, Article 2.2 provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.[16]

The WTO Agreement on Import Licensing Procedures applies to either discretionary or non-discretionary regulation of imports, including both automatic and non-automatic licensing systems. It requires WTO Members not to use import licensing requirements in a manner that disrupts international trade or violates the GATT.[17] However, there are no prohibitions on the legitimate use of import licensing systems under the WTO system provided they meet these requirements.[18]

As for dispute settlement, the Dispute Settlement Understanding included in the WTO Agreement establishes a dispute settlement system administered by the Dispute Settlement Body (DSB). This dispute settlement system applies only to complaints under the WTO Agreement. A WTO tribunal would not have jurisdiction to rule on a dispute concerning application of non-WTO rules.[19]

In the context of existing MEAs, both the Basel Convention[20] and the Rotterdam Convention[21] include import and export requirements for transboundary movement of hazardous and other wastes, as well as procedures for prior informed consent, as core elements. The Stockholm Convention[22] includes similar trade restrictions and licensing requirements for persistent organic pollutants. These provisions coexist with the WTO system and the Agreements upon which it has been founded, and to date there have been no claims regarding any WTO Member State's

---

[15] WTO, Agreement on Technical Barriers to Trade, Preamble, available at: https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.
[16] Ibid., at Article 2.2.
[17] WTO, Agreement on Import Licensing Procedures, available at: https://www.wto.org/english/docs_e/legal_e/23-lic_e.htm.
[18] Ibid., at Articles 2 and 3.
[19] WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.
[20] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Doc. UNEP/BRS/2014/3/Rev.2 of June 2020, available at: https://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx
[21] Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, Doc. UNEP/BRS/2023/11, available at https://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx
[22] Stockholm Convention on Persistent Organic Pollutants, Doc. UNEP/BRS/2023/12, available at: https://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx

activities in implementing these Conventions as being in violation of WTO law. The same is true of other MEAs with trade-restrictive components, including CITES[23] and the Convention on Biological Diversity's Cartagena Protocol on Biosafety.[24]

C. Conclusions

The terms of the WTO Agreements discussed above, as well as entrenched practice involving multiple MEAs, establish that there is no inherent conflict between MEAs that include aspects of trade regulation and WTO laws provided the trade provisions are carefully tailored. In practice, this can be seen in the relationship between the trade elements in the Basel, Rotterdam and Stockholm Conventions (BRS Convention) and the Cartagena Protocol and the TBT Agreement. The proposed import and export licensing provisions in the Compilation Document build on the existing and accepted frameworks of the BRS Conventions and the Nagoya Protocol, and there is no indication that these terms would be applied in a different manner. Thus, these proposals could co-exist along with the WTO Agreements in the same manner that existing MEAs do.

Given the general nature of the proposals for packaging, labelling and marking requirements under Part II of the Compilation Document, there is no evidence to suggest that these elements would be applied in contravention of WTO law. Such concerns would be well-placed during the future Conferences of the Parties for the ILBI, where it can be expected that these issues will be addressed when the governing body establishes the applicable annexes, guidelines, standards and other forms of guidance for implementation by State Parties.

In terms of oversight and disputes, it is clear from the WTO law that the DSB has a circumscribed scope of jurisdiction and that this extends solely to hearing complaints based on the core WTO Agreements and several subsequently adopted measures within the WTO system. There is no basis for DSB jurisdiction over the trade provisions of an MEA or other international agreement *per se* and, indeed, efforts to expand DSB jurisdiction to environmental and related matters have largely been unsuccessful over the history of DSB jurisprudence.[25]

---

[23] Convention on International Trade in Endangered Species of Wild Fauna and Flora, available at: https://cites.org/eng/disc/text.php

[24] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, available at: https://bch.cbd.int/protocol/text

[25] See, e.g., *United States–Import Prohibition on Certain Shrimp and Shrimp Products, Report of the Panel, 6 November 1998, WT/DS58/R; China–Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Complaint by the United States, the European Union, and Japan), Report of the Panel, 29 August 2014, WT/DS431/R*.