TESS Forum on Trade, Environment, & the SDGs

Informal Briefing Note

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Trade-Related Considerations in the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, Including in the Marine Environment

In the context of the second part of the fifth session of the Intergovernmental Negotiating Committee (INC-5.2) on plastic pollution, INC members are reviewing a range of trade-related issues and provisions.

Promoting sustainable production and consumption of plastics—a core part of the INC mandate—is intrinsically about transforming trade and supply chains. Given the magnitude of trade flows across the life cycle of plastics, a number of proposed treaty provisions to protect human health and the environment from the adverse impacts of plastic pollution will have direct or indirect implications on trade, and indeed are, in some instances, explicitly proposed to end or shape certain trade flows.

This briefing note provides a synopsis of how trade-related issues and considerations are arising in the INC discussions, accompanied by annexes that provide illustrative examples of approaches in existing multilateral environmental agreements (MEAs). The considerations are clustered under four broad headings:

1. *Trade issues related to obligations proposed for inclusion in the treaty.*
2. *Issues related to the risk of arbitrary or unjustified trade discrimination and disguised protectionism.*
3. *Issues related to the ability of parties to meet trade-related obligations proposed for inclusion in the treaty, including costs of implementation.*
4. *The relationship with other international treaties and processes.*

As governments and stakeholders work to bolster international cooperation on plastic pollution, there is growing recognition of the relevance of trade flows and policies to efforts to end plastic pollution.

Trade flows are relevant to plastic pollution for several reasons. First, plastic pollution occurs across the life cycle of plastics and significant volumes of trade also occur across that life cycle—from trade in feedstocks, precursors, and chemical additives commonly used in plastics through to plastic products and plastic waste. Second, trade in plastics and plastic waste adds to the pollution burden on importing countries and the associated leakage of plastics into the environment, especially in countries with inadequate capacity for environmentally sound waste management. Third, trade flows play a central role in the international supply chains, production systems, and consumption trends that shape the global plastics economy. The transformation of international trade and supply chains will thus be key to ending plastic pollution.

Trade across the plastics life cycle occurs in large volumes and all countries are players in international trade in plastics—either as producers, consumers, or both. According to recent UNCTAD data, in 2023 the value of global plastics trade was $1.1 trillion and over 78% of plastics produced were traded internationally.

1. Trade Issues Related to Obligations Proposed for Inclusion in the Treaty

Given the significant role of trade in the global plastics economy, international cooperation that spurs and guides the transformation of international supply chains for plastics towards greater sustainability will be key to efforts to protect the environment and health from plastic pollution. Indeed, a key rationale for negotiating an international treaty on plastic pollution is that plastics, plastic products, and plastic wastes are produced, used, and traded in ways that transcend national borders. No country can tackle plastic pollution alone.

International trade cooperation will also be vital because countries are taking trade-related action domestically and regionally with the aim of tackling plastic pollution, including measures that seek to restrict or ban imports, as well as exports, of certain plastic products and wastes. According to the WTO Dialogue on Plastic Pollution, over 85 WTO members have notified more than 220 trade-related measures to address plastic pollution.

In the face of this complexity, common global rules that address cross-border trade and value chains can play a key role to (i) rationalize a patchwork of disjointed national regulations, which can be especially disadvantageous for developing countries (there are for example 808 new laws since 2008 according to the Global Plastic Laws database), and (ii) improve effectiveness and fairness of trade-related efforts to end plastic pollution by ensuring a level playing field and a transparent, predictable framework for business. In addition, a coordinated approach can: (i) reduce costs of the transition and increase efficiency for business across supply chains, especially for those involved in multiple markets; (ii) avoid diversion and leakage of environmentally harmful products and wastes; and (iii) support transparency so that parties have visibility of plastic products and ingredients entering their borders, which are vital for effective regulation and policy action domestically. Overall, cooperation on clear, transparent, and predictable rules on trade can catalyse and boost investment in environmental action across global supply chains.

Many countries across the world do not manufacture domestically the plastic products consumed within their borders but import them. Given their limited control over the design and composition of products, products containing plastics, and associated plastic packaging, some of the strongest advocates of common global rules have been those with limited capacities to monitor trade flows and enforce treaty obligations at their borders.

Spurred by numerous proposals from INC members, a number of provisions under discussion in the INC process, including those included in the latest Chair's Text, have explicit or implicit linkages to trade. These include proposed measures to:

- restrict production, use, and trade in certain plastic products and chemicals of concern in plastic products
- control trade of plastic wastes[1]
- introduce product design requirements or criteria, which may impact exports and exports of plastic products or products with associated packaging or embedded plastics
- require transparency, such as to disclose the material composition of products or labelling
- require reporting on trade data, such as on trade flows across the full life cycle of plastics
- address trade with non-parties, such as to i) encourage non-parties to the agreement to become parties; and/or ii) require parties to develop requirements on trade that apply to non-parties to the treaty, unless those non-parties conform to the requirements of the relevant treaty (see Annex 2 for examples in other MEAs).

[1] The Chair's Text, for instance, includes a draft provision that parties to the Basel Convention shall take appropriate measures to ensure that transboundary movement of plastic waste is carried out in accordance with the obligations of the Basel Convention.

Trade-related considerations—and issues for international cooperation—are likely also to arise in relation to implementation of treaty obligations. The implementation of some proposed provisions could, for instance, call for specific trade-related regulation or administrative action by governments including in relation to: labelling of products or certification that they meet certain criteria or standards; conformity assessment procedures or testing procedures; new approaches to classification of goods for the purposes of trade; or the development, mutual recognition, or harmonization of standards, each of which may involve a range of domestic authorities—from customs authorities to regulatory agencies and trade ministries, as well as stakeholders.

Regarding non-party trade provisions, some have been included in a number of existing MEAs, either as general stand-alone articles or within other substantive articles with dedicated requirements. Annex 3 provides some illustrative and non-exhaustive examples of non-party trade provisions and requirements in existing MEAs.

2. Non-Discrimination and Disguised Protectionism

In relation to trade-related obligations under discussion in the INC, a number of members have advanced proposals to guard against disguised protectionism and arbitrary or unjustified discrimination.[2] This concern arises in part due to the volume and value of trade across the full life cycle of plastics, and relates both to provisions that may seek to restrict the manufacture, consumption, and trade in certain products, or that establish design requirements or criteria. Notably, such provisions may impact the product itself (e.g. a plastic toy) or might also be related to the composition of a product or associated packaging (e.g. fish or meat packaged in plastic).

Notably, a number of existing MEAs have included provisions to ensure that the treaty's obligations are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between parties where the same conditions prevail, or do not serve as a disguised restriction on international trade (see Annex 2; for the legal origins of this text on non-discrimination, see Annex 4). The implication of such language is that parties to these MEAs can differentiate between polluting and greener products but must avoid unjustifiable or arbitrary discrimination (such as discrimination among trade partners, or between imported and domestic products) or disguised restrictions on international trade. Notably, under WTO rules, measures that negatively affect trade can be justifiable if they pursue a set of recognized legitimate environmental and health objectives and if certain conditions are fulfilled (see, for instance, GATT Article XX, among other provisions). To date, no provision in an MEA, or taken pursuant to an MEA, has been judged to be in violation of WTO law.

Notably, there are several placement options for including text on non-discrimination in a given MEA—i.e. either as preambular text, in an article on principles, or as a "substantive" provision in its own right.

First, preambular language is widely accepted (consistent with the customary rules of treaty interpretation) as informing the interpretation of a treaty's substantive provisions (adding "colour, texture and shading"). It can be useful, for example, in interpretive exercises like determining the object and purpose of a treaty. However, preambular language does not, and is not intended, to contain substantive content—i.e. it is not an operative part of the treaty.

[2] In the current Chair's text, Article 3.8 includes the following text (pending further consultations): [Any measures taken by a Party in the implementation of this Article shall [be based on scientific evidence and] not be applied in a manner that constitute[s] [a means of] arbitrary or unjustifiable discrimination between Parties where similar conditions prevail, nor shall they serve as a disguised restriction on international trade.]

Second, substantive provisions can be understood as concrete, legally binding obligations on states, as signalled by the term "shall".

A third option is to include text in a substantive article on "principles". Drawing on the experience of existing MEAs, an article on principles usually houses concepts that are more substantive and specific than preambular language, but like preambular language, animate the interpretation of the treaty at large. Let us take the example of the following potential text on non-discrimination:

> *[Measures, i.e. those taken in furtherance of the treaty's objectives] should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.*

Such a text could be considered as more substantive than typical preambular language; its terms have legal content beyond an expression of the general will or intent of the treaty drafters. At the same time, such text is not intended to constitute, in itself, a legally binding obligation: it uses the term "should"—i.e. a strong recommendation or expectation, not "shall". For these reasons, in the case of the UNFCCC, the text was not included in either the preamble language, nor "commitments" under UNFCCC Article 4, but rather under Article 3, focused on "principles".

A fourth option would be to incorporate reference to non-discrimination in a stand-alone article or in an article focused on relationships with other international agreements (See section 4).

3. Issues Related to the Ability of Parties to Meet Trade-Related Obligations, Including Costs of Implementation

A third set of trade-related issues that arises in the INC process relates to the potential socio-economic and fiscal costs that governments and businesses may face in the context of implementation of the treaty.

The mechanisms and processes required to implement trade-related requirements may require extensive fiscal resources from governments. Governments will face costs, for instance, related to implementation measures that may require new monitoring and control of products at the border, support to national businesses to meet certification, labelling, disclosure, data gathering, or reporting requirements. Compliance may be particularly challenging for countries where governments lack quality and conformity assessment infrastructure (e.g. testing facilities) or face a shortage of trained personnel or relevant technologies for monitoring products at the border.

Treaty provisions addressing financial resources, capacity building, technical assistance, and technology transfer, along with options for flexibilities in light of national circumstances and capabilities, will be especially relevant for addressing such costs.

A further consideration is that businesses producing specific goods may, for instance, be impacted by new product criteria or requirements, or by restrictions on use of certain plastic products or chemicals of concern in plastic products. These costs may be particularly impactful for micro, small, and medium-sized enterprises (MSMEs), especially in developing countries, that face challenges complying with a range of technical requirements in export markets, including due to lack of affordable access to technologies or financing required to transform production processes and products in order to meet new requirements.

4. Additional Interlinkages With Other International Instruments

A related issue under consideration concerns interlinkages and cooperation of the treaty with other established international treaties and processes, including those with trade-related dimensions. In their proposals and interventions, a broad range of INC members have argued that provisions in the treaty should not affect the rights and obligations of any party deriving from any existing international agreement nor create a hierarchy between the treaty and other international agreements. See Annex 1 for examples of language on linkages with other international instruments that has been used in other MEAs, usually to ensure coherence, avoid conflict, or clarify how the MEA fits within the broader international legal framework. Such language sometimes appears in the preamble to MEAs or in provisions on institutional arrangements, information sharing, and technical assistance. Additionally, there are MEAs that have stand-alone articles on relationships with other international agreements, instruments, or entities, as well as on relationships with other international organizations, and there are sometimes references to other intergovernmental organizations in the context of articles on the Secretariat of the given MEA.

In the context of the INC, a number of members have proposed the inclusion of language in the preamble or in specific articles related to the mutual supportiveness of international agreements, including those related to trade and the environment. Some countries have also called for specific reference to WTO law. While no MEA to date has explicitly referenced the WTO or WTO law, there have been numerous references to non-discrimination, which is a core WTO principle, with some MEAs directly incorporating specific language from GATT Article XX on non-discrimination. A further view expressed by some members is that an MEA is not the right forum for trade-related discussions or obligations, with some going further to argue that the inclusion of trade-related obligations would conflict with WTO obligations or that the WTO would in some way "not allow" such trade-related provisions in an MEA or for parties to take trade-related action to implement them.

Notably, to date, no trade measure taken pursuant to an MEA has ever been found to be contrary to WTO rules and governments have considerable experience with the implementation of trade-related measures under MEAs. At least 15 MEAs currently in force include provisions to control trade in order to prevent harm to the environment (see Annex 1 for examples of language in existing MEAs that addresses interlinkages with other international instruments). Further, the WTO Trade and Environment Database, which draws together information on trade-related environment measures implemented by WTO members, includes almost 2,000 measures taken for MEA implementation and compliance.[3]

During the INC process, there have also been references to discussions about the relevance of international standards. Notably, few MEAs to date have been directly engaged in processes of standardization, although there are some notable examples that could be useful to consider.[4] Notably, in the trade context, including at

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[3] See, World Trade Organization. (n.d.). *Cooperation with multilateral environmental agreements.* https://www.wto.org/english/tratop_e/envir_e/envir_matrix_e.htm. Notably, the importance of trade-related cooperation on plastic pollution has been a topic of focused discussion at the WTO Dialogue on Plastic Pollution (DPP), a member-led initiative supported by 83 WTO members. A summary of insights from the DPP's work is available in a recording of a webinar, hosted by Australia with support of the co-coordinators of the DPP and TESS on The Work of the WTO Dialogue on Plastic Pollution: Insights and Reflections for the INC Process Ahead of INC-5." The webinar covered the global plastics trade landscape, lessons about compatibility of multilateral environmental agreements and WTO rules, and national experiences on trade and plastic pollution that can inform and support the work of the INC. See: https://tessforum.org/latest/webinar-on-the-work-of-the-wto-dialogue-on-plastic-pollution-insights-and-reflections-for-the-inc-process.

[4] See, for instance, the Montreal Protocol on Substances that Deplete the Ozone Layer. Decision XXVIII/4: Establishment of regular consultations on safety standards at https://ozone.unep.org/treaties/montreal-protocol/meetings/twenty-eighth-meeting-parties/decisions/decision-xxviii4-establishment-regular-consultations-safety-standards.

the WTO, there is a distinction made between, on the one hand, technical regulations (requirements) put in place by governments, and on the other hand, standards that generally refer to voluntary standards established by private sector organizations or international organizations like the International Organization for Standardization. (Confusingly, however, these terms are often used interchangeably in practice).

While not specifically referred to by the Chair's Text, a further trade-related issue relevant to linkages with other international organizations and processes concerns the ongoing work of the World Customs Organization and its Harmonized System customs classifications codes, which may be relevant to the implementation of treaty requirements and reporting of trade flows.[5]

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See also Article X - Standards of the International Plant Protection Convention, regarding the development of a dedicated standards setting body:
"1. The contracting parties agree to cooperate in the development of international standards in accordance with the procedures adopted by the Commission.
2. International standards shall be adopted by the Commission.
3. Regional standards should be consistent with the principles of this Convention; such standards may be deposited with the Commission for consideration as candidates for international standards for phytosanitary measures if more broadly applicable.
4. Contracting parties should take into account, as appropriate, international standards when undertaking activities related to this Convention." See https://www.ippc.int/static/media/files/publications/en/2013/06/06/1329129099_ippc_2011-12-01_reformatted.pdf.

[5] Existing examples of collaboration in this regard in an existing MEA can be found in Article 13 of the Rotterdam Convention: "The COP shall encourage the World Customs Organization to assign specific Harmonized System customs codes to the individual chemicals or groups of chemicals listed in Annex III, as appropriate. Each Party shall require that, whenever a code has been assigned to such a chemical, the shipping document for that chemical bears the code when exported." A related example is Basel Convention COP Decision BC-14/9 requesting the Basel Convention Secretariat to submit a proposal for amending the Harmonized System to allow the identification of, among others, plastic wastes. See BC-14/9: Cooperation with the World Customs Organization on the Harmonized Commodity Description and Coding System. See https://www.basel.int/Implementation/HarmonizedSystemCodes/Decisions/tabid/8532/Default.aspx.

Annex 1. Examples of Measures Addressing Interlinkages With Other International Instruments

International Instrument	Provision
Minamata Convention on Mercury (Adopted in October 2013)	*Preamble* *"Recognizing that this Convention and other international agreements in the field of the environment and trade are mutually supportive,* *Recalling the United Nations Conference on Sustainable Development's reaffirmation of the principles of the Rio Declaration on Environment and Development, including, inter alia, common but differentiated responsibilities, and acknowledging States' respective circumstances and capabilities and the need for global action,* *Emphasizing that nothing in this Convention is intended to affect the rights and obligations of any Party deriving from any existing international agreement,* *Understanding that the above recital is not intended to create a hierarchy between this Convention and other international instruments,"*
Nagoya Protocol On Access To Genetic Resources And The Fair And Equitable Sharing Of Benefits Arising From Their Utilization To The Convention On Biological Diversity (Adopted in October 2010)	*Article 4 - Relationship with International Agreements and Instruments* *"1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.* *2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialised access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.* *3. This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.* *4. This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialised international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialised instrument in respect of the specific genetic resource covered by and for the purpose of the specialised instrument."*

Stockholm Convention on Persistent Organic Pollutants (Adopted in May 2001)	*Preamble* *"Recalling also the pertinent provisions of the Rio Declaration on Environment and Development and Agenda 21,* *Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive* *Reaffirming Principle 16 of the Rio Declaration on Environment and Development which states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment,"*
Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Adopted in January 2000)	*"... Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,* *Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,* *Understanding that the above recital is not intended to subordinate this Protocol to other international agreements".*
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Adopted in September 1998)	*Preamble* *"Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,* *Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,* *Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements"*
United Nations Fish Stocks Agreement (UNFSA) (Adopted in December 1995)	*Article 44 - Relation to other agreements* *"1. This Agreement shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Agreement and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement"*
Convention on Biological Diversity (CBD) (Adopted in 1992)	*Article 22 - Relationship with Other International Conventions* *"1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity"*

International Tropical Timber Agreement (ITTA) (Adopted in November 1983)	*Preamble* *[...]* *(c) Further recalling the Johannesburg Declaration and Plan of Implementation as adopted by the World Summit on Sustainable Development in September 2002, the United Nations Forum on Forests established in October 2000 and the associated creation of the Collaborative Partnership on Forests, of which the International Tropical Timber Organization is a member, as well as the Rio Declaration on Environment and Development, the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, and the relevant Chapters of Agenda 21 as adopted by the United Nations Conference on Environment and Development in June 1992, the United Nations Framework Convention on Climate Change, the United Nations Convention on Biological Diversity and the United Nations Convention to Combat Desertification;"* *Article 1 – Objectives* *The objectives of the International Tropical Timber Agreement, 2006 (hereinafter referred to as "this Agreement") are to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests by:**[...]*** *(b) Providing a forum for consultation to promote non-discriminatory timber trade practices;* *Article 15 - Cooperation And Coordination With Other Organizations* *"1. In pursuing the objectives of the Agreement, the Council shall make arrangements as appropriate for consultations and cooperation with the United Nations and its organs and specialized agencies, including the United Nations Conference on Trade and Development (UNCTAD) and other relevant international and regional organizations and institutions, as well as the private sector, non-governmental organizations and civil society."*
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Adopted in March 1973)	*Article XIV - Effect On Domestic Legislation And International Conventions* *"1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:* *(a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or* *(b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.* *2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.* *3. The provisions of the present Convention shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external Customs control and removing Customs control between the parties thereto insofar as they relate to trade among the States members of that union or agreement.* *4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in*

	Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement"
International Plant Protection Convention (IPPC) (Adopted in December 1951)	***Article III - Relationship With Other International Agreements*** *"Nothing in this Convention shall affect the rights and obligations of the contracting parties under relevant international agreements."* ***Article VII - Requirements In Relation To Imports*** *"[...]* *d. If a contracting party requires consignments of particular plants or plant products to be imported only through specified points of entry, such points shall be so selected as not to unnecessarily impede international trade. The contracting party shall publish a list of such points of entry and communicate it to the Secretary, any regional plant protection organization of which the contracting party is a member, all contracting parties which the contracting party believes to be directly affected, and other contracting parties upon request. Such restrictions on points of entry shall not be made unless the plants, plant products or other regulated articles concerned are required to be accompanied by phytosanitary certificates or to be submitted to inspection or treatment."*

Annex 2. Examples of MEA Provisions Referring Explicitly or Indirectly to Non-Discrimination in Relation to International Trade

International Instrument	Provision
Stockholm Convention on Persistent Organic Pollutants (Adopted in May 2001)	*Preamble* *"Recalling also the pertinent provisions of the Rio Declaration on Environment and Development ..." [where Principle 12 addresses trade policy measures for environmental purposes, stating they should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade].*
International Plant Protection Convention (IPPC) (Adopted in December 1951)	*Preamble* *"Recognizing that phytosanitary measures should be technically justified, transparent and should not be applied in such a way as to constitute either a means of arbitrary or unjustified discrimination or a disguised restriction, particularly on international trade;"*
United Nations Framework Convention on Climate Change (UNFCCC) (Adopted in May 1992)	*Article 3 – Principles* *"5. 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".*

Annex 3. Examples of Non-Party Trade Provisions in Multilateral Environmental Agreements

International Instrument	Provision
Minamata Convention on Mercury (Adopted in October 2013)	*Article 3 - Mercury supply sources and trade* *"6. Each Party shall not allow the export of mercury except: (a) To a Party that has provided the exporting Party with its written consent, and only for the purpose of: (i) A use allowed to the importing Party under this Convention; or (ii) Environmentally sound interim storage as set out in Article 10; or (b) To a non-Party that has provided the exporting Party with its written consent, including certification demonstrating that: (i) The non-Party has measures in place to ensure the protection of human health and the environment and to ensure its compliance with the provisions of Articles 10 and 11; and (ii) Such mercury will be used only for a use allowed to a Party under this Convention or for environmentally sound interim storage as set out in Article 10.* *7. An exporting Party may rely on a general notification to the Secretariat by the importing Party or non-Party as the written consent required by paragraph 6. Such general notification shall set out any terms and conditions under which the importing Party or non-Party provides its consent. The notification may be revoked at any time by that Party or non-Party. The Secretariat shall keep a public register of all such notifications.* *8. Each Party shall not allow the import of mercury from a non-Party to whom it will provide its written consent unless the non-Party has provided certification that the mercury is not from sources identified as not allowed under paragraph 3 or paragraph 5 (b)"*
Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Adopted in January 2000)	*Article 14 - Bilateral, Regional And Multilateral Agreements And Arrangements* *"1. Parties may enter into bilateral, regional and multilateral agreements and arrangements regarding intentional transboundary movements of living modified organisms, consistent with the objective of this Protocol and provided that such agreements and arrangements do not result in a lower level of protection than that provided for by the Protocol.* *2. The Parties shall inform each other, through the Biosafety Clearing-House, of any such bilateral, regional and multilateral agreements and arrangements that they have entered into before or after the date of entry into force of this Protocol.* *3. The provisions of this Protocol shall not affect intentional transboundary movements that take place pursuant to such agreements and arrangements as between the parties to those agreements or arrangements.* *4. Any Party may determine that its domestic regulations shall apply with respect to specific imports to it and shall notify the Biosafety Clearing-House of its decision."* *Article 24 - Non-Parties* *"1. Transboundary movements of living modified organisms between Parties and non-Parties shall be consistent with the objective of this Protocol. The Parties may enter into bilateral, regional and multilateral agreements and arrangements with non-Parties regarding such transboundary movements."*

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Adopted in March 1989)	*Article 4 - General Obligations* *"5. A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."* Article 6 - Transboundary Movement between Parties *"1. The State of export shall notify, or shall require the generator or exporter to notify, in writing, the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. Such notification shall contain the declarations and information specified in Annex V A, written in a language acceptable to the State of import. Only one notification needs to be sent to each State concerned. [...]* *Article 7 - Transboundary Movement from a Party through States which are not Parties* *"Paragraph 1 of Article 6 of the Convention shall apply mutatis mutandis to transboundary movement of hazardous wastes or other wastes from a Party through a State or States which are not Parties".* *Article 11 - Bilateral, Multilateral and Regional Agreements* *"1. Notwithstanding the provisions of Article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other* ***wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention****. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.*
United Nations Fish Stocks Agreement (UNFSA) (Adopted in December 1995)	*Article 44 - Relation to other agreements* *[...]* *"2. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Agreement, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement"*

Montreal Protocol to the Vienna Convention on Substances that Deplete the Ozone Layer (Adopted in September 1987)	*Article 4 - Control of trade with non-Parties* *"1. Within one year of the entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol.* *2. Beginning on 1 January 1993, no Party operating under paragraph 1 of Article 5 may export any controlled substance to any State not party to this Protocol.* *3. Within three years of the date of the entry into force of this Protocol, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of products containing controlled substances. Parties that have not objected to the annex in accordance with those procedures shall ban, within one year of the annex having become effective, the import of those products from any State not party to this Protocol.* *4. Within five years of the entry into force of this Protocol, the Parties shall determine the feasibility of banning or restricting, from States not party to this Protocol, the import of products produced with, but not containing, controlled substances. If determined feasible, the Parties shall, following the procedures in Article 10 of the Convention, elaborate in an annex a list of such products. Parties that have not objected to it in accordance with those procedures shall ban or restrict, within one year of the annex having become effective the import of those products from any State not party to this Protocol.* *5. Each Party shall discourage the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances.* *6. Each Party shall refrain from providing new subsidies, aid, credits, guarantees or insurance programmes for the export to States not party to this Protocol of products, equipment, plants or technology that would facilitate the production of controlled substances.* *7. Paragraphs 5 and 6 shall not apply to products, equipment, plants or technology that improve the containment, recovery, recycling or destruction of controlled substances, promote the development of alternative substances, or otherwise contribute to the reduction of emissions of controlled substances.* *8. Notwithstanding the provisions of this Article, imports referred to in paragraphs 1, 3 and 4 may be permitted from any State not party to this Protocol if that State is determined, by a meeting of the Parties, to be in full compliance with Article 2 and this Article, and has submitted data to that effect as specified in Article 7."* *Article 7 - Reporting of Data* *"1. Each Party shall provide to the secretariat, within three months of becoming a Party, statistical data on its production, imports and exports of each of the controlled substances for the year 1986, or the best possible estimates of such data where actual data are not available.* *2. Each Party shall provide statistical data to the secretariat on its annual production (with separate data on amounts destroyed by technologies to be approved by the Parties), imports, **and exports to Parties and non-Parties**, respectively, of such substances for the year during which it becomes a Party and for each year thereafter. It shall forward the data no later than nine months after the end of the year to which the data relate."*

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Adopted in March 1973)	*Article X - Trade with States not Party to the Convention* *"Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party."*
International Plant Protection Convention (IPPC) (Adopted in December 1951)	*Article XVIII - Non-Contracting Parties* *"The contracting parties shall encourage any state or member organization of FAO, not a party to this Convention, to accept this Convention, and shall encourage any non-contracting party to apply phytosanitary measures consistent with the provisions of this Convention and any international standards adopted hereunder."*

Annex 4. Legal Background to Text on Non-Discrimination in MEAs

Language in MEAs on non-discrimination originates from the international trade space: it was included in the GATT 1947 and now appears as the "chapeau" (introductory paragraph) of Article XX of the GATT 1994. In that context, the text operates as the second limb of the conditions for justifying a WTO-inconsistent trade measure (e.g. one which discriminates between products of different origins, or imposes quantitative restrictions on imports, including product bans). To be justified, a measure must first fall under one of the objectives identified in the subsequent paragraphs of Article XX; and second, not constitute a means of "arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

In the international environmental law context, the text appears most prominently in Principle 12, second sentence, of the 1992 Rio Declaration on Environment and Development (a foundational instrument setting out core principles of international environmental law):

> "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."

Principle 12 reflects the long-standing recognition that environmental protection measures may also have an impact on trade, and in particular trade with developing countries. The 1972 Stockholm "Action Plan for the Human Environment" (emerging from the very first UN environmental conference) had, to this end, recommended that governments "agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets." This concept was eventually expressed in the Rio Declaration, as above, using (in part) the text originating in the GATT 1947. It is generally accepted that this recognition was crucial to securing developing country buy-in to early efforts at multilateral environmental cooperation and treaty-making. Since then, the text has become somewhat "boilerplate" in capturing core principles of international trade law as they may apply to trade-related environmental measures. For example, the text appears at Article 3.5 of the UNFCCC:

> "The Parties should cooperate to promote a supportive and open international economic system that would lead to sustained economic growth and development in all Parties, particularly developing country Parties, thus enabling better to address the problem 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."

Notably, the language in the UNFCCC follows the language in the Rio principles and omits the reference included in GATT Article XX to "where the same conditions prevail" (i.e. GATT Article XX provides that measures should not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination *between countries where the same conditions prevail*" (emphasis added).