

# INTERNATIONAL TRADING RULES & THE POPs CONVENTION

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## **I. Introduction**

In June 1998, over 90 governments met in Montreal to begin negotiating a global agreement to reduce the environmental and public health threats caused by the global presence of certain “persistent organic pollutants” (POPs). In the year 2000, negotiators hope to conclude an agreement that will eliminate twelve of the worst persistent organic pollutants, including such chemicals and wastes as dioxin, PCBs, and DDT.<sup>1</sup> POPs are truly a global threat – they persist in the environment, are capable of long-range transport, bioaccumulate in human and animal tissue, and have significant impacts on human health and the environment, even at low concentrations. Such impacts include cancer, developmental and behavioral disorders and disruptions of the endocrine system.<sup>2</sup> People are generally exposed to POPs through their food supply, although workers and residents near POPs sources are also exposed directly.<sup>3</sup>

Because POPs pose a global environmental and health hazard, the international community has reached consensus that a global agreement on POPs is necessary. POPs negotiators must have the latitude to negotiate the best possible agreement to quickly and equitably eliminate these substances. Trade concerns have colored the POPs negotiations. At the first meeting of the Intergovernmental Negotiating Committee (INC) some countries had already begun to take trade measures off the table and out of the arsenal of possible tools countries will be allowed to use in eliminating the problem of POPs. At the second meeting of the INC a “WTO supremacy clause” was proposed for inclusion in the POPs Convention.<sup>4</sup> A “WTO supremacy clause” is a provision that explicitly establishes the superiority of the rules of the World Trade Organization (WTO) over the rules of the agreement in which the supremacy clause is placed. At the third meeting of the INC in September 1999, some possible trade measures were discussed in relation to the basic obligations and several countries raised trade concerns. As a result, in the basic obligations section of the draft Convention language related to import, export and production is bracketed. These positions stem from a fundamental misunderstanding of the trade rules and their place within the broader international legal framework.

To take trade measures off the table entirely in the POPs negotiations, to allow trade concerns to hinder the adoption of effective measures to eliminate POPs, and to include a WTO supremacy clause in the POPs Convention would be a mistake. Trade measures can provide critical strength to multilateral environmental agreements (MEAs) and, when they are agreed to through a multilateral process, countries should not be allowed to turn to the WTO to undo the multilateral consensus. The WTO rules themselves explicitly acknowledge that countries may take measures to protect human, animal and plant life and health and to conserve exhaustible natural resources, even when those measures might otherwise violate WTO rules,<sup>5</sup> and acknowledge the importance of internationally arrived

at environmental standards.<sup>6</sup> Indeed, the widely-held view at the WTO is that once a trade-related environmental measure has been included in an MEA, it should be presumed WTO-consistent. WTO supremacy clauses are, therefore, particularly dangerous because they could encourage States to challenge trade measures in MEAs at the WTO. POPs negotiators must be free to determine the best set of policy measures to achieve the goals of the POPs Convention – whether trade-related or not – unhindered by concerns that some states may use the WTO to second guess those measures.

The purpose of this brief is to explain the relationship between the rules developed in the POPs negotiations and the rules of international trade, to explain why appropriate trade measures can and should be included and why the supremacy clause should be eliminated from the POPs Convention. The following sections discuss the importance of the POPs negotiations and their relationship to the trade rules, provide a brief introduction to the structure of the WTO, and some background on the General Agreement on Tariffs and Trade's (GATT's) core principles and environmental exceptions. They also provide a brief overview of the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) – two of the many independent agreements included in the Agreement Establishing the WTO (the WTO Agreement) that may be most relevant to POPs measures. Finally, this brief will discuss how these rules interact with possible trade-related measures in the future POPs Convention.

## **II. Importance of the POPs Negotiations and their Relationship to the International Trade Rules**

The POPs negotiations represent the culmination of a multilateral consensus-building and priority-setting process. At the United Nations Conference on Environment and Development (the Earth Summit) in 1992, governments included measures for reducing and eliminating discharges of POPs into the marine environment in Agenda 21. In May of 1995, the UNEP Governing Council called on several organizations, including the Intergovernmental Forum on Chemical Safety (IFCS), to examine whether sufficient evidence existed to move forward on a global agreement on POPs.<sup>7</sup> The Governing Council focused on 12 of the worst POPs – DDT, dieldrin, aldrin, endrin, chlordane, hexachlorobenzene, mirex, toxaphene, heptachlor, PCBs, dioxins and furans – the 12 prioritized POPs. In November 1995, the Washington Conference on Protection of the Marine Environment from Land-Based Activities was held. The Global Programme of Action that emerged from that Conference, and was agreed to by consensus of over 100 governments, was the first time such governmental consensus was expressed on the need for a global, legally binding instrument for the reduction and elimination of the 12 prioritized POPs, identified by UNEP.<sup>8</sup>

Following a process of assessing the health effects, transport, sources, risks and benefits of POPs, the IFCS Working Group on POPs concluded that there was sufficient scientific consensus on the harm caused by POPs to warrant immediate negotiation of a global treaty. In February 1997, the UNEP Governing Council met again. This time the Governing Council adopted a resolution asking UNEP to convene an intergovernmental ne-

gotiating committee (INC) to prepare a global, legally binding POPs instrument, beginning with the 12 prioritized POPs.<sup>9</sup> The first meeting of the INC was held in June 1998. The UNEP Governing Council resolution calls on the INC to complete its work by the year 2000.

#### ***A. Trade measures may be useful in achieving the goals of the POPs Convention***

POPs negotiators may wish to use trade-related measures as part of a mix of tools to achieve the goals of the POPs Convention. Trade-related measures can provide important strength to the POPs Convention when combined with incentives such as financial and technical assistance and may be necessary to promote the goals of the POPs Convention. The goal of POPs elimination, for example, will be undermined if export of POPs is permitted to countries not party to the POPs Convention, because the exported POPs will not be subject to the restrictions and phase-out obligations in the Convention. The ability of POPs to travel long distances and to damage human health and the environment far from their original source make the use trade-related measures to achieve the goal of POPs elimination appropriate.

Trade-related measures in MEAs can also promote broad participation in the MEA.<sup>10</sup> For example, trade bans with non-parties can remove incentives to remain outside the agreement and thus effectively increase the coverage of the agreement and prevent its goals from being undermined by action of non-parties. If major POPs producers, for example, do not become parties to the POPs Convention, then the goal of elimination will be undermined.

Given the variety of goals that may be served by trade measures, and their central importance in many effective MEAs, negotiators should defend their right to include trade measures as part of a package of policy tools to address global and transboundary harm. However, trade-related measures should always be accompanied by enabling measures, such as financial and technical assistance. Some might argue that such measures conflict with the trade rules, especially if they treat trade with countries who are not parties to the POPs Convention differently from trade with parties. These arguments are flawed, as will be demonstrated below, and should not deter negotiators from designing the most effective Convention possible.

#### ***B. Trade measures explicitly developed in multilateral process are preferable to unilateral measures***

Any trade-related measure in the POPs Convention will be developed in a multilateral forum where many different countries – developing and developed, producing and consuming, large and small, rich and poor – are represented. The international community prefers multilateral approaches to the resolution of environmental problems outside or across national boundaries, although unilateral environmental measures – measures taken by one country, acting alone – are acceptable under certain circumstances.<sup>11</sup> The distrust of unilateral environmental measures stems from concerns that such measures are often designed more to protect domestic industry than to protect the environment, that such

measures will require extensive, costly steps be taken to address low priority problems, and that the design of such measures might not factor in local distinctions and differences. Environmental measures taken multilaterally are thought to be more likely motivated by a desire to solve the environmental problem at hand and less likely to be motivated by protectionism. Moreover, multilateralism provides greater assurance that the environmental problem being addressed has been acknowledged as a priority by a wide range of countries. Finally, measures developed in an international negotiating forum are more likely to be designed to equitably achieve environmental goals, taking into account the priorities and needs of both developed and developing countries.

It is conceivable, for instance, that in order to achieve the goals of the POPs Convention a country might take a trade-related measure, even if the POPs Convention were silent on trade measures. Such measures would be viewed differently in the context of a WTO challenge than measures explicitly required or authorized by the POPs Convention. Since the decision to negotiate a POPs Convention is itself a decision reached by international consensus through a process spanning over seven years, the trade measures developed through the POPs negotiation process would be multilateral measures.

Trade-related measures explicitly required or authorized by the POPs Convention will receive the greatest deference in a dispute with the trade rules. These measures, arrived at through a multilateral process, are more likely to be equitably directed at the goal of POPs elimination than measures that a state unilaterally determines are necessary to achieve the goals of the POPs Convention. The POPs negotiations are the most appropriate forum for selecting the best mix of measures – trade and non-trade – to achieve the goals of the POPs Convention. Such measures *should* be deemed WTO consistent. Once agreement on such measures has been reached, it should not be second guessed at a different international forum, such as the WTO. Unfortunately it is not yet certain that the WTO *will* grant such preference to trade measures in MEAs.

### ***C. Mechanisms already exist to resolve conflicts between the POPs Convention and the trade rules***

Unless the potential conflicts between the trade rules and the POPs Convention are addressed, trade-related measures in the POPs Convention may be threatened by the WTO rules. Nothing in the international trade rules or in the nature of the WTO prevents POPs negotiators from including trade-related measures in the POPs Convention, if negotiators believe that trade-related measures are needed to achieve the goals of the POPs Convention. To take trade measures off the table entirely is to allow the WTO rules – and the States that would use them to promote national economic interests over internationally agreed policy – to hinder the development of effective international policy to address POPs.

A variety of mechanisms already exist to address potential conflicts between trade and POPs rules. First, many of the WTO agreements include environmental exceptions. These exceptions can and should be interpreted to cover environmental measures authorized or required by MEAs. Second many of the most relevant WTO agreements, such as

the SPS and TBT Agreements, explicitly defer to international standards, creating a presumption that national measures based on international standards are consistent with the WTO agreements' provisions. Measures agreed upon in MEAs should be considered international standards and therefore consistent with those agreements.

Third, where conflicts arise between international trade agreements and MEAs, existing rules of treaty interpretation are available to resolve those conflicts. International law allows States to negotiate treaties that alter obligations under prior treaties or provide for more specific obligations. Under the rules of international law, where there is a conflict between two treaties, the later in time will prevail. Moreover, international law interprets conflict of law very narrowly. Where a subsequent treaty, such as the POPs Convention, addresses a specific problem that was not considered by the prior treaty (POPs for example were not considered in drafting the international trade agreements), the more specific agreement will apply. Thus POPs negotiators need not shy away from employing trade-related environmental measures where they deem such measures to be important to achieving the goals of the POPs Convention.

POPs negotiators and activists must defend the right to include trade measures in the POPs Convention. POPs negotiators and activists must ensure that these trade measures are not vulnerable to WTO attack after their adoption. Two important steps can be taken to protect the POPs Convention from challenge in the WTO. First, POPs negotiators should ensure that the POPs Convention does not contain a WTO supremacy clause, as is currently proposed in article N *bis* of the draft POPs Convention. Second, negotiators should explicitly and carefully review all trade measures suggested for inclusion in the POPs Convention. At a minimum the review process should consider less trade-restrictive alternatives and demonstrate their flaws in attaining the goals of the POPs Convention.

#### ***WTO Supremacy Clause in the POPs Agreement***

The current text of the draft POPs Convention contains a WTO supremacy clause in article N *bis*:

The provisions of this Convention shall not affect the rights and obligations of any Party deriving from any existing international agreements.

To review contemplated trade measures, negotiators and their advisors need to understand the WTO and various of the independent agreements comprising the WTO, and in particular, an understanding of how conflicts between WTO rules and trade-related environmental measures can be resolved.

### **III. The World Trade Organization (WTO)**

The World Trade Organization (WTO) is the primary political and legal institution regulating global trade. The WTO performs a variety of functions, primarily providing a fo-

rum for negotiations on trade liberalization, settling trade disputes, and administering and enforcing the WTO agreements.

Historically, the international trade rules were set out in the General Agreement on Tariffs and Trade and subsequent agreements between various GATT Contracting Parties. These various agreements formed a patchwork of international trade rights and obligations. In 1994 this patchwork of rules of international trade was modified and consolidated in the Agreement Establishing the World Trade Organization (WTO Agreement). The WTO Agreement incorporates the GATT slightly modified as well as many additional, independent agreements.

A new element introduced by the transformation of the GATT into the WTO, was the incorporation of sustainable development into the objective of the WTO, through its inclusion in the Preamble to the WTO Agreement.<sup>12</sup> The fact that the WTO's objective includes sustainable development is relevant under international law for interpreting the various WTO agreements, and for resolving conflicts between the WTO agreements and other international agreements, such as the POPs Convention.<sup>13</sup>

#### ***A. Institutional Framework***

The WTO provides a forum for negotiating trade liberalization – primarily by negotiating progressive reduction of tariffs and eliminating or minimizing all non-tariff barriers. Certain issues are identified in the agreement itself as topics for future negotiations (referred to as “the built in agenda”). Negotiations on new issues can be initiated at periodic meetings of the trade ministers of the WTO Member States, referred to as “Ministerials.” The next Ministerial meeting is to be held in Seattle in November 1999. At that time a new round of trade negotiations is likely to be launched, which may include liberalizing

#### ***Chemical Tariff Reductions in the Next Trade Round?***

The International Council of Chemical Associations (ICCA) has begun lobbying trade officials to establish as an objective for the next round of trade negotiations a reduction of tariffs on chemicals to zero by the year 2010. An agreement on chemical tariffs – the Chemical Tariff Harmonization Agreement – came out of the Uruguay Round, but only 31 of the WTO's 134 Members are parties, making it one of the few WTO agreements to which not all WTO Members are parties.

Source: International Trade Reporter, vol. 16, no. 27, July 7, 1999, p.1124.

chemical tariffs.

The Ministerial and the General Council are the formal decision-making bodies within the WTO.<sup>14</sup> In addition, however, numerous subsidiary bodies frequently address environmental issues, such as the Committee on Trade and Environment, the Committee on Technical Barriers to Trade Committee, the Subsidies Committee, the Committee on Sanitary and Phytosanitary Measures, and the Dispute Settlement Body. These bodies can then make recommendations for action to the General Council or the Ministerial.

The WTO also includes a powerful system for settling disputes between WTO Members. This two-tiered dispute settlement system is established by the WTO Understanding on the Settlement of Disputes. The first tier is comprised of panels, made up of specially appointed trade experts who seek to resolve the dispute on the basis of the countries' obligations under the WTO agreements. The decisions of WTO panels may be appealed to the WTO Appellate Body if a Member State is not satisfied with the legal interpretation of the panel. The Appellate Body is a standing body composed of seven members, broadly representative of the Membership of the WTO, three of whom serve on any given case. Members of the Appellate Body must have demonstrated expertise in the field of law and international trade and not be affiliated with any government.<sup>15</sup> The Appellate Body's decision is binding and final, unless all WTO Members, including the winning party, agree by consensus to reject it.<sup>16</sup>

The potential for conflict between WTO obligations and the use of trade measures in MEAs has been explicitly acknowledged by WTO Members. At the conclusion of the Uruguay Round, WTO Members established the Committee on Trade and Environment (CTE) with the mandate of examining "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements" and making "appropriate recommendations on whether any modification of the provisions of the multilateral trading system are required."<sup>17</sup> Despite this mandate, and after almost 5 years of discussion, however, the CTE has failed to resolve this issue. Moreover, despite proposals by a number of WTO Members to amend WTO agreements, it has offered no recommendations about modification of the rules of the trading system, or other measures, to address the tensions between the WTO and MEAs using trade measures.

While the WTO's institutional framework and agreements have been successful in liberalizing international trade, they raise a number of problematic issues relating to the environment. The WTO is characterized by an almost complete lack of transparency and public participation.<sup>18</sup> The opportunities for access to the dispute settlement process are likewise extremely limited. Access to dispute settlement documents is highly restricted,<sup>19</sup> and panel and Appellate Body proceedings are all carried out in complete secrecy.<sup>20</sup> Moreover, the dispute settlement process, which has often been called upon to rule on the compatibility of national environmental protection measures with the trade rules, can require changes in domestically established policy priorities – typically arrived at through more open and democratic decision-making processes. The WTO's lack of transparency is particularly troubling because it influences and regulates domestic policy in areas in which its negotiators lack expertise – including environmental policy.

## ***B. WTO Agreements***

The WTO Agreement incorporates the GATT, slightly modified, and the Understanding on the Settlement of Disputes (the DSU), as well as many additional, independent agreements, such as the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).

- The GATT contains the fundamental rules governing international trade in goods. GATT rules apply to the extent that its provisions do not conflict with the more specific WTO agreements (The GATT is discussed in section IV below).
- The TBT Agreement covers technical regulations and standards (i.e. regulations regarding product specifications, labeling, packaging and other “technical” issues).
- The SPS Agreement applies to sanitary and phytosanitary measures (SPS measures), which are regulations aimed at protecting human, animal and plant health from risks due to contaminants and toxins found in food or feedstuffs.<sup>21</sup> (The TBT and SPS Agreement are discussed in section V below).

The relationship between the GATT, SPS Agreement and TBT Agreement is complex. In determining how the agreements will apply to a particular POPs measure, the more specific agreements are applied first. GATT rules apply to the extent that its provisions do not conflict with the more specific WTO agreements – such as the SPS or TBT Agreements.<sup>22</sup> In most cases, the rules of the various WTO agreements are complementary and apply simultaneously. The obligations in the GATT are most likely to raise concerns about conflicts with trade-related measures in a future POPs Convention, and thus it will be discussed first.

#### IV. The General Agreement on Tariffs and Trade

##### A. Core Obligations under the GATT

Under the GATT, WTO Members take on three core obligations: the “most favored nation” (MFN) and “national treatment” obligation, and the “prohibition on quantitative restrictions.”

- **The MFN obligation** prohibits a Member State from playing favorites among its WTO trading partners; the products of one trading partner must be afforded every advantage and privilege conferred on the *like* products of another trading partner. Thus, for example, if the POPs Convention were to restrict uses of DDT and allow trade in DDT between parties to the POPs Convention, but ban trade with non-parties, this could violate the MFN obligation.
- **The national treatment obligation** prohibits discrimination between *like* foreign and domestic products; the products of any trading partner must be given treatment no less favorable than *like* domestic products.<sup>23</sup> Suppose, for example, a POPs Convention were to restrict uses of DDT and allow trade between parties, but ban trade with non-parties, and permit parties to continue producing DDT during the phase-out period. A party who was producing DDT and banned import of DDT from a non-party could violate the national treatment obligation.
- **The prohibition on quantitative restrictions** requires WTO Members to remove non-tariff restrictions on imports, such as bans, quotas, and licenses. Its aim is to limit import barriers as much as possible to one kind of measure – tariffs – which can be progressively reduced.<sup>24</sup> If a POPs Convention were to ban all trade in a substance during a phase-out period, whether between parties or non-parties, such a provision could trigger the prohibition on quantitative restrictions.



### ***“Like” Products and “Production and Processing Methods”***

The WTO’s interpretation of “like products” under the MFN and national treatment obligations will have significant implications for POPs measures, particularly measures aimed at addressing the problem of POPs by-products. The MFN and national treatment obligations are based on the principle that products that are the same – “like” products – should be treated the same. The WTO agreements do not define “like” product. Instead, the determination of what constitutes a “like product” has been made on a case-by-case basis in trade disputes before the WTO.

According to the majority of past interpretations of the GATT, the actual characteristics of the final product itself are the basis for determining what “like products” are. Under this interpretation, how a product is made (often referred to as “production and processing methods” or PPMs) – and the social and environmental impacts of those production and processing methods – is irrelevant to determining whether one product is “like” another. For example, paper produced using a chlorinated bleaching process is identical to paper made using a non-chlorinated bleaching process according to the trade rules – paper is paper. Thus, both types of paper must be treated as “like” one another in applying the MFN and national treatment obligations. A minority of panel decisions have found that products with the same physical characteristics could be treated differently (i.e. were not “like” one another) if the different treatment served a legitimate policy purpose. Under this interpretation, DDT produced or used within the POPs Convention regime would not be like DDT produced outside that regime, and could be treated differently without violating either MFN or the national treatment obligations.

From a POPs perspective, the way a product is made may be the most important distinguishing feature of the product. Products produced using a technology that does not produce dioxin, for example, are preferable from a POPs perspective, than products produced in a way that emits dioxin. PPM-based measures otherwise found to violate the MFN or national treatment obligation, might be permitted under the trade rules if they were covered by the environmental exceptions to the general GATT rules (discussed below).

In the GATT, these three obligations are qualified by a general exception provision (Article XX), which preserves the sovereign right of nations to take measures to pursue certain overriding national policy objectives, even where those measures violate one of the basic GATT obligations. This GATT exception includes two environmental provisions, which have been invoked (unsuccessfully) on a number of occasions to protect national environmental measures from challenge at the WTO.

#### ***B. Environmental Exceptions to the Core Trade Obligations (Article XX)***

A WTO Member may take a measure that violates one of the GATT obligations discussed above if it can justify the breach under one of the environmental exceptions (Article XX(b) & (g)).<sup>25</sup> The environmental exceptions permit WTO parties to take measures to protect life or health and to conserve natural resources. In order to qualify for one of the environmental exceptions a measure must both meet the requirements laid out in the

exceptions and not be applied in a way that abuses the privilege of asserting an overriding national policy.

*The Environmental Exceptions in GATT Article XX:*

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting Party of measures:

....

b) necessary to protect human, animal or plant life or health; [or]

....

g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption.

- ***Protection of Life or Health of Humans, Plants or Animals (Article XX(b)).*** Under the exception, a WTO Member may take trade measures that are “necessary” to protect the life or health of humans, plants or animals. This exception is most likely to apply to measures related to POPs. The term “necessary” has been interpreted narrowly by GATT panels.<sup>26</sup> The panels have fashioned a least-trade-restrictiveness test for Article XX(b)’s necessity requirement.<sup>27</sup> In other words, if more than one measure is available to achieve the particular environmental protection goal, only the measure or measures that are *the least* inconsistent with the trade rules are considered “necessary” under this exception. This test was developed by GATT panels prior to the establishment of the WTO. Although it is the most recently articulated test, it does not bind future panels or the Appellate Body.<sup>28</sup>
- ***Conserving Exhaustible Natural Resources (Article XX(g)).*** Under this exception, a Party may take trade measures to conserve exhaustible natural resources. Natural resources has been interpreted broadly to include, for example, clean air, fish, and dolphins. In order to qualify for the exception, the measure must be related to the conservation goal. Moreover, the trade measure must be accompanied by even-handed domestic limitations on the resources’ use.
- ***Preventing “Abuse” of the Environmental Exceptions (the Chapeau to Article XX).*** To qualify for either of the environmental exceptions, in addition to meeting the criteria discussed above, the measure must be applied in a way that meets the requirements of the article’s introductory paragraph, referred to as the chapeau. The chapeau focuses not so much on what the measure protects, but on how it is *applied*. It requires that measures not be applied in a manner that constitutes either (i) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (ii) a disguised restriction on international trade. According to the WTO Appellate Body the purpose of the chapeau is to prevent countries from abusing the Article XX exceptions.<sup>29</sup> The chapeau has been interpreted to require finding a point of equilibrium between the right of a Member to invoke the exceptions under Article XX and

the rights of other Members under the substantive provisions of the GATT.<sup>30</sup> At the very least, the chapeau seems to require that the country imposing the measure in question has adequately explored ways of mitigating unfavorable treatment of foreign products resulting from the measure. And it requires that the environmental measure be applied by a transparent, objective process.

The relationship between the environmental exceptions and trade-related measures in MEAs is not entirely clear. However, many countries and commentators have argued that trade measures in MEAs should presumptively qualify for protection under the environmental exceptions to the GATT.<sup>31</sup> The GATT itself does not distinguish between multilateral and unilateral measures. The decisions of GATT/WTO panels, however, have indicated that while the WTO frowns upon unilateral measures, it might view multilateral measures, such as those authorized by a future POPs Convention, differently.<sup>32</sup>

Where a trade-related measure is neither required by nor authorized by an MEA, the presumption that the environmental exceptions should apply will be more difficult to secure, even if the measure furthers the goals of the MEA. Therefore, if trade-related measures will be necessary to accomplish the goals of the POPs Convention, they should be expressly required or authorized by the Convention. Trade-related measures taken by Parties to the POPs Convention, but not explicitly authorized or required by the Convention, are more likely to be successfully challenged before the WTO. Even if a trade-related environmental measure were to meet the requirements of the environmental exceptions to the GATT, if it falls within the TBT or SPS Agreement, it must meet the requirements of these agreements.<sup>33</sup>

## **V. The Agreements on Technical Barriers to Trade (TBT Agreement) and on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)**

The GATT will be the main agreement of importance for determining the potential conflict between the POPs Convention and the trade rules. The TBT and SPS Agreements, however, are relevant to the POPs Convention, especially because they promote harmonization of environmental measures by encouraging Members to base their measures on international standards. Measures required or authorized by an MEA, such as the POPs Convention, *should* be considered based on international standards, although it is not clear that they *will* be.

### ***A. Core Obligations under the TBT Agreement***

The TBT Agreement applies to a broad range of domestic health and environment regulations. The agreement divides these into two categories: “technical regulations” and “standards.” “Technical regulations” establish mandatory disciplines on products or related processes and production methods.<sup>34</sup> “Standards” establish voluntary requirements for products or related processes and production methods.<sup>35</sup> For example, a requirement that certain products only be produced using clean production methods or best available technology would be a “technical regulation.” A program that would allow producers

using clean technology or best available technology to label their products as “clean products” would be a “standard.”

The TBT Agreement contains the non-discrimination obligations of MFN and national treatment, similar to those in the GATT.<sup>36</sup> It also requires Members to ensure that their national regulations do not create “unnecessary obstacles to international trade” and are not “more trade-restrictive than necessary” to achieve their purpose.<sup>37</sup> The aim of these provisions is to ensure that WTO Members do not use technical regulations and standards as disguised measures to protect domestic industries from foreign competition.

The TBT Agreement also aims at reducing the extent to which technical regulations and standards operate as barriers to market access, primarily by encouraging governments to harmonize national laws by reference to international standards.<sup>38</sup> Harmonization is expected to reduce the obstacles to trade that producers may face as a result of numerous, sometimes incompatible, standards and regulations for products in different countries.

### ***B. Core Requirements of the SPS Agreement***

The SPS Agreement aims to prevent national laws that regulate food quality, including regulations related to toxins and contaminants in food, from unduly restricting international trade. The SPS agreement requires that national SPS measures must be based on a risk assessment and scientific evidence.<sup>39</sup> Members must also ensure their measures do not “arbitrarily or unjustifiably discriminate” between Members and must apply their SPS measures in a way that does not constitute “disguised restrictions on international trade.”<sup>40</sup> In particular, the agreement states that “arbitrary distinctions” in the levels of sanitary protection applicable to different products must not result in discrimination or disguised restrictions on international trade.<sup>41</sup> SPS measures must not be “more trade restrictive than required” to achieve the Member’s chosen level of SPS protection.<sup>42</sup> In addition to these obligations, the SPS Agreement, like the TBT Agreement, encourages Members to base their SPS measures on international standards.<sup>43</sup>

### ***C. The Preference for International Standards***

Both the SPS Agreement and the TBT Agreement encourage Members to base their national measures on international standards in order to promote harmonization and thus reduce trade tensions.<sup>44</sup> For measures that are governed by the TBT Agreement, those that are *based on* international standards are presumed not to create “unnecessary obstacles to trade” under the TBT Agreement.<sup>45</sup> Conversely, laws that are *not* based on international standards do not qualify for this presumption. The SPS Agreement specifies that measures that conform to international standards are deemed necessary to protect human, animal or plant life or health and are presumed consistent with both the SPS Agreement and the GATT.<sup>46</sup> For measures that are governed by the SPS Agreement, those not based on international standards must meet the risk assessment requirements imposed by the SPS Agreement.

Both the SPS and TBT Agreements' presumption of WTO-consistency for domestic measures based on international standards should apply to standards developed in MEAs. Like other international standards, MEAs encourage the harmonization of environmental measures, reducing trade tensions. Such an understanding would also encourage States to become parties to MEAs. Therefore, a trade measure authorized or required by the POPs Convention would likely be considered an international standard and would in turn be presumed consistent with the TBT and SPS Agreements and possibly the GATT.

## **VI. Possible Trade-Related Measures in the POPs Convention**

A variety of trade-related measures are under consideration in the POPs negotiations and others may be considered in the future. Use of trade-related measures would be extremely helpful in achieving the goals of the POPs Convention. At the same time, countries that favor a weak POPs Convention can use potential WTO conflicts to place downward pressure on the negotiations. Concerns over WTO consistency have indeed overshadowed discussions about what are the best mix of measures – trade and non-trade – to accomplish the goals of the POPs Convention.

POPs are either intentionally produced products, or by-products unintentionally released in other processes. This section looks at the trade-related measures that might be included in the POPs Convention for both these categories of POPs and demonstrates that they do not raise WTO concerns sufficient to warrant their exclusion. In addition, this section examines the implications of the inclusion of the WTO supremacy clause, currently contained in article N *bis* of the draft POPs Convention.

### ***A. Trade-Related Measures for Intentionally Produced POPs***

A number of trade-related measures are under consideration – or may be considered – for the intentionally produced POPs. The draft POPs Convention will subject the intentionally produced POPs either to elimination<sup>47</sup> or to restriction<sup>48</sup> obligations. Substances subject to the elimination obligation will be listed in Annex A of the Convention. Annex A will either specify that a substance is to be eliminated from production and use upon entry into force of the Convention or will establish specific exemptions. These exemptions will be of limited duration and granted on a substance specific, country specific and use specific basis. At the third meeting of the INC, for example, countries tentatively agreed that aldrin, endrin, toxaphene and dieldrin would be phased out of production and use upon entry into force of the Convention.<sup>49</sup> For mirex, however, some countries requested a specific exemption for termite control (with a date of expiry to be determined).<sup>50</sup>

Substances subject to the restriction obligation will be listed on Annex B. The main difference between the elimination obligation with specific exemptions for Annex A substances and the restriction obligation for Annex B substances is that for Annex B substances no end date for complete elimination is established (although hopefully the Convention will establish a mechanism for moving substance from Annex B to Annex A as viable alternatives are identified for the Annex B substances).

In the current draft of the Convention the obligation for Annex B substances refers to “[production] [and] [or] use,” with the language referring to production in brackets because countries have not agreed to it.<sup>51</sup> Some governments have not agreed to the production language, because they feel “production” might be read to include exports, which, they argue, would conflict with core GATT obligations. No import or export language is included in this obligation for the same reason. For example, DDT is still used in very limited quantities for residual indoor spraying a few times a year in malaria ridden areas to control the spread of malaria mosquitoes. DDT use in agriculture is banned, but illegal diversion of DDT intended for malaria control into agriculture does occur.<sup>52</sup> In order to achieve the goal of limiting DDT use to malaria control, negotiators may wish to restrict production, import and export of DDT as well as its use. And, as this section will explain, the WTO rules should not raise an impediment to imposing multilaterally agreed upon restrictions.

Trade-related measures have been considered in conjunction with both the restriction and elimination obligations. With respect to Annex A substances (those subject to the elimination obligation), for example, negotiators might wish to ban export or import of substances once their production and use are banned for all countries (other than for the purposes of environmentally sound destruction).<sup>53</sup> Once domestic production and use of a substance are banned, no fatal issues of GATT inconsistency arise. An unqualified import and export ban of an illegal hazardous substances is protected by the environmental exception in GATT Article XX(b). Thus, while the ban might trigger the prohibitions against quantitative restrictions, Article XX will shield the ban in the event of a WTO challenge.<sup>54</sup> Any assertions to the contrary either stem from ignorance of the dangers the international community has already determined POPs pose to human health and the global environment, or are motivated by a political agenda.

The issue of import or export measures with respect to substances that have a specific exemption under Annex A or that are subject to Annex B is slightly more complicated (the trade issues arising in both cases are the same and so they are treated together). If countries with a use specific exemption, or using a substance on Annex B, were, for example, also producers and were to ban imports, or if they were using existing stockpiles and were to ban imports, or if they would import only from parties to the POPs Convention, then their actions would raise several concerns vis-à-vis basic GATT obligations. The MFN obligation might be violated if parties with a specific exemption were to allow imports from parties to the POPs Convention, but to ban imports from non-parties, if those non-parties were WTO Members (they would essentially be playing favorites among WTO Members). The national treatment obligation similarly might be violated if a party with a specific exemption, or using an Annex B substance, were to allow domestic producers to continue to produce, but were to ban or severely restricted imports. The same could also be true if the country were to ban domestic production and imports, yet allow continued use of stockpiled quantities of the substances. In the final analysis, however, such measures would likely be WTO consistent because they would qualify for protection under the environmental exception in GATT Article XX(b) – protection of life or health of humans, plants or animals.

To qualify for this exception, first the measure must be “necessary” to protect the life or health of humans, plants or animals. While “necessary” as used in Article XX(b) has in the past been interpreted to mean least trade restrictive,<sup>55</sup> this term has never been interpreted in the context of a measure taken pursuant to an MEA. In the case of the POPs Convention, the international community has determined through a multi-year, multilateral process that an international solution to the problems posed by POPs is necessary. Countries are in the midst of negotiating rules for a multilateral Convention that will include trade-related measures. These trade measures will be an integral part of an overall design that the countries will have identified as necessary to protect human, animal and plant life and health and should easily pass WTO scrutiny.

Consider, for example, the country using and producing an Annex B substance that bans imports of that substance from non-parties as provided in a future POPs Convention. Allowing trade in such substances only among parties will greatly enhance the parties’ ability to limit the use of these substances to those uses enumerated in Annex B. Because trade will only be permitted between parties, any substances that are produced or traded by the parties will be subject to the obligations in, and oversight mechanisms of, the POPs Convention. Such trade restrictions will better prevent the uncontrolled spread of POPs and enable more rapid and effective enforcement in cases of a breach of the obligations. Allowing trade only between parties will also create an incentive for some countries to join the Convention, particularly those that need assured access to Annex B chemicals for permitted uses. The more countries that join the Convention, the more these chemicals will be subject to the oversight of a multilateral system designed to minimize the dangers associated with their production and use, to provide assistance in obtaining less dangerous alternatives, and ultimately to eliminate these substances. If the POPs negotiators include such trade measures in the Convention, it will be for all these reasons, and probably more. Thus, the trade-related measures in the POPs Convention should be considered “necessary” within the meaning of Article XX(b).

Because measures taken under the POPs Convention will be multilateral measures, they should be presumed to be necessary to protect human, animal and plant life and health from the dangers posed by POPs. There is a growing consensus, even in trade circles, that trade-related environmental measures authorized by MEAs should be presumed consistent with one or more of GATT’s environmental exceptions. The WTO Appellate Body, for example, has signaled its willingness to respect multilaterally agreed upon trade-related environmental measures,<sup>56</sup> as have numerous WTO Member States. MEAs will reflect a range of perspectives, including those of large and small, rich and poor, and importing and exporting countries. Measures developed through such multilateral processes are unlikely to be motivated by protectionist intentions and will be carefully crafted to meet the goals of the Convention. The acceptance of an MEA by a wide range of parties also ensures that any trade-related measures the MEA authorizes will not impose burdens that developing countries cannot meet or that are disproportionate to the measure’s environmental benefits. For these reasons the trade community has become increasingly receptive to the notion that trade measures in MEAs, such as the POPs Convention, should be presumed consistent with Article XX. While this presumption is not

reflected in any existing WTO cases, POPs negotiators should not let uncertainty deter them from adding trade measures to the mix of measures in the Convention.

Indeed, by including trade measures in the Convention and expressing the view that the WTO will defer to their decision to authorize the use of these measures, the negotiators will assist in further cementing WTO acceptance of the MEA-deference interpretation of Article XX. Many of the countries negotiating the POPs Convention are also WTO Member States. Their expression through the Convention of an expectation of such deference will signal to the WTO strong Membership support for such an interpretation.

The second step in qualifying for the environmental exceptions is to meet the requirements of the chapeau of Article XX – the measure must not be *applied* in a manner that constitutes either arbitrary or unjustifiable discrimination or a disguised restriction on international trade. As with the determination of “necessary,” the multilateral nature of the measure should lead to the presumption that the measure is neither arbitrarily nor unjustifiably discriminatory nor a disguised restriction on international trade. A multilaterally agreed-upon trade-related environmental measure, for the reasons discussed above, is not likely to be arbitrary or unjustifiable in its discrimination or to be designed to serve a hidden trade agenda. To the contrary, the measure will have been scrutinized by countries with varied interests and concerns. These countries will have designed the measure as necessary to achieve the goals of the agreement.

However, a specific party’s *application* of the measure might need scrutinizing, where the Convention has not specified how an authorized trade measure is to be applied. The Convention, therefore, might want to establish a mechanism to review complaints alleging improper application by parties of these trade-related measures. A body established by the POPs Convention (as opposed to a WTO dispute settlement panel) will have the solid understanding of the POPs Convention – how it functions, its goals, and the role of the parties – required to make such determinations.

### ***B. Trade-Related Measures for Unintentionally Produced POPs***

Trade measures are not currently contemplated for the POPs produced as by-products. The basic obligation with respect to POPs by-products, listed in Annex C, will be to reduce releases, hopefully with the goal of their elimination.<sup>57</sup> This goal is to be achieved primarily through the application of best available techniques. The question of trade measures may nevertheless arise in conjunction with national measures to implement the POPs Convention – for example, purchasing preferences for products made in a way that does not produce dioxins, or products whose disposal will not lead to dioxin formation. These measures should be encouraged by the POPs negotiators by protecting them from attack at the WTO. The POPs negotiators can shield these measures from the WTO by explicitly authorizing their use in the Convention so these measures will receive the same deference as other multilaterally agreed-upon trade-related environmental measures.

### ***C. WTO Supremacy Clause in the POPs Convention***



The discussion above illustrates that trade-related measures selected by the negotiators to achieve the goal of the POPs Convention ultimately would not conflict with WTO rules, because they would be protected by Article XX of the GATT. If a measure in the POPs agreement were so discriminatory or egregious as to be protectionist, it would not qualify for the presumption that trade-related measures in MEAs are entitled to Article XX protection. For example, if a measure were to explicitly discriminate against a particular party to the POPs Convention (as opposed to discriminating between parties and non-parties), it would most likely not qualify for the Article XX exception. The WTO could, and probably would, rule against such a measure.

Existing dispute settlement mechanisms would be competent to address such problems were they to arise. Nevertheless, ostensibly to address the potential conflict with WTO rules, some countries are supporting inclusion of a “WTO supremacy clause” in the POPs Agreement. It is currently contained in Article N *bis* of the draft POPs Convention in brackets:

The provisions of this Convention shall not affect the rights and obligations of any Party deriving from any existing international agreements.<sup>58</sup>

Similar text was proposed in drafts of the Prior Informed Consent (PIC) Agreement, but eventually it was moved out of the body of the Agreement proper and into the preamble.<sup>59</sup> The POPs Protocol to the Convention on Long-Range Transboundary Air Pollution did not contain a WTO supremacy clause, but its preamble does state “that measures taken to reduce [POPs] emissions should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international competition and trade[.]”<sup>60</sup> The Basel Convention does not contain a supremacy clause.<sup>61</sup>

The precise legal impact of the WTO supremacy clause will depend on future interpretations of MEAs and WTO rules. However, the aim of supremacy clause proponents is to place the rules of the multilateral trading system above those of the POPs Convention. Most dangerously, the inclusion of a supremacy clause in the POPs Convention might call into question the presumption that the WTO’s environmental exceptions apply to measures developed through MEAs. Simply by calling this presumption into question, supremacy clauses, and the countries that promote them, do great harm to the growing, yet still fragile, consensus at the WTO to ensure that trade rules are interpreted in a manner that accommodates environmental mandates developed through open, multilateral processes. Such clauses could persuade a WTO dispute settlement panel to reject arguments to establish a presumption protecting trade-related measures in MEAs. A supremacy clause could also reverse the tacit position of many WTO Members that MEAs should never be challenged by the WTO.

Moreover, a supremacy clause is unnecessary because principles of international law governing the interpretation of treaties are available for resolving disputes that may arise under the POPs Convention and the WTO Agreements.<sup>62</sup> International law requires that the WTO Agreement be interpreted in light of its object and purpose.<sup>63</sup> The fact that the Preamble to the WTO Agreement now includes the objective of promoting sustainable

development, means that the WTO Agreement should, wherever possible, be interpreted in a way that does not conflict with MEAs, which are also aimed at promoting sustainable development.<sup>64</sup> A blanket “supremacy clause,” such as that currently proposed in Article *N bis* of the draft POPs Convention is overly broad. It serves simply to add uncertainty as to the status of the POPs Convention and may undermine its effectiveness. Such a blunt instrument may have unintended effects.

## VII. Conclusion

Both taking trade measures off the table, and including a “WTO supremacy clause,” considerably restrict the potential arsenal of tools available to achieve the goals of the POPs Convention. Either course sets a dangerous precedent of environmental negotiators limiting – unnecessarily – the policy tools they have to achieve sustainable development.

The potential conflicts between POPs measures and the rules identified in this paper can be minimized with environmentally sensitive interpretations of the WTO Agreement and the thoughtful use of trade-related environmental measures. The WTO is moving (albeit slowly) toward recognizing the importance of deferring to environmental decision-makers on environmental matters. The WTO rules themselves explicitly acknowledge that countries may take measures to protect human, animal and plant life and health and to conserve exhaustible natural resources even when those measures might otherwise violate WTO rules.<sup>65</sup> No MEA has ever been directly challenged in the WTO, and experts widely believe that this is because any measure authorized under such an agreement would be presumed to be covered by these environmental exceptions. Such a presumption recognizes the legal equality of environmental agreements and trade agreements.<sup>66</sup>

Excessive encroachment of the WTO into additional policy areas is not only bad for the environment – it is also bad for the WTO. The multilateral trading system is in danger of being overloaded and rejected by the public because of its extension into too many other policy areas. To preserve the integrity of the trading system and its public support, the WTO’s boundaries must be clearly and carefully defined to prevent it from straying into other policy areas – such as environmental policy, or POPs policy in particular. Trade policy makers must begin to establish some limits to the reach of international trade rules, including deference to multilaterally agreed-upon environmental protection measures.

In the case of POPs, governments are attempting to establish an effective regulatory framework for the protection of human health from the negative impacts of these dangerous chemicals. The POPs Convention is a multilateral process in which many countries are participating. It is thus the most appropriate forum for identifying and fashioning the right mix of trade-related and other environmental measures. From the point of view of WTO consistency, negotiators are better off carefully crafting and explicitly adopting the needed trade-related measures in order to clarify what measures are required or authorized by the POPs Convention. Uncertainty about WTO rules should not be allowed to undermine the creation of an effective POPs Convention.

Consequently, negotiators should identify appropriate trade-related measures, design them to achieve the goals of the POPs Convention, and include them in the POPs Convention, if they are needed. The record of the negotiations should show why the trade-related measures selected are related to the goal of elimination and why non-trade-related measures are inadequate to achieve the goals of the POPs Convention. Explicit and deliberately chosen measures are preferable, because they are most likely to survive WTO challenge.

Similarly, negotiators should remove the WTO supremacy clause from the draft of the POPs Convention. If negotiators are concerned about potential conflicts between the draft POPs Convention and other international agreements, these conflicts should be expressly identified and dealt with specifically in the text of the POPs Convention. If, for example, there are concerns about the relationship between the POPs Convention and the Basel Convention on Transboundary Movement of Hazardous Wastes, the nature of the conflict should be identified and appropriate language inserted in the POPs Convention.

When negotiating an agreement to achieve a very specific goal – like the elimination of POPs – countries are willing to make compromises and sacrifices, even of trade principles, that they are not willing to make in the abstract. They should be allowed to do so. It was never the intent of the WTO Members in negotiating the trade rules to eliminate forever and under all circumstances the use of trade-related measures to achieve non-trade goals, such as protection of health and the environment. The POPs negotiation is the best forum for selecting the optimal mix of measures – trade and non-trade – to achieve the goals of the POPs Convention. POPs negotiators should be able to move forward using every appropriate tool without being “chilled” by concerns over the WTO.

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<sup>1</sup> The twelve POPs covered by the International POPs negotiation are: aldrin, endrin, hexachlorobenzene, toxaphene, chlordane, dieldrin, heptachlor, mirex, DDT, PCBs, dioxins and furans.

<sup>2</sup> Not all POPs chemicals have the same health impacts. For more specific information on the health impacts associated with specific POP chemicals see WWF Issue Brief, *Persistent Organic Pollutants: Hand Me Down Poisons that Threaten Wildlife and People* (WWF: Washington, D.C.) (Jan. 1999), available at URL: <<http://www.worldwildlife.org>>; Physicians for Social Responsibility, *POPs and Human Health*, 13 PSR MONITOR 4 (Feb. 1998); WWF Issue Brief, *Chemicals that Compromise Life: A Call to Action* (WWF: Washington, D.C.) (Sept. 1998), available at URL: <<http://www.worldwildlife.org>>.

<sup>3</sup> See *supra* note 2.

<sup>4</sup> See Report of the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants on the Work of its Third Session, Annex II, art. N *bis*, Geneva, Sept. 6-11, 1999, UN Doc. UNEP/POPS/INC.3/4 (1999) [hereinafter Draft POPs Convention].

<sup>5</sup> See General Agreement on Tariffs and Trade (GATT), art. XX(b) & (g), Oct. 30, 1947, available at URL: <<http://www.wto.org/wto/legal/finalact.htm>>.

<sup>6</sup> See, e.g., Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3.3, April 15, 1994 [hereinafter SPS Agreement], available at URL: <<http://www.wto.org/wto/goods/spsagr.htm>>; Agreement on Technical Barriers to Trade, art. 2.2, April 15, 1994 [hereinafter TBT Agreement], available at URL: <<http://www.wto.org/wto/legal/finalact.htm>>.

<sup>7</sup> See *Persistent organic pollutants*, UNEP Governing Council Resolution 18/32 (May 25, 1995).

<sup>8</sup> See Washington Declaration on the Protection of the Marine Environment from Land-Based Activities, ¶ 17, UNEP(OCA)/LBA/IG.2/6 (1995), annex II of Report of the Intergovernmental Conference to Adopt a

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Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, Dec. 5, 1995.

<sup>9</sup> See *International action to protect human health and the environment through measures which will reduce and/or eliminate emissions and discharges of persistent organic pollutants including the development of an international legally binding instrument*, UNEP Governing Council Resolution 19/13C (Feb. 7, 1997).

<sup>10</sup> For a more in depth discussion of the role of trade measures in MEAs see CIEL, *Trade Measures and Multilateral Environmental Agreements – Resolving WTO Uncertainty* (World Wide Fund for Nature International, 1999).

<sup>11</sup> The preference for multilateral environmental measures is expressed in Principle 12 of the Rio Declaration:

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.

Rio Declaration on Environment and Development, June 13, 1992, UN Doc. A/CONF.151/26, *reprinted in* 31 I.L.M. 876 (1992).

<sup>12</sup> The relevant text states that the objective of the WTO includes:

. . . raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while *allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, 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.

Agreement Establishing the World Trade Organization, preamble, April 15, 1994, *reprinted in* 33 I.L.M. 1144 (1994) (emphasis added) [hereinafter WTO Agreement].

<sup>13</sup> The WTO Appellate Body acknowledged as much in its decision on the Shrimp Turtle dispute, where it relied on the preambular language to interpret article XX of the GATT. See Report of the Appellate Body on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, ¶¶ 129-31, 152-55, WTO/DS58/AB/R (12 Oct. 1998) [hereinafter Shrimp-Turtle].

<sup>14</sup> See WTO Agreement, *supra* note 12, at art. IV.

<sup>15</sup> See Understanding on Rules Procedures Governing the Settlement of Disputes, art. 17, ¶¶ 1 & 3, *reprinted in* 33 I.L.M. 1226 (1994) [hereinafter DSU], *available at* URL: <<http://www.wto.org/wto/dispute/dsu.htm>>.

<sup>16</sup> See *id.* art. 17, ¶ 14.

<sup>17</sup> Decisions on Trade and Environment, part of the Ministerial Decisions and Declarations, *reprinted in* 33 I.L.M. 1267 (1994) (establishing the CTE).

<sup>18</sup> See Claudia Saladin & Brennan Van Dyke, *Implementing the Principles of the Public Participation Convention in International Organizations* (CIEL: Washington, D.C. 1998). Most WTO documents, if they are made public at all, are only made public after the policy decisions to which they relate have been made. All meetings of the WTO bodies are held behind closed doors and the minutes of those meetings are rarely made public. While the WTO does have *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, they do little to give NGOs access in the WTO. See *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, Decisions adopted by the General Council, July 23, 1996, WT/L/162 [hereinafter *NGO Guidelines*]. For a further discussion of transparency at the WTO, see L. Brennan Van Dyke & John Barlow Weiner, *An Introduction to the WTO Decision on Document Restriction* (CIEL: Washington, D.C. undated); Sally Bullen & Brennan Van Dyke, *In Search of Sound Environment and Trade Policy: A Critique of Public Participation in the WTO* (CIEL: Washington, D.C. 1996).

<sup>19</sup> DSU, *supra* note 15, at art 18.2.

<sup>20</sup> *Id.* arts. 14.1, 17.10.

<sup>21</sup> SPS measure is defined in the SPS Agreement to be any measure applied:

- (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
- (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
- (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
- (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee [on Sanitary and Phytosanitary Measures].

SPS Agreement, *supra* note 6, Annex A, ¶ 3. The aspect of this definition relevant to POPs is contaminants and toxins in foodstuffs (sub-paragraph (b)).

<sup>22</sup> The SPS Agreement applies to all SPS measures (see definition of an SPS measure quoted in note 21, *supra*) and the TBT applies to essentially all other product restrictions.

<sup>23</sup> See JOHN JACKSON THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 213-28 (2d ed.) (MIT Press: Cambridge, Massachusetts 1997). A GATT panel report concerning certain US taxes on autos may provide guidance as to what constitutes a “like product” for the purposes of the application of MFN. See Report of the Panel on *United States - Taxes on Automobiles*, ¶¶ 5.5-5.10, GATT Doc. DS 31/R (Sept. 29, 1994) (unadopted) [hereinafter Auto Taxes Panel]. Although this report involved only like products under Article III, and not under Article I, prior panels have expressed that the term like products under these two articles is functionally indistinguishable. See, e.g., Report of the Panel on *EEC Measures on Animal Feed Proteins*, GATT Doc. L/4599, BISD (25th Supp.) 49, at 63 (adopted Mar. 14, 1978) (applying same analysis to like products under articles I and III).

<sup>24</sup> This provision is unlikely to be interpreted as broadly as it is written. For example, many measures that would meet the requirements of the TBT Agreement would fail a literal application of the prohibition on quantitative restrictions. Thus, it is almost certain that any legitimate TBT or SPS measures would be found not to violate this prohibition.

<sup>25</sup> See GATT, *supra* note 5, at art. XX (b) & (g).

<sup>26</sup> See Report of the Panel on *United States Restrictions on Imports of Tuna*, ¶ 5.35, GATT Doc. DS29/R (June 16, 1994) [hereinafter Tuna/Dolphin II].

<sup>27</sup> See Report of the Panel on *Thailand-Restriction on Importation of and Internal Taxes on Cigarettes*, ¶ 23, GATT Doc. DS 10/R-37S/200 (Oct. 5, 1990) [hereinafter Thai Cigarettes]; Report of the Panel on *United States Restrictions on Imports of Tuna*, ¶ 5.28, GATT Doc. DS21/R (Sept. 3, 1991) (unadopted) [hereinafter Tuna/Dolphin I]; Tuna/Dolphin II, *supra* note 26, at ¶ 5.35.

<sup>28</sup> A significant change with the creation of the WTO is the insertion of sustainable development into the preamble. Moreover, in the Shrimp-Turtle Appellate Body decision, the Appellate Body relied heavily on international law, see *supra* note 13. Thus a more nuanced interpretation of article XX(b) may emerge in the future.

<sup>29</sup> See Shrimp-Turtle, *supra* note 13, at ¶¶ 156, 158.

<sup>30</sup> In the Shrimp-Turtle dispute, the Appellate Body stated:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions . . . of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

*Id.* ¶ 159.

<sup>31</sup> See, e.g., Robert Housman & Donald M. Goldberg, *Legal Principles in Resolving Conflicts Between Multilateral Environmental Agreements and the GATT/WTO*, in ENVIRONMENT AND TRADE 10: THE USE OF TRADE MEASURES IN SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS 297 (CIEL & UNEP: Washington, D.C. 1995).

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<sup>32</sup> A challenge to a US sea turtle protection law prevailed in a dispute before the WTO, in part because the United States had failed to exhaust multilateral options in its efforts to protect sea turtles, before imposing a unilateral protection strategy. *See* Shrimp-Turtle, *supra* note 13.

<sup>33</sup> Some trade law experts have questioned whether Article XX should be interpreted to apply to the TBT Agreement. No cases to date have raised this issue.

<sup>34</sup> *See* TBT Agreement Annex 1, ¶ 1.

<sup>35</sup> *See id.* Annex 1, ¶ 2.

<sup>36</sup> *See id.* art. 2.1.

<sup>37</sup> *Id.* art. 2.2.

<sup>38</sup> *See id.* art. 2.4.

<sup>39</sup> *See* SPS Agreement, *supra* note 6, at art. 5. The WTO Appellate Body has interpreted the requirement that SPS measures be “based on” a risk assessment to mean that the country must demonstrate a “rational relationship” between the SPS measure and a risk assessment. *See* Report of the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, ¶ 193, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) [hereinafter *Beef Hormones*]; Report of the Appellate Body on *Japan – Measures Affecting Agricultural Products*, AB-1998-8, ¶ 84, WT/DS76/AB/R (22 February 1999) [hereinafter *Japan-Varietals*]. Both reports of the Appellate Body are available from the WTO document distribution facility at <<http://www.wto.org>>. In cases where scientific evidence is insufficient, a Member may adopt provisional SPS measures on a precautionary basis, but must, within a reasonable time, seek additional information in order to undertake a more objective assessment of the risks.

<sup>40</sup> SPS Agreement, *supra* note 6, at art. 2.3.

<sup>41</sup> *Id.* art. 5.5

<sup>42</sup> *Id.* art. 5.6.

<sup>43</sup> *See id.* art. 3.1.

<sup>44</sup> *See id.* *See also* *Beef Hormones*, *supra* note 39, at ¶ 163 (overruling the panel decision that “based on” means “conform to”). The Appellate Body stated that “We read the Panel’s interpretation that Article 3.2 ‘equates’ measures ‘based on’ international standards with measures which ‘conform to’ such standards, as signifying that ‘based on’ and ‘conform to’ are identical in meaning. The Panel is thus saying that, henceforth, SPS measures of Members *must* ‘conform to’ Codex standards, guidelines and recommendations. We are unable to accept this interpretation of the Panel.” *Id.* ¶ 162. The Appellate Body went on to state “A thing is commonly said to be ‘based on’ another thing when the former ‘stands’ on is ‘founded’ or ‘built’ upon or is ‘supported by’ the latter. In contrast, much more is required before one thing may be regarded as ‘conform[ing] to’ another: the former must ‘comply with’, ‘yield’ or show ‘compliance’ with the latter.” *Id.* at 163. Consequently, a Member does not have to show that its measure provides the same level of protection as the international standard, before it can be said to be based on that standard.

<sup>45</sup> TBT Agreement, *supra* note 6, at art. 2.5.

<sup>46</sup> *See* SPS Agreement, *supra* note 6, at art. 3.3.

<sup>47</sup> *See* Draft POPs Convention, *supra* note 4, at Annex II, art. D(1). The current text reads:

1. [Subject to the accessibility of financial and technical assistance,] each party shall [prohibit] [prohibit [and] [or] take [other] [the] legal measures necessary to eliminate] [take the legal measures necessary to eliminate], the production[, import, export] and use of chemicals listed in Annex A (Elimination), in accordance with the provisions in that Annex.

[1 *bis*. Each Party shall ensure that chemicals listed in Annex A, once their production and use have been banned, shall not be exported or imported except for the purpose of environmentally sound [destruction] [or] [disposal].]

<sup>48</sup> *See id.* Annex II, art. D(2). The current text reads:

2. [Subject to the accessibility of financial and technical assistance,] each Party shall [prohibit] [prohibit [and] [or] take [other] [the] legal measures necessary to eliminate] [take the legal measures necessary to eliminate], the [production] [or] [and] use of chemicals listed in Annex B, (Restriction), except for the purposes specified therein, in accordance with the provisions in that Annex.

<sup>49</sup> *See id.* Annex A.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* Annex II, art. D(2).

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<sup>52</sup> See WWF Issue Brief, *Successful, Safe, and Sustainable Alternatives to Persistent Organic Pollutants*, at 3 (WWF: Washington, D.C. Sept. 1999).

<sup>53</sup> This is in fact contemplated in the proposed article D.1 *bis* quoted *supra* note 47.

<sup>54</sup> Since domestic production and use will have been banned, banning imports does not violate the national treatment obligation; since all imports and exports will be banned, the most favored nation obligation is not violated.

<sup>55</sup> See *supra* discussion in section IV.B.

<sup>56</sup> See, e.g., *Shrimp-Turtle*, *supra* note 13, at ¶ 166.

<sup>57</sup> See Draft POPs Convention, *supra* note 4, at Annex II, art. D.3.

<sup>58</sup> *Id.* art. N *bis*.

<sup>59</sup> The relevant preambular text reads:

*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.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, preamble, Sept. 11, 1998, UN Doc. UNEP/FAO/PIC/CONF/5 (emphasis added).

<sup>60</sup> Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, UNEP Doc. EB.AIR/1998/2.

<sup>61</sup> See 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, *reprinted in* 28 I.L.M. 649 (1989) (entered into force May 5, 1994).

<sup>62</sup> See Vienna Convention on the Law of Treaties, arts. 30-38, May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (entered into force Jan. 27 1980).

<sup>63</sup> See *id.* art. 31.1.

<sup>64</sup> See *supra* note 12 and accompanying text.

<sup>65</sup> See GATT, *supra* note 5, at art. XX(b) & (g).

<sup>66</sup> As a legal matter, environmental agreements have equal status to trade agreements, such as the WTO Agreements. If all the parties to the future POPs Convention were to agree to a rule that conflicted with a WTO rule, then the rules of the POPs Convention would apply between parties to that Convention. Difficulties would only arise if a POPs Convention included measures against a state that is a WTO Member, but not a party to the POPs Convention. Even in such circumstances, however, trade-related environmental measures should not be rejected out of hand.