

Restrictions to Transboundary Movements of Plastics and WTO Law: A Policy Brief

By

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Introduction

This policy brief aims to inform discussions on restrictions on transboundary movements of certain plastic products and plastic waste. It outlines the limits set by WTO law to impose import and export restrictions on plastic products and plastic waste. It focuses on WTO rules that discipline the use of quantitative restrictions and technical specifications, due the recent proliferation of such instruments, and reflects on the policy space left to WTO members to impose such trade-restrictive measures on plastics.

It begins by introducing the current policy context – notably the growing use of trade restrictions related to the transboundary movement of plastic waste, and the interest among some WTO Members in seeking ways to limit the trade of plastic products and inputs that are prohibited or restricted on the domestic market. There is, for example, interest in proposals to reduce the flow in international trade of unnecessary and problematic single use plastics, such as by establishing voluntary targets to reduce the proportion of plastic packaging used and embedded in international trade.

Governments seek to promote policy coherence between domestic policies related to the consumption and production of plastic and their external trade policies. To inform these discussions, this note aims to provide guidance on the directly relevant rules of international trade law and the way they affect the options that countries could consider.

In section two it introduces the concept of “quantitative restrictions”. These highly trade-restrictive measures are in principle prohibited, but justification is available in certain cases. The WTO Agreements strive at a balance between trade and non-trade interests, respectively Members’ rights to invoke an exception and their duty to respect the treaty rights of other Members. In this spirit Article XXIV GATT permits Members to pursue important state interests, including the protection of human health and the environment. At the same time it sets stringent requirements on the consistent and even-handed design and application of challenged measures.

Section three deals with regulations that set out requirements on certain product features, such as composition or performance, and labelling. These internal measures are required to follow the principles of non-discrimination, but deviations may be

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justified. Further, if qualified as a technical regulations, these rules must conform to the principles of least-trade-restrictiveness, and be based on international standards where available and appropriate.

To provide context, section four gives a brief overview of WTO case law on trade restrictions that governments have taken on public interest or environmental grounds in other areas, and highlights how these might be relevant in the context of plastics trade. Lastly, to illustrate the application of WTO rules, this paper outlines legal considerations related to two measures: the import restriction applied by China to waste plastics, adopted in 2018, and the prohibition on the placing on the market of certain single-use plastic products and products made from oxo-degradable plastics in the EU, foreseeably in effect by 2021.

1. Policy context

Growing interest in trade-related dimensions and policy options with regard to plastic pollution: International trade plays a central role in the global plastics economy. Transboundary movements of virgin plastics and multiple plastic end-products account in some cases up to 60% of global production. Rising concern about the environmental and economic challenges caused by poorly regulated plastic waste trade spurred the adoption of the 2019 Plastic Amendments to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (Basel Convention). At the same time, governments across the globe are implementing trade-related measures with the aim to reduce plastic pollution by restricting imports and/or exports of certain plastic products, including plastic waste.

Against this backdrop the multilateral trading system has a vital role to play in supporting greater understanding, dialogue and action on the trade-related aspects of tackling plastics pollution. Attempts undertaken within the WTO shall support and complement existing intergovernmental efforts to reduce plastic pollution, including the UN Environment Assembly and the Basel Convention.

Growing interest in proposal for a WTO Plastics Initiative and in ways in which governments could cooperation at the WTO and use trade policy to promote transformation of the sector and reduce plastic pollution: The 2020 WTO Ministerial Conference is a critical opportunity for WTO Members to signal high-level political commitment to a multilateral trading system that better supports environmental sustainability. As part of such attempt, a group of like-minded Members should launch a WTO initiative on plastic pollution as a platform for efforts to promote coherence between domestic restrictions on certain plastic products that might affect international trade, and the relevant WTO obligations such as transparency, non-discrimination and least-trade-restrictiveness. The experience and infrastructure of WTO Committees – especially the Committee on Technical Barriers to Trade and the Committee on Trade and Environment – could advance a dialogue on plastics-related sustainability standards and technical assistance to developing country Members.

The initiative may also serves to facilitate the reduction of trade barriers for goods and

services that help eliminating plastic pollution, and could include voluntary commitments and targets to reduce trade in certain plastic products.³

- A brief review of prior GATT/WTO discussion on trade restrictions of domestically prohibited goods.
- A brief review (perhaps some boxes) on existing WTO experiences of export and import restrictions on public interest/environmental grounds, and also to provide examples of precedents for governments using export or import restrictions on certain pesticides (and recently on health - although these are not considered a good example).

2. WTO rules governing the use of quantitative restrictions on imports or exports of plastics

2.1. Defining quantitative restrictions

Quantitative restrictions (QRs) are measures that limit the quantity of a product that can be imported to or exported from a WTO Member. Thus, QRs applied at the border. Other than internal measures, falling within the scope of Article III:4 GATT, they do not affect domestic products.⁴ Formal QRs may take the form of:

- Prohibitions on the importation or exportation of a product. A prohibition may be absolute or conditional (that is, applicable if the product does not fulfill certain requirements).
- Import or export quotas, which define the quantity of a product that can be imported or exported. They may take the form of global quota, a global quota allocated between countries, or a bilateral quota.

Measures other than “formal” QRs may still have the effect of reducing the volume of imports or exports and may hence be considered quantitative restrictions. For instance, administrative measures such as import or export licensing procedures may still end up having restrictive or distortive effects on imports or exports, for instance when they exhibit discretionary features. This is important to the extent that non-automatic licensing schemes are usually implemented to administer import or export quotas.

³ On the policy context see C. Deere Birkbeck, ‘Strengthening international cooperation to tackle plastic pollution: Options for the WTO’, Global Governance Centre Brief 20/1, Global Governance Centre, The Graduate Institute, 2020, available at < <https://www.plasticpolitics.solutions/research-1/2020/1/9/policy-brief-strengthening-international-cooperation-to-tackle-plastic-pollution-options-for-the-wto>>.

⁴ In some cases it might be difficult to distinguish border measures from internal measures. The *application* of import licensing requirements might affect the internal sale of products. However, this does not lead to the conclusion that the border measure itself, necessary for the distribution of import licenses, would fall within the scope of Article III:4 GATT (Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 211).

2.2. Applicable rules and exceptions

General prohibition

Article XI:1 General Agreement on Tariffs and Trade (GATT) sets out a general prohibition on quantitative restrictions on imports and exports. Art. XI:1 GATT has a comprehensive scope. It applies to any measures irrespective of their legal status, and covers any acts – be they *de jure* or *de facto* – to the extent that they exhibit an actual or potential limiting effect on the quantity or amount of a product being imported or exported.⁵ Based on the broad interpretation of Art. XI:1 GATT given by WTO case law, virtually any QRs imposed in the plastic sector could run afoul of this provision.

Art. XI:1 GATT does not apply to measures that deal with the quality, rather than the quantity of imports; the import-restrictive elements of such measures are to be considered under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) discussed *infra*.⁶ However, a set of measures “containing both prohibitive and permissive aspects, namely a ban and exceptions” may be challenged as a whole under Art. XI if the acts, taken together, work as a QR.⁷ For example, the import restrictions on plastic waste recently enacted by China consist of a ban on post-consumer and industrial plastic waste, and a technical regulation that requires any imports of plastic waste (destined for recycling) to meet a 0.5 percent maximum level of contamination by non-recyclable materials. As such ambitious requirements may de facto create restrictions on the quantity of imports, the acts could be as argued to be inconsistent with Art. XI GATT.⁸

General exceptions

With a view to balance Members’ right to protect important societal values, and the rights of other Members under basic trade disciplines, Art. XX GATT allows Members to deviate from any GATT provisions (that is, including Art. XI:1) to the extent that they

⁵ Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials* (hereafter *China – Raw Materials*), WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, paras 319-320. Accordingly, Art. XI:1 GATT covers minimum import or export price requirements, discretionary non-automatic licensing systems, and any other measures that have “the very *potential*” to have a limiting effect on trade.

⁶ See WTO Doc. G/L/59/Rev. 1, Decision on Notification Procedures for Quantitative Restrictions, 3 July 2012, para. 9.

⁷ Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, paras.7.660-7.663.

⁸ For example, plastic material entering recycling facilities in the US may contain up to 15 – 25 weight percent contamination. Against this background, the Chinese requirements have been considered “almost impossible to meet”: Heinrich Böll Foundation and Break Free From Plastic, *Plastic Atlas 2019*, 2nd edn, December 2019, p. 38. For an overview of the Chinese and other restrictive measures that have been recently proliferating in the plastic sector, see I. Espa and B. Imeli, ‘Exploring the Implications of the Basel Convention’s Plastic Amendment under WTO Law: A case Study on the Chinese Import Restrictions on Plastic Waste’, forthcoming.

impose measures that i) can be provisionally justified under one of the paragraphs of Art. XX GATT and ii) meet the requirements of the chapeau.

Provisional justification under Art. XX (b) GATT

Art. XX (b) GATT concerns otherwise GATT-inconsistent measures allegedly adopted to protect human, animal or plant life or health. Provisional justification presupposes that the measure:

- is designed to “protect human, animal or plant life or health”, that is, it at least contributes to these goals (which have been interpreted as to include environmental policy measures aimed at protecting public health), and
- is “necessary” to achieve the goal to the level of ambition as defined by the enacting Member, meaning that there is no other measure less trade-restrictive reasonably available that would contribute to the policy aim to the same extent.

A number of recently introduced import and export restrictions on plastic waste⁹ may be provisionally justified under Art. XX (b) GATT to the extent that they were adopted within the context of the Basel Convention and its recently adopted Plastic Amendment.¹⁰ This is because, on the one hand, the adoption of the Plastic Amendment by the nearly universal membership of the Basel Convention arguably denotes the recognition of (marine) plastic pollution as a global environmental and human health concern while, on the other hand, it increases the likelihood that QRs concerning “covered wastes” under the Amendment may be considered necessary.¹¹ Importantly, Art. XX (b) GATT does not require that the restrictions also affect domestic waste plastics. The restrictions must, however, meet the requirements imposed by the chapeau (see *infra*).

Provisional justification under Art. XX (g) GATT

Art. XX (g) GATT concerns otherwise GATT-inconsistent measures allegedly adopted for the “conservation of exhaustible natural resources”. “Exhaustible natural resources” have been interpreted as to include the preservation of the environment¹² and living as well as non-living resources.¹³ Provisional justification presupposes that the measure:

⁹ See, among others, China’s ban on plastic waste imports, which was recognized by the Organisation for Economic Co-operation and Development (OECD) to be consistent with China’s rights and obligations as a party of the Basel Convention: OECD Environment Policy Paper No. 12, *Improving Plastics Management: Trends, policy responses, and the role of international co-operation and trade*, September 2018, p.10. On the export side, see, e.g. the prohibitions imposed by the EU on plastic waste for disposal to non-EU countries and on hazardous plastic waste (as defined under the Basel Convention) for recovery to countries that are not part of the OECD: G/TBT/N/CHN/1211 and G/TBT/N/CHN/1212, notified on 18 July 2017; G/TBT/N/CHN/1233, notified on 15 November 2017; and Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

¹⁰ See UNEP/CHW.14/28, Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the work of its fourteenth meeting, 11 May 2019.

¹¹ For more details, see I. Espa and B. Imeli, *supra* n. 2.

¹² Appellate Body Reports, *China –Raw Materials*, para. 355.

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras 142-143.

- “relates to” its stated aim, meaning that a real and close relationship between the trade-restrictive act and its objective exists.
- be “made effective in conjunction with restrictions on domestic production or consumption”: this is a requirement of even-handedness in the imposition of restrictions on imported and domestic products, which however does not mandate the equal treatment of imported and domestic products.

QRs on consumer goods – like a ban or a quota on single-use plastics items¹⁴– could seek justification under this paragraph as they could be seen as a so-called restriction on domestic consumption. The Appellate Body clarified that in case “[...] no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.”¹⁵ Accordingly, a measure that equally applies to competing plastic products irrespective of their origin would arguably fulfil this requirement to the greatest extent.

Requirements of the chapeau

Measures provisionally justified under one of the paragraphs of Art. XX GATT must subsequently meet the requirements of the chapeau. The chapeau focuses on the way provisionally justified measures are applied with a view to exclude the misuse or abuse of the exceptions for protectionist purposes. To this end, it prohibits

- “arbitrary or unjustifiable discrimination” that occurs “between countries where the same conditions prevail”: this condition i) proscribes discrimination that is not rationally connected to the pursuit of the policy objective and ii) requires Members to consider differences in conditions between countries, rather than to apply a measure in a rigid and inflexible manner. With regard to import restrictions other than a ban, market access requirements set out in terms of performance rather than in terms of specific procedures (for instance, by mandating a certain level of recycled material content / biodegradability of plastic products, or a maximum level of impurities in plastic waste) are examples that could facilitate a measure’s compliance with the chapeau requirements.
- “disguised restrictions on international trade”: this last condition must be interpreted in conjunction with the previous criteria of arbitrary or unjustifiable discrimination, and is aimed at overall avoiding situations of disguised protectionism. In line with this, any restrictions on the international trade in plastics, including possible exceptions, must clearly be driven by the measure’s stated goal. In the past, one manner to demonstrate that a measure was not a *disguised* restriction was to refer to Members’ to undertake good faith efforts to *negotiate* (with no obligation to reach) an across-the-board solution before

¹⁴ See, e.g. the EU’s ban on certain single-use plastic items: Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

¹⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 21.

resorting to a unilateral measure. Thus, before enacting trade restrictions on plastic products, it may be useful that Members reach out in a bilateral, plurilateral or multilateral agreement to other affected Members so as to better reflect their major considerations. A WTO initiative on plastic pollution is such opportunity, while as regards plastic waste, the Basel Convention is a relevant multilateral agreement. Measures based on such agreements could be considered a justifiable response to the risks posed by plastic waste covered by the Convention.

Administration of Quantitative Restrictions

To the extent that otherwise GATT-inconsistent QRs are justified under Art. XX GATT, Art. XIII:1 GATT requires that they be administered in a non-discriminatory manner. This means that a quantitative restriction on the exportation or importation of a product shall apply to all Members likewise.

To this end, Art. XIII:2 GATT requires that QRs on imports other than quotas shall aim at a distribution of trade that resembles the shares which the supplying countries might be expected to obtain in the absence of the restriction. Accordingly, in case a global quota is allocated among supplying countries (rather than on a first-come, first-served basis), it shall be distributed among all Members with a substantial interest in supplying the product concerned. The Member applying the measure shall thus seek an agreement with such supplying countries. In case no agreement can be reached, the quota is to be allocated on the basis of the suppliers' share of trade during a "previous representative period" (basically a three-year period prior to the imposition of the quota). Accordingly, the allocation of a global quota for plastic products, including plastic waste, shall be distributed among all Members with a substantial interest in supplying the product, or resemble the shares of supplying countries during the last three-year period before the measure is put in place.

3. WTO rules governing technical regulations affecting imports of plastics

3.1. Defining technical regulations

Technical regulations set out mandatory requirements on certain product features – like the physical characteristics or performance of a product, or the way it is labelled or packaged before it is put on sale.¹⁶ Regulations that require a certain content of recycled

¹⁶ Substantially the same rules apply to "standards"; the difference between a governmental standard and a technical regulation lies in compliance. While conformity with technical regulations is by nature mandatory, compliance with standards is voluntary. A different set of rules governs sanitary and phytosanitary measures, applied to protect human, animal or plant life or health within a Member's territory from risks arising from e.g. additives, contaminants and toxins. Such measures must be based on a risk assessment, addressing the specific risks within that Member, supported by scientific evidence. General studies that show the adverse impact of plastics on animal and plant life may not suffice (Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 200). Given these stringent requirements, a measure

plastic in PET bottles,¹⁷ define maximum acceptable levels of contamination for plastic materials destined for recycling,¹⁸ or specify mandatory marking requirements affecting (single-use) plastic products¹⁹ are technical regulations. Whether a measure qualifies as technical regulation has important implications with regard to the applicable obligations. Internal regulations that fall outside of the TBT Agreement's scope of application are only subject to GATT rules – with no disciplines on the trade-restrictiveness of origin-neutral measures.²⁰

3.2. Main obligations with regard to technical regulations

Technical regulations are subject to the following basic rules, which are laid down in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and the GATT:

- *Non-discriminatory treatment*: Art. 2.1 TBT Agreement and Arts I:1 and III:4 GATT prohibit discriminatory treatment that i) impedes the competitive opportunities of imported products as compared to domestic goods (so-called national treatment obligation) or ii) discriminates between imports (so-called most-favoured nation treatment obligation). In line with this, technical specifications shall be applied irrespective of the origin of plastic products, including plastic waste. These obligations apply only to so called “like” products, meaning products that compete in the regulating Member’s market place,. In assessing likeness, the products’ physical characteristics and consumer preferences (attached to production methods or environmental impact) play a role.²¹ In line with this products that serve the same end use, but are made from different materials – affecting their biodegradability, for example – may be accorded different treatment without violating the non-discrimination obligations. Such assessment shall be made on a case-by-case basis.
- *Regulation is not more trade-restrictive than necessary*: In line with Art. 2.2 TBT Agreement, technical regulations’ with a limiting effect on trade shall not go beyond what is “necessary” to achieve the legitimate objective pursued (i.e.

adopted both for the purposes of environmental protection and the protection of human and animal life or health, may be easier defended under the TBT Agreement.

¹⁷ These include, for instance, the requirement that PET bottles contain at least 25 % recycled plastic (calculated as an average for all PET bottles placed on the market in an EU Member State): Art. 6 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (hereinafter Directive (EU) 2019/904).

¹⁸ For example, the Chinese technical regulation that allows for a 0.5 percent maximum level of contamination by non-recyclable materials in imports of plastic waste destined for recycling. This requirement does not apply to domestic waste.

¹⁹ Directive (EU) 2019/904, for instance, imposes a marking requirement that calls for information on the presence of plastics in certain products and the resulting negative impact of inappropriate waste disposal on the environment (see Art. 7).

²⁰ Internal regulations are measures that affect products’ sale, offering for sale or use, independently of whether they are enforced at the border or e.g. at the place of distribution.

²¹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paras 141 and 147; These considerations equally apply under all three provisions (Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, para. 7.73).

protection of human health or the environment at a level set by the regulating Member).

- *Regulation is based on international standards where available:* According to Art. 2.4 TBT Agreement, when a relevant international standard (which was adopted by a body that is open to all Members) exists, Members shall use them, or their relevant parts, as a basis for technical regulations, unless ineffective or inappropriate to accomplish the legitimate objective pursued. Standards developed by the International Organization for Standardization (ISO), e.g. 'ISO 15270:2008' on the recovery and recycling of plastics waste or 'ISO 18830:2016' on testing plastic products' biodegradability, might qualify as such.²²
- *Requirements are specified in terms of performance:* Art. 2.8 TBT prefers Members to adopt, wherever appropriate, product requirements in terms of performance since these are typically less prescriptive (see for instance the measures described in fn. 13 and 14).

3.3. Available exceptions

A violation of Arts. I:1 or III:4 GATT may be justified under Art. XX GATT; the explanations made in relation to QRs and Art. XX GATT apply in the same way. Similar considerations can heal a potential conflict with Article 2.1 TBT Agreement. For example, technical regulations that only affect *imports* of plastic waste, and thus violate the national treatment obligation, may be justified – especially if enacted in line with the Basel Convention.

4. WTO rules in work: An overview of case law and illustrative examples of adopted measures

4.1 An overview of relevant case law

A number of past WTO cases illustrate Members' policy space for adopting trade-related measures that protect the environment and public health. Article XX General Agreement on Tariffs and Trade (GATT) on General Exceptions lists specific grounds of justification for measures otherwise inconsistent with the Agreement's provisions. Two exceptions are of particular relevance in the context of trade restrictions on plastics: Article XX(b) GATT allows for measures that are necessary for the protection of human, animal or plant life or health, while policies relating to the conservation of exhaustible natural may be justified under Article XX(g).

²² The TBT Agreement does not list the bodies that qualify to promulgate international standards. The ISO, in essence a federation of the national standards bodies of 164 countries, plays an important role in developing voluntary standards that meet the TBT Agreement's requirements on "international standard" and thus supports the programs of government authorities. Nevertheless, whether a particular ISO standard qualifies as an "international standard" shall be assessed on a case-by-case basis, considering effective participation in the respective standard's development. For a detailed overview see Janelle M. Diller, 'Private Standardization in Public International Law Making' 33 *Michigan Journal of International Law* 3 (2012) pp. 481-536. For an overview of relevant ISO standards see < <https://www.iso.org/news/ref2292.html>>.

Measure at issue	Findings of the Appellate Body	Key takeaway
<i>DS2: US – Gasoline, Appellate Body report adopted in 1996</i>		
<p>The “Gasoline rule” under the US Clean Air Act set out requirements on the cleanliness of gasoline. In large metropolitan areas with heavy pollution it only allowed for the sale of “refined gasoline” with certain requirements attached to the 1990 baseline, while in the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 could be sold.</p> <p>Domestic refineries in operation for at least six months in 1990 could establish an individual baseline, while foreign refineries importing to the US were not allowed to rely on individual baselines. Instead, they had to comply with a statutory baseline established by the Environmental Protection Agency.</p>	<p>The measure was found to violate the national treatment obligation (Article III:4 GATT), but was provisionally justified under Article XX(g) GATT. It primarily aimed at the conservation of exhaustible natural resources (clean air), and restrictions applied to both domestic and imported products.</p> <p>However, the lack of even-handedness in the baseline establishment rules prevented the measure’s justification under the chapeau of Article XX GATT.</p>	<p>The case affirms Members’ right to adopt the highest possible standard to protect the environment so long they fulfill their obligations and respect the rights of other Members under the WTO Agreements.</p> <p>It also clarifies that “in conjunction with” does not refer to identical restrictions on domestic products. Merely required are even-handed restrictions on domestic production <i>or</i> consumption.</p> <p>In line with this import restrictions on plastic products, especially plastic waste, may be justified without imposing the same restrictions on domestic products.</p>
<i>DS58: US –Shrimp, Appellate Body Report adopted in 1998</i>		
<p>The US legislation under scrutiny prohibited i.e. the capture or killing of endangered turtle species that occur in US waters. To implement this objective the act required US shrimp trawlers to use a certain type of “turtle excluder device” (TED) in their nets when fishing in areas with a significant likelihood of encountering sea turtles.</p> <p>The measure also prohibited imports of shrimp harvested with commercial fishing technology, unless the harvesting nation was certified to have a regulatory</p>	<p>The measure was found to violate the prohibition of quantitative restrictions (Article XI:1 GATT), but to be provisionally justified under Article XX(g) GATT. It related to the conservation of exhaustible natural resources (turtles as species susceptible of depletion), and the restrictions imposed on domestic products were even-handed.</p> <p>However, the measure failed the chapeau test as it unjustifiably (not as a necessary result of the policy goal) discriminated between countries where the same</p>	<p>The case reiterates that Members are free to adopt their own policies aimed at protecting the environment, within the limits of the WTO Agreements.</p> <p>Further, it highlights the importance of laying down requirements in terms of performance as opposed to defining a single way of compliance – for example by defining targets of biodegradability or recycled content in end-products.</p> <p>The case also brings to the fore the importance of seeking (but not necessarily</p>

<p>programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles. However, the application of the measure required other Members to adopt a regulatory program that is not merely comparable, but rather essentially the same, as the one applied to US shrimp trawlers.</p>	<p>conditions prevail: i) it required, in effect, all other exporting Members to adopt essentially the same policy as in force in the US, and ii) failed to engage exporting Members in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and sea turtles, before enforcing unilateral import prohibitions. This inflexibility and the lack of transparency and procedural fairness in its application was also found to constitute arbitrary discrimination.</p> <p>Subsequently the US revised and successfully justified its legislation under Article XX(g) GATT. The adapted measure required other Members' programmes simply to be "comparable in effectiveness", as opposed to "essentially the same", and the US made serious, good faith efforts to negotiate an international agreement.</p>	<p>to achieve) international cooperation before resorting to unilateral action. Such endeavors, for example in the form of plurilateral cooperation in the WTO, would strengthen the grounds to justify trade-restrictive measures on plastics.</p>
<p><i>DS135: EC-Asbestos, Appellate Body Report adopted in 2001</i></p>		
<p>The French decree at issue prohibited the manufacture, processing, sale, import, placing on the domestic market and transfer of all varieties of asbestos fibres, regardless of whether incorporated into materials or end-products. Certain limited and temporary exceptions were available from the ban. All measures applied regardless of the products' origin. Canada claimed that the measure discriminates against imported asbestos (products) as it treats certain domestic substitutes, such as</p>	<p>The measure was found to be consistent with the EC's obligations under the WTO Agreements. Especially with regard to the products' different health effects, their likeness was denied. Therefore no violation of the national treatment obligation occurred.</p> <p>Further, the ban was justified pursuant to Article XX(b) GATT. It was found to be necessary to achieve the level of health protection chosen by France; no less trade-restrictive measures</p>	<p>The case highlights Members' right to autonomously define the level of health protection they aim at. At the same time it subjects import restrictions with permissive elements, specified in terms of product characteristics, to the rules of the TBT Agreement. Therefore, also origin-neutral restrictions must comply with the requirement of "least trade-restrictiveness", meaning that such restrictions must be "necessary" to achieve the</p>

<p>PVA, cellulose and glass fibres, more favourably.</p>	<p>were available to this end. Further, it satisfied the conditions of the chapeau.</p>	<p>legitimate policy goal they aim at.</p> <p>The likeness analysis indicates that products posing a serious risk to public health (and arguably the environment) may be accorded different treatment without violating the non-discrimination obligations. This might have implications on the legal treatment of end-products from easily biodegradable and from “conventional”/oxo-degradable plastics.</p>
<p><i>DS332: Brazil – Retreaded Tyres, Appellate Body report adopted in 2007</i></p>		
<p>At issue was a Brazilian import prohibition on used and retreaded tyres (a shorter life-span than new tyres, leading to waste accumulation and serving as vectors for diseases), as well as an exemption from the import ban for MERCOSUR countries.</p> <p>The ban was part of a comprehensive strategy including a collection and disposal scheme, which makes it mandatory for domestic manufacturers and importers of new tyres to provide for the safe disposal of waste tyres in specified proportions, and encouraging domestic retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.</p> <p>Notwithstanding the import ban on used tyres, a number of Brazilian factories obtained court injunctions allowing them to import used tyres to subsequently retread them.</p>	<p>The ban was found to be inconsistent with the prohibition of quantitative restrictions (Article XI:1 GATT).</p> <p>However, it was provisionally justified under Article XX(b) GATT: As the key element of a <i>comprehensive strategy</i> to deal with waste tyres, it contributed to the retreading of domestic used tyres, and thus brought about a material contribution to the reduction of waste tyres. This conclusion was reached without (undoubtedly useful) estimates on the measure’s quantitative contribution/time horizon regarding the reduction of waste tyres. Establishing its necessity, the Appellate Body noted that material recycling is costly and might require advanced technologies and know-how that are not readily available on a large scale. Therefore, it was not an available alternative to the ban.</p>	<p>The decision highlights that a provisional justification under Article XX(b) GATT is available without quantifying (as opposed to a qualitative assessment of) the measure’s contribution to public health protection. Required is a material contribution – a genuine relationship between ends and means – to the stated objective.</p> <p>This contribution is not required to be immediately observable, but may manifest only after a certain period of time. For example, import restrictions on plastic waste may first lead to a shortage of feedstock for the domestic recycling industry – an interstage of developing domestic waste collection and sorting (given the appropriate economic incentives) that will bring about the positive environmental and public health effects the measure aims at.</p> <p>Further, the case acknowledges that less</p>

These decisions have been challenged as well.	The import prohibition could not be justified because the MERCOSUR exemption and the imports of used tyres under court injunctions resulted in arbitrary or unjustifiable discrimination.	trade-restrictive measures that pose an undue burden on the importing Member, taking into account its level of development, may not be considered as available alternatives.
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4.2 Illustrative examples of adopted measures

In recent years a number of Members adopted comprehensive legislative frameworks to address the adverse environmental and public health impacts of plastic waste. To illustrate the application of WTO rules, this paper addresses two measures: the import restriction applied by China to waste plastics, and the prohibition on the placing on the market of certain single-use plastic products and products made from oxo-degradable plastics in the EU, foreseeably in effect by 2021.

Description of the measures	Key WTO law considerations
<i>Chinese import restrictions on plastic waste</i>	
<p>In 2018 China prohibited the importation of post-consumer and industrial plastic waste and scrap. Exempted are products that comply with a 0.5 percent maximum level of contamination by non-recyclable materials (as compared to the previous 1.5 percent requirement). The measures largely halted the inflow of plastic waste.</p> <p>The trade restrictions are part of a comprehensive policy framework that includes the establishment of municipal waste sorting and disposal systems in major cities by 2020, and the promotion of waste-to-energy projects in rural areas, accompanied by public education. Further steps include a cradle-to-grave waste management system to monitor the generation, transport, processing, and disposal of solid wastes.</p> <p>These measures are apt to induce sustainable changes in the practices of the domestic recycling industry, and result in a better waste management and a higher domestic recycling rate in China.</p>	<p>The measure qualifies as a quantitative restriction, prohibited by Article XI:1 GATT.</p> <p>However, it may be justified under Article XX(g) GATT. It can be expected to bring about a material contribution to the conservation of natural resources (e.g. marine species), and is part of a comprehensive policy framework that includes restrictions on domestic production and consumption.</p> <p>A justification under Article XX(b) GATT also appears available. The ambitious measures contribute to the protection of public health, by largely halting (low-quality) plastic waste imports. Less trade-restrictive alternatives – such as lower contamination thresholds or enhanced material recycling – may not provide the same level of protection or would pose an undue burden on China. Further, the measure is acknowledged to be consistent with China’s rights and obligations as a Party to the Basel Convention. This supports the conclusion that the restrictions are “necessary”.</p> <p>The measure also appears to comply with the requirements of the chapeau. The different treatment of imports rationally relates to the protection of the environment and public health, therefore no unjustifiable</p>

	<p>discrimination appears. At last, measures taken in line with the Basel Convention – a multilateral outcome that reflects the response of the international community to a genuine environmental problem – most likely comply with the requirement of non-arbitrariness under the chapeau of Article XX GATT.</p>
<p><i>EU prohibition on the placing on the market of certain single-use plastic products</i></p>	
<p>The EU strategy will prohibit the placing on the market of certain single-use plastic products (see Article 5 and Annex B Directive (EU) 2019/904). The marketing prohibition, also affecting imports, is expected to come into force in 2021.</p> <p>The marketing prohibition of single-use plastic items targets products that appear particularly relevant for the prevention of marine plastic litter in the EU; the covered products are estimated to represent 86 % of the single-use plastics found on beaches.</p> <p>The definitions of “plastic” and “single-use plastic products” exempts i) natural polymers that have not been chemically modified and ii) products that are conceived, designed and placed on the market to accomplish within their life span multiple trips or rotations by being refilled or re-used for the same purpose for which they are conceived.</p> <p>Directive (EU) 2019/904 emphasizes that the restrictions shall remain proportionate and non-discriminatory.</p> <p>The measure is part of the European Strategy for Plastics in a Circular Economy, comprising the extension of domestic recycling capacity, requirements on the recyclability and recycled content of certain plastic products, and the phase out of exports of recyclables.</p>	<p>The definitions of “plastics” and “single-use plastic products” trigger the applicability of the TBT Agreement.</p> <p>A potential conflict arises with Article 2.2 TBT Agreement that requires technical regulations to be no more trade-restrictive than necessary to achieve a legitimate objective, such as environment protection. But the origin-neutral marketing prohibition is likely to be found “necessary”. While its trade-restrictiveness may not be contested, the marketing prohibition can be expected to reduce marine plastic pollution more effectively than less incisive measures. In this context Directive (EU) 2019/904 highlights that existing measures, such as the recycling target for plastic packaging waste and targets requiring all plastic packaging to be reusable or easy to recycle by 2030, appear as insufficient to address the immediate concern of marine plastic litter.</p> <p>However, the deviation from Article XI:1 GATT may be justified under Article XX(g) GATT. The prohibition can be expected to deliver a material contribution to the conservation of the marine ecosystem, by reducing marine litter. Further, the measure is drafted in an origin-neutral manner that supports its consistency with the chapeau of Article XX GATT.</p>
<p><i>EU prohibition on the placing on the market of products made from oxo-degradable plastic</i></p>	
<p>The EU strategy will as well prohibit the placing on the market of products made from oxo-degradable plastics (see Article 5 Directive (EU) 2019/904). The marketing prohibition, also affecting imports, is expected to come into force in 2021.</p>	<p>While single-use plastic products prima facie differ from products conceived for multiple trips (for example in their end-use and physical characteristics), this conclusion might differ when comparing products made from oxo-degradable plastics with products made from other types of plastic.</p>

<p>Oxo-degradable plastic materials include additives which, through oxidation, lead to their fragmentation into micro-fragments or to their chemical decomposition. On account of their insufficient biodegradability, oxo-degradable plastics contribute to microplastic pollution in the environment. Moreover, they negatively affect the recycling of conventional plastic and fail to deliver a proven environmental benefit.</p>	<p>Given their different biodegradability – affecting the marine environment – the physical characteristics of oxo-degradable plastic products differ from those made from other plastics. However, this is only one factor in assessing products’ likeness. Taking into account the end use, tariff classification and consumer preferences of these products, a holistic analysis would presumably lead to the conclusion that the products compete in the market place. Therefore, a claim of discriminatory treatment under Article III:4 GATT cannot be excluded.</p> <p>However, the potential deviation from Article III:4 GATT may be justified under Article XX(g) GATT. The prohibition can be expected to deliver a material contribution to the conservation of the marine ecosystem (and human health) by preventing microplastic pollution. Further, the measure is drafted in an origin-neutral manner. Any discrimination (that might arise from different production structures in the EU and importing Members) may be seen as a necessary result of the efforts to achieve the legitimate policy goal of environment protection.</p>
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5. Conclusions

Import or export restrictions on plastic products and plastic waste are, in most cases, in an initial conflict with the applicable WTO rules. Art. XI:1 GATT prohibits any measures with a limiting effect on the imports or exports of plastic, while Article 2.1 TBT Agreement and Articles I:1 and III:4 GATT require that trade-restrictive technical specifications are applied irrespective of the origin of the affected products.

Nevertheless, Members may take measures that deviate from WTO rules inasmuch as they are apt to protect public health and/or the environment. Important prerequisites to this end are that the implied trade-restrictions or discrimination serve the measures’ regulatory goal, and, whenever possible, follow upon negotiations with affected Members.

Accordingly, QRs and technical regulations on plastic products shall be applied in an origin-neutral way, and also affect domestic products. For example, Directive (EU) 2019/904 fulfils this requirement as the labeling requirement affects any products covered by the directive, irrespective of their origin. Trade restrictions on plastic waste, even if applied only to foreign products, may nevertheless seek justification unless they are applied in an arbitrary fashion.