

Trade Rules and International Hazardous Substance Regulation

An Inventory Focusing on Chemicals and Waste

Ole Kristian Fauchald



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Abstract

This report systematically explores the links between global regulation of hazardous substances and international trade rules. It offers an inventory covering the most relevant international regulation of hazardous substances, with a focus on hazardous chemicals and waste (the Basel Convention, the PIC Convention and the POPs Convention), and trade rules (the WTO Agreement). This report is part of the research project 'Toxics Diplomacy and Trade: Norway in International Cooperation concerning Hazardous Substances and Trade', and aims to identify issues that could become focal areas for the research project. The report identifies the following cases as being of particular interest to the project: (1) adding new chemicals to existing instruments; (2) implementation of existing instruments, with a focus on use of technical guidelines; (3) non-compliance mechanisms.

Key Words

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Contents

1	Introduction	1
2	Issues and Cases under the WTO	3
	2.1 The Trade and Environment Committee of the WTO (CTE)	3
	2.2 The Committee on Technical Barriers to Trade (TBT Committee)	5
	2.3 The Committee on Sanitary and Phytosanitary Measures (SPS Committee)	8
	2.4 Disputes	10
	2.5 WTO – some concluding remarks	11
3	Cases under the Basel Convention related to International Trade	13
	3.1 The Ban Amendment	13
	3.2 Article 11 agreements	14
	3.3 The Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention	14
	3.4 Development of technical guidelines	15
	3.5 Customs classification of hazardous wastes for trade purposes	18
	3.6 The Protocol on Liability and Compensation	18
	3.7 Partnerships	18
	3.8 Preliminary conclusions	19
4	Cases under the PIC Convention (Rotterdam Convention)	20
	4.1 Adding new chemicals to Annex III	21
	4.2 Chrysotile asbestos	22
	4.3 Intentional misuse	23
	4.4 Disagreement concerning decision-making	23
	4.5 The failure to establish an implementation / compliance mechanism	24
	4.6 Preliminary conclusions	24
5	Cases under the POPs Convention (Stockholm Convention)	25
	5.1 The establishment of a compliance mechanism	25
	5.2 Disagreement concerning decision-making	26
	5.3 Adding new chemicals to the annexes	26
	5.4 Further work on regulated substances	28
	5.5 The procedure under Article 3(2)(b) of the POPs Convention	29
	5.6 Adoption of guidelines (including standardized toolkits)	30
	5.7 Preliminary conclusions	30

6	Common Issues in the Three Chemicals Conventions	31
	6.1 Non-compliance	31
	6.2 Relationship to the WTO	31
7	Conclusions	32

1 Introduction

This report systematically explores the links between global regulation of hazardous substances and international trade rules. It offers an inventory covering the most relevant international regulation of hazardous substances, with a focus on hazardous chemicals and waste, and trade rules. This report is part of the research project ‘Toxics Diplomacy and Trade: Norway in International Cooperation concerning Hazardous Substances and Trade’, and aims to identify issues that could become focal areas for the research project.

The main issue addressed in the research project is how Norway participates in increasingly complex international cooperative efforts to pursue its national goals and interests in reducing the import of hazardous substances, with particular attention to trade-related measures. This general topic may be divided into two main sub-points: (1) analysis of Norway’s participation and influence in key international cooperative efforts concerning hazardous substances and its interface with trade concerns and commitments; (2) analysis of the synergies and tensions between particularly relevant international institutions, and the effects of this institutional interplay on Norway’s room for manoeuvre in developing and implementing measures to reduce its exposure to hazardous substances.

A working hypothesis is that Norway’s ability to influence decisions taken by other states and actors depends on, *inter alia*, the following factors:

- a) The degree to which different branches of government have been able to co-ordinate their positions so as to frame a solid and coherent foreign environmental policy.
- b) The more active a state is in furthering its interests in the core regime in question (for example, by taking a leadership role) the greater the probability of success in ‘uploading’ its goals to the international level.
- c) The extent of success depends on how compatible Norway’s goals and interests are with those of other, more influential states.

The cases selected for further study should contribute to clarify the relative importance of the above factors. They should also contribute to our understanding of how international commitments regarding hazardous substances can be implemented more effectively, as well as how to approach future challenges regarding international regulation of hazardous substances.

Attention will be paid to certain substances representing ‘old’ problems, such as mercury, as well as ‘new’ problems like brominated flame retardants. Also in focus are substances imported into Norway through international trade, and substances discharged into the environment outside Norway, and for which Norway has expressed interest in promoting international regulation. While a broad range of substances can be and are regarded as hazardous, this report concentrates on a somewhat

narrower sub-set of such substances: chemicals and waste that are toxic. We will not deal with nuclear substances, nano-materials, genetically modified organisms or ozone-depleting substances. Against this background, this study focuses on the following multilateral environmental agreements (MEAs):

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), 1989.
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), 1998.
- Stockholm Convention on Persistent Organic Pollutants (POPs Convention), 2001.

In addition, the ongoing negotiations of a legally binding instrument on mercury, initiated by the Governing Council of UNEP in 2009, are of particular interest.¹

The project concerns trade-related measures. In light of international trade rules, the Agreement Establishing the World Trade Organization (WTO Agreement) in particular, we apply a broad definition of ‘trade-related’ measures. In addition to measures directly aimed at import and export, these may include measures related to production of the substance, use of the substance in production processes, consumption, transport, measures to impose responsibility and liability for harmful effects of the substance, subsidies of less harmful substitutes, and public–private partnership activities. International trade law contains rules regarding:

- non-discrimination, including explicit and implicit discrimination (in particular the General Agreement on Tariffs and Trade (GATT) articles I and III and the General Agreement on Trade in Services (GATS) article XVI),
- duties to avoid unnecessary trade restrictions (the Agreement on Technical Barriers to Trade (TBT Agreement) article 2.2 and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) article 2.2),
- duties to base national rules on international standards (in particular the TBT Agreement article 2.4 and the SPS Agreement article 3.1),
- subsidies and dumping (GATT articles III, VI and XVI, the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)),
- monopolies (GATT article XVII, GATS article VIII and the Anti-Dumping Agreement).

¹ See www.chem.unep.ch/mercury/OEWG/Meeting.htm.

2 Issues and Cases under the WTO

2.1 The Trade and Environment Committee of the WTO (CTE)

The original work programme of the CTE from 1994 included ten items. Of these, the following are of interest to this project (the order is intended to indicate their relative importance to the project):²

Item 7 – *Domestically prohibited goods*: This item concerns of export of domestically prohibited goods (DPGs), hazardous waste in particular. This item has remained dormant in the CTE since 2001.³ A main focus of the CTE has been on work within the UN on a Consolidated List of Products Whose Consumption and/or Sale have been Banned, Withdrawn, Severely Restricted or not Approved by Governments.⁴

Item 3 – *How taxes and other environmental requirements fit in*: This item concern the relationship between the provisions of the multi-lateral trading system and (a) charges and taxes for environmental purposes; (b) requirements for environmental purposes relating to products, such as standards and technical regulations, and packaging, labelling and recycling requirements. The latter item is of particular interest to this project. This item is on the agenda of the Doha Round (see below, para. 32(iii)), and its main focus has been eco-labelling.

Items 1 and 5 – *Trade rules, environmental agreements and disputes*: These items concern the relationship between the rules of the multilateral trading system and the trade measures contained in multilateral environmental agreements (MEAs), and between their dispute settlement mechanisms. This item is on the agenda of the Doha Round (see below, para. 31(i)). One document of interest to this study is the Matrix on Trade Measures Pursuant to Selected Multilateral Agreements.⁵

Item 2 – *Environmental protection and the trading system*: This item concerns the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system. This item is on the agenda of the Doha Round and has been re-formulated to concern technical assistance and capacity building in the field of trade and environment to developing countries.

² For an overview of documents circulated in the CTE as of 5 November 2010, see WTO doc. WT/CTE/INF/5/Rev.9. WTO documents can be accessed here: http://docsonline.wto.org/gen_home.asp.

³ The last document of interest circulated by the WTO Secretariat, WTO doc. WT/CTE/W/161 (2 October 2000).

⁴ The most recent list of chemicals (another list exists for pharmaceuticals) was issued by UNEP in 2010 and can be accessed here: www.chem.unep.ch/Legal/ECOSOC/UNEP%20Consolidated%20List%2010%20May%202010.pdf.

⁵ WTO doc. WT/CTE/W/160/Rev.4 (14 March 2007). It contains information concerning trade-related measures under the three chemicals treaties.

Item 9 – *Services*: This item covers the work programme envisaged in the Decision on Trade in Services and the Environment, and may be of relevance to the extent that waste treatment is covered by the GATS. This item has been dormant in the CTE since 2002, and is currently being dealt with in the services negotiations of the WTO.⁶

The Doha Ministerial Declaration, adopted in 2001, changed the mandate of the CTE.⁷ According to this declaration, the CTE is to have a special role as a forum of negotiations. The topics for which the CTE is responsible and which are particularly relevant for this project are set out in paras. 31 to 32 of the Doha Declaration:

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of

⁶ For a report on progress in these negotiations, see WTO doc. WT/CTE/GEN/11/Suppl.1 (11 October 2005).

⁷ See www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

The Hong Kong Ministerial Declaration (2005) took stock of the status of negotiations and instructed the CTE to continue and finalize its work on the three topics mentioned in para. 31.

None of the three chemicals treaties has achieved observer status at the CTE. The Basel Convention and the Rotterdam Convention requested observer status in 2007 and 2009, respectively.⁸ In general, the activity of the CTE has been reduced significantly, from an average of six meeting days per year between 2000 and 2005 to an average of two meeting days per year from 2006 to 2010.

Against this background, it is tentatively concluded that the following topics on the agenda of the CTE might be of particular interest to the project:

1. Norwegian positions and results achieved in the CTE in relation to 'International trade in domestically prohibited goods'. This item has been a high priority of developing countries, and has met with considerable resistance among developed countries. Discussions on this topic in the WTO can be characterized as unsuccessful from an environmental perspective.
2. The role of the three main chemicals conventions in the CTE, including discussions concerning observer status and how they have been dealt with in discussions and reports. These issues are of relevance to items 1 and 5.

It is suggested that labelling issues would be of more interest in relation to the TBT Agreement (see below), while taking into account relevant discussions in the CTE.

2.2 The Committee on Technical Barriers to Trade (TBT Committee)

The following preliminary assessment of issues addressed by the TBT Committee is based on a reading of the summary records of meetings during the years 2005–10.⁹ Summary records from one recent meeting were not available.¹⁰ In addition, a document setting out decisions by the TBT Committee has been examined.¹¹ No decisions of specific interest to the project were identified, but the decisions may be of general interest.

⁸ See WT/CTE/COM/13 and WT/CTE/COM/14, respectively.

⁹ See WTO documents from G/TBT/M/35 to G/TBT/M/51.

¹⁰ The meeting for which records were to be published in G/TBT/M/50.

¹¹ G/TBT/1/Rev.9.

The main issue discussed by the TBT Committee during this period was EU's REACH rules. A broad range of countries raised several different concerns regarding various aspects of REACH, and the topic figured on the agenda of all meetings.¹² In addition, other EU rules concerning chemicals were prominent in the discussions of the Committee, including in particular:

Directive 2002/95/EC on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and Directive 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE) (G/TBT/N/EEC/247 and G/TBT/Notif.00/310, Corr.1).¹³

European Communities – Dangerous Chemical Substances: Draft Commission Directive amending, for the 30th time, Council Directive 67/548/EEC (G/TBT/N/EEC/151 and Add.1–2) and European Communities – Dangerous Chemical Substances; Draft Commission Directive amending, for the 31st time, Council Directive 67/548/EEC (G/TBT/N/EEC/212 and Add.1–3)¹⁴

In addition, there were brief discussions of some other EU-related issues.¹⁵

Two issues were raised in relation to *Norwegian* regulation of hazardous substances during the period examined: Norway – Proposed regulation concerning specific hazardous substances in consumer products (G/TBT/N/NOR/17), which concerned prohibition of 10 hazardous sub-

¹² See G/TBT/M/51, paras. 39–68 and 88–109, G/TBT/M/49: paras. 45–78, 87–93 and 101 ff., G/TBT/M/48 paras. 87–108, G/TBT/M/47 paras. 167–203, G/TBT/M/46 paras. 145–202, G/TBT/M/45 paras. 32–65, G/TBT/M/44, G/TBT/M/43 paras. 23–43, paras. 109–49, G/TBT/M/42 paras. 84–96, G/TBT/M/41 paras. 23–59, G/TBT/M/40 paras. 43–52, G/TBT/M/39 paras. 45–52, G/TBT/M/38 paras. 66–76, G/TBT/M/37 paras. 25–32, G/TBT/M/36 paras. 10–17, G/TBT/M/35 paras. 15–24. On issues up until 2008, see www.wto.org/english/news_e/news08_e/tbt_20march08_e.htm.

¹³ See G/TBT/M/51, paras. 69–79, G/TBT/M/49 paras. 87–93, G/TBT/M/48 paras. 109–21, G/TBT/M/47 paras. 98–104 and G/TBT/M/46 paras. 275–83, G/TBT/M/45 paras. 158–60, G/TBT/M/44 paras. 155–8, G/TBT/M/39 paras. 62–3, G/TBT/M/36 paras. 23–9.

¹⁴ See G/TBT/M/48 paras. 137–72, G/TBT/M/47 paras. 115–66, G/TBT/M/46 paras. 46–127 and G/TBT/M/45 paras. 76–106, G/TBT/M/44 paras. 57–108, G/TBT/M/43 paras. 83–102, G/TBT/M/42 paras. 29–48.

¹⁵ European Communities – Decision on Restrictions of the Marketing and Use of Organostannic Compounds (G/TBT/N/EEC/244 and Add.1): G/TBT/M/49 para. 226 and G/TBT/M/48 paras. 16–18; European Communities – Biocide Dimethylfumarate (G/TBT/N/EEC/258 and Add.1): G/TBT/M/48 paras. 19–20; European Communities – Napropamide (G/TBT/N/EEC/203): G/TBT/M/46 paras. 21–2; European Communities – Batteries (G/TBT/N/EEC/98): G/TBT/M/39 paras. 11–12.

stances in consumer products;¹⁶ and Norwegian restrictions on the use of deca-bromo diphenylether (G/TBT/N/NOR/6, Add.1).¹⁷

It might also be of interest that several issues concerning hazardous substances were raised in relation to China.¹⁸ Some issues concerning regulation of chemicals that might be used for terrorist purposes were also brought on the agenda of the TBT Committee.¹⁹ Few other issues concerning hazardous substances were on the agenda during the meetings examined; notably, the TBT Committee did not deal with any significant case concerning labelling issues.

Against this background, it is tentatively concluded that the following topics on the agenda of the TBT Committee might be of particular interest:

1. The TBT Committee's discussions of initiatives under REACH; it might be especially interesting to examine whether and how these discussions have influenced the design and implementation of REACH. It may also be of interest to examine which countries were particularly active during these discussions and which aspects of REACH had given rise to their concerns. These issues could be addressed in light of Norwegian considerations of REACH.
2. The TBT Committee's discussions of the two Norwegian notifications; it might of interest to examine how the discussions of the TBT have affected Norwegian policy regarding the substances in question

¹⁶ See G/TBT/M/48 paras. 173–6, G/TBT/M/47 paras. 204–8 and G/TBT/M/46 paras. 257–74, G/TBT/M/45 paras. 151–6, G/TBT/M/44 paras. 150–4, G/TBT/M/43 paras. 12–18.

¹⁷ G/TBT/M/45 para. 157, G/TBT/M/44 paras. 188–92, G/TBT/M/43 paras. 65–6, G/TBT/M/42 paras. 97–100, G/TBT/M/41 paras.70–1, G/TBT/M/40 paras. 82–3, G/TBT/M/39 paras. 23–6, G/TBT/M/38 paras. 5–10. See also Sweden – Restrictions on the use of Deca-bromo diphenylether (deca-BDE) (G/TBT/N/SWE/59): G/TBT/M/45 paras. 114–18, G/TBT/M/44 paras. 184–7, G/TBT/M/43 paras. 61–4, G/TBT/M/42 paras. 101–2, G/TBT/M/41 paras. 67–9, G/TBT/M/40 paras. 29–35, G/TBT/M/39 paras. 34–7, G/TBT/M/38 paras. 11–13.

¹⁸ China – Draft Standards on Lithium Batteries for Mobile Phones: G/TBT/M/45 paras. 161–3, G/TBT/M/44 paras. 208–11; China – Revision of the list of toxic chemicals severely restricted in the People's Republic of China in the regulation for environmental management on the first import of chemicals and the import and export of toxic chemicals: G/TBT/M/45 paras. 183–5, G/TBT/M/44 paras. 193–5, G/TBT/M/41 paras. 72–4, G/TBT/M/40 paras. 53–6, G/TBT/M/39 paras. 53–6, G/TBT/M/38 paras. 25–31; China – Administration on the Control of Pollution Caused by Electronic Information Products (G/TBT/N/CHN/140 and Add.1): G/TBT/M/44 paras. 204–5, G/TBT/M/42 paras. 75–6, G/TBT/M/41 paras. 10–11, G/TBT/M/40 paras. 39–40, G/TBT/M/39 paras. 57–60, G/TBT/M/38 paras. 81–4, G/TBT/M/37 paras. 3–4; China – Measures on the Environmental Management of New Chemical Substances (G/TBT/N/CHN/210): G/TBT/M/41 paras. 81–2, G/TBT/M/40 paras 27–8.

¹⁹ Germany – Changes in the Prohibition of Chemicals Ordinance: G/TBT/M/45 paras. 15–17; United States – Chemical Facility Anti-Terrorist Regulation: G/TBT/M/45 paras. 107–11, G/TBT/M/44 paras. 10–18.

and whether the discussions might have had any spill-over effects for Norwegian policy regarding other hazardous substances.

3. The TBT Committee's discussions of initiatives under the Directive on Dangerous Chemical Substances, Council Directive 67/548/EEC; as there has been considerable attention regarding this Directive in the TBT Committee, it might be of interest to examine whether and how discussions in the TBT Committee might have affected initiatives taken under the Directive, in light of Norwegian interests.

2.3 The Committee on Sanitary and Phytosanitary Measures (SPS Committee)

This preliminary assessment of issues considered by the SPS Committee is based on overviews of 'specific trade concerns' prepared by the WTO Secretariat, as well as a reading of summary records of SPS Committee meetings during the years 2008 to 2010. According to the general overviews issued by WTO Secretariat:

Altogether, 312 specific trade concerns were raised in the sixteen years between 1995 and the end of 2010. ...

Overall, 28 per cent of trade concerns relate to food safety concerns, 25 per cent relate to plant health, and six per cent concern other issues such as certification requirements or translation. Forty-one per cent of concerns raised relate to animal health and zoonoses.²⁰

Food safety concerns cover toxic substances such as chemicals and pesticides. Concerns regarding food additives and genetically modified organisms, which are not relevant for the purposes of this project, represent a significant share of the cases related to food safety. Main cases of interest to this project, as extracted from the Secretariat's overviews, include the following.²¹

Specific trade concern number	Description of measure	Member(s) maintaining the measure	Member(s) raising the issue
11	Restrictions on levels of copper and cadmium in imported squid	Spain, EU	USA
31	Rules on 'specified risk materials' in products of animal origin	EU	USA
63	Information on dioxin	Not provided	EU
64	Ban on antibiotics in feed	EU	USA
66	Notifications related to dioxin	Malaysia, Singapore	Switzerland
78	Notification on methyl bromide	Australia	EU
94	Directive 2000/42 on pesticide residues	EU	Côte d'Ivoire
131	Pesticide and antibiotic limits in honey (Directive 96/23)	EU	Cuba

²⁰ G/SPS/GEN/204/Rev.11 paras. 7–8.

²¹ Extracted from G/SPS/GEN/204/Rev.11 pp. 6–22, and further refined on the basis of information set out in G/SPS/GEN/204/Rev.11 /Add.1–3. This list is not exhaustive of all potentially relevant cases.

Specific trade concern number	Description of measure	Member(s) maintaining the measure	Member(s) raising the issue
169	EC proposed regulation on maximum residue levels of pesticides	EU	Argentina, China
179	Guidelines for maximum residue level (MRL) testing	Korea	USA
191	Maximum residue levels for pesticides on food	EU	China
207	Directives on residual pesticide tolerance and inspection methods for tea	EU	China
212	Positive list system for pesticides, veterinary drugs and feed additives MRLs	Japan	China, USA
215	Public Health Regulation 11 ²²	Thailand	USA
246	Import restrictions on products of animal origin due to dioxin	China	EU
250	Trade restrictions related to national systems for determining maximum residue levels (MRLs) for pesticides	Not provided	Argentina
264	Maximum residue levels for Ethephon in pineapple	EU	Ecuador
267	Pesticide maximum residue level (MRL) enforcement system	Japan	USA
276	Maximum residue levels for pesticides in cacao	EU	Ecuador
283	Pesticide maximum residue levels (MRLs)	Japan	Brazil
304	Proposed MRL for 1-Methylcyclopropene in bananas	Canada	Ecuador
306	Maximum residue levels of pesticides	EU	India

Only one case brought up before the Committee concerned a measure taken by Norway, and that case is of no interest to the project.²³ Against this background, we can observe that the main trade concerns raised in the SPS Committee have related to residue levels of pesticides and toxic chemicals in food and feed. The reading of summary records of the SPS Committee meetings indicates that few of the relevant topics have been subject to in-depth discussions.

In addition to the above specific trade concerns, the following more general topics might be of some interest: the relationship to standard-setting inter-governmental organizations ('the Three Sisters': the International Plant Protection Convention, the Codex Alimentarius Commission, and the International Office of Epizootics)²⁴ and to private standards. The

²² For further details, see G/SPS/GEN/204/Rev.11/Add.2 paras. 705–12.

²³ See G/SPS/GEN/204/Rev.11/Add.3 paras. 238–9.

²⁴ See G/SPS/R/57 para. 20: priority issues in the SPS Committee: '(1) enhance the coordination between the SPS Committee and Three Sisters, and between the Three Sisters themselves; (2) increase the use and usefulness of international

relationship to the Three Sisters has been somewhat controversial – in particular in the field of genetically modified organisms, where the Biosafety Protocol to the Convention on Biological Diversity can be regarded as a ‘competing’ standardizing institution. Similar issues can be raised concerning the relationship between the Codex Alimentarius Commission and the Rotterdam Convention.

In conclusion, the following topics on the agenda of the SPS Committee might be of particular interest:

1. Maximum residue limits of pesticides; potentially relevant measures include those taken by the EU²⁵ and Japan.²⁶ According to information in the documents, Norway was not actively involved in any of these cases.
2. The relationship between the SPS Agreement and standard-setting intergovernmental organizations. This topic is also relevant for the TBT Agreement, but might be of more interest in relation to the SPS Agreement.

2.4 Disputes

The trade concerns brought before the TBT and SPS Committees sometimes lead to dispute settlement proceedings. However, although a total of 423 cases had been brought to such proceedings by March 2011, none of the specific cases identified above led to such proceedings.

Among the WTO disputes the following are of interest to the project:²⁷

DS2 , DS4	United States of America — Standards for Reformulated and Conventional Gasoline (Complainants: Venezuela and Brazil)	24 January 1995
DS26 , DS48	European Communities — Measures Concerning Meat and Meat Products (Hormones) (Complainants: United States of America and Canada)	26 January 1996
DS135	European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complainant: Canada)	28 May 1998
DS232	Mexico — Measures Affecting the Import of Matches (Complainant: Chile)	17 May 2001
DS291 , DS292 , DS293	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainants: United States of America, Canada and Argentina)	13 May 2003
DS320	United States of America — Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: European Communities)	8 November 2004
DS321	Canada — Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: European Communities)	8 November 2004

standards; (3) avoid unnecessary duplication of effort; and (4) ensure that the standard-setting process is in line with the implementation of the SPS Agreement, and facilitates trade in agriculture and food products.’

²⁵ For further details, see G/SPS/GEN/204/Rev.11/Add.1 paras. 74–6 and G/SPS/GEN/204/Rev.11/Add.2 paras. 274–5.

²⁶ For further details, see G/SPS/GEN/204/Rev.11/Add.1 paras. 143–66 and G/SPS/GEN/204/Rev.11/Add.2 paras. 544–56

²⁷ This list of disputes has been extracted from the general list of WTO disputes, available at: www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

DS332	Brazil — Measures Affecting Imports of Retreaded Tyres (Complainant: European Communities)	20 June 2005
DS421	Moldova — Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge) (Complainant: Ukraine)	17 February 2011

In addition, among the 101 cases dealt with under the former GATT 1947, the following are of some interest:²⁸

[United States – Taxes on petroleum and certain imported substances \(Superfund\) \(BISD 34S/136\)](#)

[Thailand – Restrictions on importation of and internal taxes on cigarettes \(BISD 37S/200\)](#)

Only three of the above disputes are of direct relevance to the project in that they concern policy measures (taxes, subsidies and import restrictions) related to hazardous substances. These three are the Superfund Case from 1987, the case concerning import of matches from 2001 and the Environmental Charge Case from 2011. The Superfund Case is rather old; the dispute concerning import of matches was terminated before a panel had been established; and the Environmental Charge Case is very recent and therefore of limited interest. Hence, none of these cases seems suitable for further study in connection with the project.

The other cases are of indirect interest as they concern topics, policy measures and trade rules (such as article XX of GATT) that are closely related to hazardous substances. Most of the cases have already been extensively analysed and debated, and can primarily serve as sources of legal arguments when analysing the relationship between the WTO rules and hazardous chemicals and waste.

Against this background, it is tentatively concluded that none of the more than 500 disputes dealt with in the WTO and the former GATT are of interest as case studies for the project. Nevertheless, some cases represent important points of reference for case studies to be undertaken.

2.5 WTO – some concluding remarks

The inventory above has identified seven issues of potential interest as cases for studying the relationship between the international trade regime and regimes dealing with environmental problems associated with hazardous substances. In further considering these issues, we need to take into account the extent to which Norway has been actively involved in international cooperative efforts concerning trade commitments, as well as any tension between relevant international institutions and the effects of this institutional interplay on Norway's room for manoeuvre.

²⁸ A list of disputes can be found here:
www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm.

The extent to which Norway has been directly involved in the cases identified above varies considerably. While Norway has participated actively in the activities of the CTE, it has been much less actively involved in the relevant cases before the TBT and SPS Committees. As Norway has invested significant resources in pursuing issues in the CTE, it might be of particular interest to study Norway's success or lack of success in such efforts.

Only two Norwegian cases of interest have been on the agenda of the TBT Committee. No other relevant cases or disputes have been brought against Norway. Cases concerning rules that form part of the Agreement on the European Economic Area (1992), such as the REACH and other EU Directives concerning hazardous substances, would be of some interest to the project. Norway and the EU would normally have parallel interests in such cases, but in some instances Norway's interests might differ from those of the EU.

Against this background, the following cases should be further considered as being of particular relevance to the project:

1. Norwegian positions as well as results achieved in the CTE in relation to 'International trade in domestically prohibited goods'. This item has been a high priority of developing countries, and has encountered considerable resistance among developed countries. These issues have also been high on the agenda of Norway, but Norway does not seem to have been particularly active in supporting the position of developing countries during relevant discussions in the CTE. The interaction involving the WTO, UNEP and WHO is of particular relevance here, and it might be of interest to examine Norwegian strategies and achievements while taking into account all three international actors. This case could also be linked up with the question concerning recognition of international standardizing bodies under the SPS (and TBT) Agreement(s).
2. The TBT Committee's discussions of initiatives under REACH; it might be particularly interesting to examine whether and how these discussions have influenced the design and implementation of REACH. It may also be pertinent to examine which countries were particularly active during these discussions and which aspects of REACH had given rise to their concerns. These issues could be addressed in light of Norwegian considerations and implementation of REACH, as well as the flexibility enjoyed by Norway in implementing stricter policies than the EU.
3. The TBT Committee's discussions of the two Norwegian notifications; it might be pertinent to examine how the discussions of the TBT have affected Norwegian policy regarding the substances in question and whether the discussions have had any spill-over effects for policy regarding other hazardous substances. As there does not seem to be much material of interest in relation to these cases, such a case study would probably be limited.

3 Cases under the Basel Convention related to International Trade

This preliminary assessment of issues under the Basel Convention is based primarily on issues that were on the table during COP IX of the Basel Convention in Indonesia in 2008.²⁹

3.1 The Ban Amendment

The Ban Amendment was adopted at COP III (decision III/1, 1995). The amendment inserts a new article 4A which prohibits the transboundary movement of hazardous wastes from the Annex VII countries ('members of OECD, EC, Liechtenstein') to other countries.³⁰ This prohibition was to apply to shipments of hazardous waste for resource recovery and recycling, as well as for final disposal. At COP IV, decision IV/8 stated that the content of Annex VII would not be re-opened until the Ban Amendment had entered into force. The Ban Amendment remains to this day a highly controversial issue under the Basel Convention. It gives rise to the following issues in particular:

1. Interpretation of Art. 17.5 of the Convention concerning amendments to the Convention.³¹ One recent COP decision of interest in this regard is decision IX/25. The disagreement among the parties to the Basel Convention concerns how many states must ratify the amendment before it can enter into force.
2. The relationship between the Ban Amendment and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991). The Bamako Convention was adopted by African countries as a response to what they perceived as weaknesses under the Basel Convention. The Basel Convention was to a significant extent based on work undertaken in the OECD.
3. The debate on the Ban Amendment gained renewed attention due to the dumping of hazardous wastes in Côte d'Ivoire in 2006.³²

²⁹ For the report from COP IX, see UNEP/CHW.9/39.

³⁰ The wording of Article 4A: '1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII. '2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1, paragraph 1 (a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movements shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention.'

³¹ See Report COP IX paras. 69–71.

³² See COP decision VIII/1 and UNEP News Release 2006/58, available at www.unep.org/documents.multilingual/default.asp?DocumentID=485&ArticleID=5430&l=en.

COP IX launched a process designed to address the deadlock on the Ban Amendment: see Decision IX/26 on the way forward and the annex containing the President's statement concerning the Ban Amendment. The focus seems to be shifting from entry into force of the amendment to achieving the objective of the Ban Amendment through other policy initiatives. Norway has been a strong supporter of the Ban Amendment in various fora, including in the OECD Committee on Trade and Environment in the late 1990s.³³ The changing status, policies and interests of the 'BRIC' countries (Brazil, Russia, India and China) is a factor of increasing significance.

3.2 Article 11 agreements

According to article 11 of the Basel Convention:

Notwithstanding the provisions of Article 4 paragraph 5 [A Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.], Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.

Such agreements, which may be bilateral or regional, can be used to weaken or strengthen trade restrictions imposed by the Basel Convention, but shall not 'derogate from the environmentally sound management of hazardous wastes'. Such agreements have proven controversial, and there has been considerable fear that they could be used to circumvent the trade restrictions of the Basel Convention, undermining its effectiveness. One important issue has been the relationship to non-parties to the Basel Convention, mainly the USA. As yet, there are nine regional agreements, some of which are stricter than the Basel Convention, and 13 bilateral agreements, including agreements between the USA and five parties to the Basel Convention.³⁴

3.3 The Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention (*Implementation and Compliance Committee*)

COP decision IX/2 contains the work programme of the Implementation and Compliance Committee for 2009-11. It focuses on:

³³ See in particular OECD, Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, OECD doc. COM/ENV/TD(97)41/FINAL, available at www.oecd.org/dataoecd/5/55/36789048.pdf

³⁴ Information concerning agreements, including texts of the agreements, is available at www.basel.int/article11/multi.html and www.basel.int/article11/bilateral.html.

- review of notifications transmitted by parties which prohibit the import of hazardous wastes or other wastes for disposal, and those which prohibit or do not permit the export of hazardous wastes and other wastes, under article 4(1)(a) and (b) of the Convention;
- review and assessment of the application of the control system for the transboundary movement of wastes (notification document and movement document) and the difficulties that parties face in implementing the system;
- assessment of the compliance and implementation status of specified obligations of the parties under articles 3, 4, 5 and 6 of the Basel Convention;
- addressing the existing shortcomings and limitations in relation to the lack of specific submissions to the Committee: at the time of the convening of the sixth session of the Committee on 28 February 2008, the Committee had not received any specific submissions from parties.

Against this background, it may be of particular interest for the project to examine the extent to which the Committee has been more effective after COP IX, and whether trade-related issues have been of importance to the Committee. Moreover, this Committee is the only implementation or compliance committee to have been established among the ‘chemicals conventions’. Efforts to establish such committees under the other conventions have proven unsuccessful and controversial. The experiences of the Implementation and Compliance Committee, as well as Norwegian positions on the establishment of such committees under the other conventions (see below), could be the basis for a case study of cross-cutting interest.

3.4 Development of technical guidelines

The Basel Convention has been undertaking significant work to develop technical guidelines.³⁵ Of interest in this context would be to examine the relationship between such guidelines and trade issues. Such guidelines under the Basel Convention are of particular relevance in relation to the TBT Agreement and the General Agreement on Trade in Services (GATS).

Cases that may be of interest include:

1. Mercury:

As indicated in the introduction, there are ongoing negotiations on a legally binding instrument on mercury, initiated by the Governing Council of UNEP in 2009.³⁶ The decision to negotiate a separate treaty rather than dealing with mercury as part of existing treaties may be of significant interest. The role played by trade issues in this

³⁵ See www.basel.int/techmatters/index.html.

³⁶ See www.chem.unep.ch/mercury/OEWG/Meeting.htm.

process is unclear. According to the mandate for the negotiations, the instrument shall include provisions to ‘reduce international trade in mercury’.³⁷ Moreover, the Negotiation Committee is to consider: ‘Technical and economic availability of mercury-free alternative products and processes, recognizing the necessity of the trade in essential products for which no suitable alternatives exist and to facilitate the environmentally sound management of mercury’.³⁸

There are two recent initiatives under the Basel Convention that are of particular relevance as regards mercury. Decision IX/15 concerning technical guidelines on the environmentally sound management of mercury wastes states the following: ‘*Welcoming* the contributions by the Chemicals Branch of the Division of Technology, Industry and Economics of the United Nations Environment Programme, Norway and the United States of America to capacity-building pilot projects in which the draft technical guidelines on the environmentally sound management of mercury wastes will be tested’. While Norway has thus been active in promoting the draft guidelines, Japan serves as the lead country.³⁹ Moreover, decision IX/7 concerning the Convention Partnership Programme workplan for 2009–2011 includes a focus on a ‘Mercury Partnership’: ‘(a) Explore linkages to activities and mechanisms under development as part of the UNEP Global Mercury Partnership. (b) Investigate with Parties the role of the Secretariat and Parties under the Partnership. (c) Continue participating in the United Nations Environment Programme Global Mercury Partnership and carrying out capacity-building projects, as funding permits.’

The relationship between the Basel Convention and the new instrument on mercury remains unclear. Moreover, Norway has demonstrated considerable interest in contributing to the development of international rules on mercury. Trade issues are likely to play an important role in many aspects of the negotiations, the division of labour among relevant institutions, and the results of the negotiations.

2. Brazil’s WTO dispute concerning retreaded tyres, see WTO dispute no. 332 above:

The panel and the Appellate Body concluded that the Brazilian measures violated articles III:4 and XI of GATT, and that they could not be justified under article XX(b). Brazil was required to bring its measures into conformity with the GATT by the end of 2008. Brazil has reported compliance with the decision of the Dispute Settlement Mechanism.⁴⁰

The same issue was brought onto the agenda of the Basel Convention by Brazil, and resulted in decision IX/14: Environmentally sound management of used tyres. Draft revised technical guidelines on the

³⁷ See UNEP, Report of the Governing Council, Twenty-fifth session (16–20 February 2009), doc. A/64/25, decision 25/5 para. 27(d). Available at www.chem.unep.ch/mercury/GC25/GC25Report_English_25_5.pdf.

³⁸ *Ibid.* para. 28(c).

³⁹ Information on the work: www.basel.int/techmatters/index.html.

⁴⁰ See www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

environmentally sound management of used tyres have been submitted to parties to the Basel Convention for comments.⁴¹

This might be an interesting case illustrating the interaction between the WTO and the Basel Convention, as well as the role of technical guidelines under the Basel Convention and their relationship to the TBT Agreement. Norway was not a third party to the dispute,⁴² nor is there any sign in the materials examined to indicate that Norway has taken a particular interest in the matter.

3. The Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Waste (e-wastes workplan): COP decision IX/6:

COP VIII adopted a work plan to prepare technical guidelines on transboundary movements of e-waste, with a particular focus on the distinction between waste and non-waste. For these purposes the COP established an Open-ended Working Group.⁴³ The Declaration adopted at COP IX represents a preparation of technical guidelines for the environmentally sound management of e-waste. It provides for the 'development of pilot projects ... collection and take-back systems and the environmentally sound reuse, refurbishment and recycling of e-waste, in particular in developing countries and countries with economies in transition'. Draft technical guidelines on the transboundary movements of e-waste were submitted to parties for their comment in February 2011.⁴⁴

In addition, an ad hoc follow-up group on mobile phones has been established.⁴⁵ Its tasks include the active dissemination of guidelines. COP decision IX/8 notes the 'significant efforts made by Parties, signatories, industry, non-governmental organizations and other stakeholders to prepare ... an overall guidance document on environmentally sound management of used and end-of-life mobile phones'. Moreover, the COP adopted, 'without prejudice to national legislation, sections 1–3 and 5 of the guidance document on environmentally sound management of used and end-of-life mobile phones, as a voluntary document'.

The overview above shows that initiatives to develop technical guidelines are a high priority under the Basel Convention. Several of these guidelines are of importance to transboundary movement of hazardous wastes, and thus of relevance to the TBT Agreement and GATS. The cases of greatest interest to this project seem to be those concerning mercury and used tyres.

⁴¹ Information concerning further work on these Guidelines is available here: www.basel.int/techmatters/index.html. The Draft Guidelines are available here: www.basel.int/techmatters/utyres/guidelines/2011-02-28.doc

⁴² The following countries were third parties: Argentina, Australia, China, Cuba, Guatemala, Japan, Republic of Korea, Mexico, Paraguay, Chinese Taipei, Thailand and the USA.

⁴³ See decision VIII/2, para 3 (a).

⁴⁴ See www.basel.int/techmatters/index.html.

⁴⁵ See www.basel.int/industry/mppi.html.

3.5 Customs classification of hazardous wastes for trade purposes

Customs classification of goods for environmental purposes has been on the agenda of the WTO and the OECD for several decades. These efforts have been closely linked to searches for ‘win–win’ trade liberalization, i.e. liberalization that would benefit both international trade and the environment.⁴⁶ By contrast, customs classification of hazardous wastes pursues a different objective: to provide an effective basis for controlling international trade in such matters. The objective here is not liberalization, but trade restriction.

COP decision IX/19 on Review of cooperation with the World Customs Organization and its Harmonized System Committee pursuant to decision VIII/20: ‘*Also requests* the Secretariat to continue to move forward, under the guidance of the Open-ended Working Group, with the issue of the identification of the wastes covered by the Basel Convention in the World Customs Organization Harmonized Commodity Description and Coding System and to report regularly to the Open-ended Working Group and the Conference of the Parties on progress’. While such classification measures might be important for the effectiveness of trade measures when applied in practice, this is a technical exercise that gives rise to few political issues of general significance.

3.6 The Protocol on Liability and Compensation

The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal was adopted in 1999. As of the end of 2010, only ten states had accepted the Protocol, which will enter into force when 20 states accept it. COP decision IX/24 ‘*Calls upon* Parties to continue to consult at the national and regional levels with a view to determining possible means of overcoming perceived obstacles to ratification of the Protocol, including in respect of the requirement for insurance, bonds or other financial guarantees under article 14 of the Protocol.’ In contrast to Denmark, Sweden and Finland, Norway has not even signed the Protocol. The scepticism of states to undertake treaty obligations regarding liability and compensation is a general phenomenon of international environmental law, so it seems unlikely that the current situation of the Protocol is related to trade issues.

3.7 Partnerships

Numerous decisions of the Basel Convention COP prepare the ground for effective partnerships between the Convention and countries not parties to the Convention, institutions and private parties. These include:

- Decision VIII/5, which established the Basel Convention Partnership Programme.
- Decision IX/3, para. 3, which ‘*Invites* Parties, non-Parties, intergovernmental organizations, members of the industry and business sec-

⁴⁶ See para. 31(iii) of the Doha Declaration, as set out above.

tors and non-governmental organizations to provide financial resources or in-kind assistance to countries that need support in implementing the current Strategic Plan and developing a new strategic framework⁷.

- Decision IX/7, which sets out the Convention Partnership Programme workplan for 2009–2011.
- Decision IX/9, which provides for a Partnership for Action on Computing Equipment (PACE).⁴⁷

There are also relevant initiatives regarding mobile phones and mercury. While these initiatives may have some trade-related aspects, they do not currently seem to be of particular interest from the perspective of the project.

3.8 Preliminary conclusions

Against this background, the following cases should be further considered as being of particular interest to the project:

1. The Ban Amendment has been high on the agenda of the Basel Convention for almost two decades, and remains a controversial issue. It gives rise to significant trade issues as it illustrates the problem of balancing the need for an effective and enforceable environmental measure, against the need to ensure that such measures are not more restrictive on international trade than necessary to achieve their objectives. Moreover, it is a measure that Norway has actively supported and even promoted.
2. The development of technical guidelines under the Basel Convention is a rather recent phenomenon which has achieved considerable momentum. This is closely related to the role of international standards in international trade law, in particular under the TBT Agreement, but also under the GATS. In addition, the standards developed for mercury are closely related to ongoing negotiations of a new legally binding instrument, and the standards developed for used tyres are closely related to a recent WTO dispute. While the former involve significant Norwegian interests, Norway does not seem to be actively engaged in the latter instance.
3. The Implementation and Compliance Committee of the Basel Convention could be a basic point of reference for a broader examination of the relationship between implementation and compliance mechanisms of the three chemicals conventions and international trade. All three conventions struggle to establish effective implementation and compliance mechanisms. One hypothesis could be that the relation-

⁴⁷ Annex I, para. 5: ‘To develop tools (such as guidelines) and activities on environmentally sound refurbishment and repair, including criteria for testing, certification and labeling’ and ‘To develop tools (such as guidelines) and activities on environmentally sound recycling and material recovery, including facility certification’.

ship to trade, including trade with non-parties to the conventions, is a major reason why states have been reluctant to the establishment of such mechanisms. This issue illustrates the basic problem of striking a balance in such mechanisms between measures to assist and facilitate compliance with treaty obligations, and measures that seek improved compliance through more confrontational procedures.

4 Cases under the PIC Convention (Rotterdam Convention)

This preliminary assessment of issues under the PIC Convention is based primarily on issues that were on the table during COP 4 of the Convention in Rome in 2008.⁴⁸ The PIC Convention concerns chemicals in general, and it is to a significant extent related to pesticides. It is therefore relevant to both the SPS Agreement and the TBT Agreement.

The discussions of the high-level segment of the meeting were summed up as follows by the President:

... representatives had laid stress on protecting human health and the environment and, in particular, shielding the most vulnerable countries from unwanted imports of chemicals. Parties had also stressed the importance of a facilitative compliance mechanism. ... Representatives had also stressed the importance of the life-cycle approach to the sound management of chemicals and called for increased synergies in implementing the Basel, Rotterdam and Stockholm conventions, including through greater use of the Basel and Stockholm convention regional centres. She noted the problems posed by inadequate management of chemicals for human health and the environment, the solution of which required improved coordination between all relevant stakeholders, strengthened national infrastructures and training for customs officials.⁴⁹

In addition:

Mr. Butler [Deputy Director-General of FAO] noted that the prior informed consent procedure and the Convention had been established owing to, among other things, the wide marketing in developing countries of many pesticides that had been banned or severely restricted in developed countries. The challenges posed by pesticide use had been further intensified, he said, by the growing food crisis, climate change and the shift in production of chemicals from developed to developing countries, where the ability to regulate chemicals effectively was limited. The Convention alone could not solve those problems⁵⁰

Annex V of the Report contains key messages emerging from the ministerial panel discussions. Many of the issues raised are of relevance to international trade in chemicals.⁵¹ In addition, attention was drawn to problems experienced in disposing of banned or expired products; it was

⁴⁸ For the report from COP 4, see UNEP/FAO/RC/COP.4/24.

⁴⁹ *Ibid.* para. 145.

⁵⁰ *Ibid.* para. 147.

⁵¹ *Ibid.* pp. 69–71, see paras. 4, 8, 12 and 15.

suggested that such products should be returned to and destroyed by producer countries.⁵²

4.1 Adding new chemicals to Annex III

One major focus during COP 4 was the addition of new chemicals to Annex III. Some relevant statements were made in Decision RC-4/1: Progress in the implementation of the Rotterdam Convention:

1. *Acknowledges* the importance of adequate national infrastructure for pesticide and industrial chemicals management in developing countries to the preparation and submission of notifications of final regulatory action to ban or severely restrict pesticides and in taking and reporting decisions on the import of chemicals listed in Annex III of the Convention;
2. *Takes note of* the substantial number of import responses which indicate consent to continued trade in chemicals listed in Annex III and reaffirms that the listing of a chemical in Annex III does not constitute a recommendation to ban or severely restrict its use;
3. *Also takes note of* the 177 chemicals for each of which at least one complete notification of final regulatory action has been submitted and invites Parties when preparing notifications of final regulatory action to give priority to those chemicals as a means of facilitating the identification of candidate chemicals for listing in Annex III; ...
6. *Invites* Parties that have taken final regulatory actions to notify the Secretariat of such actions within the timeframe established by the Convention, if they have not yet done so, given that notifications of final regulatory action are key to the addition of chemicals to Annex III and the continued effectiveness of the prior informed consent procedure and information exchange

Problems were encountered for some chemicals which were recommended for inclusion by the Chemicals Review Committee, but in relation to which no consensus could be reached at the COP. The Chemical Review Committee also reported on other chemicals that it had considered, including eight notifications and associated supporting documents for five chemicals and ten notifications and associated supporting documentation regarding six chemicals.⁵³

The problems concerning listing of new chemicals related to inclusion of chrysotile asbestos⁵⁴ and endosulfan⁵⁵ in Annex III of the Convention (see below). The failure to reach consensus on adding new chemicals led to a proposal to add a new annex to the Convention, but that proposal was not accepted.⁵⁶ Moreover, a proposed decision on the effectiveness of the Convention was discussed.⁵⁷ There was no consensus on this draft

⁵² *Ibid.* para. 16.

⁵³ *Ibid.* paras. 49–50.

⁵⁴ Decision RC-4/4.

⁵⁵ Decision RC-4/6.

⁵⁶ See UNEP/FAO/RC/COP.4/24 paras. 34–6.

⁵⁷ *Ibid.* para. 38.

decision, which has been included in Annex III to the Report. Moreover, Annex IV of the Report contains a Declaration by the European Community and others and a statement by Australia under agenda item 5(e). The EC and a range of other countries expressed deep concern with the fact that parties had not yet reached agreement on listing endosulfan and chrysotile asbestos in Annex III to the Convention despite the fact that technical requirements for listing had been fulfilled. Australia expressed similar concerns in a less explicit manner.

The controversies associated with listing of new chemicals are related to international trade concerns. This is clearly demonstrated by the case concerning chrysotile asbestos, further explored below. The project could explore the role of trade concerns in general, or as related to specific chemicals.

4.2 Chrysotile asbestos

An import ban on chrysotile asbestos was the contested issue in the WTO Asbestos Case between Canada and the EU.⁵⁸ The issue of listing chrysotile asbestos in Annex III was brought on the agenda of the COP at COP 3. No consensus on listing was achieved, but a decision at COP 3 stated that the requirements for the listing of chemicals in Annex III had been met with respect to chrysotile asbestos.⁵⁹ The issue was hotly debated during COP 4,⁶⁰ and resulted in decision RC-4/4: Inclusion of chrysotile asbestos in Annex III of the Convention:

Taking into account that the Conference of the Parties is not yet able to reach consensus on whether to list chrysotile asbestos in Annex III of the Convention, ...

2. *Encourages* Parties to make use of all available information on chrysotile asbestos to assist others, in particular developing countries and countries with economies in transition, to make informed decisions regarding the import and management of chrysotile asbestos and to inform other Parties of those decisions using the information exchange provisions laid down in Article 14 of the Convention.

The representative of the World Health Organization emphasized that chrysotile asbestos was a human carcinogen, drew attention to information provided concerning safer alternatives to chrysotile asbestos, and expressed deep concern at the continued use of chrysotile despite the safety risks.

This case is illustrative of the relationship between the WTO and the PIC Convention, and could be an illustrative case for studying how the regimes interact when confronted with an issue that is controversial in both regimes.

⁵⁸ See the discussion of WTO disputes above, case no. DS135, www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm.

⁵⁹ See decision RC-3/3 and UNEP/FAO/RC/COP.4/24 paras. 55–6.

⁶⁰ See UNEP/FAO/RC/COP.4/24 paras. 50, 54–64 and 79–81.

4.3 Intentional misuse

One of the issues to be considered when adding endosulfan to Annex III was whether the criteria mentioned in Annex II of the PIC Convention were fulfilled.⁶¹ One of these criteria is to: ‘d) Take into account that intentional misuse is not in itself an adequate reason to list a chemical in Annex III.’ The consequences of this criterion became a major issue during COP 4. Decision RC-4/6: Inclusion of endosulfan in Annex III of the Convention stated:

1. *Requests* that Parties and interested observers provide to the Secretariat within six months of the date of the present decision their considered views on the application of criterion (d) in Annex II of the Convention;
2. *Requests* that the Secretariat provide the views submitted in accordance with the preceding paragraph to the United Nations Environment Programme legal office for it to review its previous advice to the Chemical Review Committee contained in the information document on the subject provided to the Committee for its third meeting regarding clarification of the meaning of ‘intentional misuse’ and the application of criterion (d) in Annex II of the Convention;

Whereas the way in which ‘intentional misuse’ is to be handled under the procedures is related to trade concerns, such concerns are indirect and have not been clearly formulated thus far.

4.4 Disagreement concerning decision-making

There is not yet full agreement on decision-making under the PIC Convention. As in the case of the POPs Convention (see below), the disagreement relates to the second sentence of paragraph 1 of rule 45 of the Rules of Procedure, and concerns whether decision-making shall be based on consensus. At COP 4: ‘Following discussion, the Conference agreed that it would again forego taking a formal decision on the item, that the brackets would remain in place and that, until it decided otherwise, it would continue to decide substantive matters by consensus.’⁶²

Controversial decisions under the PIC Convention include decisions on adding chemicals to Annex III (see above), as well as more general issues concerning establishment of a compliance mechanism (see below). One issue that may be of particular interest to the project is whether lack of consensus is closely related to trade issues and the interests of non-parties, the USA in particular.

⁶¹ *Ibid.* paras. 72–8.

⁶² *Ibid.* paras. 21–2.

4.5 The failure to establish an implementation / compliance mechanism

According to article 17 of the PIC Convention, the Parties ‘shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for treatment of Parties found to be in non-compliance.’ The PIC Convention entered into force in 2004. Negotiations on the establishment of a compliance mechanism have so far resulted in a draft text presented at COP 4, which contained only a few brackets.⁶³ There is disagreement on the following issues:

- Triggering of procedures (referrals): shall affected parties be allowed to make referrals? Shall the Secretariat be allowed to make referrals?
- Decision-making in the committee (consensus).
- Operationalization of article 18(5)(c): ‘Consider and undertake any additional action that may be required for the achievement of the objectives of the Convention’.
- From where may the Committee receive information.⁶⁴

At COP 4, decision SC- RC-4/7: ‘*Decides* also that the draft text contained in the annex to the present decision shall be the basis for its further work on the procedures and institutional mechanisms at its fifth meeting.’ One representative said that in his country’s view none of the text in the draft procedures and mechanisms had been agreed. He therefore reserved the right to propose amendments to any part of the draft text without regard to whether it was enclosed in square brackets.⁶⁵

The text to be discussed at COP 5 in 2011 still contains significant brackets.⁶⁶ One reason why this issue has remained controversial and failed to move forward more quickly may be trade concerns. As indicated in the inventory of the Basel Convention above, the role of trade concerns when designing and establishing implementation and compliance mechanisms could be a cross-cutting issue of interest to all three chemicals conventions.

4.6 Preliminary conclusions

Against this background, the following issues should be further considered as being of particular interest to the project:

1. The disagreement regarding decision-making procedures is related to trade concerns, as exemplified by the case of chrysotile asbestos. Similar issues are of relevance to the POPs Convention, see below.
2. The relationship between the PIC Convention and non-parties is related to some of the above controversies under the Convention. One main underlying topic is trade concerns. The relationship to non-parties could be a common issue for the chemicals conventions.

⁶³ *Ibid.*, pp. 26–30.

⁶⁴ The discussion is set out in paras. 84–90 of the Report.

⁶⁵ See para. 90 of the Report.

⁶⁶ UNEP/FAO/RC/COP.5/16.

3. Disagreement regarding establishment of a compliance mechanism could be related to trade concerns, and could be taken up together with a discussion of the Implementation and Compliance Committee of the Basel Convention, see above.

5 Cases under the POPs Convention (Stockholm Convention)

The POPs Convention is the most recent of the three chemicals conventions. It was adopted in 2001, and has already had four COPs. This preliminary assessment of issues under the POPs Convention is based primarily on issues that were on the table during COP 4 of the POPs Convention in Geneva in 2009.⁶⁷ As observed during the high-level segment of COP 4, the Convention ‘had moved from the preparatory to the implementation phase, where activities necessary to protect human health and the environment were being put into place’. Moreover, ‘the safe management, use and trade in chemicals was swiftly moving up the international agenda, as demonstrated by the discussion of chemicals at the recent Group of Eight environment ministers’ meeting in Italy’.⁶⁸ The high-level segment concluded as follows:

Problems were a key point of discussion, with participants citing lack of funding, mislabelling of chemicals, smuggling of pollutants as a result of porous borders and corruption, top-heavy bureaucracy and lack of technology to destroy stockpiles, among other things. The need to evaluate the effectiveness of the Convention was highlighted – if the Parties did not know how well the Convention was working, there was a risk of wasting resources and time. Participants also noted the important economic dimension at play. While some products, such as DDT, were harmful, they continued to be used in some countries and therefore could not be banned outright without posing significant problems to users. ...

It was important to find alternatives to persistent organic pollutants, but also to encourage local populations to use such alternatives. Bio-alternatives and traditional methods should be promoted and, with a view to reaching out to populations, documentation should be made available in all languages and displayed on the Convention’s website.⁶⁹

The following issues of particular interest were on the agenda of COP 4.

5.1 The establishment of a compliance mechanism

Article 17 of the POPs Convention sets out a framework for establishing a compliance mechanism: ‘The Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of Parties found to be in non-compliance.’ The

⁶⁷ For the report from COP 4, see UNEP/POPS/COP.4/38.

⁶⁸ *Ibid.*, paras. 183 and 185, respectively.

⁶⁹ *Ibid.*, paras. 12 and 16 of the summary, see p. 111.

POPs Convention entered into force in 2004. Negotiations on the establishment of a compliance mechanism have so far resulted in a draft text setting out the mechanism presented at COP 4, which contained brackets throughout significant parts of the text.⁷⁰ The draft text was accompanied by a proposal of the Chair of the contact group to resolve some of the outstanding issues. COP 4 adopted the following decision (SC-4/33) to set the framework for the continued negotiations: ‘*Decides also that the draft text contained in the annex to the present decision, bearing in mind the proposal of the chair of the contact group as contained in the appendix to that annex, shall be the basis for its further work on the procedures and institutional mechanisms at its fifth meeting.*’

The text to be discussed at COP 5 in June 2011 still contains numerous brackets.⁷¹ One reason why this issue has remained controversial and failed to move forward more quickly may be trade concerns. As indicated in the inventory of the Basel Convention above, the role of trade concerns when designing and establishing implementation and compliance mechanisms could be a cross-cutting issue of interest to all three chemicals conventions.

5.2 Disagreement concerning decision-making

There is not yet full agreement concerning decision-making under the POPs Convention. The disagreement is closely related to decisions regarding addition of chemicals to the annexes of the Convention (see below), as well as other decisions, like those concerning the establishment of a compliance mechanism (see above). The disagreement relates to the second sentence of paragraph 1 of rule 45 of the Rules of Procedure. At COP 4: ‘The Conference agreed that it would not take a formal decision on the item at the current meeting, that the square brackets around the second sentence of paragraph 45 would remain in place and that, until it decided otherwise, it would continue to decide substantive matters by consensus.’⁷² Issues that may be of particular interest to the project are whether the disagreement concerning decision-making procedures is related to concerns that trade-related measures might be facilitated and that the interests of non-parties might not be sufficiently protected if decisions are made without requiring consensus.

The procedure for decision-making of the POPs Review Committee was amended by decision SC-4/20, but the changes were minor.

5.3 Adding new chemicals to the annexes

COP 4 discussed the possible addition of nine new chemicals to the annexes of the Convention. It was stated that such addition would be critical to attaining the Convention’s long-term objectives and to achieving the sound management of chemicals. According to the POPs Review Committee: ‘although the Committee always strived to reach decisions by consensus it had been necessary to proceed by vote in

⁷⁰ Ibid., pp. 89–94.

⁷¹ See UNEP/POPS/COP.5/6.

⁷² UNEP/POPS/COP.4/38 para. 22. See also paras. 106–7. COP 5 does not seem to be moving ahead on this issue, see UNEP/POPS/COP.5/3.

deciding whether the chemical endosulfan had satisfied the screening criteria set out in Annex D to the Convention.⁷³ One Party argued that ‘decision-making by the Persistent Organic Pollutants Review Committee should be governed by rule 45 of the rules of procedure for meetings of the Conference of the Parties and ... its decisions on substantive matters should be taken by consensus in accordance with paragraph 1 of that rule.’⁷⁴ Moreover, there was a call for a science-based approach: ‘While appreciation was expressed for the work of the Committee, attention was also drawn to the need to ensure that it worked independently and used rigorous science to examine the facts presented for its consideration.’⁷⁵ A call was also made for alternative chemicals to be made available: ‘Observing that some of the chemicals proposed for inclusion remained in use or were produced in developing countries, some representatives pointed out that alternatives to those chemicals were not always available to or cost-effective for those countries. ... new chemicals should be added only where alternatives were available and cost-effective.’⁷⁶

Most decisions on adding new chemicals were standard, with the following exceptions:

- Decision SC-4/14 concerning listing of hexabromodiphenyl ether and heptabromodiphenyl ether contains specific exemptions: ‘Articles in accordance with provisions of part IV of this Annex’ concern recycling and final disposal, and ‘The Party takes steps to prevent exports of such articles that contain levels/concentrations of hexabromodiphenyl ether and heptabromodiphenyl ether exceeding those permitted for the sale, use, import or manufacture of those articles within territory of the Party’
- Decision SC-4/15 concerning listing of lindane contains specific exemptions concerning use: ‘Human health pharmaceutical for control of head lice and scabies as second line treatment’
- Decision SC-4/17 concerning listing of perfluorooctane sulfonic acid, its salts and perfluorooctane sulfonyl fluoride contains a broad range of detailed exemptions, related to both production and use.⁷⁷
- Decision SC-4/18 concerning listing of tetrabromodiphenyl ether and pentabromodiphenyl ether contains a specific exemption for use as well as restriction on export.

The controversies surrounding decisions regarding the addition of new chemicals illustrates the problems involved in agreeing on decision-making procedures. These controversies are partly trade-related and could

⁷³ *Ibid.* para. 73.

⁷⁴ *Ibid.* para. 74.

⁷⁵ *Ibid.* para. 76. See also para. 185.

⁷⁶ *Ibid.* para. 78.

⁷⁷ *Ibid.* para. 7 of new annex B, part III: ‘Due to the complexity of the use and the many sectors of society involved in the use of these chemicals, there might be other uses of these chemicals of which countries are not presently aware.’

also be related to the relationship between the POPs Convention and non-parties to the Convention. It might be of interest for the project to explore the extent to which the controversies are trade-related.

5.4 Further work on regulated substances

Two of the regulated substances, DDT and PCB, were subject to further initiatives during COP 4. For DDT, which is subject to an obligation of restriction according to Annex B of the POPs Convention, the initiative resulted in decision SC-4/2:

2. *Concludes* that countries that are currently using DDT for disease vector control may need to continue such use until locally appropriate and cost-effective alternatives are available for sustainable transition away from DDT; ...

4. *Endorses* the establishment of a global alliance for the development and deployment of products, methods and strategies as alternatives to DDT for disease vector control as described in the annex to the note by the Secretariat on a draft business plan for promoting a global partnership on the development and deployment of alternative products, methods and strategies to DDT for disease vector control⁷⁸

There was agreement on the need to phase out the use of DDT, although several representatives described how their countries were continuing to use it for disease vector control owing to the lack of available and affordable alternatives. One representative said that any mention of DDT use for malaria vector control should also mention visceral leishmaniasis; controlling the vectors for the disease, which was endemic in certain parts of his country, also required DDT.⁷⁹

For PCB, which is subject to an obligation of elimination according to Annex A of the POPs Convention, the initiative resulted in decision SC-4/5:

1. *Endorses* the proposal by the Secretariat for the establishment of a polychlorinated biphenyls elimination network, as described in the annex to the note by the Secretariat on the initiation of a cooperative framework to support Parties in their efforts to eliminate polychlorinated biphenyls through environmentally sound management and disposal

2. *Invites* the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to join the network on an equal footing

According to the secretariat note: 'Given that polychlorinated biphenyl oils continue to be used in electrical transformers and other equipment worldwide, the proposal takes into account the extensive set of activities to be undertaken and completed by 2025 to remove such equipment and to achieve disposal in an environmentally sound manner by 2028.'⁸⁰

⁷⁸ UNEP/POPS/COP.4/6/Rev1.

⁷⁹ UNEP/POPS/COP.4/38 paras. 27 and 30.

⁸⁰ UNEP/POPS/COP.4/9/Rev.1, para. 4.

Norway announced that it would support the network financially and also provide experts to participate therein.⁸¹

These cases illustrate some of the practical challenges involved in implementing obligations under the POPs Convention. Some of these challenges are trade-related, but they do not seem to raise issues of broad trade-policy interest.

5.5 The procedure under Article 3(2)(b) of the POPs Convention

According to Article 3(2)(b)(iii), which concerns trade with non-parties to the POPs Convention:

Each Party shall take measures to ensure: ... (b) That a chemical listed in Annex A for which any production or use specific exemption is in effect or a chemical listed in Annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments, is exported only: ...

(iii) To a State not Party to this Convention which has provided an annual certification to the exporting Party. Such certification shall specify the intended use of the chemical and include a statement that, with respect to that chemical, the importing State is committed to: (a) Protect human health and the environment by taking the necessary measures to minimize or prevent releases; (b) Comply with the provisions of paragraph 1 of Article 6; and (c) Comply, where appropriate, with the provisions of paragraph 2 of Part II of Annex B. The certification shall also include any appropriate supporting documentation, such as legislation, regulatory instruments, or administrative or policy guidelines. The exporting Party shall transmit the certification to the Secretariat within sixty days of receipt.

At COP 4 it was alleged that there was insufficient information concerning the continued need for this procedure in relation to non-parties. Decision SC-4/4 sets out the relevant conclusions:

4. *Reminds* Parties that export chemicals listed in Annex A or Annex B to the Convention to any State not party to the Convention that subparagraph 2 (b) (iii) of Article 3 of the Convention requires them to submit to the Secretariat the certification from the importing State specified in paragraph 2 (b) (iii);

5. *Requests* the Secretariat to prepare a report, based on Party reports submitted pursuant to Article 15, certifications from exporting Parties submitted pursuant to paragraph 2 (b) (iii) of Article 3 and other relevant information, for consideration by the Conference of the Parties at its fifth meeting;

6. *Decides* to evaluate further the continued need for the procedure set out in paragraph 2 (b) of Article 3 at its fifth meeting.

⁸¹ UNEP/POPS/COP.4/38 para. 43.

The discussions concerning procedures in relation to non-parties are illustrative of controversial trade issues under the Convention. They also reflect one of the most controversial issues discussed in the WTO – namely, how a case should be resolved under article XX of GATT when a trade measure under a multilateral environmental agreement is applied in relation to non-parties to the agreement. This issue has remained unresolved in the CTE.⁸²

5.6 Adoption of guidelines (including standardized toolkits)

Compared to the Basel Convention, the POPs Convention is in an early phase of producing guidelines for its implementation. Decision SC-4/6 illustrates how far the POPs Convention has come in this process. The decision concerns guidelines on best available techniques/best environmental practices. Such guidelines would have few, if any, normative effects. However, they could be relevant to the project to the extent that they prepare the ground for guidelines with normative effects. Such normative effects can already be traced in the discussions of the current guidelines, as many representatives expressed strong concern regarding the definition of low persistent organic pollutant content. The limits, they said, remained too high, and allowed persistent organic pollutant wastes to be dumped in Africa.⁸³

5.7 Preliminary conclusions

Against this background, the following issues should be further considered as being of particular interest to the project:

1. The disagreement concerning decision-making procedures could be related to trade concerns. Similar issues are of relevance to the PIC Convention, see above.
2. The relationship between the POPs Convention and non-parties, in particular the USA, is related to many of the above controversies under the Convention. One main underlying topic is trade concerns. The relationship to non-parties could be a common issue for the chemicals conventions, and it could cover many of the issues identified above as being of interest from a trade perspective.
3. The development of guidelines under the POPs Convention is in its infancy. Such guidelines under the POPs Convention could be discussed together with a discussion of guidelines under the Basel Convention, see above.
4. Disagreement regarding the establishment of a compliance mechanism is parallel to that under the PIC Convention; it could be related to trade concerns, and could be taken up together with a discussion of the Implementation and Compliance Committee of the Basel Convention, see above.

⁸² See items 1 and 5 on its agenda as described above. See also WT/CTE/1, Report (1996) of the Committee on Trade and Environment, paras. 5–31, in particular para. 8. The relationship to non-parties was (probably) considered too controversial to be brought onto the agenda of the Doha Round; see para. 31(i) of the Doha Declaration as reproduced above.

⁸³ UNEP/POPS/COP.4/38 para. 62.

6 Common Issues in the Three Chemicals Conventions

The most advanced form of cooperation and coordination among multi-lateral environmental agreements has taken place among the chemicals conventions. The three conventions held their first simultaneous meetings of the COPs in April 2010 and made parallel decisions on cooperation.⁸⁴ Prior to the simultaneous meeting, the three COPs had made parallel decisions on cooperation and coordination.⁸⁵ In light of the common decisions of the three COPs, we can identify the following two issues as being of particular interest to the project:

6.1 Non-compliance

The common decisions of the three COPs contain the following elements regarding mechanisms for addressing non-compliance:

2. *Requests* the secretariats of the Basel, Rotterdam and Stockholm Conventions, once compliance/non-compliance mechanisms are established under all three conventions, to prepare proposals for consideration by the Conferences of the Parties to the three conventions exploring the possibilities for enhancing coordination among the agreed mechanisms to facilitate compliance by, for example, provision of joint secretariat support for the committees, the attendance of the chairs of the three committees at each others' meetings or encouraging the appointment of members to the committees who have experience with other compliance mechanisms;
3. *Requests* the secretariats of the Basel, Rotterdam and Stockholm Conventions to exchange information on progress made on the operation or establishment of the compliance/non-compliance mechanisms established or under negotiation under the three conventions;⁸⁶

This demonstrates a cautious interest in coordinating the mechanisms of the three conventions. As the trade issues that arise under the three conventions are similar and are likely to be related to the compliance mechanisms in similar ways, it may be useful to examine such an issue in parallel under the three conventions.

6.2 Relationship to the WTO

None of the three treaties has obtained observer status in the WTO. The common decisions of the three COPs: '5. *Requests* the secretariats of the Basel, Rotterdam and Stockholm Conventions, whenever feasible, to act jointly in participating in other related processes and in providing information to other related bodies, organizations, institutions and

⁸⁴ UNEP/FAO/CHW/RC/POPS/EXCOPS.1/8 pp. 8–25.

⁸⁵ The common decisions are the following: the Basel Convention – CoP decision IX/10, the PIC Convention – CoP decision RC-4/11, and the POP Convention – CoP decision SC-4/34.

⁸⁶ Section II on Technical issues.

processes'.⁸⁷ The current situation regarding their relationship to the WTO is as follows:

- The Basel Convention: Decision IX/11 para. 2: '*Also requests* the Secretariat to continue efforts to seek observer status in the Committee on Trade and Environment of the World Trade Organization and to advise the Parties to the Basel Convention when its request is granted by the World Trade Organization'. The WTO was not present as observer at COP IX.
- The PIC Convention: Decision RC-4/10 para. 2: 'Requests the secretariat, while continuing to follow up the request for observer status in the World Trade Organization's Committee on Trade and Environment in Special Session, to seek observer status in the Organization's Committee on Trade and Environment, as that Committee is the standing body of the World Trade Organization mandated to discuss trade and environment issues in regular sessions, and to inform Parties when the request has been submitted and when it has been granted.' A secretariat note was presented at the meeting, and there was some discussion of the issue.⁸⁸ The representative of WTO said that the agreement to allow the Convention to participate in meetings on an ad hoc basis was a means to bypass the political deadlock within WTO on that issue.⁸⁹ The WTO was present as observer at COP 4.
- POPs Convention: No issue regarding observer status with the WTO was raised during COP 4. The WTO was present as observer at COP 4.

7 Conclusions

A broad range of factors are relevant when choosing case studies in the interface between trade and international environmental regulation of hazardous substances. The following factors have been decisive for the above inventory and the conclusions below (the order does not indicate relative importance):

- The case(s) should be of interest from both a WTO perspective and from the perspective of one or more of the chemicals conventions.
- The case(s) should concern issues that are of interest to all three chemicals conventions.
- The case(s) should be of interest from a Norwegian policy perspective.
- The case(s) should be of interest in light of future challenges regarding the interface between trade and hazardous substances.

⁸⁷ Section II on Technical issues.

⁸⁸ See paras. 113–16 of the Report.

⁸⁹ See www.wto.org/english/thewto_e/igo_obs_e.htm.

Against this background, consideration should be given to the following cases as being of particular interest to the project (the order is not intended to indicate relative priorities):

- 1) *Adding new chemicals to existing instruments*: There has been considerable disagreement regarding the addition of new chemicals to existing instruments. Such disagreement is relevant to the balance between policy and science in decision-making processes. Two issues stand out as particularly relevant here: the cases of mercury, which is currently subject to a separate negotiation process, and the case of chrysotile asbestos. These cases could be examined in light of: (a) the failure of parties under the POPs and PIC Conventions to agree on decision-making procedures; (b) the failure under the Basel Convention to agree on the 'Ban Amendment'; (c) the implications that adding a new instrument (the legally binding instrument on mercury) to the existing chemicals conventions have for governance issues within international environmental policy; (d) the failure in the WTO CTE to resolve issues on how to deal with trade measures applied to non-parties under multilateral environmental agreements; and (e) the results of the asbestos case in the WTO.
- 2) *Implementation of existing instruments – the issue of technical guidelines*: In several areas, international regulation of hazardous substances is moving from a discussion of general policy issues to more technical discussions establishing detailed rules. The emerging body of technical guidelines under the Basel Convention is illustrative of this trend, and the EU REACH is the prime example at the regional level. This development has important trade implications. A case study could investigate the how states have approached the discussions concerning 'international trade in domestically prohibited goods', as well as the development of technical guidelines under the Basel Convention. These cases could be examined in light of: (a) the recognition of international standardizing bodies under the TBT and SPS Agreement(s); (b) the TBT Committee's discussions of initiatives under REACH; (c) the problems faced by the chemicals conventions in seeking observer status at the WTO; (d) the failure of parties under the POPs and PIC Conventions to agree on decision-making procedures; (e) the relationship to non-parties to the chemicals conventions; and (f) the results of the tyres case in the WTO.
- 3) *Non-compliance mechanisms*: Non-compliance with obligations under the chemicals conventions may be due to various reasons – ranging from inability to comply, to direct unwillingness to comply. Moreover, the relationship to non-parties to the conventions may be an important factor for states' willingness to accept non-compliance mechanisms. Trade issues are likely to be a significant factor for the design and effectiveness of non-compliance mechanisms. A study of the Implementation and Compliance Committee of the Basel Convention could serve as a basic point of reference for a broader examination of the problems associated with establishing compliance mechanisms under the PIC and POPS Conventions. This case could be examined in light of: (a) the relationship between compliance

mechanisms under multilateral environmental agreements and the dispute settlement mechanism of the WTO (relevant to items 1 and 5 of the CTE); (b) the relationship to non-parties to the chemicals conventions; and (c) problems related to establishment of common rules regarding civil responsibility and liability under conventions regulating hazardous substances.

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