

Altmann, Jörn

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Jörn Altmann\*

# International Environmental Standards: Considerations on Principles and Procedures

*International environmental law is highly fragmented and national legislation differs widely. General principles for drafting environmental standards would facilitate harmonisation. The article examines the general principles that could be applied at international level.*

Opinions differ widely on what is correct and necessary in the field of environmental policy. Many countries have established environmental protection laws independently, while other regulations have been negotiated internationally. Environmental protection measures can have a strong impact on international trade, and yet international environmental law is highly fragmented, patchy and sometimes contradictory. There is also a danger that environmental arguments will be used as a pretext for measures that impede free trade, a manifestation of so-called "eco-protectionism". On the other hand, international trade law, and in particular the General Agreement on Tariffs and Trade (GATT) and its various codes, pays scant regard to environmental protection.

It therefore makes sense to consider general principles for the drafting of environmental standards at the point where trade and environmental interests converge. A set of general principles would provide a uniform framework for environmental protection and make national environmental law more consistent from one country to another and more compatible with international environmental and trade law. Environmental law must be derived from a set of central principles in the same way as the GATT. The discussion here centres on general principles that should provide the procedures for laying down concrete environmental standards, in other words "standards for standards". Hence, it does *not* relate to the actual content of environmental standards themselves.

A distinction is usually made between voluntary standards (guidelines, recommendations) and binding regulations.<sup>1</sup> International environmental agreements can therefore initially set only standards that become international law (and hence binding on signatory states) after ratification and implementation, and which can also become binding on individuals after incorporation in national law. The term "standards" will be used in this article to refer to both voluntary and binding standards unless the context calls for a more precise distinction to be drawn.

## Fragmentation of Environmental Law

At present there is no consistent body of environmental law at national, international or supranational level; in Germany, for example, there are more than 2,000 environmental regulations in force.<sup>2</sup> It is true that the Single European Act of 1987 made the protection of the environment an objective enshrined in primary Community law by inserting Articles 130r to t into the EEC Treaty, but these provisions only create a framework for concrete secondary Community law and especially for national regulations, which must or should fill the gaps in Community law.<sup>3</sup> Notwithstanding the very weak formal basis for environmental protection, a consensus is

<sup>1</sup> Cf. UNCTAD, Trade and Development Board: Trends in the field of trade and environment in the framework of international co-operation, Geneva, August 1993, pp. 10 and 27 f.

<sup>2</sup> Cf. Jörn Altmann: Nationales, supranationales und internationales Wirtschaftsrecht, in: WISU, 5/1992, pp. 271-276.

<sup>3</sup> Cf. Ulrich Becker: Der Gestaltungsspielraum der EG-Mitgliedstaaten im Spannungsfeld zwischen Umweltschutz und freiem Warenverkehr, Baden-Baden 1991, pp. 35 ff.

\* Hochschule für Wirtschaft und Technik, Bochum, Germany.

beginning to form that there is a fundamental right to a clean environment, particularly in the interests of future generations. From this derives the need to preserve ecosystems and resources in the sense of ensuring sustainable development. Environmental considerations must therefore become an integral part of legislation in other spheres, but above all they must be compatible with international law. This applies equally to foreign policy and international trade relations.

The GATT embraces all countries of the world at the trade level, but it is extremely poorly equipped to deal with environmental matters, and indeed it was not designed to do so.<sup>4</sup> This is not the place to discuss whether comprehensive international environmental law should form part of the GATT or not, but until such a body of legislation exists, partial international environmental agreements must serve as second-best solutions. Environmental protection standards with a direct or indirect impact on world trade have been developed in a multitude of conferences and international agreements.

International environmental law is not only patchy, it is also "soft", in other words it does not operate directly at the level of concrete action and is not equipped with sanctions to punish violations. This can only occur once the legislation has been incorporated into national law. National environmental law, in turn, can legitimately develop only within the confines of what is permitted at international or supranational level.<sup>5</sup> It is therefore constrained in many respects, as will be demonstrated below. The result is a hotch-potch of environmental protection law.

## Attempts at Harmonisation

Attempts to develop uniform general procedural principles and standards for the interface between trade and the environment have been intensified in order to co-ordinate both the form and content of environmental law at the various levels and at the same time to avoid and eliminate contradictions with international trade law. The OECD's "Recommendations on guiding principles concerning the international aspect of environmental policies" were published as long ago as 1972. These

include the principle that the polluter should pay, non-discrimination and national treatment. In mid-1993 the OECD unveiled its "Procedural guidelines on integrating trade and environment policies",<sup>6</sup> which build upon the 1972 guidelines and take account of UNCED agenda 21 and the Rio Declaration.<sup>7</sup> The new set of guidelines relate, inter alia, to the transparency of standards, the obligation to consult and to co-operate internationally, and arbitration to resolve disputes. After a long period of abstinence, the GATT has also now begun to tackle environmental issues more actively.<sup>8</sup> It would therefore be sensible if the various activities being undertaken in parallel were at least made mutually compatible by laying down common principles. The ultimate objective, however, should be to establish a consistent body of binding international law.

The development of principles and procedural standards also facilitates the mutual recognition of existing national law, especially within the EC<sup>9</sup> or the OECD or in regionally integrated areas generally (NAFTA, AFTA, EEA, etc.). This does not imply identical regulations covering such matters as product and process standards, packaging or labelling requirements,<sup>10</sup> but it does reduce the likelihood of erratic deviations. It is much more difficult to harmonise the content and specific provisions of legislation, as there is so little agreement about the optimum or desirable solutions.

## Participation of the Parties Involved

Environmental standards can be set unilaterally or negotiated. In principle, the states affected should be involved in the development of standards, but in certain circumstances, which I shall describe later, there may be good reasons for deviating from this rule. If national standards apply only to the country's own territory, this is of no relevance in the context under discussion here. "Bilateral standardisation" takes place between only two partners (the USA and Canada, for example) or two groups of countries (e.g. the EU and EFTA), while "multilateral standardisation" relates to more than two contracting parties or groups, and "global" relates to the attempt to include as many countries as possible. The internal agreement reached within groups of countries acting as a

<sup>4</sup> Cf. Margareta Kulessa: Free Trade and Protection of the Environment: Is the GATT in Need of Reform?, in: INTERECONOMICS, 4/1992, pp. 165-173; Richard H. Snape: The environment, international trade, and GATT, Monash University/USA, Dept. of Economics, Seminar Paper 8/91; Jörn Altmann: Das Problem des Umweltschutzes im internationalen Handel, in: Hermann Sautter (ed.): Entwicklung und Umwelt, Berlin 1992, pp. 207-244.

<sup>5</sup> Jörn Altmann: Nationales, supranationales und internationales Wirtschaftsrecht, op. cit.

<sup>6</sup> Cf. OECD: Trade and Environment, GD(93)99, Paris, June 1993.

<sup>7</sup> Cf. GATT: Note on the United Nations Conference on Environment and Development, L/6892/add. 3, Geneva, 2. 7. 1992.

<sup>8</sup> Cf. GATT: Trade and Environment, L/6896, Geneva, 18. 9. 1991.

<sup>9</sup> For an example, see UNCTAD: Trends ..., op. cit., pp. 27 f.

<sup>10</sup> On so-called eco-labelling, see GATT: Packaging and labelling requirements, TRE/W/12, Geneva, 14. 6. 1993; GATT: Trade effects of new packaging and labelling requirements aimed at protecting the environment, TRE/W/9, Geneva, 10. 3. 1993, and a general typology in GATT: Prescriptions en matière d'étiquetage et d'emballage, TRE/W/3, Geneva, 29. 9. 1992.

*single* negotiating partner, such as the EU, may in turn be bilateral or multilateral.<sup>11</sup>

If environmental standards are applied outside the territory of the legislating country or group of countries without the third countries having been involved in the decision-making process, as with the application of product standards to imports,<sup>12</sup> there will be spill-over effects. The unilateral setting of standards that affect non-participating third countries may therefore stem from national legislation or from bilateral or multilateral environmental agreements. It is generally considered a poor solution and is often illegal under international law; however, exceptions may be necessary. Multilateral or global environmental agreements are preferable to bilateral agreements because of the wider acceptance they enjoy and may be granted a waiver under Article XXV of the GATT, as described below.

With all non-global standards, the question arises as to whether and to what extent third countries are involved in the decision-making process. For example, a common fear is that the standards devised by industrial countries will pay insufficient heed to the specific problems and needs of developing countries and, more recently, the Eastern European countries.<sup>13</sup> There are two possible scenarios:

1. The parties setting the standards negotiate only among themselves (e.g. within the EU or the OECD) and at most attempt to take account of external interests, so to speak "thinking for" other countries (the authoritarian solution). The resulting standards may apply only internally, or they may also be applied to third countries. It may be possible for third countries to accede to the agreement at a later stage. Whether and to what extent the various internal interests are taken into consideration at the preparatory stage, by means of hearings with industry, commerce, consumers, administrators, academics, etc., cannot be discussed here. Attention should only be drawn to the danger of administrative authorities developing standards that may lead to avoidable problems when applied at the practical business level.<sup>14</sup>

2. Representatives of external interests (e.g. developing countries, Eastern European countries, NGOs or international organisations in the case of the OECD) are consulted during the standard-setting process in order to smooth off the "corners and edges" (participational

approach). For example, the OECD is discussing the development of internal standards offering a relatively high level of protection and their global application on a non-discriminatory basis.<sup>15</sup> It is therefore not so much a question of developing environmental guidelines for trade within the OECD area as for international trade as a whole. All those affected or only a limited number may be given the chance to express their views, and they may participate in the entire process ("seat at the table but no vote") or only in certain aspects (limited participational approach). Even when setting purely internal standards, it is often useful to gather external opinions.

## Strengths and Weaknesses

As a rule, the larger the number of decision-makers involved, the more complicated the decision-making process. It is difficult enough to set environmental standards at national level, let alone multilaterally. Past experience with international environmental agreements shows that there are fundamental weaknesses in their effectiveness.

There is a tendency to water down environmental standards, as agreement can be reached only on uncontentious and often purely theoretical formulae ("Environmental protection shall be improved"), or on very low standards. If participants attempt to achieve a higher level of environmental protection, the negotiating process can become extremely protracted or may collapse altogether. Consequently, special provisions are commonly used to take account of the needs and possibilities of individual countries. In this way, the exception can easily become the rule, so that it is always necessary to weigh the relative advantages of consensus on a minimum standard against those of setting a higher level of protection subject to exceptions.

The lack of legal teeth is often a further weakness. International agreements not infrequently remain non-binding because they are not ratified, or ratification is delayed, or there is no obligation to incorporate their provisions into national law, or the agreed deadline for incorporation is so long that the agreements have no immediate impact. Several of these factors often apply simultaneously.

The main advantage of multilateral agreements lies in the transparency of decision-making for those involved,

<sup>11</sup> Usage of the terms is not consistent. Whereas bilateral is also used here to refer to agreements between two groups of countries, this is also described in the literature as multilateral, because more than two countries are involved. This problem of definition is clearly of secondary importance, however.

<sup>12</sup> Cf. UNCTAD: Trends ..., op. cit., pp. 26 f.

<sup>13</sup> Cf. OECD: Trade, environment and development, DCD/DAC/ENV(93)1, Paris, 13. 4. 1993.

<sup>14</sup> Cf. International Chamber of Commerce (ICC), Commission on Environment: International Trade and the Environment: Principles for Policy and Implementation, Paris 1991.

<sup>15</sup> Cf. OECD: Trade, environment and development, op. cit., p. 3.

and hence in the greater acceptance of the results. However, this depends partly on the negotiating strategy; those who formulate the draft tend to leave their indelible stamp on the final version. Countries that are not party to the agreement but are affected by it tend to express reservations, raise objections or refuse to accept the outcome. The better the match between those involved in drafting the agreement and those affected by it, the more legitimate it will be to impose sanctions on "free-riding" outsiders.

Unilateral standards are common, particularly with regard to product characteristics, recyclability and the packaging and description of goods (eco-labelling), but as they tend to have trade-restrictive effects they should be avoided as far as possible. There is the danger that they will impose conditions over which the countries affected can have no direct influence, and not only in the field of trade.<sup>16</sup> Bilateral standards have the advantage that the above decision-making problems are much reduced. As a rule they too have spill-over effects beyond the control of non-signatories. Bilateral agreements are often only an interim stage in a process of multilateral negotiations,<sup>17</sup> aimed at achieving certain effects in advance.

For practical reasons, there is undoubtedly much to be said for unilateral standards that have an external impact. A limited group of countries is more likely to have common interests, problems, capabilities and environmental awareness than a large number of participants. Consequently, agreement is more likely to be reached on environmental standards that have not been watered down nor are merely voluntary and which have tangible practical effects. As this tends to occur primarily among industrial countries,<sup>18</sup> the developing, newly industrialised and Eastern European countries fear that this will lead to a level of standards they will find too high.<sup>19</sup> Moreover, non-signatory countries have little opportunity to be innovative and therefore lag behind the industry standards,<sup>20</sup> with the

result that their information costs and subsequent adjustment costs are higher.

## Voluntary Compliance and the Principle of Co-operation

Ideally, the setting of environmental standards should stem from collective recognition of the need for environmental protection and from a corresponding common responsibility on the part of all nations (although Principle 7 of the Rio Declaration speaks of "differentiated responsibility"<sup>21</sup>). This implies a general obligation to co-operate in devising international environmental standards, but needs to be translated into a more comprehensive obligation to protect the environment, prevent and reduce pollution and pay compensation for environmental damage.

According to the rules of international law and the principles of sovereignty, non-participating countries cannot be made subject to regulations that they have not explicitly accepted.<sup>22</sup> The implied principle of consent therefore gives individual countries or country groups a de facto partial right of veto and, as I have already said, can lead to a watering down of standards, delay in implementation or the marginalisation of countries unwilling to agree. (This problem also arises with the GATT codes.) It will therefore often be necessary to suspend the principle of consent and co-operation and set certain standards unilaterally in order to be able to ensure that certain effects are actually achieved. Provided this is done in a non-discriminatory way, both as between countries and as between residents and non-residents, it is compatible with the GATT.

## Transparency

Lack of information is one of the main reasons why environmental standards are not accepted, apart from the failure to take account of specific interests. Environmental standards should therefore not be couched in general and vague terms but be as specific as possible. In multilateral negotiations the participating countries enjoy the greatest possible transparency, but this is a sensitive aspect where standards are set unilaterally. In principle, countries affected by national environmental standards should be consulted in advance<sup>23</sup> so that the measures and consequences are foreseeable and predictable. In addition, there should be a general obligation to inform,

<sup>16</sup> Cf. OECD: Trade, environment and development co-operation, DCD/DAC/ENV(93)12, Paris, 27. 9. 1993.

<sup>17</sup> Cf. OECD: Environmental policies and industrial competitiveness, Paris 1993, p. 15.

<sup>18</sup> Cf. OECD: Trade, environment and development co-operation, op. cit., pp. 7 ff.

<sup>19</sup> The extensive debate on this issue, especially the danger of eco-protectionism, cannot be described here. See inter alia, UNCTAD: Trends ..., op. cit., pp. 9, 16 ff.; Jürgen Wiemann: Umweltorientierte Handelspolitik: Ein neues Konfliktfeld zwischen Nord und Süd?, Deutsches Institut für Entwicklungspolitik, Berlin 1992, p. 9; OECD: Trade and Environment, op. cit.; OECD: Trade, environment and development co-operation, op. cit.; GATT: Packaging ..., op. cit.; GATT: Trade effects ..., op. cit.; GATT: The packing ordinance and international trade, TRE/W/15, Geneva, 23. 7. 1993.

<sup>20</sup> Cf. OECD: Trade and Environment, op. cit., pp. 7 f.

<sup>21</sup> Cf. GATT: Trade and the Environment, Geneva, 26. 11. 1993, p. 5.

<sup>22</sup> Exceptions to the general rule, such as UN embargoes, will not be discussed here.

<sup>23</sup> Cf. GATT: Multinational transparency of national environmental regulations likely to have trade effects, TRE/W/7, Geneva, 3. 3. 1993, and TRE/W/10/Rev. 1, Geneva, 14. 10. 93.

including an obligation to justify the decision; Article X of the GATT already requires such publication.<sup>24</sup> It would also make sense to set a period before measures come into force, rather than their becoming effective immediately (barring emergencies), so that those passively affected have time to assimilate the information and adapt and those actively involved have an opportunity to influence the standard and where necessary to raise objections. Inadequate transparency in the setting of standards is one of the main complaints<sup>25</sup> and for businesses represents a risk that is difficult to quantify.<sup>26</sup>

## Global versus Restricted Application

The most comprehensive approach is to seek the universal applicability of standards. This is easier to achieve with multilaterally or globally negotiated standards, more difficult with standards that are set unilaterally or negotiated multilaterally with a claim to global applicability. The smaller the circle of countries involved, the greater the discrepancy between the negotiating mandate and the claim for universal applicability.

Where the environment is concerned, problems occur on different levels. For example, the exploitation of a coal deposit leads to environmental problems at local level and is a purely national matter. The pollution of a river flowing through several countries is a regional problem, and a limited international one. Global environmental problems stem partly from regional causes (climatic changes brought about by destruction of the rain forest in some countries) and partly from global causes (worldwide CO<sub>2</sub> emissions). It therefore makes little sense to treat all problems equally; specific national regulations to prevent destruction of the countryside are hardly suited for application globally. However, as a rule it can be said that environmental standards should apply globally if the damage to the environment is global, especially if its causes are of a global nature. Here responsibility and the circle of countries affected coincide, despite differences in their ability to deal with these problems. A claim for global applicability therefore also implies harmonisation of the environmental standards themselves.

## Non-Discrimination and Exceptions

There are, however, various arguments against the international harmonisation of environmental standards

or the global, non-discriminatory application of unilateral regulations.

First, complex situations cannot be reduced to a common denominator; the family of nations is too diverse. For that reason individual solutions often make more sense in order to take account of specific causes and effects. Secondly, the ability to absorb environmental pollution depends partly on the level of development. From the standpoint of the theory of comparative advantage (and in most cases from that of absolute advantage as well) a levelling of the playing field by setting universal standards may be economically inefficient in global terms.<sup>27</sup> This goes hand in hand with the third point, namely the ability to bear the financial and social cost of environmental standards: a high standard may be an excessive burden for certain countries and require compensatory mechanisms<sup>28</sup> or staggered implementation. Fourthly, differences in social preferences and traditions must be taken into account for reasons of sovereignty. For some countries, the lowest common denominator attainable in multilateral or global agreements is unacceptably low, but for reasons of international law it is difficult to set more stringent standards at national level. European Community law allows EU member states to do so (Article 130t of the EEC Treaty), but this does not necessarily mean that the measures are compatible with the GATT.<sup>29</sup> Fifthly, it must be possible to deviate from the general rule in certain economic situations, and sixthly there must be exceptions to deal with ecological emergencies in which action must be taken without delay.

For various reasons it must therefore be possible to provide "special and differential treatment" if exceptions are necessary and sensible. For example, the OECD wholeheartedly advocates the use of the "polluter pays" principle, but subject to explicit limitations as far as developing countries are concerned.<sup>30</sup> This should not, however, be allowed to undermine the fundamental validity of universal standards; otherwise, there is a danger that the principle will be riddled with exceptions. As a rule, differentiation should therefore not be enshrined in the wording of the principle but taken into account in explicit exceptions. The standard itself should have universal validity. A rough differentiation according to country group may be helpful only in the initial stages, for here too there

<sup>24</sup> Cf. GATT: Trade and the Environment, op. cit., p. 7.

<sup>25</sup> Cf. GATT: Multinational transparency, op. cit.

<sup>26</sup> Cf. Jörn Altmann: Außenwirtschaft für Unternehmen, Stuttgart 1993, pp. 710 ff.

<sup>27</sup> Cf. OECD: Environmental policies ..., op. cit., p. 15; UNCTAD: Trends ..., op. cit., p. 26; Candice Stevens: The OECD Guiding Principles revisited, in: Environmental Law, 23/1993, p. 611.

<sup>28</sup> Cf. UNCTAD: Trends ..., op. cit., pp. 26 f.

<sup>29</sup> Ibid., op. cit., p. 27.

<sup>30</sup> Cf. Candice Stevens, op. cit. p. 608.

are difficulties of classification and definition; for example, China counts as a developing country, but not Russia, the Ukraine or Poland. In addition, imprecise terms are used, such as "needs", "concerns" and "requirements".

## Compatibility between Ecology and Economics

Opposition to environmental protection measures often stems from the fear that a raising of environmental standards may harm the country's position in world trade or distort the structure of trade, especially where eco-protectionism is concerned. On the other hand, it has to be assumed that the international harmonisation of environmental standards, in the sense of a steady adjustment to the higher standards applied in the industrial countries, would also mean a corresponding increase in import prices for the latter countries. There can therefore undoubtedly be points of friction between economics and ecology. Nevertheless, there is no fundamental conflict between ecological and economic objectives; they are far more likely to be highly compatible:<sup>31</sup> feared adverse effects, such as the flight of industry to "pollution heavens", seldom occur in practice, as environmentally friendly products and technologies tend to be the market leaders. Hence, the more international trade law can be integrated with international environmental law, the easier will it be to resolve conflicts.

Environmental standards should be negotiated directly, rather than imposed indirectly via trade-restrictive measures, not least because this will exclude the danger of retaliation. Only 17 of 152 environmental agreements contain trade restrictions, and of these only two discriminate against non-signatories. Inversely, none of the 245 registered environmental protection measures has given rise to a complaint to the GATT.<sup>32</sup>

In this connection, it is repeatedly argued in the literature that a waiver under Article XXV of the GATT can be obtained for multilaterally agreed environmental standards if there is broad consensus on the regulation in question, as a waiver requires a two-thirds majority. There are many factors that militate against such an assumption. The procedure for obtaining waivers is highly complex, so that at the time of negotiating environmental agreements it is completely open whether a subsequent waiver can be obtained;<sup>33</sup> for that reason, an environmental agreement would initially be subject to approval by the GATT. Even if a waiver is granted, it is still possible for the countries affected to lodge a complaint under Article XXIII. As a

matter of principle, waivers are intended to deal with temporary problems, so that they may need to be extended. If a wider range of waivers appeared to be needed, it would be better to supplement GATT law; this would create a more transparent and predictable basis. Whether defining an "environmental window" in Article XX would be a good way of achieving this, whether a special GATT environmental code makes sense, whether GATT as a whole should be reformed and whether GATT/WTO is the appropriate forum in any case – as this could give GATT/WTO a general power to approve environmental agreements<sup>34</sup> – goes far beyond the scope of this article. However, it can be stated in general terms that the necessary regulations must be sufficiently general to be used in all possible cases, but at the same time sufficiently specific to prevent abuse; the advocates of GATT reform also mostly view this problem in the same light.<sup>35</sup>

## Institutional Powers

Of course, this raises the question of the institutional competence for developing global environmental standards. Should GATT/WTO be given competence for environmental matters? Or UNCTAD? Or UNEP? Or should a special institution be established? In my view, GATT and UNCTAD should concentrate on world trade, but take account of the interface between trade, environment and development in view of environmental measures with trade effects.<sup>36</sup> In principle, it would be conceivable to give UNCED or UNEP the necessary powers, but neither of these institutions has made a convincing display of efficiency so far. Initially, the most suitable operational forum is probably the OECD, which already works competently and effectively in the fields of environment, trade and development.

## Prevention and Avoidance

Preventive measures to *avoid* environmental damage are usually more efficient and cheaper than damage *limitation* after the event. There is little dispute about the priority to be given to the principle of prevention: prevention is better than cure. Remedial measures not infrequently merely transfer the problem, as with the "disposal" of problem waste, which is simply exported to other countries. This does not reduce the environmental damage, quite the reverse. Attention to the need for

<sup>31</sup> Cf. OECD: Trade and Environment, op. cit., pp. 3 f.

<sup>32</sup> Cf. GATT: Trade provisions contained in multilateral environmental agreements, TRE/W/1/Rev. 1, Geneva, 14. 10. 1993, and TRE/W/18, Geneva, 1. 10. 1993.

<sup>33</sup> Cf. GATT: Trade and the Environment, op. cit., pp. 4 f.

<sup>34</sup> Ibid., p. 5.

<sup>35</sup> Ibid., p. 5.

<sup>36</sup> The OECD and GATT agree; see OECD: Trade, environment and development co-operation, op. cit., p. 7, and GATT: Trade and the Environment, op. cit., p. 5.

prevention should therefore be an integral part of all environmental legislation. At the business level, this is emphasised clearly by Principle 5 of the ICC principles of environmental management, which requires that the environmental consequences be assessed before action is taken.<sup>37</sup>

### Liability for Damage

The "polluter pays" principle, which was enunciated as early as 1972 in the OECD's guiding principles, complements prevention: if environmental damage cannot be avoided, then the originator should at least bear the cost. This accords with the economic principle of the internalisation of external costs. The attempt to avoid the damage that gives rise to such costs therefore works to the benefit of the environment. If costs are not internalised, they are transferred to the community; this is acceptable only if it can be justified on social grounds or if costs cannot be internalised, for example owing to methodological difficulties in measuring the damage.

The "polluter pays" principle should prevent environmental costs from being subsidised by the state, but permits subsidies that facilitate adjustment to environmental standards, promote technological development or cushion the socio-economic consequences.<sup>38</sup> This was taken up again in the 1992 Rio Declaration on environment and development.<sup>39</sup> The logical consequence of the "polluter pays" principle is liability for damage, whereby no fault need be proven on the part of the originator – the fact that damage has occurred is sufficient irrespective of the question of fault. For example, in early 1994 Ciba-Geigy undertook to remove pesticides on the North Sea coast without clarification of its legal obligation to do so and despite the fact that legal liability probably lay with the shipping company or the insurers of the wrecked vessel.

### Proportionality of Measures

In accordance with international convention,<sup>40</sup> environmental standards should be necessary and appropriate. The severity of the regulations or measures must, however, be proportionate to the intended effect. Environmental regulations should be used only to the extent and for the period necessary to achieve the intended effect (the principle of "minimal interference"). In

particular, one-off solutions should not be generalised. As a result, standards must be constantly reviewed.

### Target Standards

Environmental objectives should be defined as specifically as possible. General objectives are often not operational, and as a consequence they are not easy to apply and hence are inefficient.<sup>41</sup> The objectives must be such that criteria for measuring attainment can be deduced from them. They must therefore have a sound methodological and scientific basis. One common problem is the inadequacy of information,<sup>42</sup> despite the WHO/UNEP Global Environment Monitoring System (GEMS), which has been in existence since 1976;<sup>43</sup> another is the fact that the connection between cause and effect cannot always be proven conclusively, either as regards the causes of environmental problems or the effects of environmental protection measures.

### Product and Process Standards

Whereas product standards that have trade-restrictive effects are permissible under international trade law provided they are applied in a non-discriminatory way, the same does not in principle apply to process standards. Under the rules of international law, national or international standards may not infringe the sovereignty of third countries (the prohibition on extraterritoriality); the regulations agreed apply only to the territory of the contracting parties. Environmental standards that relate not to product characteristics but to production techniques or processes are therefore in principle no justification for trade-restrictive measures. For example, a country may ban tuna imports altogether, but not limit the ban to tuna fish not caught with "dolphin-friendly" nets. If the production process is harmful to the environment, but the product itself is not, there is therefore little that can be done unilaterally, apart from completely banning consumption of the product. Process standards that have repercussions on international trade can be achieved only on the basis of an international agreement, and even then they apply only to the contracting parties. Under GATT law, they can at best be globalised by means of a waiver.

This argumentation is clear from the point of view of trade law and sovereignty. However, the prohibition on unilateral process standards hinders efforts to achieve environmental effects outside a country's own territory,

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<sup>37</sup> Cf. International Chamber of Commerce, *op. cit.*

<sup>38</sup> Cf. Candice Stevens, *op. cit.*, pp. 608 ff., and OECD: Environmental policies, *op. cit.*, p. 14.

<sup>39</sup> Cf. UNCTAD: Trends ..., *op. cit.*, p. 6.

<sup>40</sup> Cf. Ulrich Becker, *op. cit.*, pp. 80 ff.

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<sup>41</sup> Cf. GATT: Trade and the Environment, *op. cit.*, p. 7.

<sup>42</sup> Cf. OECD: Trade, environment and development co-operation, *op. cit.*, pp. 3 f.

<sup>43</sup> Cf. OECD: Environmental policies, *op. cit.*, p. 8.

whether in relation to global problems, such as the protection of species, global warming or the hole in the ozone layer, or in order to prevent production-related cross-border pollution. This is highly questionable, for "environmental degradation is best handled at its source".<sup>44</sup> Environmental standards that are not trade-related can therefore have absolutely no extraterritorial effect if one does not want to go so far as to enforce compliance by means of unrelated trade sanctions.

The problem is clear: process standards can very easily become non-tariff trade barriers. Other, non-technical production aspects could also become involved, such as the question of child labour or wage dumping. The present state of international law means, however, that an acknowledged wrong, in this case environmental damage, cannot be corrected because no solution is currently available for other problems. Making environment-related process standards permissible would probably act as a catalyst for tackling social and political aspects. National sovereignty cannot serve as an alibi; uniform international standards do apply to the interpretation of human rights, and cannot be reinterpreted according to national whim.

## Instrumental Standards

General principles for the development of environmental standards that affect trade must also cover the permissibility and form of particular environmental protection *instruments*. As to permissibility, standards must be compatible with existing instrument-oriented regulations, in particular the GATT codes on technical standards, duties, subsidies and anti-dumping duties.<sup>45</sup> The environmental toolbox should not be fundamentally different from the instruments of trade policy. This is not the place for a detailed discussion of these aspects. The question whether the failure to apply environmental protection measures is to be regarded as an export subsidy remains unresolved, or at best not satisfactorily answered; according to the rules of the GATT subsidies code, it is not viewed in this way at present, although there are sound arguments for doing so.

There is widespread theoretical agreement that many environmental problems can be tackled by internalising external costs, but opinions differ considerably as to the intensity or extent of cost internalisation, not least because there are no established standards for measuring

and assessing environmental damage. Irrespective of this, market instruments must be supplemented by administrative measures, in particular with regard to health and safety. It is possible to adopt a political stance as to the adequate level of state intervention—for example, a wide-ranging debate is taking place about the advantages and disadvantages of price instruments versus quantitative instruments – but this conceptual aspect contributes little to international standardisation. However, general principles, such as the principle of proportionality mentioned above, are also applicable here.

## Enforcing Standards

The effectiveness of environmental standards depends primarily on the willingness of individual states to enforce them within their jurisdiction. Internationally agreed recommendations for action are ineffectual, if the willingness to implement them at national level is lacking. This accords conceptually with the principle of free will. Incentives may have a positive effect, such as the Technical Co-operation Fund foreseen in the Montreal Protocol, but it would be wrong to set great store by them.<sup>46</sup> The Global Environment Facility, for which there is provision in the Climate Convention,<sup>47</sup> points in another direction: here compensatory payments are intended to make it easier to forego import duties and export subsidies (i.e. compensation at the border for higher domestic standards), or put another way to tolerate lower foreign standards.

The scope for sanctions to enforce environmental standards is small. What is meant in this context is not so much specific cause-related trade restrictions, such as curbs on imports of environmentally harmful goods, but rather means of exerting pressure on states generally to introduce and adhere to environmental standards. For example, the Montreal Protocol provides for trade sanctions in the event of violations of the agreement, but this is really no more than an empty threat. It is true that prohibitions have achieved considerable effect, but in some areas, such as the protection of species or in the field of toxic waste, they have led to an expansion of illegal trade.<sup>48</sup> Diplomatic consultation and, where appropriate, international arbitration mechanisms will therefore as a rule be the primary means of resolving conflicts.<sup>49</sup> Nevertheless, it is well worth considering tying the granting of tariff preferences and development co-operation more closely to environmental considerations.

<sup>44</sup> Cf. OECD: Trade and Environment, op. cit., p. 7.

<sup>45</sup> Cf. Candice Stevens, op. cit., p. 616.

<sup>46</sup> Cf. OECD: Environmental policies ..., op. cit., p. 15, and Jürgen Wiemann, op. cit., pp. 28 ff.

<sup>47</sup> Cf. Candice Stevens, op. cit. p. 616.

<sup>48</sup> Cf. OECD: Trade, environment and development, op. cit., p. 7.

<sup>49</sup> Cf. Jörn Altmann: Außenwirtschaft für Unternehmen, op. cit., pp. 437 ff.