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Group on Environmental Measures and International Trade

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GATT AND INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEAS)

Submission by Austria

1. This discussion paper primarily attempts to synthesize arguments already made in the Group and to put forward some points for further discussion and analysis. In providing the Group with this paper the Austrian delegation endeavours to contribute to a focused discussion of agenda item one. Furthermore, in incorporating organically to some extent, the UNCED follow-up process, the establishment of a link between these two subjects under consideration by the Group is attempted. Therefore, this submission is not meant to reflect a formal Austrian position but to be a working tool for the Group.

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2. The United Nations Conference on Environment and Development (UNCED) calls upon States to establish a "new global partnership" and extracts that "sustainable development should become a priority item on the agenda of the international community"[1]. In promoting this partnership, both environmental policies and trade liberalization should be aimed at the common goal of promoting sustainable development[2] and that the overarching principle of cooperation and partnership, closely linked with consensus building, should be the approach to be taken at the interface of environment, trade and development[3].

I. The internationalization of environmental issues

3. As the GATT secretariat has pointed out, GATT rules place essentially no constraints on a country's right to protect its own environment against damage from either domestic production or the consumption of domestically produced or imported goods. Domestic environmental problems, i.e. those which do not involve physical transborder spillover, can be resolved by purely domestic policy choices, according to a nation's own priorities regarding the trade-off between income and environmental quality. This holds for pollution caused both by production activities and by consumption activities, and also for health and safety standards for goods and services consumed in the domestic economy. Economic analysis strongly supports the view that effective solution to problems involving purely domestic environmental problems are not likely to involve trade policies that discriminate against imports[4].

4. Domestic environmental issues can become internationalized in three ways:

(a) concern with the implications for firms' competitiveness;

(b) attempts to assert jurisdiction over the environmental priorities of other countries[5];

(c) concern with global commons[6].

5. Transborder spillover of pollution is by its very nature an international issue, causing bilateral, regional or global environmental effects. These environmental effects may cause serious or non-serious damage.

6. In academic writing, the following distinction has been proposed:

> "To qualify damage as serious, a valuation becomes necessary which forestalls answering this question on a general normative basis by treaty law. The distinction between serious damage(s) and non-serious damage(s), i.e. damage which must be tolerated by the neighbouring State, must be assessed according to the following criteria: the respective state of development of

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[1]Agenda 21, Chapter 2, para. 2.1.

[2]Nordic countries, TRE/8, para. 135.

[3]Canada, TRE/12, para. 160.

[4]GATT secretariat Study on Trade and Environment, see: International Trade in 1990-91, GATT 1992, Vol.1, p. 23, 27, 28.

[5]IBID. 28.

[6]Such as the atmosphere, the high seas, the ozone layer.

technically advanced facilities, the usual degree of pollution, which is emitted by such facilities, the prior degree of pollution of the respective area and the hereby resulting restriction in using the area by the burdened State"[7].

II. Unilateral measures

7. Unilateral action based on IEAs is not in the centre of our discussion.

8. As pointed out in previous interventions[8], the extraterritorial application of national regulations in order to protect the global commons, or unilateral actions to deal with environmental challenges outside the jurisdiction and not based on international consensus are at the very centre of our submission. However, there could be room for unilateral action, if according to the rules of international law, the responsibility of a State has been clearly established. This could be the case if transboundary pollution causes serious environmental damage on a country's territory.

9. The concept of "common but differentiated responsibilities" of States[9] and "equitable sharing of the costs to protect the environment" would be circumvented if a country could take unilateral trade restrictions aimed at changing the environmental policies of another country, while ignoring the costs imposed on that country by trade restrictions[10]. In adopting unilateral trade restrictions in situations where international consensus building is cumbersome, legitimate environmental objectives could run the risk of being kidnapped by protectionist aspirations.

III. Defining criteria for an international environmental agreement (IEA)

10. GATT contracting parties have concluded more than 150 international agreements in the environmental field[11].

11. As outlined by Canada[12], only seventeen of these agreements include trade provisions, providing for import and export restrictions and requiring countries to protect the environment also outside their national jurisdiction.

12. There is broad consensus within this Group that transboundary environmental problems should be tackled and resolved through internationally agreed measures[13]. The EC has pointed out, that the Rio Declaration in Principles 2, 7 and 12 underlines the obligation of countries to cooperate for the solution of global and transboundary problems.

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[7]Rüdiger Wolfrum, Purposes and Principles of International Environmental Law, in German Yearbook of International Law, Vol. 33 (1990), 311.

[8]TRE/7, paras.50ff.

[9]Principle 7 of the Rio Declaration points out that "in view of the different contribution to global environment degradation, States have common but differentiated responsibilities".

[10]EC, TRE/W/5, p.2.

[11]Listed by the GATT secretariat in its factual note L/6896.

[12]TRE/12, para.76.

[13]See for example: Nordic Countries TRE/4, para.33; Mexico TRE/5, para.23.

13. If there is either a domestic or transboundary environmental problem, environmental policy measures are the first best solution to tackle an environmental problem.

14. There may be cases where environmental policy measures, domestic or transboundary, do not suffice and accompanying trade measures are required. Thus global and regional ecological problems should be dealt with at their source by means of a sound environmental policy in a genuine multilateral and effective way, using only those trade measures necessary to achieve the environmental objective of an IEA. Necessary trade measures must neither be an instrument of protectionism nor a disguised restriction on international trade. As trade measures were judged necessary in only a limited number of more than 150 IEAs, a very strict test of necessity seems justified[14].

15. Even if an IEA is not feasible, States should limit themselves as far as possible to environmental policy measures to remedy environmental problems.

16. Sweden[15] made the point that GATT rules should fulfil two functions:

(1) they should not be used to impede the implementation of legitimate trade obligations in an IEA, but

(2) should provide for reasonable safeguards against any misuse of trade measures.

17. In this respect, the GATT should not stand in the way of a **"genuine multilateral" IEA** subject to the following **criteria**[16]:

1. Framework, consultation and accession

18. The IEA should be negotiated *within the framework of the U.N.* or within the framework of a representative regional institution and should be *open for accession* by any GATT contracting party on equitable terms vis-à-vis its original members; no country should be excluded from negotiating an IEA especially it if were affected by a trade measure.

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[14]Compare fn.4, pp.35.

[15]TRE/4, para.34.

[16]The EC (cf. TRE/W/5, p.9) suggests that a "genuine multilateral" environmental agreement has to fulfil the following criteria:

(i) The agreement should have been negotiated under the aegis of the United Nations or a specialized agency or the procedures for negotiation should have been open for participation of all GATT members.
(ii) The agreement should be open for accession by any GATT members on terms which are equitable in relation to those which apply to original members.
(iii) Regional agreements, addressing environmental problems at the regional level, cannot provide any justification for applying extrajurisdictional trade measures vis-à-vis countries outside the region.

In addition to these criteria, it is necessary to consider the level of participation in the agreement.

Chapter VI of the Havana Charter contained criteria for intergovernmental commodity agreements. These agreements had to:

(a) be open initially to all members on equal terms;
(b) provide for adequate participation by countries whose interest was in the importation or consumption of a commodity;
(c) accord fair treatment to members who did not participate.

In addition, their negotiation and administration needed to be given full publicity, (Cf. TRE/W/17, para.5.).

19. The best way to tackle environmental problems is in consultation with all interested groups, including representatives of the trade and environmental communities and to reach a common understanding on the existence of the environmental problem to find effective instruments to solve it, including trade instruments if necessary.

2. Geographic scope

20. Domestic environmental problems, which do not affect other countries, should be resolved by national authorities by means of suitable policies according to their own national environmental objectives and priorities, whereas transboundary environmental problems that go beyond national frontiers and have transborder or global effects should be resolved through international cooperation or by consensus[17].

(a) Regional environmental problems

21. Transboundary environmental problems primarily arise from emissions of "dirty" industries and transport, resulting in pollution of air, soil and water. If these problems need to be addressed at the regional level, regional institutions could be adequate fora for negotiations. The EC[18] points out that if most or all states in a region concerned participate, a regional agreement might be an IEA if it dealt with a problem occurring primarily in that region.

(b) Global environmental problems

22. In the case of global environmental problems the state community as a whole is called upon to cooperate to address and solve the problem adequately. In some cases trade measures, as provided for in the Montreal Protocol, might be considered necessary for obtaining the goal of an IEA.

3. The level of participation

23. The level of participation in an IEA is linked to the issue of geographical scope and depends on various factors. A country may decide not to join an IEA because of controversial scientific evidence, differences in national risk assessment, differences in the capability to adhere to certain environmental standards and different absorption capacities of its environment.

24. As outlined by New Zealand[19], it is of great importance for the effectiveness of an IEA whether parties to an IEA include the majority of production and consumption of substances controlled by an IEA. If non-signatories include major sources of both production and consumption of the specific product subject to restriction, the IEA would have only marginal impact on the environmental problem. Thus, the participation of the "key players" is essential for the effectiveness of an IEA.

25. The EC[20] has argued, that certain types of trade measures foreseen in an IEA applied vis-à-vis non-participants should only benefit from an exemption under GATT Article XX if the level of participation is sufficiently representative of producers and consumers. Mexico[21] has proposed the following criteria for measuring the representativeness of an IEA:

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[17]Mexico, TRE/12, para. 136.

[18]TRE/W/5, p.9.

[19]TRE/W/8.

[20]TRE/W/5, p.9.

[21]Mexico, TRE/7, para.15.

- adequate geographical coverage,
- level of development,
- involvement in the environmental problem.

26. Principles 6 and 7 of the Rio Declaration call for common but differentiated responsibilities of states in view of the different contributions to global environmental degradation and for the encouragement of the participation of developing countries in IEAs[22].

4. Specificity and transparency

27. Trade provisions in an IEA should be specific. They should be implemented in a transparent manner and notified to the GATT in accordance with the relevant provisions[23].

28. In a factual note[24], the secretariat compiled the trade-related notification requirements existing in IEAs. These provide "generally for notification of measures to the secretariats of the Agreements and to the Parties to the Agreements, but not on a wider basis". The issue has been raised whether or not trade-related measures taken in pursuance of a goal specified in an IEA should be notified to the GATT secretariat[25]. This notification to the GATT secretariat is the more useful as the implementation of a measure nearly always gives discretionary leeway to the implementing State. Thus, there should be the possibility of an international control of the implementation to secure that the least trade restrictive or distorting measure is chosen.

29. In this context the Nordic Countries[26] raised the question, whether and to what degree an IEA setting out environmental objectives, needs to specify the trade measures to attain them. Thus, the Nordics raised the interesting problem whether such an IEA represents a genuine international agreement to apply trade measures in conformity with GATT law.

IV. Trade measures taken pursuant to an IEA

30. Conflicts with GATT are possible when an IEA includes trade measures vis-à-vis non-signatories that are not applied on an MFN and national treatment basis. As GATT is the contractual basis between a GATT contracting party non-signatory to an IEA and a GATT contracting party also a signatory to that IEA, trade measures taken pursuant to such an IEA must be consistent with the basic GATT principles, most notably with GATT Articles I, III and XI. If this is not the case, Article XX(b) and (g) could be invoked.

31. In this context, the main issue of extraterritoriality arises in a situation where measures are aimed at environmental protection or conservation outside the jurisdiction of countries taking the measure.

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[22]Agenda 21, Chapter 2, para. 2.22(h) calls governments to "(e)ncourage participation of developing countries in multilateral agreements through such mechanisms as special transitional rules." According to Principle 6 of the Rio Declaration, "(t)he special situations and needs of developing countries (...) shall be given special priority."

[23]Activity 2.22(c) states that "In those cases when trade measures related to environment are used, ensure transparency and compatibility with international obligations."

[24]TRE/W/10.

[25]TRE/10, paras.32,33.

[26]TRE/11, paras.78ff.

32. The environmental impact of a behaviour causing environmental damage by a non-signatory to an IEA could affect:

- the territory of a signatory to an IEA;
- areas beyond national jurisdiction; or
- solely the environment within the jurisdiction of the non-party signatory.

33. As pointed out by New Zealand[27], trade measures vis-à-vis non-signatories can be applied on a non-discriminatory or a discriminatory basis. In the latter case, which poses more serious GATT constraints, measures could either be a

- discriminatory application to non-signatories of measures not in force between signatories, or
- non-application to non-parties of measures which are in force between signatories.

34. A panel report clarified that the objective intended by Article XX is to allow contracting parties to impose trade-restrictive measures inconsistent with the GATT to pursue overriding public policy goals to the extent such inconsistencies are unavoidable[28].

1. The discrimination-necessity test

35. According to Article XX, trade measures are "subject to the requirement that [they] are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the *same conditions* prevail"[29].

36. Differential treatment of signatories and non-signatories could be necessary to achieve the goals of the IEA. A need for such a regulation appears when IEAs are designed to limit trade in ecologically-sensitive goods, such as hazardous products or endangered species. Trade regulations might also be necessary to reduce the use of environmental damaging products at the global level, such as the controlled substances in the Montreal Protocol. In this case, differential treatment may also be necessary to prevent the migration of production of controlled substances from signatories to non-signatories, thus frustrating the environmental objective of the Montreal Protocol.

37. It appears[30] that in dealing with the "free-rider problem", the issue at stake is not one of non-signatories deriving benefits from actions undertaken by signatories to IEAs, but that the actions undertaken by the signatories to an IEA to tackle a global problem may be nullified by actions of non-signatories.

38. Allowing a country with higher environmental standards to offset the resulting higher costs of its domestic producers by imposing countervailing duties on the competing imports is very problematic and not authorized by present GATT.

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[27]TRE/W/8.

[28]Panel Report "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", BISD 37S/200, DS10/R.

[29]Principle 12 of the Rio Declaration has a similar language in stating that "trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction to international trade". Activity 2.22(f) of Agenda 21 provides the same for environment related regulations and standards.

[30]EC, TRE/6, para.234; Nordic countries, TRE/7, para.7.

39. As outlined by Switzerland[31], States differ with regard to their economic, social and cultural conditions and have different policy priorities. Differences in production capacity, in available infrastructure, in scale of economies or in any environmental or economic condition, would mean that measures to restore a level playing field (e.g. a countervailing duty) would not accurately reflect the amount by which a particular foreign industry is favoured. Different environmental preferences and hence different environmental standards are only one of many differences in policies that influence a county's competitiveness. In economic terms, environment is another factor of production.

40. Article XX(b) does not justify trade sanctions for commercial policy reasons. This principle is confirmed by paragraph 2.22(e) of Agenda 21[32]. After all, since an IEA has environmental objectives, it would hardly ever provide for the establishment of a "level playing field". Differential treatment of "free riders" solely to ensure an overall level playing field seems not to be justified under present GATT law.

41. The efficiency and proportionality of means to achieve the environmental goal are the prime yardsticks of necessity. Discriminating trade provisions should not be used as a "stick" to put pressure on non-signatories to join an IEA when trade with non-signatories is not an underlying factor in perpetuating the environmental problem being addressed.

42. The EC[33] underlines that the term "where the same conditions prevail" has to be understood as to base differential treatment on countries' environmental conduct and not on their membership or non-membership to an IEA. There must be an actual difference between the environmental protection commitments applied by parties and non-parties. This principle is fully recognized under CITES, the Basel Convention and the Montreal Protocol.

43. Thus for the *"discrimination-necessity test"* trade measures pursuant to an IEA should give different treatment to parties and non-signatories only to the extent necessary to achieve the environmental goal and should be based on an actual difference in environmental conduct. In applying these criteria, the questions outlined by Hong Kong[34] seem to provide a useful guideline.

2. The primary purpose test

44. Article XX further requires that measures must not be applied in a manner which would constitute a *"disguised restriction to international trade"*.

45. The meaning of the term "disguised restrictions to international trade" is ambiguous. According to the view of the Panel on U.S. Prohibition on Imports of Tuna from Canada[35] this term is a ***transparency requirement***. The Panel stated that the U.S. prohibition of imports of tuna and tuna

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[31]TRE/12, para.147.

[32]Agenda 21, Chapter 2, para.2.22(e) calls governments to "(s)eek to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environmental standards and regulations since their application could lead to trade distortions and increase protectionist tendencies".

[33]TRE/W/5, p.6.

[34]TRE/5, para.87; How universally accepted was the environmental standard being imposed upon the non-member; were the discriminatory measures really to enhance the environmental objective of the IEA or to iron out the competitive advantage enjoyed by the non-party who might have different environmental priorities; was the non-compliance by a particular party a result of a lack of resources to comply with the level of obligations imposed by that IEA?

[35]BISD/29S/91, p.108, para.4.8.

products from Canada should not be considered to be a disguised restriction on international trade, since it had been taken as a trade measure and publicly announced as such.

46. Article XX does not relieve a contracting party from its obligations to notify its national environmental regulations, including those taken pursuant to an IEA, in accordance with Article X, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance and the TBT Agreement, or additional transparency requirements resulting from the ongoing Uruguay Round.

47. The Panel on Canada Prohibition of Exports of Salmon and Herring[36] points to an additional rationale: The *"primary purpose test"*. The Panel found that the export prohibitions were not justified by Article XX(g) because these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish.

48. Articles 2.1 and 7.1 of the TBT Agreement recognize that "Parties shall ensure that technical regulations and standards (including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards) are not prepared, adopted or applied with a view to creating obstacles to international trade."

49. In contrast to the necessity test, which examines whether a measure is necessary to achieve the objective aimed at, the primary purpose test looks into the primary **motive** of the measure under consideration.

50. Since motivation is hard to verify the context in which a measure was adopted[37], or the manner in which it was applied[38] have to be examined in order to determine whether a trade measure affords protection to domestic production[39].

51. In this context, the **complementarity** of trade measures is also of interest. Trade measures pursuant to an IEA should only be taken in conjunction with domestic restrictions on production and consumption[40].

52. If this test reveals that the objective or effect of a measure is to afford protection to domestic producers, in circumstances where such protection is not "necessary" to achieve the environmental objectives, a justification of a trade measure under Article XX would not be possible.

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[36]BISD/35S/98.

[37]For example: The adoption after heavy lobbying from domestic producers against "dirty imports".

[38]For example: The introduction of a packaging ordinance with the effect of a de facto discrimination of foreign producers as far as the participation in the collection system is concerned, thus unduly impeding market access or increasing costs; The Panel on U.S. Imports of Certain Automotive Spring Assemblies (BISD 30S/107, para.56) noted that the preamble of Article XX made it clear that it was the application of the measure itself that needed to be examined.

[39]The Panel Report on "United States - Measures Affecting Alcoholic and Malt Beverages", DS23/R, recognized that in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production".

[40]The Panel Report on "Canada - Measures Affecting Exports of Unprocessed Herring and Salmon", L/6268, 35S/98 recognized that measures taken in conjunction with domestic restrictions are considered to be measures "primarily aimed at rendering effective (domestic production) restrictions".

3. The meaning of the term "environment"

53. The primary purpose of a trade measure pursuant to an IEA must be the protection of the environment and not the protection of an industry. However, as a review of international agreements shows, there is no multilaterally agreed uniform definition of the term "environment".

54. Measures taken "to protect human, animal or plant life or health" and "the conservation of exhaustible natural resources" are by their very nature to protect the environment. Nevertheless, in general use, the term "environment" seems to be given a rather broad, encompassing meaning.

55. Various international agreements offer some common features of the term "environment". Environment includes the human, animal and plant life or health, but also air, water and soil. The landscape and even cultural heritage are to be found in definitions. "Environment" seems not to be limited to nature and natural resources but also to include human made creations. As the destruction of the environment may influence or even destroy the social fabric or grown habitats, thus threatening the very existence of creatures, the social dimension of the environment might also deserve more attention in the future[41].

56. Therefore, as Article XX is an exception clause which has to be interpreted narrowly to avoid legal uncertainty on loopholes, it would prime facie appear to be problematic to add the term "environment" to the enumeration of Article XX(b) without a clear understanding of its meaning.

57. A common understanding or a collective interpretation could clarify that the language of Article XX(b) and (g) is broad enough to cover all global and transboundary environmental problems addressed in IEAs. "Necessary" trade measures taken pursuant to an IEA would hardly ever fail to meet the requirement of Article XX(b), because global or transboundary environmental problems always endanger human, animal or plant life or health.

58. However, one could imagine a case when it is necessary to take trade measures to limit or even prohibit activities which taken individually appear not to aim directly to protect human, animal or plant life or health (Article XX(b)) or relate to the conservation of exhaustible natural resources (Article XX(g)). Nevertheless, the cumulative effects of these individual actions over a certain period of time could have negative effects and therefore threaten the life or health of human, animal or plant life or the ecosystem. According to the precautionary approach[42], measures could be justified if they are necessary to avoid damage to the environment in the future. In such cases the term "environment" appears to be more appropriate than the enumeration of the elements actually used in Article XX.

59. The term "environment" is explicitly mentioned in both the 1979 TBT Agreement and the Uruguay Round 1992 Draft TBT Agreement and in the UR Draft Decision on Sanitary and Phytosanitary Measures (Draft SPS Decision).

60. Article XIV(b) of the UR Draft General Agreement on Trade in Services (GATS), which is the equivalent to GATT Article XX(b), does not include the term "environment". However, on the insistence of Austria, a draft ministerial decision was attached to the Agreement: "Parties acknowledge that measures necessary to protect the environment may conflict with the provisions of the Agreement. Since these measures typically have as their objective the protection of human, animal or plant life

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[41]TRE/7, para.51.

[42]Principle 15 of the Rio Declaration states that "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities."

or health, it is not clear that there is a need to provide for more than is contained in Article XIV(b)". Furthermore, this draft decision provides for a future working party to "examine and report, with recommendations if any, on the relationship between services, trade and the environment including the issue of sustainable development", whether any modifications of Article XIV in order to take account of measures necessary to protect the environment is required.

4. The necessity of a trade measure

61. As a general rule, trade measure pursuant to an IEA should be in conformity with the following *necessity-principles*:

(a) Trade measures must be necessary to prevent developments in trade from undermining the effectiveness of the IEA.

62. Trade measures must be necessary to ensure that trade itself does not impede the IEAs' effectiveness in achieving the environmental goal. Trade provisions in IEAs should be directly related to the environmental problem or conduct at hand and not take the form of trade sanctions or measures aimed at unrelated products. If the products with which an IEA is concerned are traded, the IEA may in practice need to regulate that trade in some way. The effects of uncontrolled trade among parties or non-parties might otherwise defeat the purpose of the IEA.

63. Relevant examples are IEAs explicitly designed to limit trade in ecologically sensitive goods, such as hazardous products or endangered species. In IEAs designed to reduce the use of environmentally-damaging products at the global level, as the Montreal Protocol, trade restrictions might be needed to prevent production and consumption of controlled substances from moving from one location to another, thereby hindering the overall reductions mandated by the agreement.

(b) Trade measures must be "proportional"/"least trade-restrictive".

64. In order to be "necessary", a trade measure must be proportional with respect to the environmental problem addressed by the IEA.

65. The Panel on United States - Section 337 of the Tariff Act of 1930 recognized that "a contracting party cannot justify a measure inconsistent with other GATT provisions as necessary if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions[43]."

66. This interpretation of the term "necessary" was also applied in the report of the Panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes[44], in the unadopted report of the Panel on United States - Import Restrictions on Tuna and Tuna Products from Mexico[45] and in the Panel on United States - Measures Affecting Alcoholic and Malt Beverages[46].

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[43]BISD 36S/345.

[44]BISD 37S/200, Art.XX(b).

[45]GATT document DS21/R, 3.09.1991.

[46]DS23/R, 16.03.1992.

67. As far as trade measures pursuant to an IEA are concerned, the panel needs to determine whether there are alternative measures that would be at least as effective in achieving the environmental goal. Then the panel must examine such alternatives if any of them are less GATT-inconsistent than the trade measures in dispute. If so, then the disputed measure will not qualify under Article XX(b)[47].

68. Under the Agreement on Technical Barriers to Trade (TBT) even non-discriminatory regulations permissible under GATT Article III might be challenged as "unnecessary obstacles to international trade". The 1992 Uruguay Round Draft TBT Agreement extends and clarifies this by requiring in Articles 2.2 and 2.3 that "technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create". Such legitimate objectives are, inter alia, protection of human health or safety, animal or plant life or health, or the environment. A footnote reads that "this provision is intended to ensure proportionality between regulations and the risks non-fulfilment of legitimate objectives would create". "Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if changed circumstances or objectives can be addressed in a less trade restrictive manner[48].

69. Paragraph 21 of the Draft SPS Decision states that "when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, contracting parties shall ensure that such measures are the least restrictive to trade, taking into account technical and economic feasibility." In the context of the SPS Decision, the risks to human, animal or plant health must first be assessed taking into account the scientific, technical, economic and other factors indicated in the text. On the basis of this risk assessment, contracting parties are to determine what level of sanitary or phytosanitary protection is appropriate under the circumstances. Once a level of protection has been determined, there are often a number of alternative measures, or combination of measures, which may be used to achieve this protection. It is when selecting which specific measures will be applied to achieve the desired protection that contracting parties are to ensure that, except when it is not feasible because of technical difficulties or high economic costs, they institute those measures which least restrict trade[49].

70. Synthesising these concepts, trade measures pursuant to an IEA should be the least trade restrictive reasonably available. They should not be more severe, and should not remain in force any longer, than necessary to protect the environmental goal of an IEA. Consideration of the degree of restrictiveness should be proportional to the risk of non-fulfilment of the objectives of an IEA.

71. Thus, the conclusion in para. 12 of the useful instructive paper[50] of the GATT secretariat on the concepts of "least trade restrictive" and "proportionality" seems to be correct.

5. Process and production methods (PPMs)

72. There is a systematic problem in the GATT if **production processes** are at the source of transboundary damage to the environment as trade restrictions are only applicable to products which themselves are a danger for or damaging the environment. Furthermore, there is no room within the present GATT system to cross-retaliate, i.e. to apply trade measures on products not being themselves harmful to the environment.

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[47]Steve Charnovitz, GATT and the Environment: Examining the Issues, In: International Environmental Affairs, Vol.4 (1992) 3,213.

[48]TRE/W/16, para.8.

[49]TRE/W/16, para.11.

[50]TRE/W/16.

73. As the EC[51] points out, restrictions can be applicable, if a product itself, or substances physically incorporated, are environmentally damaging. If environmental damage is embodied in the product, then there is a consumption externality that should be internalised by an importing country either through a regulation or a tax. This view is supported by Principle 16 of the Rio Declaration which calls for "the internalization of environmental costs and the use of economic instruments, taking into account that the polluter should, in principle, bear the cost of pollution"[52].

74. However, environmental damage is not limited to the product itself, but can also occur through the production process, even if the product itself is not harmful to the environment. Trying to internalize such a production externality raises the problem of giving domestic laws extraterritorial effect if the PPM does not affect the product as such.

75. GATT dispute settlement practice has confirmed that the *concept of like products* refers to the nature and characteristics of competing, not necessarily identical, products and not to the factors involved in their production. Differences resulting from geographical factors, cultivation methods, processing, and the genetic factor were not considered a sufficient reason to allow for a different tariff treatment[53].

76. When the negative environmental impact of a PPM is embodied in the product as such, non-discriminatory domestic product regulations can be enforced vis-à-vis imported products at the border in a GATT-consistent way. When the negative environmental impact of a PPM is **not** embodied in the product the same proceeding could be a discrimination between "like products".

77. However, the principle that different PPMs do not allow for a differentiation between "like products" seems to be changing, which can be derived from the following development.

78. According to the 1992 Draft Uruguay Round Agreement on TBT a "technical regulation" is defined as a "document which lays down product characteristics or their related processes and production methods". Thus, in reforming the 1979 TBT Agreement, a product discrimination on different PPMs is explicitly stated.

79. Also the EC[54] hinted in its submission that "restrictions may only be applied on products on the basis that their production is damaging to the environment under certain circumstances." These "certain circumstances", however, need further clarification. Furthermore, if understood correctly, the EC proposes that restrictions placed on products because of the damage done to the environment during the production process is only justified if the restricting signatory to an IEA controls/limits itself the same production process.

80. Such an approach could help to avoid that restrictions are taken because of protectionist and not environmental reasons. However, there is a problem if there is no comparable production in the restricting state.

81. PPMs may be used as legitimate criteria for restructuring trade in specific goods when it is agreed in an IEA, among the main users of these PPMs, that their phasing out is necessary to achieve

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[51]TRE/W/5.

[52]The "Polluter Pays Principle" means that the polluter should bear the costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment. Thus the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.

[53]Panel Report on "Spain - Tariff Treatment of Unroasted Coffee", L/5135, 28S/102, 111-112.

[54]TRE/W/5, p.8.

the environmental objective set out in this IEA. A typical example is the ban on imports from non-parties of products produced with controlled substances provided for in the Montreal Protocol.

82. Taking into account these considerations, Article XX could thus eventually be construed to justify not only product related but also production related measures if they are necessary to protect human, animal or plant life or health (or the environment).

V. Trade measures of an IEA in the GATT context: possible alternative solutions

The following enumeration attempts to list some possible alternative solutions.

1. Insertion of the term "environment" in Article XX

83. This would presuppose the elaboration of a commonly accepted understanding of the term "environment" by the contracting parties, along the lines previously outlined (cf.IV.3. above).

2. Collective interpretation

84. The EC[55] proposed a collective interpretation of Article XX to clarify the relationship between the GATT and trade measure taken pursuant to an IEA. "Clear" criteria should be essentially geared to establishing safeguards against the application of unnecessary restrictions on GATT members which are not parties to the IEA.

3. Trumping Clause

85. Suggestions were made to amend Article XX so as to provide for a so-called "*trumping treaty clause*". This could be implemented by either listing existing IEAs as trumping treaties, or formulate abstract criteria for IEAs to be met, for example those outlined in Section III, and determine that obligations from those IEAs would override obligations of the GATT.

86. This approach was taken by NAFTA. NAFTA parties agreed on a list of IEAs with trade provisions (Montreal Protocol, Basel Convention and CITES) that are given precedence in case of a conflict between a party's obligations under the listed IEAs and the NAFTA.

87. Articles 1 and 2 of the Draft UR Agreement on Trade-Related Aspects of Intellectual Property Rights take a similar approach in enumerating agreements in the field of intellectual property rights and referring to those treaty obligations.

4. Waiver procedure

88. Article XXV of the GATT had been created to allow CONTRACTING PARTIES to waive GATT obligations in exceptional circumstances upon an affirmative vote of two-thirds of the votes cast, provided the two-thirds majority constitutes more than half of all contracting parties. Thus in the case of an IEA with large acceptance, parties might jointly seek a waiver for a particular measure in the MEA.

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[55]TRE/W/5, p.4.

89. Although, as noted by the Nordic delegation[56], a waiver approach has some potential disadvantages since obtaining a waiver could be time consuming and uncertain and granted only for a limited time, Canada[57] and Hong Kong point out that such concerns might not be warranted at the practical level. If an IEA reflects a genuine multilateral consensus, it should therefore find broad support among GATT contracting parties over the time. Thus, the use of the waiver provisions could identify which amendments of the GATT might be required and eliminate the need to agree on certain general criteria to apply to any future "trumping" IEA.

90. The current eighty-two signatories to the Montreal Protocol include all major producing and consuming countries and cover more than ninety-five per cent of world consumption and production of ozone depleting substances. The CITES Convention is now ratified by 111 States[58]. If most of the participants in an IEA are also GATT contracting parties, the required majority to grant a waiver could be expected.

5. Introduction of an approval procedure

91. An amendment of Article XX to include measures undertaken in pursuance of obligations under an international environmental agreement could follow the lines of Article XX(h).

92. GATT Article XX(h) and its interpretative note covers measures where an international commodity agreement:

(a) conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them;

(b) is itself submitted and not disapproved; or

(c) conforms to the principles approved by ECOSOC Resolution 30(IV), adopted 28 March 1947.

93. However, as the GATT secretariat points out, no contracting party has submitted a complaint under Article XXIII that a measure taken pursuant to an international commodity agreement was GATT-inconsistent, nor has an international commodity agreement been submitted to the CONTRACTING PARTIES for approval under Article XX(h), nor have any criteria for international commodity agreements been established by the CONTRACTING PARTIES.

94. Such an amendment of Article XX would clarify that trade measures based on genuine IEAs, which find the approval of the CONTRACTING PARTIES according to one of the alternatives outlined, are GATT-compatible[59].

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[56]TRE/9.

[57]TRE/12, para.84.

[58]E.-U. Petersmann, *International Trade Law and International Environmental Law*, in: 27 JWT 1 (1993), 75.

[59]TRE/W/17, para.2; see also para.5:

Chapter VI of the Havana Charter contained criteria for intergovernmental commodity agreements. These agreements had to:

(a) be open initially to all members on equal terms;

(b) provide for adequate participation by countries whose interest was in the importation or consumption of a commodity;

(c) accord fair treatment to members who did not participate.

In addition, their negotiation and administration needed to be given full publicity.

6. Shifting the burden of proof

95. Another possibility to privilege trade measures agreed in an IEA could be the shifting of the burden of proof in the GATT dispute settlement procedure.

96. When a dispute between two GATT contracting parties - a signatory and a non-signatory to an IEA - regarding a trade measure taken pursuant to this IEA, arises because a party to the dispute claims the violation or infringement or nullification of its rights under GATT, the dispute settlement procedure of the GATT is available.

97. Since Article XX is a limited and conditional exception from obligations under other provisions of the GATT, and not a positive rule establishing obligations in itself, the burden of proof is placed on the party invoking Article XX to justify its invocation.

98. Article 2.6 of the UR Draft TBT Agreement states: "Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives (i.e. protection of human health or safety, animal or plant life or health, or the environment) and is *in accordance with the relevant international standards*, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."

99. We support the view expressed by the EC[60], that it is a fundamental principle reflected in the draft TBT and SPS Agreements, that measures which conform to international standards shall be deemed to fulfil the "necessity" test. This principle applies a fortiori to trade measures taken pursuant to an IEA. Since IEAs which impose binding obligations on members to achieve a common goal reflect a much higher degree of international consensus than standards, Article 2.6. could serve in a panel procedure as a model to privilege IEAs, containing sufficiently precise trade measures and subject to criteria III.1.-4- above. Given the broad consensus upon which such IEAs are based, the burden of proof could shift to the complaining contracting party, thus proving to the panel, that

- the trade measure is not primarily aimed at the environmental goal set in the IEA;
- the trade measure is not necessary or proportional.

100. Setting up a rebuttable presumption that trade measures taken pursuant to an IEA are not in conflict with the GATT could be combined with alternatives (3) and (4) outlined above.

101. This innovation would give potential free riders a more burdensome stand in a GATT dispute settlement procedure.

102. In determining commercial costs and environmental benefits of a trade measure, there is often a considerable uncertainty about environmental effects of certain trade measures, thus requiring a close examination of the matter by trade and environmental experts. Therefore, when a problem of the interface of international trade and the environment is under consideration, it seems worthwhile to discuss, whether the current GATT dispute settlement system provides for the required expert participation.

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[60]TRE/W/5, p.8.

7. Preservation of the status quo

103. Finally, it might be considered whether the language of Article XX is not already broad enough to cover all legitimate trade-related environmental objectives and measures. Moreover, in combination with the waiver-approach, measures based on multilateral IEAs would hardly be subject to any GATT constraints.