ANALYSEN UND BERICHTE

International Trade Rules and Environmental Protection

By *Rolf Knieper* and *Gerd Winter*

I. Introduction

World trade has a powerful impact on the environment. Its nation state oriented terms and its corollary, the balance of payments(-constraints) determine what kind of crop is grown, how intensively forests have to be exploited, where production and use of products is concentrated, how transport of raw materials, semi-finished and finished goods is organized, where waste - including the hazardous element - is finally deposited.

Concentration on one export crop may have surface-impoverishing effects, deforestation may endanger the world climate, heavy concentration of production may overpollute certain regions, superfluous transport may consume energy and create pollution. Despite all this, the ecological question has not yet really concerned international trade law. It is true that the General Agreement on Tariffs and Trade (GATT) takes notice of environmental protection. But the treaty perceives it as a basically undesired barrier to trade[1], not as a necessary element of long-term economic stability. And even in the negative sense of trade restriction the issue has not really preoccupied the GATT law and practice for very long time.

A standing group on environmental matters set up as early as 1971 with the mandate to examine, upon request, trade policy aspects of environmental protection measures has not been requested to study any such matter for 20 years[2]. This inactivity ended when the environmental NGO's took up the issue and began campaigning in the frame of the ongoing

1 As an early official assessment see GATT Studies in International Trade No. 1/1971, "Industrial Pollution Control and International Trade".

2 The decision to establish the group stood in the context of preparations for the UN Conference on the Human Environment in Stockholm in 1972.

Uruguay Round[3]. In October 1991 the GATT Council accepted a request of the EFTA countries to revive the working group and noted an agenda[4].

Economic theory since Adam Smith and Friedrich List has considered the costs and benefits of international trade: should there be barriers against imports for the protection of national infant industries; should there be export promotion to foster national industries, jobs and other nationally defined issues; or should trade be left to the competitive market behaviour of autonomous enterprises? Keynes' appraisal of international trade as "a desperate expedient to maintain employment at home by forcing sales on foreign markets and restricting purchases, which, if successful, will merely shift the problem of unemployment to the neighbour which is worsted in the struggle..." is as correct today as it was 57 years ago[5].

Apparently, the above verdict was not only applicable to one of the two seemingly fundamentally opposed schools of thought and practice in international trade. It was passed upon both free traders and protectionists. National governments have used both liberalisation and protectionism at different times to support national industries in their struggle on the world market, the difference lying in the evaluation of a national competitive edge. As a rule of thumb, protectionists thought poorly of the competitiveness of local industries whereas free traders believed in competitive advantages. Both schools pretended over the time to favor better and fairer market conditions and used such noble symbols as infant industry protection or the play of comparative advantages. The practice was different, as eloquently described by Keynes. By taking sides in international competition and by trying to influence market conditions states disregarded in the international arena what was their reason of being within territorial borders: to be the sole institution independent of market imperatives and thus able to formulate and execute the common interest of bourgeois societies. From that arose the still deep suspicion that governments, by executing such common interest and by imposing social rationality and objectives on individual interests at home, act in reality and intentionally in order to one-sidedly push national interests in international competition. An emerging practice of forming trading blocks and trying to fall back into a near form of "aggressive unilateralism"[6] demonstrates that these concepts die hard despite a profoundly changed global economic situation.

3 See the position papers of the NGO's GATT steering committee and a conference held in Brussels, Nov. 28 to Dec. 2, 1990, available at Avenue Cortenbergh 62, B-1040 Brussels.

4 GATT Focus No. 85 (Oct. 1991), p. 1

5 *J. M. Keynes*, The General Theory of Employment, Interest and Money, 1935, Book VI, Chapter 24, V.

6 *J. Bhagwati*, Departures from Multilateralism: Regionalism and Aggresive Unilateralism, The Economic Journal 100 (Dec. 1990), pp. 1304 ss.; also: *E. H. Preeg*, The Growth of Regional Trading Blocks, Economic Impact, 1989/4, pp. 4 ss.

However, the ever increasing integration of the world economy has objectively loosened the connection between states and national industries. The global threat of environmental disaster, to which an unrestrained fight for competitive advantages must lead, forces upon the governments the necessity to define the general interest also on the level of international trade policy. Environmental protection has to be enacted as an external, general frame to commerce and not in the perspective of a non-tariff barrier to trade. This can be done on local, regional, national and global levels, statehood still being asked for, even and evermore without restriction by territorial borders[7].

Economic theory has primarily had efficiency and distribution in mind when reflecting on protectionism and free trade. The tragedy is that both options are prone to failure when the element of environmental concern is added to the equation. On the one side, protectionist measures may hinder in the long run technological progress in developing countries, thereby preserving poverty and, given high population growth, overexploitation of natural resources. In a worst case scenario classical protectionism, which has usually been economically motivated, may be superseded by environmentalist protectionism where developed countries use trade threats against countries which willfully deplete their natural resources deemed global heritage by the better-offs[8]. On the other side, liberalization stimulates growth (and technological progress) but produces at the same time negative effects by causing (industrial) overexploitation and overpollution of the environment. It seems that Scylla and Charybdis can only be passed by a mixture of a carefully limited protectionism which grants differential treatment to poorer states and offers national latitude or internationally harmonized regulation for environmental protection, in combination with transfer payments from more to less ecologically advanced states[9].

II. Two types of law freeing international trade

Reiterating the major legal instruments of abating traditional economic protectionism, thereby stimulating growth, two categories may be distinguished, both of which work together to liberalize and frame free international markets. The first consists of measures which reduce or harmonize specific national impediments to trade, and the second provides a general legal infrastructure, i.e., for instance, contract and tort law, intellectual property law, standardization, and procedures for dispute settlement which create a uniform, non-

7 Cf. *R. Knieper*, Nationale Souveränität - Versuch über Ende und Anfang einer Weltordnung, 1991.

8 *J. Whalley*, The interface between environmental and trade policies, in: 101 The Economic Journal (1991), p. 187.

9 See *G. Handl*, Environmental security and global change: the challenge to international law, in: 1 Yearbook of International Environmental Law (1990), p. 29.

discriminating frame of international transactions, thereby making them calculable and reliable.

The first category is best exemplified by the major liberalizing provisions of the General Agreement on Tariffs and Trade (GATT) of 1947, as revised in 1969, of which some are debated in the ongoing Uruguay Round:

The GATT accepts the principle of customs duties and other charges as long as it is applied without intention to discriminate among nations, which means that for any privilege and advantage the principle of most favoured nation treatment must be applied (Art. I). The emphasis of the Agreement lies on curtailing import and export restrictions of goods and products. Any national market regulation has to grant national treatment for imported goods (Art. III); dumping is condemned and anti-dumping duties are conceded (Art. VI); marks of origin regulations shall not discriminate against imports (Art. IX); quantitative restrictions and other measures are forbidden, exceptions being admitted, e.g. in order to cope with internal shortages or overproduction and to safeguard the balance of payment (Art. XI and XII). For admissible measures the principle of non-discrimination applies (Art. XIII). Subsidies for increasing exports or reducing imports are not forbidden but have to be notified and, upon request, justified (Art. XVI sec. 1), as specified by the Tokyo Subsidy Code of 1973. Developing countries are granted preferential treatment (Art. XVIII) according to the decision of the Contracting Parties of 28 November 1979[10].

The second category of law, viz. the general legal infrastructure for international transactions, is not included in but rather presupposed by the GATT. It has been internationally harmonized by other conventions less directly tied to liberalising international trade, as, for instance, the UN Convention on International Sales Contracts of 1980. But there are also connecting links with the GATT. Art. III requires non-discrimination by any national law, regulation and requirements affecting the internal sale of products. This includes technical normalization such as, in particular, classification and grading norms (Art. XI sec. 2(b)) as well as marking requirements (Art. IX). As to the law of intellectual property, the United States and the business community have urged the Uruguay Round to integrate intellectual property into the GATT framework. Within the frame of the Bern and Paris Conventions on Intellectual Property they have experienced opposition by the developing states against enlarging the range of patentability as well as against establishing more effective means of enforcing the treaty obligations. The developing states fear that transfer of technology will become too costly if they are to provide full scale patent protection. The US expects that in the GATT framework preferential treatment for developing countries can be traded against progress in the inclusion of higher standards of intellectual property law. Also, it is expected that the more elaborate international dispute settlement system of GATT may be

10 See The Texts of the Tokyo Round Agreements, ed. by GATT secretariat, Geneva 1980.

used for enforcing patent law particularly in the "threshold" (newly industrializing) countries, where enforcement is deemed to be seriously in default.

III. Two types of law "ecologizing" international free trade

Liberalizing imports and exports creates demand and spreads supply, thereby accelerating international trade. In addition, transactions are eased and stimulated by the liberalization of transit. The overall result, in environmental terms, has both a quantitative and qualitative dimension. The sheer mass of products and services causes higher consumption of energy, raw materials and other natural resources for production and transport as well as more pollution and higher amounts of waste. Qualitatively, liberalized international markets may disentangle environmentally harmful products and services from national restrictions. In consequence, natural resources are overexploited and the environment is polluted by many kinds of non-degradable dangerous substances.

Trade-related international law may be made responsive to these deplorable effects by various means. One can either "ecologize" the free trade economic conventions or create specific "environmental" conventions which focus on problems originating from trade.[11]

The first set of agreements, conventions or treaties can roughly be described as trade-oriented, the environment being looked upon as an external nuisance. The second set is environment-oriented, trade being looked upon as a nuisance. Both sets have their specific patterns of evolution which in many cases point in the direction of growing environmental concern of trade-related conventions and adoption of free trade thinking by environment-related conventions.

A trade-oriented convention like the GATT has during its first period greatly ignored health- and environment-related non-tariff barriers to trade, for the focus was on more direct barriers like quantitative restrictions, tariffs, discrimination, subsidies etc.[12] During a second period starting in the seventies the GATT system took closer notice of trade restrictions motivated by health and environmental concerns, mainly scrutinizing them for disguised protectionist purposes. In a third phase, the resulting checking of national regulation by the international bodies provokes resistance from the side of the international environmental protection networks as well as of more progressive states. The elaboration of

11 For a similar conceptualization in a national context see *G. Winter*, Perspectives for environmental law, in: Journal of Environmental Law, 1989, p. 38 sequ.

12 *S. Charnovitz*, Exploring the environmental exceptions in GATT Article XX, 25 Journal of World Trade, p. 37-55 (1991).

health and environmental protection standards is advocated as a solution, but it is still open if harmonization on a high level will finally be achieved.

On the other hand, environment-oriented agreements about trade (such as the Washington Convention on International Trade in Endangered Species (CITES) of 1973) which arise out of acute environmental harm may start off with harmonisation on a high substantial level which exposes all traders to the same competitive conditions. More recently, critiques have argued that strict prohibition of trade in species may prove counterproductive because local populations are discouraged to take interest in their preservation. Therefore, debates about opening up CITES for carefully controlled trade are under way. While this means making use of the free market in the interest of both exporting and importing countries the idea is perverted when it shall serve to open up "markets" for a one sided environmental exploitation. The major case in point is the export of hazardous waste for storage in third world countries. The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal of 1989 has adopted a concept of prior informed consent instead of a complete ban thus using free trade as a means of taking pressure from "upstream control" of hazardous waste[13].

IV. Environmental protection in trade-oriented conventions

1. "Ecologizing" trade barriers

a) Major treaties

Conventions which focus on trade barriers usually accept justified exemptions from free trade principles.

The GATT itself provides the basic model for this approach. Its Art. XX allows for national measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

These measures, however, must meet two conditions: First, they should "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

13 See *C. Hilz / J.R. Ehrenfeld*, Transboundary movements of hazardous waste, 3 International Environmental Affairs, p. 26 sequ. (1991), at p. 42; Note: Emerging controls on transfers of hazardous waste to developing countries, 21 Law and Policy in International Business, p. 247 sequ. (1989), at p. 268. For a different approach of the Bamako Convention see below footnote 43.

countries where the same conditions prevail". Second, they should not be "a disguised restriction on international trade"[14].

The Fourth ACP-EEC Convention signed in Lomé on December 15, 1989, is another outstanding example. It represents the most complete legal document on development cooperation worldwide. Contrary to its predecessors, "Lomé IV" extends over a period of 10 years and contains explicit passages on the environment. While it reiterates its commitment to environmental protection in development cooperation for sectoral developments like agriculture (Art. 42), fishery (Art. 59), industry (Art. 77), mining (Art. 99), energy (Art. 106) and services (Art. 122), it is less comprehensive as far as promotion and regulation of trade is concerned.

The export from the Community and the import into ACP States of hazardous and radioactive waste is prohibited (Art. 39)[15]. However, the prohibition is formulated not to prejudice the provisions of the Basel Convention, which means that the contracting parties to both the ACP and Basel Conventions will finally apply the latter's concept of prior informed consent. The export of pesticides from the Community to ACP States (not the other way round) gets an even more lenient treatment. In weak and meaningless language it is suggested to the Community to provide technical information on pesticides and other chemical products. Article 40 reads:

> "At the request of the ACP States, the Community shall provide available technical information on pesticides and other chemical products with a view to helping them to develop or reinforce a suitable and safe use of these products. Where necessary and in accordance with the provisions for development and finance cooperation, technical assistance can be given in order to ensure conditions of safety at all stages, from production to disposal of such products".

While import of ACP-products into the Community is to be promoted by eliminating a good deal of customs duties (Art. 267) and quantitative restrictions (Art. 169), prohibitions or restrictions on transboundary trade remain intact if justified on grounds of public policy and security, the protection of health and life of humans, animals and plants (Art. 170). The enumeration seems strange since in all other parts of the convention the general term of environmental protection is used. Seemingly, Art. XX of the GATT served as a model. Section 2 of Art. 170 tries to dissipate structural suspicions by ascertaining that restrictions

14 Preamble to Art. XX.

15 Annex VIII somewhat weakens this prohibition by stating that the contracting parties will refrain from any practice of discharging hazardous or radioactive waste "which would encroach upon the sovereignty of states or threaten the environment or public health in other countries". This may be understood to allow transfrontier movement of waste subject to the stated conditions, or - preferably - to only refer to waste which shall be treated or stored close to the country's borders.

"shall in no case constitute a means of arbitrary discrimination or a disguised restriction of trade generally". An obligation to apply identical restrictions to both ACP and Community commodities, which is the only valid test of non-trade consideration, is missing.

While "Lomé IV" refers to trade relations between countries of different economic structures, the Canada-US Free Trade Agreement[16], another example of the first approach, was concluded by countries of comparable industrial and social systems but very different market sizes. Entered into force on January 1, 1989, it is of more than bilateral importance since it equally reflects general North-American trade philosophy in ongoing multilateral negotiations in the framework of the GATT. In fact, the agreement explicitly puts forward a negotiation strategy by fixing the objective to abolish all subsidies to agriculture in the Uruguay Round (Art. 7.01), without excepting those which might be given for landscape and environmental protection. On the other hand, it incorporates Art. XX of GATT (Art. 12.01).

As a matter of principle, both parties agree to abolish and to refrain from creating technical norms and approval procedures which would work as non-tariff barriers between the two countries. They explicitly recognize that norms which have a legitimate interior objective like the protection of health and the environment cannot be considered as non-tariff barriers. This general principle is clearly stated in Art. 6.03, defined in Art. 6.09, and specified for agricultural activities in a wide sense in Art. 7.08. Attached to this principle is the obligation that technical norms must not be applied in a discriminatory way to products of only one party but are only valid if "national" products are subjected to identical considerations.

The recent Treaty Establishing a Common Market between Argentine, Brazil, Paraguay and Uruguay (Mercosur)[17] presents itself very much as a classical arrangement to create a free trade area without giving any hint as to operational environmental protection. The expression of belief in the preservation of the environment, as stated in the preamble as one among many objectives, looks very much like a last minute insertion and as a purely verbal reference to a modern trend.

And even though the U.S.-administration had to promise to include environmental issues related to trade into the agenda for negotiations of a free trade arrangement with Mexico[18],

16 27 I.L.M. 281 (1988).
17 30 I.L.M. 1044 (1991).
18 See *S. Charnovitz* (Fn 12), p. 37.

the intermediary results[19] do not seem to be overly concerned by the protection of the environment.

b) Shortcomings of the treaties

First, as the basic thrust is on trade liberalization, environmental concern comes as an exception and bears the burden of proof whenever doubt arises whether a restriction is really necessary. A state which instead of waiting for sound scientific proof takes precautionary measures or which wants to take stringent and enforceable measures may have difficulties to defend this attitude. For instance, the Canadian government has joined in a legal challenge to the US phasing-out regulations for asbestos. They invoke Art. 6.03 of the FTA which says that the parties may not adopt standard-related measures that create obstacles to trade unless they are necessary for achieving legitimate domestic objectives. The government argues that while health was a legitimate domestic objective the import ban was not necessary to achieve it because asbestos had not been proven to cause unreasonable risk[20]. Likewise, the US government challenged Canadian regulations established to promote the conservation of herring and salmon stocks in Canada's Pacific cost waters. The regulations required that all fish commercially caught must be landed in Canada to detect false reporting. The FTA dispute panel deemed this incompatible with Art. 4.07 FTA which refers to Art. XX GATT, arguing that while conservation of stock was a legitimate goal the means was disproportionate[21].

In the GATT frame the 1989 Mid Term Review package of results stated that measures under Art. XX (b) "necessary to protect human, animal or plant life or health" shall be "consistent with sound scientific evidence"[22]. The US Discussion Paper on Tariffication which was submitted in July 1989 points into the same direction[23]. Precautionary measures will have difficulties to pass the test of scientific evidence. An example is the European beef hormone ban which was attacked by the US for not being scientifically based. In addition, there is a draft for an amendment incorporating the principle of proportionality

19 For a discussion of the US-Mexico Free Trade Agreement cf. *G.C. Sprenger*, Negotiating a Free Trade Agreement between Mexico and the United States, Comercio Internacional Banamex, Vol. 3, Nr. 1, Marzo 1991, pp. 30 ss; J. Schott, The Mexican Free Trade Illusion; The International Economy, June/July 1990, pp. 32 ss.

20 See *S. Shrybman* (for the Canadian Law Association), Selling the environment short: an environmental assessment of the first two years of free trade between Canada and the US, Xeroxed paper, Nov. 1990, at page 12.

21 *S. Shrybman*, op.cit., at page 8.

22 See GATT Focus No. 61, 1989.

23 See *M. Ritchie*, The environmental implications of the GATT negotiations, on file at GATT library, no. 89/006.

into the TBT agreement[24]. This means that the measures taken must be those with the least degree of inconsistency with the principle of free trade. This would narrow the discretionary margin of the states and result in a transfer of sovereignty to GATT panels which may lack insight in the often complex economic and cultural background of restrictive measures. For instance, a ban on exporting ivory may be challenged by free trade ideologists on the grounds that there are more GATT consistent measures like, e.g., setting up markets for ivory based on individual property rights in elephants[25].

Secondly, trade agreements as they stand fall short of grasping the full range of possible environmental impacts which may require trade restrictions. For instance, the GATT Art. XX (b) exceptions do not mention soil and ground water protection as such, i.e. independently of the protection of human health. Art XX (g) which allows measures "relating to the conservation of exhaustible natural resources" may be understood not to cover renewable resources. While a historical interpretation shows that the drafters of the GATT indeed assumed a broad meaning[26], a recent GATT panel left open if such renewables have to be prone to depletion in order to qualify for Art. XX (g).

It is also unclear to what extent socio-economic impact and ethical considerations are acknowledged as reasons for trade restrictions[27]. For instance, the EC import moratorium for the genetically engineered bovine growth hormone BTS could hardly be justified as being "necessary to protect animal life or health" in the sense of GATT Art. XX (b). What is at stake is the threat of bankruptcy for smaller dairy farmers as a socio-economic consequence of the use of the drug as well as pity with the animals for being turned into mere milk factories. Such pity or ethical consideration can only with difficulties be subsumed under Art. XX (a) which allows measures "necessary to protect public morals". Socio-economic consequences can in principle be considered under Art. XI (2). This clause allows for import restrictions in agricultural or fisheries products "necessary to the enforcement of governmental measures which operate (i) to restrict the quantities of the like domestic products permitted to be marketed or produced". Under this clause internal production restrictions such as the EC program of setting aside agricultural land[28] which leads to a reduction of cereals production may be protected against compensatory cereals

24 GATT Focus No. 85 (Oct. 1991), p. 5.

25 The example was taken from *Charnovitz*, op. cit. (fn. 12), p. 49.

26 *Charnovitz*, op.cit. (fn. 12), p. 45 sequ.

27 On this aspect see: *M. Ritchie*, Trading away our environment: GATT and global harmonization, in: 10 Journal of Pesticide Reform (1990) No. 3.

28 Regulation 1094/88 of 25 April 1988, OJ L 106/28.

imports[29]. However, one would be at pains to classify the non-use of BTS as production restriction; furthermore, BTS is not an agricultural product.

Thirdly, it is unclear to what extent states may restrict imports of products the fabrication or harvesting of which do not meet their internal processing standards. In this instance, importing states would be able to urge their own higher standards on exporting states. The issue is delicate, because questions of paternalism and possible misuse arise. On the other hand, low process standards provide the exporting state with a competitive advantage and may even be understood as indirect subsidy for exports which the importing state may want to counteract. A third perception may regard the nature damaged by low process standards as a common heritage which importing states may feel obliged to defend.

An example in point is the Tuna case: a GATT Panel was set up to decide about the US Marine Mammals Act which forbids import of tuna fish caught with nets which unintentionally also catch and kill dolphins[30]. The panel held that the import ban the US imposed on Mexico violated Art. XI of the GATT and was not excused by Art. XX. The panel refused to accept process standards related to products as exceptions under Art. XX (b) and (g) because otherwise "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations".

We think this to be too simplistic. First of all the panel strikes us to greatly exaggerate when it predicts that the GATT will shrink to a liberal trade scheme only among parties with "identical internal regulations". We suspect that regulations like that of the US Marine Mammals Act will remain rare cases, and that process thresholds will in most cases be rather weak (as it is also in the Tuna case where the import restriction only applies if a very substantial number of dolphins are killed). They will give ample margin for other than "identical internal regulations". As background information it may be noted that there were many conventions and laws pre-dating the GATT which tied trade restrictions to manufacturing or harvesting methods. During the drafting of the GATT this was taken for granted[31]. On the other hand, it has to be recognized that process related product standards may worsen the already weak position particularly of Southern countries. Therefore, more

29 *H.C. v. Heydebrand*, Mengenmäßige Begrenzung von Futtermitteleinfuhren nach Art. XI GATT als flankierende Maßnahmen zur Reform der Gemeinsamen Agrarpolitik, in: Agrarrecht (1988), p. 245-248, at p. 248.

30 GATT Panel Report of 3 September 1991, sub 5.27.

31 *Charnovitz*, op. cit. (fn. 12) at p. 53.

complex criteria are needed. One could think of allowing process requirements only in specified cases, i.e., if they are given notice of some years before application in order to allow exporting countries to adapt their process, if they are reasonably to be met in terms of available technology and cost, if they are embedded in a more comprehensive scheme of process technology transfer, stabilization of commodity prices, improvement of terms of trade and/or alleviation of tariffs on imports of higher valued products, or if the importing country deems itself to be affected by the deleterious process. For instance, selective import measures on sustainably and non-sustainably harvested timber may be accepted under the second criterion, but also the fourth, considering the interrelation between tropical forests and the world climate.

Fourthly, exceptions for environmental protection though being basically recognized with regard to non-tariff barriers to trade in products are rarely mentioned in other fields of free trade. They are therefore difficult to determine.

Art. V (2) of the GATT grants freedom of transit. Art. V (3) concedes charges imposed in respect of transit only for transportation, administrative expenses and services rendered. Would Austria, a typical transit country, be allowed to impose on transit a road transportation charge that is designed to abate air pollution and give railroads a competitive advantage? The wording of Art. V (3), in particular the "costs of services rendered", would have to be stretched to cover this case. The same is true for Art. III (4) where differential internal and external charges are allowed if the charges are "based exclusively on the economic operation of the means of transport".

Gradually, free trade conventions also cover trade in services. The Lomé IV treaty in its programmatic Art. 185 on trade in services envisages liberalisation but, besides paying "due respect for national policy objectives", does not explicitly take environmental impacts into consideration. Much remains to be done to make concrete such consideration when, for instance, transport or tourism services are liberalized. The draft General Agreement on Trade in Services (GATS) is more specific in this respect. Art. XIV will allow for exceptions to free trade needed for the protection of human, animal and plant life. But the formula is too narrow to also cover ecosystems, exhaustible resoures, and the climate, etc.[32]

As to subsidies the Tokyo Subsidy Code of 1973 states in Art. 11 that it does not intend to restrict the use of subsidies which are not export subsidies and serve to promote social and economic policy. Such policies are exemplarily listed. The catalogue includes regional, structural, employment, R and D as well as development policies, whereas environmental protection is only mentioned in the context of subsidies for redeployment of industries. This

32 See GATT Focus No. 85 (Oct. 1991), p. 5.

excludes subsidies which make up for additional costs arising out of sustainable and adapted production techniques (which is not to say that they could not be understood to form an additional case of the list).

With regard to direct or indirect export subsidies for non-primary products Art. XVI of the GATT prohibits discrimination between external and internal measures. However, there may be sound reasons for special indirect or direct export subsidizing of sustainably produced products[33].

Vice versa, ecological dumping, i.e. import of products which can be sold at low prices as a consequence of overexploitative or highly polluting production methods, is not regarded as dumping in the sense of Art. VI of the GATT and therefore may not be counteracted by anti-dumping duties.

2. *"Ecologizing" the general legal infrastructure*

The general "legal infrastructure" for international trade is still far from reflecting environmental concern. This is hardly surprising since the concept of enriching all law by environmental considerations only starts to make its way into legal theory and practice.

Still we want to indicate potential impacts on several levels. The UN Convention on International Sales Contracts is a codification of common principles of national contract laws. Neither these nor the convention have as yet been alerted to environmental questions, such as the damaging side-effects of bilateral contracts. Traditionally, such side-effects are referred to public law framing contracts although they could be reflected in terms of contractual obligations under Art. 35 of the UN Convention. For instance, a pesticide which, though being effective as such, has devastating side-effects could be regarded as not being up to the quality standard required by the (implicit) purpose of the contract. Such a result could be reached by a broad reading of Art. 35 (2) (a) which declares not conform with the contract goods which are not "fit for the purposes for which goods of the same description would ordinarily be used"[34].

Tort law is somewhat closer to the point. If in application of principles of conflicts of laws a more developed tort law applies third parties whose living resources are damaged by a

33 The environmental issue is also missing in the recent World Bank discussion paper No.55 on "Subsidies and countervailing measures. Critical issues forthe Uruguay Round", 1989 (B. Balassa, ed.).

34 For considerations of this sort in the frame of national and EC law see *N. Reich*, Diverse approaches to consumer protection philosophy, 14 Journal of Consumer Policy (1992), p. 257, at p. 285.

pesticide may claim compensation from the seller under the rules of product and no fault liability. The applicability of the more stringent product liability legislation of different countries in international trade is facilitated by the common practice in conflicts of tort laws which recognizes a choice of laws for the person having suffered damages. This principle is confirmed by the Hague Convention on the Law Applicable to Product Liability of October 2, 1973, in force since 1977. It states that the claimant can base his claim on the internal law of the state of either the principal place of business of the defendant or the place of injury (Art. 6).

On the substantive law side it is worth noting that on the basis of the European Community Directive 85/374/EEC of July 25, 1985, a system close to strict product liability was introduced in member countries which holds not only the producer liable but extends liability to the importing supplier. The purpose of such extension is to allow for pursuing national defendants and not having to refer to uncertain manufacturers abroad.

Intellectual property is still being discussed without any regard of the environmental impact of the protected intellectual product. As a matter of fact the above mentioned attempt of the USA and the business community to attach intellectual property law to the GATT points into the opposite direction. If, as they wish[35], patentability is extended to genes, proteins, cells, plants and animals including processes of creating such products, this may not only result in distributional injustice, because the developing countries will have to repurchase their own genetic resources[36], but may also lead to environmental risks by overaccelerating genetechnology, promoting varieties of high yield but low resistance to pests, pull basic research away from safety questions to applied areas, etc.[37].

Finally, standardization, despite its orientation towards easing transactions, often regulates environmental effects simultaneously. A point in case are the exhaust thresholds for automobiles set by the ECE-Convention of 1958 on Uniform Conditions for the Authorization of Automobiles. While they originated as mere standardization for the purpose of facilitating international trade, the thresholds obviously have an impact on air pollution and hence a potential of being turned into anti-pollution devices[38]. The GATT also shows an environmental backwardness e.g. in Art. IX, where it is recognized that marks of origin

35 See *Th. Coffier*, The prospects for intellectual property in GATT, Common Market Law Review 1991, p. 383-414.

36 *H. Ullrich*, GATT: industrial property protection, fair trade and development, in: *F.K. Beier / G. Schricker* (eds.), GATT or WIPO? 1989, p. 127-160.

37 *J.K. Kloppenburg*, First the seed. The political economy of plant biotechnology, 1988. *G. Winter*, Patent law policy in biotechnology, to be published in Journal of Environmental Law.

38 Some of the numerous regulations emanating from the convention have realized this potential, although not yet sufficiently. See *A. Kiss*, Droit international de l'environnement, 1989, p. 210 sequ.

regulations shall have due regard to the necessity of protecting consumers against fraudulent or misleading indications, but nothing is said about the important role marking requirements may play as a means of actively providing consumers with information. Likewise, Art. XI sec. 2(b), by clarifying that standards and regulations for the classification, grading or marketing of commodities are not regarded as quantitative trade restrictions, ignores the potential of such regulations as a means of active environmental protection. Yet, anyway, if not explicitly recommended to the contracting parties such regulations are at least not forbidden if, as Art. III requires, national treatment of imported goods is guaranteed.

V. Environmental protection in environment-oriented conventions

There is a considerable body of conventions which are environment-oriented, regarding trade as a nuisance. Some of it was framed into full blown conventions, some has only reached the level of informal codes of conduct and other soft law.

One can distinguish between conventions and codes of conduct restricting "demand pull" and others restricting "supply push". An elaborate case of the former is CITES. The major thrust of this convention is to reduce and control demand from the side of economically rich countries for specimen belonging to species deemed endangered. A case for the latter is the Basel Convention. The convention aims at reducing and controlling "waste supply" pressure wielded by industrialized on less industrialized states.

As to codes of conduct, the FAO Code of Conduct on the Distribution and Use of Pesticides of 1985, as revised 1989, and the UNEP Guidelines for the Exchange of Information on Chemicals in International Trade of 1989 may be mentioned[39]. They, too, attempt to tame supply pressure exerted by more developed on less developed states.

An important point is the constructive element in this kind of international regulation. Rather than leaving trade-related environmental protection to the varying national levels of environmental consciousness and subsuming it under a deconstructive regime of liberalisation criteria, a world-wide discourse about the proper means of protection is set up which in itself has the potential to foster an ever-growing concern.

The discourse may lead to specific standards which give terms for different instruments of trade restrictions. The CITES appendices which list three sorts of more or less endangered

39 For a comprehensive list of such codes and guidelines see *J. Sankey*, Domestically prohibited goods and hazardous substances - a new GATT working group is established, in: 23 Journal of World Trade (1989), p. 99-108.

species provides a rather sophisticated example. Standardization does not necessarily mean uniformity. Contracting parties may and should be allowed to set stricter standards. For instance, this competence is explicitly reserved by Art. XIV sec.1 CITES and was used by the EC when they promoted some Appendix II species to Appendix I and introduced stricter regulation for Appendix II and III species[40]. One can also make the international standard itself flexible enough to reflect differing national views. Thus, CITES Appendix III is open to list species identified by only one party or a few parties as deserving protection (see Art. II sec. 3)[41].

Standards age over time. Therefore it is important to establish an expeditious mechanism for adaptation[42]. Many conventions use a three-step procedure: preparation of a proposal by the secretariat and its special technical working groups and/or by individual contracting parties - adoption by the parties of the proposal at a conference, most often by majority vote - entering into force of the amendment after expiry of a deadline for those parties who do not opt out (see e.g. Art. XV CITES; Art. 18 Convention on Hazardous Waste). One could, in addition, imagine a procedure where scientific expertise and the different societal interests - promotional as well as ecologist - are given an opportunity to be heard before the proposal passes the filter of national interests.

As far as the instruments of trade restrictions[43] are concerned it is sometimes said that prior informed consent schemes are paternalistic. This is obviously not true in those cases where the less developed state has signed a convention which establishes the scheme. He who signs the contract in order to benefit from the others' knowledge does not lose but exerts his sovereign will. There may be grounds to raise the paternalism issue when an exporting state unilaterally controls the export of hazardous or import of non-sustainably extracted products. However, there is no principle of international customary law saying that sovereignty is violated by a state restricting its own export or import. On the contrary, the importing state may invoke the principle of common heritage in order to justify its action, for this principle is presently evolving to include natural resources even if they are located within another state's territory.

But what scheme is the most appropriate one? More specifically: should the state, by establishing a permit system, decide what product may be sold on the market, or is it sufficient to require the exporter and/or importer to inform consumers or other recipients

40 See EC regulation 3626/82 of December 3, 1982.

41 For more details see *Kiss*, op. cit. (fn. 38), p. 227-232.

42 See about such first steps towards supranational structures *Handl*, op. cit. (fn. 9) at p. 6.

43 About the following see also *L. Gündling*, Prior notification and consultation, in: *G. Handl / R.E. Lutz* (eds.), Transferring hazardous technologies and substances. The international legal challenge, 1989, p. 63-82; *B. Wynne*, The toxic waste trade: international regulatory issues and options , 11 Third World Quarterly, p. 120-146 (1989).

about the hazards, origin, mode of production and transport etc. of the commodity. Obviously, mere information presupposes that the adressees understand and are able to assess the message. For instance, given the broad public debate about tropical forests one may expect the consumer to be able to decide for herself whether or not to buy tropical wood. Purchasing pesticides is certainly another case. Where product risks are severe, complex, or difficult to explore, the state must retain its responsibility.

Where this is the case it still remains to be clarified to what extent knowledge accumulated in one state should be transferred to the other. Knowledge must, first of all, be fit for transfer. For instance, it is not sufficient to transfer data from tests carried out on dangerous products under "northern" climatic etc. conditions. Some of these data are certainly valid also under "southern" conditions. But should the northern administrative agencies not require producers of dangerous products to also submit data about risks which may arise in the countries of import? Neither the Convention on Hazardous Waste nor the FAO and UNEP Codes of Conduct, nor even the WHO "Certification Scheme on the Quality of Pharmaceutical Products Moving in International Commerce" of 1975 dare to require this. Leaving the collection of such data to the importing state is not a very promising solution. Alternatively, one could think about inviting the southern regional institutions like e.g. the ASEAN or SADCC to step in and build up the necessary scientific basis.

One may also ask in what way the transfer of knowledge should be organized. The transitional solution was that the exporting state ensure that the importing country is informed about the product risk prior to the import. This "prior information" scheme has meanwhile been replaced by the "prior informed consent" scheme both in the Convention on Hazardous Waste and in most of the codes of conduct, including the FAO Code on Pesticides as well as the UNEP Guidelines on Chemicals.

Prior informed consent schemes usually operate on a general and a specific level. On the general level common registers are established, as, e.g. the important International Register of Potentially Toxic Chemicals (IRPTC) set up by the UNEP Guidelines. Product bans and restrictions by exporting states have to be notified to the register. The information is then provided to importing states which in turn notify their decision to ban the product from imports. As to the specific level of actual export transactions, the state of export has to ensure that the ban of the state of import is respected. In addition, the state of export has to ensure that the state of import is, as a reminder, informed about the export. Unfortunately, according to the FAO and UNEP Codes the export has not to be made dependent on the prior explicit consent of the state of import. This is only required in the case of hazardous waste (see Basel Convention Art. 4(c)). Another major flaw is the paucity of information to be provided before or together with the export. Neither the FAO nor the UNEP Code oblige the provision of information about products which are not banned or severely restricted in

the state of export, although they may also pose considerable risks. The importing state is compromised into being unable to decide on its own.

Very rarely the Conventions and Codes contain provisions on sanctions in cases where the prior consent scheme was not observed. The Basel Convention contains interesting material in this respect. When the fault lies on the exporter's side the state of export shall ensure that the exported waste is taken back (Art. 9 sec.2). Moreover, even if there is no fault but a consented and contracted import, and yet the waste cannot be safely managed, the exporting state shall ensure that the waste is taken back (Art. 8). Unfortunately, the Convention leaves problems of liability and compensation to a future protocol (Art. 12). Also, insurance or other guarantee for transport and disposal is not made obligatory (Art. 6 sec.11). It can only be required by the state of import or transit, which is anyway in the power of the states.

In sum, the Basel Convention is somewhat more developed in terms of protection of the weaker partner. However, this may only be due to the desperate need of industrialized countries to get rid of their piles of hazardous waste. The best protection against imported waste hazards certainly remains to completely ban imports[44]. Therefore, the Lomé IV treaty though formally less sophisticated is, with its clear ban, more progressive in substance. In this perspective it is encouraging that the poor African states have not fallen in line with their rich northern neighbours and have encouraged themselves to "take every appropriate step to ban the importation and dumping of hazardous wastes in their respective territories"[45].

VI. Conclusions

Drawing together the lessons to be learned from possible regulatory approaches one can imagine several types of improvement for trade-oriented agreements:

First of all: health and environmental protection exceptions should be phrased such that there is ample margin (instead of a strict burden of proof) for the regulating state to take protective measures, including precautionary ones.

Furthermore, the exceptions should cover the whole range of environmental concern, including, besides the protection of living organisms, the protection of air, climate, water

44 See *Wynne*, op. cit. (fn. 43).

45 Art. 59 of the Treaty Establishing the African Economic Community of 3 June 1991, 30 I.L.M. 1245 (1991).

and soil as such, the saving of energy resources, and respect for ethical and aesthetical values.

Thirdly, as to provisions regarding transport, services, export subsidies, and dumping, environmental protection is still to be discovered as a concern and topic for regulation.

However, trade-oriented agreements should also be developed to adopt a constructive approach, if it is maintained that the contracting parties may individually go further, be it only subject to a procedure of preliminary notice to and possible comment by the international body. One may start with a list of products banned or severely restricted by producer states, for which the IRPTC is an example. This model may gradually be developed to become a positive instrument of collecting data about dangerous products for whose further elaboration a group of experts should be set up. This may be done in the form of soft law as in the case of the FAO register. But it can also be framed more categorically. For instance, in the US-Canadian free trade agreement the intention is expressed to render compatible and harmonize to the maximum technical and protective norms (Article 6.04 and 7.08). The obligation to harmonize is detailed for agricultural and annexed products like additives, pesticides and others (Annex 708.1). In practice, however, harmonization efforts apparently have not made much progress and, if so, are limited to searching for the lowest common denominator[46]. It should be specified that harmonization should go for the highest denominator.

Standardization may become the basis for approximated trade restrictions. For potentially dangerous and overexploitative goods the prior informed consent scheme should be utilized and sanctioned by explicit liability rules. Where consumers can protect themselves, consumer information schemes are preferable to prohibitive measures. In the GATT context one could think about building on the mark of origin rules (Art. IX) and add to them private or officially controlled product labelling which enhances the consumer's information basis.

Another case in point are subsidies. The environmental perspective on the subject is ambivalent. Subsidies should be curtailed where they instigate over-production, as in the case of much of the EC agrarian subsidies. However, they should be welcomed where they make ecologically produced and utilizable products capable of competing on a market. In addition, a positive approach would establish a mechanism of transfer payment for those developing countries which lose income from exports because of ecologically motivated import restrictions. An example on which one could build are the compensation schemes of the STABEX and SYSMIN-type in the Lomé IV treaty. In fact, SYSMIN refers to "unfore-

46 See *Ritchie*, op. cit. (fn. 27) for critical comments on a US proposal in the Uruguay round to harmonize pesticide residue limits in food on the apparently low level of the industry-influenced Codex Alimentarius.

seeable difficulties - whether technical, economic or political - beyond the control of the state" and "major technological and economic changes" (Art. 215). These terms can be interpreted widely, encompassing changes in environmental policies, thus reflecting the general spirit of the convention. In addition to this interpretation it is highly advisable to foresee financial compensation schemes when environmental policies have an impact on ACP-EC trade. Such schemes would be in line with project financing which is in general oriented to enhance economic and trade performance but insists on environmental considerations. It is also in line with structural adjustment support: although adjustment efforts are defined under exclusively economic terms (Art. 241, 243), the decision on financial support has to take the environmental situation and protection into account (Art. 244). Instead of lowering environmental standards in order to facilitate the exchange of any commodities, the standards as well as freedom of setting new ones should be maintained but compensated by adding a new element to a structural adjustment.

Transfer of technological, management, environmental and hazard information is as important and as often mentioned in economist as well as environmental conventions as it is factually disregarded. The simple reason to this is that the bulk of the really valuable information is protected by intellectual property law, trade secret rules or rules about proprietary information[47]. Therefore, for instance, Art. 10 sec.2(d) of the Basel Convention is probably in vain in requiring the contracting parties to "cooperate actively, subject to the national laws, regulations and policies, in the development and implementation of new environmentally sound low-waste technologies". In order to make technology transfer provisions viable they must be accompanied by provisions about who shall pay.

The convergence of approaches should be accompanied by a revision of what was above called "legal infrastructure for free markets". It has already been said that, for instance, broadening the scope of patentability should be seen not only from a distributional but also from an ecological perspective. Likewise, normalization is an important object for instilling ecological concern.

Our proposals might be considered to be reaching too far. However, if economic growth continues to be of primary concern we can imagine a situation when free trade becomes its own most effective non-tariff barrier because nothing valuable is left for the trading.

47 See basic framework of GATT provisions on intellectual property, statement of use of the European-Japanese and United States business communities, June 1988, reprinted in: *F. Beier-Schricker* (ed.), GATT or WIPO? 1989, p. 355 (395).

ABSTRACTS

International Trade Rules and Environmental Protection

By *Rolf Knieper* and *Gerd Winter*

Protectionism as well as liberalism in international trade have in the past been debated as different ways of how to create wealth and, by implication, how to exploit nature most effectively. As to exploitation of nature they have indeed been effective, the first due to its tragic sliding into technological backwardness, the second due to its power of fostering growth. Meanwhile, nature has been realized to be a finite resource. Environmental protection is being recognized as a new goal against which protectionism and liberalism are to be measured. The authors develop a conceptual frame-work for such analysis and apply it to the major conventions on international trade. They distinguish between conventions which primarily foster growth by either providing a general legal infrastructure (like e.g. contract law and patent law) or by removing specific trade restrictions, on the one side, and conventions which primarily strive for environmental protection by directly restricting trade. Trade related conventions basically regard environmental protection as an obstacle, environment related conventions see trade as a nuisance. Both types have started with a concept of internationally supervised national (environmental) protectionism but forcefully evolve towards supranational structures.

Fiscal Policy and Tax Administration in Tanzania during the "Lost Decade" of Economic Development

By *Ulrich Fanger*

In the course of several decades of self-imposed economic Self-Reliance, Tanzania permitted her fiscal and budgetary policies to slip into increasing dependency on foreign financial contributions in order to cover the widening budgetary deficits. While obviously due to constant governmental over-spending on subsidies, this development had at its source the diminishing fiscal revenue of the country and its shrinking tax base.
The article is based on the results of a study of the Tanzanian tax system and the public administration involved in taxation and customs operations. They show that taxation policy developed a strong bias in favour of indirect taxes (purchase and sales taxes, customs