

TRADE-ENVIRONMENT NEXUS IN GATT JURISPRUDENCE: PRESSING ISSUES FOR DEVELOPING COUNTRIES

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Introduction

This article considers the approaches of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organisation (WTO) to trade, the environment and sustainable development. It examines the main principles and rules of GATT/WTO which are relevant for the examination of the trade-environment issues and the dilemmas they pose for trade and development prospects of developing countries. The main objective of this article is to identify and illustrate the pressing issues for developing countries in the process of intersection between multilateral trade liberalisation and the environment.

In view of the concerns of developing countries regarding the interaction between trade and the environment, the article argues that the objectives of sustainable development can be achieved by taking into account the developmental needs, limited resources and level of economic development of developing countries. Developing countries' concerns need to be addressed as a priority in order to make any progress in achieving the global objectives of environmental protection and sustainable development.

Genesis of GATT/WTO

GATT was adopted as an ad hoc agreement in 1947 in an attempt to liberalise tariffs and trade in the post-war period. It was a temporary solution to trade related issues which lasted until the Havana Charter and the International Trade Organisation came into being. GATT was originally intended to be a component of a larger agreement establishing an International Trade Organisation.¹ Driven by the philosophy of a

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market economy, its main objective was economic growth, to be achieved by providing trade rules and a framework for trade liberalisation. GATT also provides for environmental exceptions in Article XX. GATT principles and environmentalism in GATT are discussed in more detail in later sections. GATT was negotiated to combat protectionist trade barriers which were believed to have contributed to the economic crises of the 1920s and 1930s. Obligatory upon member states, GATT essentially forbids any country to discriminate between like products of other countries.

GATT continued to pursue its objective of regulating trade between national governments until it was incorporated into and strengthened by the 1993 Uruguay Round Agreement. Following the 1995 Uruguay Round of trade negotiations, the World Trade Organisation (WTO) was established by the WTO Agreement. Under this agreement, the WTO became the legal and institutional framework for the international trading system. It provided a forum for implementing trade agreements, negotiating new agreements and resolving trade-related disputes. The WTO Agreement incorporated the original GATT which continues to apply to issues not covered by more specific agreements negotiated during the Uruguay Round.² It also includes specific agreements that cover many trade-related environmental issues such as the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), and the Agreement on Trade-related Intellectual Property Rights (TRIPS).³

Despite the current recognition, the original GATT agreement was negotiated without any reference to the need for the sustainability of that economic growth. It did not consider the environmental effects of its trade rules on the production of goods. Rather, environmental protectionism was treated as a non-tariff trade barrier. This inattention to environmental matters may have been due to the fact that environmentalism was a relatively new concern in national and international policy areas, while the concept of sustainable development had not yet been internationalised. However, widespread concern and increasing demand for environmental protection prompted GATT to form a Group on Environmental Measures and International Trade (GEMIT) on environmental measures and international trade in 1971. This group recognised the relationship between trade and

supervisor. I also offer my thanks to the three examiners for their reports and helpful comments on the thesis.

1 D Hunter, J Salzman, and D Zaelke, *International Environmental Law and Policy* (1st Ed, 1998) Foundation Press, New York at 1180.

2 Ibid 1181.

3 Examination of trade-related environmental issues in the TBT, SPS and TRIPS Agreements is beyond the scope of this article.

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environment at the inter-governmental level and published a report recognising the need to make trade and environment policies more supportive of each other.

Despite this report the relationship between economic growth and environmental protection was not recognised by the successive GATT negotiations until the Uruguay Round, which finally recognised the need for a complementary regime that supported both objectives or something to that effect. This is discussed later sections in this article.

The WTO has formally established the Committee on Trade and Environment to identify the relationship between trade and environmental measures and to make recommendations for modifications of the rules of the multilateral trading system. WTO is an improvement over GATT in that the WTO acknowledges that trade liberalisation has implications for the environment and recognises the need to preserve the environment, something the old GATT did not.^{4 5}

Issues and Problems

There are some broad explicit and implicit objectives of GATT, as well as imbalances in the negotiating positions of individual nations and groups of nations, which tend to work against environmental and resource conservation.^{6 7} GATT/WTO has increased the world trade and economic benefits reaped by its member states. While the GATT/WTO has increased the world trade and economic benefits, it has been alleged that its current process ignores the concomitant environmental consequences. The objectives and the structure of GATT/WTO have economic and environmental impacts upon the trade-environment interests of developing countries. While developing countries face a number of trade-related environmental issues, this article will restrict its discussion to the challenges posed by trade-related environmental

4 Matthew A Cole, *Trade Liberalisation, Economic Growth and the Environment* (1st ed, 2000) 19.

5 The preamble to the Agreement establishing the WTO clearly states the objective of sustainable development as well as the need to preserve and protect natural environment.

6 Charles Arden Clarke, 'The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development' (WWF Discussion Paper, June 1991), 11 (Copy in file with author).

7 For various aspects of asymmetries and disadvantages to developing countries resulting from the GATT/WTO trade negotiations and WTO agreements, see generally, Bhagirath Lal Das, *WTO Agreements: Deficiencies, Imbalances and Required Changes* (1st ed, 1997); Maghda Shahin, *From Marrakesh to Singapore: The WTO and Developing Countries* (1st ed, 1996); South Centre, *The Uruguay Round and the South: A Critical Analysis*, South Centre, Geneva, 1995.

measures based on process and production methods standards for the trade and development prospects of developing countries.

(a) Trade-Related Environmental Measures (TREMS)

The practice of using trade measures as environmental tools has created controversy among both trade supporters and developing countries who often condemn the use of such measures as protectionist, extra jurisdictional, eco-imperial and unilateral. TREMS may be used as bans on trade, as tools pursuant to multilateral environmental agreements or unilaterally by a developed country. Various GATT and WTO panels' rulings on disputes employing trade sanctions for environmental purposes have fuelled this controversy over the use of TREMS.⁸

In its 1992 Report on Trade and Environment, the GATT Secretariat concluded that 'where pollution has only local effects, environmental policies are a matter of preference and that even when pollution crosses national boundaries, unilateral action is rarely justified'.⁹ Despite this caution, the use of trade sanctions based on process and production methods (PPM) has been gaining momentum. The 1999 Trade and Development Report of UNCTAD, while criticising the protectionist tendencies of developed countries, indicated that if the North lifted its protectionism, an extra US\$700 billion of annual export earnings could be achieved in a relatively short time in a number of low technology and resource-based countries.¹⁰

8 See United States - Restrictions on Imports of Tuna, GATT BISD 39th Supp. 155 (1993) (Report was not adopted by the Contracting Parties). United States - Restrictions on Imports of Tuna (II): Report of the Panel, GATT Doc. DS29/R (May 20, 1994), 33 ILM 839 (1994). United States- Prohibition of Shrimps and Certain Shrimp Products, WTO Doc. WT/DS58/AB/R, WTO Appellate Body Report, 12 October 1998. United States - Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DSS/AB/R (20 May 1996), 35 ILM 603 (1996).

9 GATT, *GATT Law and the Environment*: GATT Doc. 1529 (3 February, 1992) 2-6.

10 *Trade and Development Report*, UNCTAD, 1999, 10. Website: <<http://www.unctad.org/Templates/WebFlyer.asp?intItemID=2518&lang=1>> 8 April 2005.

(b) Trade-related environmental measures under Multilateral Environmental Agreements

The trade-related environmental measures prescribed by a number of Multilateral Environmental Agreements¹¹ come into direct conflict with GATT MFN requirements. The global trade regime and the environmental regime were developed in an abyss and have different policy goals. Multilateral Environmental Agreements are concerned with the PPM of a product and suggest the use of trade measures as a means of changing the behaviour of both parties and non-parties even extra-jurisdictionally. However, GATT rules do not permit parties to adopt TREMS to discriminate between trading partners on the basis of the environmental impact of their PPMs. GATT also prohibits the use of unilateral/extra-territorial trade measures. There are areas in which the two regimes may counter each other in the context of TREMS.

(c) Product Standards and Eco-labelling

There have been attempts to set out international standards for products based on their PPMs. There has also been a proposal to extend the coverage of the TBT and SPS Agreement to include eco-labelling schemes with a view to harmonising product standards. The criteria in eco-labelling schemes are determined by national bodies rather than internationally and vary from product to product and country to country. It is difficult for developing countries' exporters to have sufficient information and advance knowledge of the standards in order to comply with them.

Product standards can be used as non-tariff barriers to the trade interests of developing countries as demonstrated by the United States' imposition of a ban on the export of unprocessed logs from United States public lands in the Pacific Northwest.¹² Japan alleged that this measure was a thinly disguised non-tariff barrier. The ban did not meet the environmental objective, as it did not apply to processed wood products.¹³ It will raise the price of unprocessed wood to Japan (the United States is

11 For example, *The Montreal Protocol on Substances That Deplete the Ozone Layer* prohibits trade of listed ozone-depleting substances between parties and non-parties. The primary objective of the Protocol's trade restricting measures from the non-parties is to encourage broad participation in the Protocol. The *Montreal Protocol* in its Article 4 has prescribed the grounds for trade measures. See for details 32 *ILM* 874 (1992).

12 Patrick Low, 'International Trade and the Environment: An Overview' in Patrick Low (ed) *International Trade and the Environment*, World Bank Discussion Paper 159, World Bank, Washington DC, 1992, at 23 (Copy in file with author).

13 Ibid.

the largest timber supplier to Japan) and encourage ailing U.S. wood processing industries.¹⁴

Eco-labelling schemes increasingly extend to the processing methods of products. An example of the kind of problems that are emerging is the Austrian requirement, introduced in June 1992, that products containing tropical wood carry a label to that effect. (Austria also imposed a 70 per cent tax on tropical wood and wood products.)¹⁵

Developing countries lack the infrastructure, environmentally sound technology, finance and good governance to improve and enforce environmental standards and measures for the integration of trade and the environment. Developing countries argue that the distribution of environmentally sound technologies would help them to comply with environmentally friendly PPMs. However, the social and economic adjustment costs of the integration and the capacity of developing countries to bear such a burden must be borne in mind when formulating policies with a view to achieving higher international standards. Developing countries also need to have effective representation and participation in international standard setting.

Developing countries have been arguing for the necessary financial support and the transfer of environmentally friendly technology which will gradually equip them with the capacity to tackle environmental issues. But the commitments and promises of the North in this regard have not yet materialised.

GATT'S Core Principles Relevant for Trade-Environment Issues

Three core principles are the basis of GATT regime. They are the most favoured nation obligation (MFN) found in Article I, the national treatment obligation found in Article III, and obligations relating to the elimination of quantitative restrictions found in Article XI.

(a) The Most Favoured Nation Obligation (MFN) - Article I

According to the MFN obligation, any advantage, favour, privilege or immunity granted by any contracting party to any product of any other country applies equally to like products of all contracting parties. No country should discriminate against any

14 Ibid.

15 K Anderson and J Drake-Brockman, 'The World Trade Organization and the Environment' in Boer, Fowler and Gunningham (eds), *Environmental Outlook: Law and Policy*, No 2, Federation Press, Sydney, 1996, 152.

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other. This obligation ensures equal treatment of trading partners and rapid reduction of trade barriers.¹⁶

(b) National Treatment - Article III

The National Treatment obligation prohibits trade restrictions which discriminate between foreign products and like domestic products. Foreign products cannot be accorded any less favourable treatment than like domestic products where the goal is the protection of the latter.¹⁷

(c) General Elimination of Quantitative Restrictions - Article XI

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.¹⁸

GATT rules prohibit the use of quantitative restrictions such as quotas and import and export licenses. Article XI provides for exceptions to these restrictions. Under Article XI, countries are allowed to impose trade restrictions if they experience shortages of essential products or where it is necessary for trade in commodities or agricultural or fisheries products. Article XI sets out the exceptions to import and/or export prohibitions in the following paragraphs:

Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other essential products (paragraph 2(a));

Import and export prohibitions or restrictions necessary for the application of standards or regulations for the clarification, grading or marketing of commodities in international trade. (paragraph 2(b));

Import restrictions on any agricultural or fisheries product necessary to the enforcement of certain governmental policy measures (paragraph 2(c)).

However, it is doubtful whether parties can use this exception on environmental grounds. Governments may take measures for export restrictions for the following reasons:

16 D Hunter, J Salzman and D Zaelke, above n 1, 1182.

17 GATT Article III.

18 Paragraph I, GATT Article XI.

1. Protection of natural resources and endangered species;
2. Promotion of higher-value-added downstream industries;
3. Upgrading the quality of export products; and
4. Ensuring adequate supply of 'essential products'.¹⁹

Measures taken by countries for the attainment of environmental objectives may violate the GATT Article XI. A case in point is *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*.²⁰ In this case, the US alleged that Canada's prohibition on the export of unprocessed pink and sockeye salmon and herring contravened Article XI and was intended to protect domestic fish processors by preventing foreign competitors from gaining access to Canadian fish. Canada claimed that the measures were an integral and long-standing component of its fisheries conservation and management regime, and were thus justified under Article XI paragraph 2(b) and Article XX (g). It was significant that the export prohibitions did not limit access to herring and salmon supplies in general and that the purchase of unprocessed fish was limited in the cases of foreign purchasers only – not in the cases of domestic processors and consumers. It was on the basis of this information that the Panel found that, since the prohibition applied to all unprocessed salmon and herring, the Canadian argument that the prohibition was necessary to prevent the export of unprocessed salmon and herring not meeting its quality standards did not stand. Thus, the export prohibitions could not be considered 'necessary to the application of standards' within the meaning of Article XI 2(b), nor could they be considered to consist of 'regulations for the marketing' of the goods in international trade within the meaning of Article XI 2(b).

Countries which impose export restrictions while tackling the uncontrolled exploitation of natural resources may violate their GATT obligations under Article XI. In developing countries, the government might want to use such restrictions to make sure of the availability of domestic resources, or to stop the uncontrolled exploitation of those resources. This situation is illustrated by the Indonesian measures which were imposed in 1986 to restrict the export of unprocessed rattan and proposed for imposition on semi-processed rattan from 1 January 1989.²¹ The measures were imposed in an attempt to prevent the uncontrolled exploitation of forest resources and to address shortages in the availability of rattan. The EU raised the matter in GATT, expressing its concern that the prohibition on exports did not conform to GATT Article XI. Indonesia argued that the measures were justified under the provisions of

19 OECD Paper, 'Analysis of Non-Tariff Measures: The Case of Export Restrictions' 4 April 2003, TD/TC/WP (2003)7/FINAL, <<http://www.oecd.org/trade>> at 7 April 2005.

20 GATT Doc. L/6268, B.I.S.D. 35S/98 (adopted 22 March 1988).

21 GATT Document MTN/SB/3.

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Part IV of GATT and Article XI 2(a). During the bilateral discussions, the EU persuaded Indonesia to replace the prohibition with taxes on exports which were more consistent with GATT rules than export restrictions. This example shows that developing countries, while taking measures to protect their natural resources, may come under GATT scrutiny for violations of their obligations under Article XI. As Vinod Rege observed:

[I]n taking measures for environmental or ecological production, the policy makers in developing countries have to weigh carefully the implications which such policies may have on economic development, particularly the need to provide employment and a source of livelihood to the millions of people living at or near subsistence levels.²²

(d) Implications of GATT Core Principles for the Environment

3.4 (d)(i) *The Most Favoured Nation (Article I) and National Treatment (Article III) Principle*

The most favoured nation clause requires a party to treat like products alike and not to discriminate between trading partners of like products. In line with this principle countries should not discriminate between domestic and foreign producers by introducing trade restrictions.

The prerequisites for the parties to qualify for equal treatment under Articles I and III are linked to the concept of a 'like product'. An examination of the meaning of this phrase is essential to an understanding of the Most Favoured Nation (MFN) and national treatment principles and their impact upon the environment. The phrase, 'like product', has been the subject of considerable debate in the area of environmental protection because national health and safety standards often restrict the use of polluting or environmentally harmful goods, such as non-recyclable items, products that emit ozone-depleting gases or harmful chemicals.²³ The debate centres around the question of how the likeness of a product may be determined.

Traditionally 'like products' refers to products with similar physical characteristics. A 'like product', according to the WTO, is a product which is alike in all respects to the product under consideration. In the absence of such a product, a 'like product' is one

22 Vinod Rege, 'GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries' (1994) 28:3 *Journal of World Trade* 140.

23 J McDonald, 'Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order' (1993) 23:2 *Environmental Law*, 12.

which has characteristics closely resembling those of the product under consideration.²⁴

Whether a product is like another is typically determined on a case-by-case basis. However, the interpretive process of WTO dispute resolution has established that the term 'like product' refers to the nature of the product itself and not its production and processing methods. Similarly, 'like products' may not be distinguished on the basis of manufacturing process so long as the physical characteristics are the same. As a result, a product cannot be treated differently because it is produced using an environmentally damaging production process rather than an environmentally friendly one.

A 1971 GATT industrial pollution study concluded that the low price of goods produced in a state that lacks environmental regulations is simply part of that country's competitive advantage, and may not be viewed as unfair.²⁵ This interpretation is generally supported by developing countries whose lower environmental standards may provide them with cost advantages and export market access.²⁶ Developing countries fear that the definition of 'like products' on the basis of PPMs may be used as a protectionist measure by developed countries.

GATT Article III restricts taxes that afford protection to domestic production. Consequently a nation cannot provide subsidies for a product which is made according to a strict environmental process to make it more competitive nor can they favour imports from countries with sound environmental regulation. Environmentalists argue that distinguishing products based on PPMs will help internalise environmental costs. However, the challenge is to find an interpretation of 'like products' that ensures developing countries have continued access to export markets whilst allowing industrialised countries to address unsustainable consumption patterns.²⁷

This limited interpretation of 'like product' first appeared in the *Tuna-Dolphin* dispute in 1991. In this case Mexico challenged US restrictions on the import of tuna whose

24 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2.6. see World Trade Organisation, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, New York, 1999, 150.

25 J McDonald, above n 25, 14.

26 D Hunter, J Salzman and D Zaelke, above n 1, 1184.

27 Ibid 1184.

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acquisition harmed dolphins. Mexico argued that the Mexican tuna and tuna available in US markets were like products and that US restrictions were discriminating against the Mexican product. The GATT Panel ruled that Article III, insofar as it dealt with the national treatment principle, covered only those measures that are applied to products as such. Thus, where the physical characteristics of a product were the same, differential treatment on the basis of any other factor was held to be inconsistent with the national treatment principle.²⁸ As a result the US *Marine Mammal Protection Act* 1972 regulations were held to be in violation of Article III because they treated the Mexican products less favourably than the domestic US products although the incidental taking rates in no way affected tuna as a final product. The GATT Panel concluded that 'a contracting party may not restrict imports of a product merely because they originate in a country with environmental policies different from its own'. It went on to state that:

Article III: 4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphin's incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.²⁹

In keeping with the *Tuna-Dolphin case*, the *Thai cigarettes case*,³⁰ the *Canadian Fisheries case*,³¹ the *Danish Beer bottle case*³² and the *Reformulated gasoline case*³³ have all indicated that discriminatory trade practices will not be tolerated under GATT, even if there is some justification for them on environmental, health or conservation grounds.³⁴ The non-discrimination principle, with its narrow scope, does not permit parties to impose import or export restrictions for the sake of environmental protection without

28 *Panel Report on United States - Restrictions on Imports of Tuna*, Final Version Transmitted to the Parties 16 August 1991. The report was submitted to GATT member countries on September 3, 1991 and was made public on September 16, 1991. GATT Doc. DS21/R (1991) (hereinafter '*Tuna-Dolphin*').

29 GATT Council, United States - Restrictions on Imports of Tuna, Report of the Panel, DS21/R-39S/155, paragraph 5.15 (1991).

30 Thailand - Restriction on Importation of and Internal Taxes on Cigarettes, GATT BISD 38 Supp 200, 201 (1990).

31 Panel Report on Prohibition of Imports of Tuna Fish and Tuna Products from Canada, GATT BISD 29 Supp, 91 (1983).

32 *EC Commission v Kingdom of Denmark* [1989] 2 CEC 167.

33 United States - Standards for Reformulated and Conventional Gasoline, 35 *ILM* 274 (1996) 280.

34 J McDonald, above n 25, 27.

violating GATT obligations. This situation leads parties to rely on the exceptions to their obligations when adopting trade-related environmental measures.

Environmentalism in GATT

(a) Environmental Exceptions to GATT – Article XX

GATT exceptions (GATT Article XX) permit a party to restrict or prohibit imports (employ trade measures) that depart from its GATT obligations under certain conditions. Trade measures must be:

1. Necessary to protect human, animal or plant life or health (Art XX.b); or
2. Related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (Art XX.g).

A party must also satisfy the following requirements in the application of the above measures:

1. The measure/s cannot be applied to discriminate arbitrarily or unjustifiably between countries where the same conditions prevail.
2. They must be necessary i.e. exhausting all less trade restrictive alternatives.
3. They must not be a disguised restriction on international trade.

(b) Article XX(b) - Protection of Human, Animal and Plant Life or Health

Article XX (b) allows trade-related environmental measures where they are necessary to protect human, animal or plant life or health. However, the operation and interpretation of Article XX (b) has created debates among trade and environment interest groups. Concerns arising out of the operation of Article XX (b) are discussed next with special reference to GATT Panel Reports.

(b)(i) Necessary test under Article XX.1 (b)

Article XX.1(b) permits a party to invoke the exceptions if they are 'necessary to protect human, animal or plant life or health' but two conditions must be met for that purpose:

1. They may not discriminate between parties arbitrarily or unjustifiably;

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2. They may not be disguised trade restrictions.

The necessity requirement for the measure for which the exception is being invoked has created controversy. In order to pass the necessity test, a party has to show that they have exhausted the alternative, GATT-consistent or less inconsistent options and that the measure in question involves the least degree of inconsistency with GATT provisions. This means that as long as reasonable alternative measures or measures that are not inconsistent with GATT are available they are expected to be employed and so a party cannot adopt a measure and justify its adoption as 'necessary'.

In the 1991 *Tuna-Dolphin case*³⁵, the Panel was set to examine the US prohibition on imports of certain tuna and tuna products from Mexico. The US argued that the measures were necessary to protect dolphin life and health and no measure other than trade sanctions was reasonably available to them to achieve this objective. However, the Panel found that US trade measures were not necessary because the average incidental taking rate for foreign fisherman was tied only arbitrarily to the U.S average taking rate, thus the regulations could not be necessary to protect dolphins.³⁶ The Panel found no evidence that the U.S had exhausted all options, particularly the option of negotiating international cooperative arrangements which would have been consistent with GATT, before resorting to trade measures.

The Panel considered that the United States' measures, even if Article XX (b) were interpreted to permit extra jurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel - as required of the party involving an Article XX exception - that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins inhabit the waters of many states and the high seas.³⁷

The term 'necessary' was interpreted to mean that no alternative to trade measures was available. In *Tuna-Dolphin II*, the US ban on tuna imports from intermediate countries was challenged by the European Union. The European Union contended that the US ban violated Articles III and XI of GATT. The United States imposed a ban

35 GATT Council, above n 31, at paragraph 5.15 (1991).

36 For details see D J Black, 'International Trade v Environmental Protection: The Case of the US Embargo on Mexican Tuna', (1992) 24:1 *Law and Policy in International Business*, 136.

37 GATT Council, above n 31, at paragraph 5.28.

in accordance with the US *Marine Mammal Protection Act* to prevent intermediary third countries from selling tuna to the US market. The US argued that the ban was necessary to protect dolphins and justified this action under Article XX (b). The Panel, in examining the application of Article XX (b), considered the meaning of the term 'necessary' to determine whether US actions were necessary to protect dolphins. However, the Panel noted that in the ordinary meaning of the term, 'necessary' meant that no alternative existed. This explanation had its origin in the Article XX (d) interpretation of the Panel in the *United States - Section 337 of the Tariff Act of 1930 case* ('U.S. Section 337 case').³⁸ In that case, the Panel examined the use of the term 'necessary' in Article XX (d) and decided that:

A contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT measures 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.³⁹

The term 'necessary' was interpreted similarly in the *Thai cigarette case*.⁴⁰ In this case the Panel was established to examine a complaint by the US about certain import licensing restrictions and internal taxes on cigarettes which they believed were inconsistent with Articles III and XI of GATT. Thailand argued that the import ban fell within the scope of Article XX (b) as the measures were necessary to protect human life and health. The Panel found that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was not necessary within the meaning of Article XX (b). The Panel agreed that smoking constituted a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the scope of XX (b). But it followed the interpretation of the term 'necessary' in the *US Section 337 case* and concluded that:

The import ban imposed by Thailand could be considered to be necessary only if there were no alternative measures consistent with GATT or less inconsistent

38 *United States - Section 337 of the Tariff Act of 1930*, November 7, 1989, GATT BISD (36 Supp) 345, paragraph 5.26 (1990).

39 Report of the Panel on *United States - Section 337 of the Tariff Act of 1930*, November 7, 1989, GATT BISD (36 Supp) 345, paragraph 5.26 (1990).

40 *Thailand*, above n 32.

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with it which Thailand could reasonably be expected to employ to achieve its health policy objective.⁴¹

Since Thailand had other measures reasonably available to it, the Panel decided that the trade measures involving import restrictions and internal discriminatory taxes levied by Thailand were not necessary.

(b)(ii) *The Proportionality Test*

In order to fulfil the requirement of 'necessity' in invoking Article XX (b), a party must ensure that the measures adopted constitute a reasonable, proportionate relationship to the conservation policy or the public health policy. In 1989, the GATT Council laid down substantive guidelines on the application of Art XX (b) which provide that:

A measure taken by an importing contracting party should not be any more severe, and should not remain in force any longer than necessary to protect the human, animal or plant life or health involved, as provided in Art XX(b).⁴²

It was perhaps this proportionality requirement to which the panel in the *Tuna-Dolphin* case was referring when it held that the method of calculating the maximum incidental dolphin taking rate was too unpredictable for trade measures to be regarded as necessary to protect the health or life of dolphins.⁴³ This proportionality test was also deployed in the *Danish Beer Bottle* case, in which the Panel stated that trade measures should not be disproportionate to their objective and should cause the least disruption to trade.⁴⁴

However the 'necessary' requirement has proven to be a barrier to the justification of legitimate environmental protection measures. The requirement gives the WTO the authority to determine sensitive relative terms such as proportionality and 'less inconsistent alternative', irrespective of the need and urgency of a situation. As McDonald pointed out:

41 Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel, GATT BISD 37 Supp 200, 201 (1990).

42 GATT, GATT Activities 1989, 100 (1990) in J McDonald, above n 25, at 41.

43 J McDonald, above n 25, 42.

44 *Commission v Denmark*, Case 302/86 [1988] ECR 4607.

To require that a party exhaust all remedies that do not violate the GATT before resorting to trade restrictions is onerous because the likely success of GATT consistent alternatives is a subjective determination.⁴⁵

Although the 'necessary' requirement demands that a party use the measure that entails the least degree of inconsistency with GATT, it did not set out any guidelines for the determination of the method involving the least degree of inconsistency with other GATT provisions. The result is a situation with great potential for mischief-makers. For example, bans on importing ivory could be challenged on the ground that a more effective (and more GATT-consistent) way to save African elephants is to privatise them.⁴⁶

The 'least restrictive' interpretation of the necessary requirement in Article XX (b) has also been criticised by both trade and environment groups. It is argued that the 'least-trade restrictive' interpretation does not correspond with the ordinary meaning of 'necessary' in Article XX (b), which focuses on the need for measures to achieve the goal of environmental protection and not on its effect on international trade.⁴⁷ GATT Panels' attitude towards the interpretation of the term 'necessary' is negative. The Panel has on many occasions deemed State measures to fall outside the scope of what is necessary but has not identified alternative less GATT-inconsistent measures that could be used to protect the environment. GATT dispute settlement Panels should take into account the intent of Article XX and should strike a balance between the policy goals of liberal trade and the goals set out in Article XX.

(c) Article XX (g) – Protection of Exhaustible Natural Resources

The Article XX (g) exception allows restriction on international trade when it is necessary to conserve exhaustible natural resources. GATT Panels' interpretations have established that trade measures must satisfy four requirements in order to qualify as an Article XX (g) exception:

1. The particular trade measure must be 'primarily aimed at' the conservation of exhaustible natural resources. The GATT Panel interpreted 'relating to conservation of natural resources' to mean 'primarily aimed at' the conservation of natural resources.

45 J McDonald, above n 25, 41.

46 Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', (1991) 25:5 *Journal of World Trade*, 49.

47 D Hunter, J Salzman and D Zaelke, above n 1, 1192.

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2. It must be made effective in 'conjunction with restrictions on domestic production or consumption'.
3. It must not be arbitrary or unjustifiable discrimination between countries where the same conditions prevail.
4. It must not be a disguised restriction on international trade.

(c)(i) 'Primarily Aimed At'

The requirement that a trade measure must be primarily aimed at the related conservation purpose was confirmed in the *Tuna II* Panel report.⁴⁸ In this case, the US trade measure was not primarily aimed at conservation, because it was based on unpredictable factors such as the incidental taking rate of US vessels, not to any objective standard of dolphin deaths.

In the US *Automobile Taxes* case, it was decided that the less favourable treatment of foreign cars did not conserve gasoline and was not primarily aimed at the conservation of natural resources.⁴⁹

In the *Canadian Tuna* dispute, the US brought a complaint against a Canadian ban on the export of unprocessed herring and salmon.⁵⁰ The Panel decided that to rely on an Article XX (g) exception, a trade measure had to be primarily aimed at the conservation of natural resources. Canada's export ban on foreign processors and consumers was not considered to be aimed primarily at conservation as the domestic production and consumption of unprocessed herring and salmon were permitted. Canada's favour of the domestic processor over foreign ones meant that it also failed the 'in conjunction with' test which required that Canada employ the measure against domestic production and consumption at the same time.

In the 1982 Panel Report on the US Prohibitions of Imports of Tuna and Tuna products from Canada, the Panel held that the US measures were unjustified because the Canadian restriction was not in conjunction with domestic consumption. Also, the restriction did not entail that every kind of tuna should be barred from Canada.

48 United States –Restrictions on Import of Tuna [Tuna-Dolphin II]: 1994, GATT Doc DS29/R, Geneva: GATT 1994.

49 United States - Taxes on Petroleum and Certain Imported Substances, BISD 34.5/136; GATT Doc L /6175 (17 June 1987).

50 Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, GATT BISD, 35 Supp 98 (1984).

Despite this definitive interpretation of 'primarily aimed at', the Panels' interpretations of Article XX (g) have left many questions unanswered. It is not clear whether the term 'exhaustible natural resources' covers only commercially valuable resources or all exhaustible natural resources. There have been suggestions that Article XX (g) was inserted to authorise contracting parties to take measures to conserve commercially valuable resources to ensure their availability for future use in international trade.⁵¹ To date, no party has been able to satisfy all the elements of Article XX (g), so it is impossible to anticipate the circumstances in which these tests will be met. It seems clear that the Article XX (g) exception for the conservation of exhaustible natural resources will continue to be interpreted with the same preference for free trade as has the interpretation of Article XX (b)'s health and safety exception.⁵²

(d) The Chapeau (or Introductory Paragraphs) to Article XX

3.5 (d)(i) No arbitrary or unjustifiable discrimination and disguised restriction

The chapeau (otherwise the introductory paragraphs) to Article XX states that trade measures must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

'The same situation' connotation of the chapeau seems to include the use of not only identical, but similar measures. The inclusion of the word 'similar' could be construed as a recognition and circumvention of the loophole contained in the Article XX preamble.⁵³ For example, in the *Shrimp-Turtle* dispute, the Appellate Body decided that the US measure served a legitimate environmental objective under Article XX (g) but that its discriminatory application constituted an arbitrary and unjustifiable discrimination and as such it was incompatible with the requirement of the chapeau of Article XX.

In the 1982 Panel Report on the US Prohibitions of Imports of Tuna and Tuna Products, the Panel interpreted the phrase 'disguised restriction' and concluded that publication of a trade measure was sufficient to prevent that measure being considered a 'disguised restriction'. This interpretation was criticised in subsequent

51 J McDonald, above n 25, 46.

52 Ibid, 55.

53 Steve Charnovitz, 'Trade Negotiations and the Environment' (1992) *International Environment Reporter*, March 11, 144-145.

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GATT practice because the function of the prohibition on disguised restrictions is not only to ensure transparency, but to supplement the prohibition on unjustifiable discrimination among GATT Contracting Parties via a prohibition on the indirect protection of domestic producers.⁵⁴

(d)(ii) Extra-Territoriality

GATT does not permit trade measures which are directed against environmental conditions outside of a country's own territory. In other words, a nation is allowed to set environmental policies within its territorial boundary, but it may not use trade measures to enforce its environmental standards beyond its territorial boundary. In its 1992 Study on Trade and Environment, the GATT Secretariat emphasised that:

When the environmental problem is due to production and consumption activities in another country, the GATT rules are more of a constraint, since they prohibit making market access dependent on changes in the domestic policies or practices of the exporting country...If the door were opened to trade policies unilaterally...the trading system would start down a very slippery slope...⁵⁵

The *Tuna-Dolphin I* Panel decided that any measures taken to control the production and consumption of exhaustible natural resources can only be effective to the extent that the production or consumption is under its jurisdiction.⁵⁶ This view was based on the drafting history of the Article which indicated that 'the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country. It further noted that any broad interpretation of Article XX (b) (as suggested by the US) would authorise contracting parties to unilaterally determine 'the life or health protection policies' from which other contracting parties could not deviate without jeopardising their rights under the General Agreement.

The *Tuna Panel II* decided that governments could enforce an Article XX (g) restriction extraterritorially only against their own nationals and vessels.⁵⁷

54 Ernst-Ulrich Petersmann, *International and European Trade and Environmental Law after the Uruguay Round*, Kluwer Law International, Boston, 1995, 30.

55 *International Trade in 1990-91* (Volume I), General Agreement on Tariffs and Trade (GATT). Secretariat, 1992, 19.

56 *Tuna-Dolphin I* GATT Panel Report GATT Doc DS 21/R: GATT, 30 *ILM* 1594 (1991).

57 *Tuna-Dolphin II*, GATT Doc DS29/R, Geneva: GATT 1994; 33 *ILM* 839, paragraph 5-29 (1994).

The drafters of GATT were also concerned about the far-reaching implications of the unilateral use of trade measures. To allow each country to determine unilaterally the environmental conditions beyond its jurisdiction would result in interference with the sovereignty of nation states and invite chaos and retaliation. This extra-jurisdictional use of trade measures would give large markets the economic leverage to impose their national socioeconomic policies upon smaller countries by forcing them to change their policies and thus reducing international trade to a power-based regime. In this light, GATT rules seem to have restricted member powers to the combat of trans-boundary environmental problems in areas which lie outside the legal jurisdiction of any particular country, even where the effect is global.

Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus. However, in the absence of an international institution that mandates sound environmental policies, the limitation of the extraterritorial scope of Article XX has left nations without the necessary instruments to handle global environmental problems.

(e) Scope of Article XX

A review of Article XX shows that although it was fashioned to cover environmental exceptions, its scope has been narrowed by the inclusion of different conditions and their distorting interpretations. In addition, narrow interpretations of the plain meaning of the exceptions may ultimately make them high hurdles to environmental protection. The cases which have been required to interpret the Article XX (b) and XX (g) exceptions have shown that very few trade restrictions which violate GATT will be upheld on the grounds that they were set in place to protect the environment.⁵⁸

The Concerns of Developing Countries

The major concern of developing countries in the trade-environment intersection is the trade related measures being adopted for the enforcement of environmental standards. These standards, as shown before, are based on pollution and similar process standards and production methods standards.

The use of trade-related environmental measures to achieve environmental objectives could be discriminatory. Developing countries argue that the environmental standards of developed countries cannot be imposed upon them without considering their socio-economic condition and their level of economic development. They fear

58 J McDonald, above n 25, 56.

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that high-income countries will impose lofty environmental standards on low income countries, depriving them of one aspect of their natural comparative advantage and subjecting them to trade barriers if they fail to perform up to the standards of developed countries.⁵⁹ Developing countries also argue that the North's attempts to dictate their domestic environmental policies by wielding its economic strength through trade sanctions is a form of eco-imperialism.⁶⁰ Unilateral sanctions, if unregulated, would fundamentally shift the trading system towards one based on power rather than on rules. Therefore, the use of trade related environmental measures for achieving the objective of sustainable development is not desirable.

The fallacy of the environmental effectiveness of trade measures does not pay heed to the concerns of developing countries or their inability to meet the stricter environmental norms set by the affluent North. Developing countries have been asking for the necessary financial support and the transfer of environmentally-friendly technology to enable them to tackle environmental issues but the promises of the North in this regard have not materialised. At present, the acquisition of such technology by developing countries from the North comes with numerous conditions, as environmentally-friendly technology is transferred from developed countries via official development assistance or through direct foreign investment. Significantly, however, nearly three quarters of such technology is obtained by the firms of developing countries on purely commercial terms.⁶¹

The degree to which environmental issues are required to be addressed should be commensurate with the level of development of each country. Applying environmental standards to production processes can be detrimental to the economic interests of developing countries. Allowing countries to distinguish between products on the basis of how they are produced threatens descent down the 'slippery slope' to protectionism which would undermine the very foundation of the international trade system.⁶² Extending these criteria to PPM might restrict the access of developing countries to the markets of developed countries. As Kym Anderson and Jane Drake-Brockman asserted and cautioned, 'firms will perceive this as an additional way to

59 Bhagwati Jagdish, 'On thinking Clearly about the Linkage between Trade and the Environment' (2000) 5:4 *Environment and Development Economics*, 485-96. Cited in Daniel C. Esty, 'Bridging the Trade-Environment Divide' (2001) 15:3 *Journal of Economic Perspectives*, 118.

60 D Hunter, J Salzman and D Zaelke, above n 1, 1189.

61 Vinod Rege, above n 24, 114.

62 D Hunter, J Salzman and D Zaelke, above n 1, 1188.

justify their demands for protection from import competition.⁶³ They further argue that 'the use of trade restrictions, in place of more efficient instruments impacting directly on production or consumption rather than on trade, will unnecessarily reduce the level and growth of global economic welfare and may even add to, rather than reduce, global environmental damage and resource depletion'.⁶⁴

Positive and effective alternatives to trade sanctions, such as market access and/or financial and technical cooperation, should be considered. Differences in environmental standards should be borne in mind in the context of the historical process of production and the present inequities between developed and developing countries. Using trade restrictions to force developing countries to comply with Northern environmental standards is not the panacea for the issue of sustainable development.

Instead of subjecting them to trade sanctions, developing countries should be given access to sophisticated environmental technology, technical and political support and funding commitments from the international community to build their capacity for sustainable development. In this context, the notion of common but differentiated responsibility which was outlined in the Rio Declaration can be a guiding principle.

The harmonisation of domestic environmental standards is often suggested as an alternative to trade sanctions for addressing environmentally harmful production processes used by exporting nations.⁶⁵ Yet, from the viewpoint of developing countries, the harmonisation of pollution and other process standards could work against their interests. If such standards were incorporated into the TBT Agreement, as certain labour and interest groups have suggested should be the case, developing countries could be forced to adopt the higher and more stringent standards prevalent in developed countries. With their resource constraints and limited or zero technological capacity, developing countries are not in a position to cope with the pressure this would place them under. The result would be that their products would be greatly disadvantaged when in competition with the products of developed countries.⁶⁶

The harmonisation of environmental quality and performance standards should be gradual and incremental, affording special and differential treatment to developing countries. Developing countries perceive the 'harmonisation of environmental

63 Kym Anderson and Jane Drake-Brockman, above n 15, 145.

64 Ibid.

65 D Hunter, J Salzman and D Zaelke, above n 1, 1186.

66 Vinod Rege, above n 24, 95-169.

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standards' debate as attempt by developed countries to ignore the commitments they made at UNCED to respect the development needs of individual countries.⁶⁷

WTO members must address environmental concerns within a broader sustainable development framework that includes structural concerns such as equity, economic development, increased market access and the alleviation of poverty in developing countries. The international trade regime could respond to the needs of developing countries by providing more market access - particularly for textiles and agricultural products - as well as increased labour mobility and greater flexibility regarding technical and sanitary standards.

Developed countries have made commitments concerning the elimination of export subsidies, substantial reductions in agricultural domestic support, significant market access improvements, removal of trade distorting subsidies and the integration of development and environment concerns. Unfortunately little progress has been made towards the implementation of these commitments. Developing countries remain subject to perverse subsidies, anti-dumping rules, unilateral trade measures and other tariff and non-tariff barriers used by developed countries. Textile and agricultural products, where developing countries have the comparative advantage, are more frequently subject to environmental standards.⁶⁸ Little progress has been made in the implementation of enabling mechanisms at the international level to assist developing countries to address environmental issues effectively. Imbalances in the trade and environment agenda can only be worked out if such mechanisms are put in place.

The domineering position of developed countries in GATT/WTO negotiations has been translated into the systematic bias of trading structures in favour of developed countries. Developing countries, with their weak bargaining position, have received the tough end of the deal. GATT/WTO cannot address the goal of sustainable development without the integration of developing countries into the trading system.

67 It was recognised at the UNCED that national environmental standards and laws should be allowed to differ and may reflect different stages of economic development.

68 See generally, S Henson, R Loader, A Swinbank and M Bredahl, 'The Impact of Sanitary and Phytosanitary Measures on Developing Country Exports of Agricultural and Food Products (draft for discussion)'. The Conference on Agriculture and the New Trade Agenda in the WTO 2000 Negotiations, The World Bank in cooperation with the World Trade Organisation, 1-2 October, 1999, Geneva, Section 6: 'Problems with the SPS Agreement encountered by Developing Countries.' Website : <http://www.cid.harvard.edu/cidtrade/issues/spstbtpaper.html>

Imbalances in the negotiating position of developing countries and unfairness in the operation and interpretation of WTO Agreements need to be addressed. As outlined in the earlier sections, the issues of trade-environment intersections should be considered to assist developing countries to pursue policies for sustainable development. The situations of developing countries need to be considered as a priority in the Agreements on Agriculture, Textiles and Clothing, TRIPs and GATS.

There should be a review of the Uruguay Round Agreements to provide greater leeway for developing countries. There should also be a new round of commodity agreements and a re-orientation of the trading system to promote safe products and discourage or bar trade in harmful products. Bringing developing countries onto the same level playing field would help them to address the global objectives of environmental protection and sustainable development without jeopardizing their right to development.

Conclusion

Trade is powerful engine for the economic growth that is vital to the creation of conditions which favour improving social conditions and advancing environmental protection.⁶⁹ Trade liberalisation can therefore be an important contributor to sustainable development, especially when implemented in conjunction with complementary environmental policies.⁷⁰ In this light, striving for an open international trading system may be an important instrument for the protection of the global environment.⁷¹ The Principle 12 of the Rio Declaration has emphasised that the mutual coexistence of trade and environment will promote sustainable development.⁷² For this to happen there should be a reconciliation of economic comparative advantage and environmental comparative advantage. Resource and environmental costs need to be incorporated into the prices of products. Such prices should then provide clear signals to producers and consumers in order to guide their decisions

69 Renato Ruggiero, Director General of WTO, in his speech in Bonn on the subject of sustainable development on 9 December 1997 see for details (1997) 1:6 (December) *Bridges* at 7 (International Centre for Trade and Sustainable Development Newsletter).

70 Kym Anderson and Jane Drake-Brockman, above n 15, 149.

71 Peter A G van Bergeijk, 'International Trade and the Environmental Challenge' (1991) 6 *Journal of World Trade*, 106.

72 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'. Rio Declaration, Principle 12. *Rio Declaration on Environment and Development*, June 14, 1992, 31 *ILM* 874 (1992).

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and to enable an efficient and sustainable allocation.⁷³ In this process the special factors affecting environment and trade policies in developing countries and their significant economic and developmental differences should be borne in mind.

This article has outlined the need for GATT/WTO to clarify and/or modify some of its rules if it is to better accommodate the concerns of developing countries and environmentalists. As illustrated by the examples examined above, an important step in this regard would be the revision of GATT Article XX so that it provides better support for the achievement of environmental goals, ensures that environment-related trade measures do not constitute disguised protectionist measures and takes account of the special situations of developing countries.

In the meantime, insufficient attention has been given to environmental considerations, as illustrated by the cases brought before the GATT dispute settlement panels. A review of the relevant GATT rules should ensure that a balance is struck between competing commercial and environmental goals and that global and transboundary environmental issues are accommodated. GATT must also address doubts regarding the conformity of the measures set out in Multilateral Environmental Agreements (MEAs).

The global institutions which deal with international trade and finance are believed to protect the interests of developed countries and to give rise to greater economic disparities between developed and developing countries. To this effect, Agenda 21 laid out the trade-related problems of developing countries in the following paragraph:

Expansion of world trade has been unevenly spread, and only a limited number of developing countries have been capable of achieving appreciable growth in their exports. Protectionist pressures and unilateral policy actions continue to endanger the functioning of an open multilateral trading system, affecting particularly the export interests of developing countries.⁷⁴

The trade-environment debate is largely entwined with the declining terms of trade and the sluggish economic growth in developing countries. The use of trade policy measures to enforce environmental policies should be non-discriminatory, least trade restrictive, transparent, should provide adequate notification of national regulations and should consider the special conditions and developmental requirements of

73 Peter AG van Bergeijk, above n 79, 109.

74 Agenda 21, paragraph 2.8. 'U.N. Conference on Environment and Development, Annex II' UN Doc A/CONF.151/26/Rev 1 (1992).

developing countries.⁷⁵ However, seeking environmental solutions by restricting trade will further threaten the prospects of sustainable development in developing countries. Free trade is not an end in itself; it is a means to achieve economic and environmental efficiency.⁷⁶ Although the potential for the reform of global institutions exists, suggestions which limit international trade should be treated with caution, especially since the environment may become the legitimising cover for what actually boils down to flat-out protectionism.⁷⁷

75 Ibid.

76 Peter AG van Bergeijk, above n 79, 109.

77 Ibid.