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AN OVERVIEW OF INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT AND A CONFRONTATION BETWEEN WTO RULES AND SUSTAINABLE DEVELOPMENT

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I. — Introduction

Since the signing of the United Nations Charter fifty years ago, a steady evolution in the world's legal structures has taken place in conjunction with the development of increasingly elaborate conceptions of international cooperation. Sustainable development currently represents the most recent and evolved legal institution (1) in the international legal system. It is now widely accepted that sustainable development, which integrates economic development with the protection of the environment, represents the most appropriate response to the problems of the third world, as well as to the concerns of the scientific community with regard to the environment (2). The concept is, however, of a broad nature and is often too vaguely defined in social sciences to be appropriately translated in concrete policy-making. It indeed involves a delicate and variable equilibrium between the search

(1) The term « institution » represents in this article a leading concept of international cooperation translated into international law. It is not to be confounded with the international organisation supposed to promote or implement it.

(2) See Gilberto C. Gallopin, Pablo Gutman and Hector Maletta, « Global Impoverishment, Sustainable Development and the Environment : A Conceptual Approach », *Intl. Social Science J.*, 1989, V, 41.

for economic growth, commitments to developing countries, and the protection of the environment. By defining concrete rights and obligations, international law may provide some guidance to this very complex dialectic (3).

This article has four objects :

The first is to define and analyze the concept of sustainable development in international law.

The second is to present evidence, including relevant material regarding the obligations of States to consider sustainable development as the ultimate goal to be achieved by the international community. Since indeed sustainable development reflects the desire to protect and improve the human environment, and is also intended to integrate such varied and apparently contradictory issues as free trade, economic development and the protection of natural resources, States committed to treat it as an ultimate goal. Therefore, it is argued that other rules of international law should be relegated to tje role of being the means towards the end of sustainable development.

The third object is to define the legal effects of sustainable development, assess their relative strength in law and evaluate how they should impact on legal relations between States. The aim is to provide policy makers and international negotiators with some guidance as to the complex combination of legal institutions surrounding sustainable development.

The fourth object is to assess and provide suggestions regarding the compatibility of international trade rules with the notion of sustainable development. Trade law, by pursuing the objectives of economic growth, may intuitively question the compatibility of the present legal system with the goals of sustainable development. Therefore, it is useful to confront trade rules as embodied in the WTO with the rules of sustainable development and try to integrate them. Because free trade is a major and exceptionally well-developed field of international law, the practical implications of which are extremely important in our societies, a special chapter is dedicated to it in this issue.

This article is generally intended to be a reminder of the direction taken and agreed by the international community with regard to the expected behaviour of States in the international arena. Increasingly, international bilateral or regional framework cooperation agreements are concluded between « emerging » economies and the industrialised world. Multilateral contacts and political missions are multiplying. The European Commission, for instance, is particularly active in opening markets and strengthening cooperation with Mediterranean, Asian and Latin American countries. Very

(3) See Nagendra SINGH, « Sustainable Development as a Principle of International Law », in *The Right to Development in International Law*, edited by Subrata Roy CHOWDURY, Erik M.G. DENTERS and Paul J.I.M. DE WAART, Martinus Nijnof, 1992, p. 1.

often, these initiatives and the agreements subsequently concluded aim at liberalising trade and are promoted by economic operators whose span of action is multinational. In this context, it is useful to recall to all those involved in these activities the goals and rules for the protection of the well-being of humanity, present and future, and the safeguard of our natural heritage.

II. — Definition of sustainable development in International Law

Since the modern concept of sustainable development appeared in the late 1970s, there have been many different definitions incorporating economic, social, political and ecological variables (4).

All these definitions reflect the same concern to integrate harmoniously the goals of economic development with the protection of natural resources in order to preserve future generations' capacity to reach or maintain well-being.

Sustainable development is based on the assumption that underdevelopment and poverty lead to the rapid deterioration of the environment (unplanned urbanisation, desertification, irrational industrialisation programmes spoiling land, sea and atmosphere) that may, in turn, be a considerable obstacle to future development itself. Industrialisation and economic growth may also generate consumption patterns that deplete natural resources and modify climates, hindering the basic availability of natural wealth and the long-term capacity of humanity to sustain itself.

Hence, economic development and growth must be achieved in a manner consistent with the sound management of natural resources (5).

Environmental protection and development are consequently mutually supportive rather than conflicting principles. Equilibrium between them is the condition for the survival of both.

This is clearly reflected in the definition of sustainable development that has eventually inspired several legal instruments (6) :

(4) See NORGAARD, « Sustainable Development : a Co-Evolutionary View », *Futures*, 1988, 606 ; SIMON, « Sustainable Development : Theoretical Construct or Attainable Goal ? », *Envtl. Conserv.*, 1989, 41.

(5) Preparations for the United Nations Conference on Environment and Development on the Basis of General Assembly Resolution 44/228 and taking into account other relevant General Assembly Resolutions, *A/CONF.151/PC/100/add.3*, Nicholas A. ROBINSON editor, Oceana Publ. 1992, vol. I., p. 93.

(6) The Rio Declaration on Environment and Development (31 *I.L.M.*, 1992, 874) ; United Nations Framework Convention on Climate Change (*id.*, 851) ; Convention on Biological Diversity (*id.*, 822) ; The Non-Legally Binding Authoritative Statement By Principles For A Global Consensus On The Management, Conservation And Sustainable Development of All Types of Forest (*id.* 882).

> « *Humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs* » (7).

Meeting the needs of the present means, in the present juridical system, ensuring health and minimum standards of life to all the populations of the world. It is the essential precept of the right to development or intra-generational equity (8).

To preserve the ability of future generations to meet their own needs implies the necessary protection of natural resources, with the view to ensure for ever « the conditions on earth that are necessary for the improvement of the quality of life » (9). Environmental legislation is grounded on this principle. We also call it inter-generational equity, which obliges each generation to maintain the quality of the planet so that future generations do not inherit it in a worse condition (10)

Sustainable development represents thus the necessary synthesis, between the right to development claimed by developing countries (11), and environmental protection and preservation. This sybthesis, which is desired and promoted by all States (12), constitutes an obligation of all means and generates by itself rights and obligations for the subjects of international law.

As a legal institution, sustainable development is obviously a source of obligations for both developed and developing countries.

III. — The sources of the Law of sustainable development

Definitive legal integration of environmental protection and economic development occurred at the United Nations Conference on Environ-

(7) World Commission on Environment and Development, *Our Common Future* (The Bruntland Report), Oxford, 1987, 8 ; emphasis added. The Bruntland Report also contains a formal definition of sustainable development whose words, however, have not been included in legal texts : « *Sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations* » (p. 46).

(8) See on the subject : Milan Bulajic, *Principles of International Development Law*, second revised ed., Martinus Nijnoff Publishers, 1993, 484 p. ; for a general exposé on international law explaining these concepts, see I. Brownlie, *Principles of Public International Law*, fourth ed., Oxford, 1990, 748 p.

(9) Declaration on the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), principle 8.

(10) E. Brown Weiss, « Our rights and obligations to future generations for the environment », *A.J.I.L.*, 1990, pp. 201-202.

(11) UN General Assembly Resolution 36/133, 14 December 1981 ; UN General Assembly Resolution 39/145, 1984 ; UN Declaration on the Right to Development, Resolution 41/128 December 1986, *UNGA RES.*, A/41/128 (1986), voted by 146 in favour, one against (the USA) and eight abstentions (Denmark, Finland, FRG, Iceland, Israel, Japan, Sweden and UK).

(12) See General Assembly Resolution 44/228 of 22 December 1989, *General Assembly Official Records : Fourty-fourth Session*, Supplement n° 49 (Doc. A/44/49).

ment and Development (UNCED), held in Rio de Janeiro, Brazil, in June 1992.

The Conference produced five documents expressly declaring sustainable development as an institution of international law :

(1) Agenda 21 comprising 40 Chapters (13)
(2) The Rio Declaration on Environment and Development
(3) United Nations Framework Convention on Climate Change
(4) Convention on Biological Diversity
(5) The Non Legally Binding Authoritative Statement Of Principles For A Global Consensus On The Management, Conservation And Sustainable Development of All Types of Forests.

These documents are built on the Preamble to the UN Charter : « to promote social progress and better standards of life », and on the 1972 Stockholm Declaration on Human Environment : « The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world ; it is the urgent desire of the people of the whole world and the duty of all governments » (14).

The objective of sustainable development is further recalled in major international agreements signed after the Rio Conference such as the Preamble to the Marrackesh Agreement establishing the World Trade Organisation signed on 15 April 1994 (15), the International Convention to combat desertification signed in October 1994 (16), and the International Cocoa Agreement of 1993 (17).

Besides these texts, no other major global international convention explicitly mentions or promotes as yet the principle of sustainable development (18). However, many of them address issues that are related to both

(13) *Agenda 21, Earth's Action Plan*, Nicholas A. ROBINSON Editor, Under the auspices of the Commission on Environmental Law, Oceana Publ., 1993, 683 p.

(14) Stockholm Declaration, paragraph 2. In the Stockholm Declaration, some of the basic elements of the notion of sustainable development were already included.

(15) The Marrackesh Agreement as well as all the instruments related to the WTO are published in *Law & Practice of the World Trade Organisation* edited by J.F. DENNIN, Oceana Publications, New York, London, Rome, 1995.

(16) The text of this agreement is published in 33, *ILM, 1328 (1994)*.

(17) The text of this agreement is published, among other sources, in *O.J.E.C.*, 1994, L 52/25.

(18) However, there may be regional or bilateral cooperation agreements that contain in their Preamble an explicit reference to the principle of sustainable development. See for instance the Interregional Framework Cooperation Agreement between the European Community and its Member States and the Southern Common Market and its Member Countries (*O.J.E.C.*, 1996, L 69/1) : the Preamble of this agreement and article 17 explicitly refer to the principle of sustainable development. However, it appears from a thorough reading of this Agreement that it is more concentrated on establishing economic cooperation for the benefits of both the EU and Mercosur's economies than on defining concrete steps for their mutual sustainable development integrating both concerns as to development and the environment. See also the Agreement on cooperation for Sustainable Development of the Mekong River Basin, 5 April 1995, between Vietnam, Laos and Cambodia, 34, *ILM*, 864 (1995).

development and some aspects of the environment, integrating and implicitly recognizing the necessary equilibrium between them (19).

There are also international resolutions and recommendations, such as the World Charter for Nature and the OECD Principles Concerning Transfrontier Pollution, taken at a rather early stage by the international community, which indirectly acknowledged the interconnection between the interests of development and those of nature (20).

Finally, following the 1987 Report of the World Commission on Environment and Development (the Bruntland Commission), the concept of sustainable development became itself the main subject of hundreds of meetings and authoritative statements in various forms in the lead up to the Rio Conference (21). The latter was also followed by periodic General Assembly Resolutions and other organs' works endorsing and recalling the

(19) See, for an authoritative study : The United Nations Conference on Environment and Development, *The effectiveness of International Environmental Agreements. A survey of Existing Legal Instruments*, edited by Peter H. SAND, Cambridge, UK, 1992 ; Among the most relevant conventions, mention must be made of
— The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES, Washington, 3 March 1973, 12 *ILM* 1085 (1973),
— The Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 12 November 1972, 11 *ILM* 1358 (1972),
— The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 29 December 1972, 11 *ILM* 1294, (1972), as amended,
— Most of the United Nation's Environment Programme sponsored regional seas conventions,
— The Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985, 26 *ILM* 1529 (1987) and the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987, 26 *ILM* 1550 (1987),
— The International Convention for the Regulation of Whaling (Washington II December 1986), as amended,
— The International Tropical Timber Agreement (Geneva, 18 November 1983),
— The International Undertaking on Plant Genetic Resources (Rome, 23 November 1983), as supplemented,
— The South Pacific Forum Fisheries Convention (Honiera, 10 July 1979), and related agreements,
— Most of the conventions sponsored by the International Labour Organisation on the working environment,
— The Fourth ACP-EC Convention (« Lomé IV », *O.J.E.C.*, 1991, L/229),
— and, last but not least, the 1992 Maastricht Treaty, implementing the European Union (*O.J.E.C.*, 29 July 1992, C/191).

(20) UN General Assembly Resolution on the World Charter for Nature (New York, 28 October 1982) ; OECD Principles Concerning Transfrontier Pollution (Paris, 14 November 1974).

(21) See, specifically, UN General Assembly Resolution 44/228 ; for a complete list of the other texts, see Andronico O. ADEDE, *International Environmental Law Digest ; Instruments for International Responses to Problems of Environment and Development 1972-1992*, Elsevier, Amsterdam, 1993, chapter V ; also from the same author : « The Road to Rio : The Development of Negotiations » in *The Environment After Rio, International Law and Economics*, edited by Luigi CAMPIGLIO, Laura PINESCHI, Domenico SINISCALCO, Tullio TREVES, on behalf of the Istituto per l'ambiente, London, Dordrech, Boston, 1994, pp. 5-6 ; see also the EC statements made by the European Council in Dublin on 25 and 26 June 1990 on the environmental imperative, *EC Bulletin*, N° 6/90, p. 18.

principle of sustainable development (22). National governments finally integrated in their practice and policy statements many references to sustainable development reaffirming their commitment to its objectives (23).

The repeated nature of these statements, the action accompanying them and the unanimous acceptance of a commitment to the ends of sustainable development demonstrate the existence of an international custom compelling States to bolster development processes without depleting the environment and the natural support for their activities (24).

If the objectives of sustainable development are well accepted as law, as an obligation of all means, its components are sometimes more controversial and blur the borders of its concrete implementation.

The following pages intend to clarify the specific commitments made by States under the concept of sustainable development and to strengthen them with other principles and institutions of international law.

IV. — THE CONTENTS OF THE LEGAL NOTION OF SUSTAINABLE DEVELOPMENT AND THEIR NORMATIVITY

A. — *Two philosophical issues*

The international community initially resolved two major philosophical controversies that opposed the countries of the North versus those of the

(22) G.A. Resolution 47/183, endorsing the conclusions and recommendations of UNCTAD VIII, of 22 December 1992, G.A. Resolution 47/190, endorsing Agenda 21, 22 Dec. 1992 ; G.A. Resolution 47/191, Follow up for Agenda 21, 22 Dec. 1992 ; G.A. Resolution 47/194, UNDP's Capacity 21, 22 Dec. 1992 ; Work Plan of the Commission on Sustainable Development for Implementation of Agenda 21, 19 Feb. 1993 ; The Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September 1994 ; and the various meetings of the Conference of the Parties to both the Conventions on Biological Diversity (Nassau, 9 December 1994) and the Convention on Climate Change ; see also the Resolution of the European Parliament on the fifth Community programme of policy and action in relation to the environment and sustainable development and the Resolution of the European Parliament on monitoring by the European Community of the implementation of Agenda 21 of the UNCED, 18 January 1994, *O.J.* No C 44/46 ; see finally the EC Council Resolution relating to a common program of policy and action in matters of environment and sustainable development of 1 February 1993, *O.J.*, No C 139/1, 17 May 1993.

(23) During the Lyon Summit of June 1996, the G7 chiefs States jointly reaffirmed and « renewed » their commitment to the goal of sustainable development and to the agreements reached at Rio (Statement « Towards Greater Security and Stability in a More Cooperarative World, Lyon, 29 June 1996, Reuter EU Briefing, 2 July 1996). See also the CONCAUSA (Conjunto Centroamerica-USA) which is a joint agreement between seven Central American countries and the United States establishing a framework for adressing environmental issues, also called the Sustainable Development Pact and presented as such in press conferences by the parties, *Int'l. Env. Rep.*, 17, 14 Dec. 1994, p. 1025.

(24) See A. KISS and S. DOUMBA-BILLE, « La Conférence des Nations-Unies sur l'environnement et le développement (Rio de Janeiro, 3-14 juin 1992) », *A.F.D.I.*, 1992, p. 823.

South : (i) human beings are at the centre of concerns, (ii) development takes precedence over environmental protection.

1. *Human beings are at the centre of concerns (Principle one of the Rio Declaration)*

In the years following the 1972 Stockholm Conference on Human Development, the vast majority of the environmental conventions focused essentially on securing a healthy environment by limiting the right of countries to adopt unsustainable patterns of development. Environmental conventions were generally made of rules and stipulations on economic activities that were often interpreted as limiting the development capacities of third world countries. These instruments were, in their philosophy (but not in law), implicitly subordinating human development to the natural environment. They considered the environment from an internal point of view, as shaping the social milieu as a whole and placed it at the centre of developmental concerns (25).

This philosophical view, mainly advocated in the Rio Conferences by some western delegations and many western NGOs, was radically opposed by the G-77 and China. The latter thought that an alleged right to a healthy environment should not interfere with the South's development plans and industrialisation programmes. They feared that environmental legislation would serve as an excuse for a new form of economic interference (on the basis of an alleged right of ecological interference (26)) by the North which might hinder their right of self-determination.

The South « won » the debate by obtaining a clear statement (principle one of the Rio Declaration) that places emphasis on the human being and looks at the natural environment as an exterior concept (27).

If this debate was justified by a history of economic exploitation and distrust, it was however a false one. It was based on fears or attitudes ungrounded from a legal point of view, since 1) any environmental convention, as all international commitments, require acceptance by developing countries in order to be landing on them, pursuant to their right of self-determination (or sovereignty) ; no other state is legally authorised to interfere in their economic policies unless international agreements to which they are parties have been violated, and 2) the natural environment can no

(25) This is particularly the case of instruments that provide for command and control programmes which limit polluting emissions or impose environmentally-safe technologies (see for instance the Convention for the Conservation and Management of the Vicuna, 1979, the text of which can be found in U.N.E.P., *Selected Multilateral Treaties in the Field of the Environment*, edited by I. Rummel-Bulske and S. Osafo, Grotius, Cambridge, 1991).

(26) See Cans, « L'ingérence verte : assistance ou intervention ? », *Les Cahiers du Futur : Environnement-Développement*, 1992, p. 12.

(27) Chris K. Mensah, « The Role of the Developing Countries » in *The Environment After Rio, op. cit.*, p. 41.

longer be seen in opposition to development since States agreed to protect future generations' well being. Furthermore, it should be obvious to all States that the final beneficiary of any environmental legislation is the human being itself. Thus, principle 1 of the Rio Declaration does not add anything different to what is already evident. If it has the merit of recalling the final humanistic goal of sustainable development, it also has the drawback of highlighting continuous rivalry between the North and South.

2. *Environmental protection is an integral part of the development process*

Principle 4 of the Rio Declaration states :

> « *In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.* »

This principle settles again the same philosophical and political controversy over which, development or environment, should take precedence over the other.

The original proposal advocated by the western countries was to have development be an integral part of environmental protection (28).

The South successfully reversed the proposition, obtaining a declaration to accord precedence to development over environmental protection. Again, it is normally part of the very essence of the principle of sustainable development that there is no real opposition between long term economic development and environmental protection. However, the debate was in this case useful since it may in fact occur that some short term tensions arise between policies aimed at protecting nature and those supporting industrialisation. In cases of clear contradiction, the international community agreed, even if reluctantly, to give priority to economic development. However, legally, all governments must still take into account the short and long term goals of the human being's well-being (principle one of the Rio Declaration, see above), which means, among others, the obligation to adequately evaluate and weigh the social and environmental impact of industrialisation programmes.

B. — *Rights and obligations contained in sustainable development*

This section spells out in ten major points the main rights and obligations incumbent on the States that are directly deducted from the institution of sustainable development as set forth in the Rio Declaration. Their normativity is however assessed by using all available sources of international law.

(28) Chris K. MENSAH, « The role of Developing countries », *loc. cit.*, p. 43.

1. *The right to development*

The right to development was recognized for the first time as a collective right (applying to all people) in the 1981 African Charter on Human and Peoples Rights (art. 22). It was then proclaimed in the UN General Assembly Resolutions 36/133 of 14 December 1981 and 39/145 of 24 May 1984 and was one of the main concerns of the UN Human Rights Commission between 1981 and 1986. It finally came to constitute the main subject of the UN Declaration on the Right to Development of 4 December 1986 (29).

Despite its prominent position both in literature and diplomacy (30) and despite the above-mentioned resolutions, declarations and recent developments (31), it was never totally recognized as a universal principle of international law shaping the international legal system because of the opposition of some important developed countries to it (32).

Since Rio, the right to development, intended as the « first and overriding priority » of the developing countries to achieve economic and social development, is recognized on a universal scale as part of the concept of sustainable development.

(29) See *supra*, note 12 ; see also Claude-Albert COLLIARD, « L'adoption par l'Assemblée Générale de la déclaration sur le droit au développement », *A.F.D.I.*, 1987, pp. 614-624 ; see also Principle 8 of the Stockholm Declaration « *Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.* »

(30) See the works of the Colloquium of the Academy of International Law (1979) on *Le droit au développement au plan international,* ed. Sijthoff, 1980 ; George ABI-SAAB, « Le droit au développement », *Annuaire Suisse de dr. int.*, 1988, pp. 9-24 ; M.H. SINKONDO, « De la fonction juridique du droit au développement », *Rev. de dr. int. et de dr. comp.*, 1991, pp. 272-293 ; the collective study *The Right to Development in International Law,* edited by Subrata Roy CHOWDURY, Erik M.G. DENTERS and Paul J.I.M. DE WAART, Martinus Nijnof, 1992 ; and, for an idea of all other available publications, I. BROWNLIE, *Principles of Public International Law, op. cit.*, p. 579 with his numerous references.

(31) See UN Declaration on International Economic Cooperation, in Particular the Revitalisation of Economic Growth and Development of the Developing Countries, UN Resolution S-18/3, 1990 ; and the adoption at the eighth session of the UNCTAD of the Declaration entitled « The Spirit of Cartagena » and a final document entitled « A New Partnership for Development : The Cartagena Commitment » that strengthen national and international cooperation « for a healthy, secure and equitable world economy ». See also the United Nations initiatives for development in Africa : UN Resolution 46/151 « Final Review and Appraisal of the implementation of the United Nations Programme of Action for African Economic Recovery and Development 1986-1990 » and the UN Agenda for the Development in Africa in the 1990s. These declarations and programmes are described in the *Yearbook of the United Nations*, Special Edition, United Nations Fiftieth Anniversary 1945-1995, Martinus Nijhoff Publishers, The Hague, Boston, London, 1995, pp. 236 and foll.

(32) The UN Declaration on the Right to Development (Resolution 41/128) was adopted with the negative vote of the United States and the abstention of five EC countries and of Japan. The Charter on Economic Rights and Duties of the States (Resolution 3281 (XXIX) of 12 December 1974), indirectly relating to the right to development, was adopted with 6 negative votes : United States, Belgium, Denmark, Luxembourg, Fed. Rep. of Germany, and UK.

Principle 3 of the Rio Declaration states : « *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations* ».

The formulation of this article reveals once more the delicate equilibrium between the right to development and the protection of the environment. During the negotiations, the words « so as » replaced the words « in order », shifting the balance from a system in which the right to development would be a precondition of environmental protection to an order where they mutually support each other (so as can indeed be understood as « in a way as ») (33).

Nevertheless, and despite the presence of an interpretative statement of the United States still denying the right to development, the « entitlement » of the developing countries to achieve the goal of economic development is widely acknowledged and legally protected throughout the language of the conventions signed in Rio (34).

2. *The eradication of poverty*

Principle 5 of the Rio Declaration states :

> « *All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development...* »

This principle is a confirmation of the preceding right, but it also implies that in pursuing the goal of economic development, States must concentrate on the elimination of poverty in their territory. This means the adoption of domestic policies aimed at fulfilling the socio economic rights of the people rather than pursuing a mere increase in GNP to the exclusive benefit of a limited industrial elite.

This clear obligation (« shall ») is imposed on all States, whether developed or developing, and is grounded on the assumption that poverty is a source of pollution and unsustainable socio-economic patterns (maximum rather than optimum yield, monoculture, mass urbanisation,

(33) see Jeffrey D. KOVAR, « A short Guide to the Rio Declaration », *Colo. J. Int'l. Env. L. & Pol'y* , 1993, p. 126.

(34) For instance, article 20 (4) of the Convention on Biological Diversity states that « ... *economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties.* » See also, the Preamble, and the paragraphs 6 and 7 of article 4 of the UN Framework Convention on Climate Change, recalling these principles as well as admitting that developing countries will have to increase their energy consumption in order to progress towards the goal of economic development. It must finally be observed that the institution of free trade as embodied in the World Trade Organisation's system of rules, implicitely recognises the right of development of developing countries by admitting that the stringent principles of free trade may be tempered by special treatment afforded to developing countries in order to achieve their economic development (Article XVIII and Articles XXXVI-XXXVIII of the General Agreement on Tariffs and Trade (GATT)(Code on Trade and Development added during the Kennedy Round in 1965).

ignorance, etc). It is also confirmed in many other legal texts, particularly those relating to the New International Economic Order (35).

3. *The obligation upon States to protect their own environment*

This obligation, intrinsic to sustainable development, is inherent in the multiple responsibilities of States to implement specific environmental legislation « for present and future generations » (36).

Besides the protection of their ecosystems and the implementation in their territory of the many international environmental conventions relating to specific aspects of the environment (species and wildlife, oceans, atmosphere, plants, minerals) (37), this obligation also includes the duty of States to develop norms regarding decision-making procedures and control on economic activities.

This means that States must undertake environmental impact assessments when drawing up public policies or deciding on issues concerning individuals (in the light of the US environmental Policy Act of 1969 (38), the European Community Directive of 27 June 1985 (39) and the Espoo Convention of 1991 (40)) (41) and ensure public participation, i.e. real involvement by the people (42) in decisions affecting the environment (43).

Furthermore, States must adopt a precautionary approach, i.e prevent environmental degradation notwithstanding uncertainties as to their real

(35) See Charter of Economic Rights and duties of the States (General Assembly Resolution 3281 (XXIX)) and the numerous resolutions of the General Assembly relating to the Progressive Development of the Principles and Norms of International Law Relating to the NIEO that have been adopted since 1974, published in Milan BULAJIC, *op. cit.*, p. 405 and following ; see also article 3 of the Convention on Climate Change. The concern for people and the human environment was central to many development initiatives of the United Nations : the World Population Plan of Action (1974) adopted to support economic development, quality of life, human rights and fundamental freedoms ; the Mexico City Declaration on Population and Development (1984) ; the Programme of Action of the 1994 International Conference on Population and Development (see *Yearbook of the United Nations, op. cit.*, p. 254 and foll.).

(36) Rio Declaration, principle 3 and 11 ; Article 3.1 of the Convention on Climate Change ; article 6 of the Convention on Biological Diversity.

(37) These obligations apply however less strictly to developing countries pursuant to the principle of common but differentiated responsibilities (see below, p. 16 and notes 53-55).

(38) 42 U.S.C. §§ 4321-4370a (1988 & Supp. II 1990).

(39) EEC Directive N° 85/337 of 27 June 1985, *O.J.*, L/175 of 5 July 1985.

(40) Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, *Y.I.E.L.*, 1991, 697.

(41) Rio Declaration, principle 17. See also the 1982 Convention on the Law of the Sea, article 206.

(42) This involves administrative openness and transparency for, as well as consultations with, NGOs and all citizens interested in the adoption of specific legislation.

(43) Rio Declaration, principle 10, 20, 21 and 22 ; Statement on Forests, article 5 (b) and 6 (d) ; Agenda 21, Chapters 8, 11 and 25 to 32 ; see, moreover, the 1988 OECD Decision-Recommendation Concerning Provision of Information to the Public and Public Participation in Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances, *OECD*, 687 sess. C(88)85 of 8 July 1988.

occurrence (44) and should eliminate patterns of production and consumption that are not sustainable in the long term (45).

The obligation upon States to take all measures to protect their environment also embraces the duty to implement the polluter pays principle (an economic concept which consists in internalising costs to the environment by charging the economic intermediary for all the environmental costs that the relevant activity created, e.g. ecotaxes (46)), and to adopt legislation regarding liability and compensation for the victims of pollution and environmental damage (47).

States have also the duty to prevent the transfer of harmful activities and substances (48) and notify other States in the case of emergencies and

(44) Rio Declaration, principle 15 ; Convention on Climate Change, art. 3.3 ; 1992 Maastrich Treaty, art. 130 R.2 ; see also article 4.3 (f) of the Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa (Bamako, 30 January 1991, 30, *I.L.M.*, 773 (1991)), and article 2.5 (a) of the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourse and International Lakes. Since Sustainable Development is an obligation of all means based on an emerging custom, and since the duty to adopt the precautionary approach is indicated in the above-mentioned texts as an obligatory mean to achieve sustainable development, therefore, the lotter duty is an obligation of international law justifying the use of the word « must ».

(45) This principle, however, contrary to the other ones included in this section (except the polluter pays principle and the reduction of population growth, see below), is introduced in the Rio Declaration (principle 8) by the word « should » rather than « shall » for political reasons and consequently does not formally constitute a legal obligation by itself. This is however coherent with the notion of sustainable development since the elimination of unsustainable production and consumption patterns are the essence of it and, if inserted as a binding rule, would imply an obligation of result whereas they are in fact an obligation of all means, the means precisely defined in the other commitments given by the States in Rio. Otherwise, if sustainable development was an obligation of result, until its achievement, which might take decades, States would be in a continuous breach of international law.

(46) In the Rio declaration (principle 16), this principle is introduced by the word « should » and not « shall » as a mere policy guideline (see A. KISS, « The Rio Declaration on Environment and Development » in *The Environment After Rio, op. cit.*, p. 62). The polluter pays principle is however a widely accepted principle of environmental protection and is the basis of a majority of international environmental conventions setting international standards affecting international trade. Although its precise scope is still unclear (see Henry SMETS, « Le principe pollueur payeur, un principe économique érigé en principe de droit de l'environnement ? », *R.G.D.I.P.*, 1993, pp. 339 and following), its main effect is to internalise costs to environment and to discourage private economic operators from adopting production methods that are harmful to the environment ; see also Agenda 21, Chapter 20 ; 1974 OECD Recommendation on the Implementation of the PPP ; the 1989 OECD Recommendation on the Application of the PPP to Accidental Pollution ; Preamble of the International Convention on Oil Pollution Preparedness, Response and Cooperation (London, November 1990), signed by 90 states, including 20 OECD Member countries ; 1992 Maastricht Treaty, article 130R.2 ; see also on this subject : Henri SMETS, « The Polluter Pays Principle in the Early 1990s » in *The Environment after Rio, op. cit.*, p. 131.

(47) Rio Declaration, principle 13 ; Convention on Biological Diversity, article 14.2 ; Stockholm Declaration, principle 22.

(48) Rio Declaration, principle 14 ; see also the Basel Convention on The Control of Transboundary Movements of Hazardous Wastes and their Disposal (28 *ILM* 657 (1989), and the Montreal Protocol on Substances that Deplete the Ozone Layer (see *supra*, note 18). This obligation is also based on principle 21 of the Stockholm Declaration and is presented as an obligatory mean to achieve sustainable development. Therefore, it is an obligation of international law.

activities with significant transboundary effect (49). The latter principle is even a rule based on general international law (50).

Finally, the Rio Declaration provides that States « *should* promote appropriate demographic policies », since over-population is a negative factor to both development and the environment (51). This principle is however introduced as a mere policy guideline (« should ») and not as a binding rule since it may interfere with certain human rights, such as the right to privacy or religious conscience.

However, the necessity for States to integrate in their policies population concerns, as well as the need to foster education, especially for girls, gender equity and equality, maternity reduction and universal access to reproductive health services, including family planning and sexual health, are universally acknowledged since the adoption in September 1994 of the Programme of Action of the International Conference on Population and Development in the Cairo, Egypt, on 13 September 1995.

All the above-mentioned obligations and policy guidelines, forming a general body of international environmental law, are usually accepted by States and are very often implemented in national legislation or regional instruments. They are consequently emerging international customs (52).

Regarding developing countries, they must, however, be tempered by the principle of common but differentiated responsibilities (53). This latter

(49) Rio Declaration, Principle 18 and 19 ; Convention on Biological Diversity, article 14.1 (d) and (e) ; Convention on the Law of the Sea article 198 ; Convention on Early Notification in the Case of Nuclear Accident of Radiological Emergency (Vienna, 26 September 1986) ; see also the two Helsinki Conventions of 17 March 1992 (Transboundary Effects of Industrial Accidents and Protection and Use of Transboundary Watercourses and International Lakes) whose object is entirely cooperation in case of emergencies.

(50) The *Corfu Channel* case, ICJ, *Reports*, 1949, p. 22. In this case, often quoted as the source of this obligation although the damage only occurred in a single country's jurisdiction, it was ruled that Albania should have notified the UK of the existence of dangerous mines affeting the latter's international right of transit.

(51) *Our Common Future, op. cit.*, p. 4, 11, 56.

(52) The International Court of Justice stressed that environmental considerations and the primacy for the need of conservation were part of the application of the principle of equity. Relevant ICJ cases applied to delimitation of continental shelves (*North Sea Continental shelves* cases, *I.C.J. Reports*, 1969, p. 3, and *Continental Shelf* (Tunisia/Libya), *Reports*, 1982, p. 18, and (*Libya/Malta*), *Reports*, 1985, p. 13) and to definition of jurisdiction over fisheries (*Fisheries Jurisdiction* case (*Fed. Rep. of G./ Iceland*), *Reports*, 1974, p. 213 ; see also Subrata Roy CHOWDURY, section « The world Court and the Development of environmental Law » in International equity : substratum of the right to sustainable development, in *The Right to Development in International Law, op. cit.*, p. 252.

(53) This principle is contained in Principle 7 of the Rio Declaration which states :

« *States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command* ».

Such principle is also reflected in principles 6 and 11 of the Rio Declaration and it shapes the whole philosophy of the Convention on Climate Change. It is also contained in principle 23

principle legally acknowledges the inequalities of States caused by different levels of development, as well as the responsibility of industrialised States in the present unsustainable situation. As a corollary of the right to development and read in connection with Principle 4 of the Rio Declaration (54), it may indeed provide grounds, for the weaker obligations for the developing States to protect their own environment (55).

4. *The obligation upon States to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*

This obligation is part of the Principle 21 of the Stockholm Declaration (see next section) and is currently accepted by the vast majority of States as being part of international customary law (56). The practical importance of the application of this rule is considerable, whether under international trade law (illegality of certain trade restrictions aimed at enforcing environmental protection in another state when it is in fact the other state's responsibilityto do so, see below) or under the law of international liability (compensation for damages arising out of activities that are not forbidden by international law (57)).

of the Stockholm Declaration, in article 20 of the Convention on Biological Diversity, in article 10 of the Montreal Protocol to the Ozone Convention, in article 203 of the Convention on the Law of the Sea, and is considered as a customary rule (A. KISS, *loc. cit.*, p. 58) ; see also Chris K. MENSAH, *loc. cit.*, p. 45.

(54) « ..environmental protection shall constitute an integral part of the development process.. », see above IV.A.2, p. 11.

(55) See however the US Delegation's interpretative statement to principle 7 : « *The United States understands and accepts that Principle 7 highlights the special leadership role of the developped countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. The United States does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries* » (emphasis added). This statement must be read in connexion with the US' reservation on principle 3 (the right to development), that denies the right of developing countries to achieve economic growth and consequently the fact that some industrialisation programmes may exceptionally overrule the protection of certain aspects of environment. This is contrary to the philosophy underlining all the instruments adopted at the Rio Conference (principle 4 of the Rio Declaration). For examples of less intense obligations for the developing countries to protect their own environment, see below, notes 161 and 166.

(56) Rio Declaration, principles 2 and 14 ; Convention on Biological Diversity, article 3 and 15.1 ; Convention on Climate Change, Preamble ; Statement of Principles on Forests, article 1 (a) ; 1982 Law of the Sea Convention, article 194.2 ; principle 21 is also included in the United Nations Charter of Economic Rights and Duties of States (UN G. Ass. Res. 3281(XXIX) of 12 December 1974), the documents related to the New International Economic Order and the World Charter of Nature ; moreover, see A. KISS, *op. cit.*, pp. 62-63 ; and Jeffrey D. KOVAR, « A Short Guide to the Rio Declaration », *Colo. J. Intl. L. & Pol'y*, 1993, p. 125 ; see, finally, for the origin of this rule, the famous « Trail Smelter Arbitration » (1938-1941), *UN Reports of International Arbitral Awards (RIIA)*, vol. 3, 1905.

(57) See *Corfu Channel* case, *I.C.J. Reports*, 1949, p. 22 ; Trail Smelter Arbitration, *RIAA*, vol. 3, 1938, 1965 ; Lake Lanoux Arbitration, *R.I.A.A.*, vol. 12, p. 281, Gut Dan Arbitration (1968) *I.L.M.*, 1969, pp. 188 and foll.

5. *The sovereign right of States over their natural resources*

This rule is the second aspect of principle 21 mentioned above. It means that countries have a sovereign right to freely exploit, according to their national policies (58), their natural resources within their area of jurisdiction. This right is connected with the right of people to self determination. It is also the basis of the right to development and completes the notion of sovereignty (59). Being part of principle 21, it is obviously part of international customary law.

This right rejects the idea, promoted by industrialised countries, that natural resources are part of the « commons » over which every country should have a right of influence. If the very strict defense of this principle by the developing countries has had a negative impact on the conservation of forests (60) it is however tempered by the obligation of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States, as mentioned above. Both principles are bound together in the same sentence (61).

Consequently, sovereignty rights and duties are « two sides of the same coin » (62) and cannot be separated from each other.

6. *Transfer by industrialised countries of environmentally sound technology and protection of intellectual property rights*

The obligation of industrialised countries « to make all efforts » to transfer environmentally sound technology to developing countries is generally

(58) The text of the Stockholm Declaration was updated after the Rio Declaration by the addition, to a similar sentence, of the word « developmental » before « policies », in order to reflect the concerns of the developing countries with regard to their right to development.

(59) See UN General Assembly Resolutions 523 (IV) of 12 January 1952 ; UN General Assembly Resolution 626 (VII) of 21 December 1952 ; UN General Assembly Resolution 1314 (XIII) of 12 December 1958 and UN General Assembly Resolution 2200 (XXI) of 16 December 1966 concerning the international Pacts on Human Rights ; UN General Assembly Resolution 1803 (XVII) of 14 December 1962 and UN General Assembly Resolution 2158(XXI) of 25 November 1968 on Permanent Sovereignty Over Natural Resources. All these resolutions present the permanent sovereignty of the people over their natural resources as « inherent to the sovereignty of the people and in accordance with the goals and principles of the Charter » ; see for further developments M.H. SINKONDO, « De la fonction juridique du droit au développement », *Rev. de Dr. Int. et de Dr. Comp.*, 1991, pp. 282-286.

(60) The Statement of Principles on Forests is widely considered as insufficiently protecting forests from depletion by developing countries' log exploiters. Developing countries strongly objected on the basis of principle 21 to any international interference in their internal economic policies. See Alberto SZEKELY, « The Legal Protection of the World's Forests after Rio '92 », in *The Environment after Rio, op. cit.*, p. 65 ;

(61) This was an issue during the negotiations of the Convention on Biological Diversity. Developing states lobbied for the inclusion of the sovereignty principle in one separate paragraph distinct from any concomitant obligation. They, however, failed. Industrialised states successfully claimed that such an idea would represent a step back from the Stockholm Declaration ; see Melinda CHANDLER, « The Biodiversity Convention : Selected Issues of Interest to the International Lawyer », *Col. J. Intl Env.l. & Plo'y*, 1993, p. 145.

(62) Jeffrey D. KOVAR, *loc. cit.*, p. 125.

accepted by all States as a condition for the developing countries to achieve sustainable development (63).

The precise content and modalities of this obligation, however, are not yet defined by international law in consideration of the many controversies existing in this regard.

Developing countries argue that they lack capital to acquire at market prices those technologies they need to foster sustainable growth and protect the environment. According to them, unless environmentally sound technology is considered as a shared resource and is transferred at subsidised prices, they will not be able to execute their obligations under the provisions signed at the Rio conference.

The industrialised countries, in which the technology is more likely to be generated, argue that they cannot compel the private sector to sell technologies below market prices and to renounce to the profits of the intellectual property rights covering them. Therefore they are only willing to « facilitate » transfer of technology at « favourable terms » and on the condition that developing countries implement legislation recognising intellectual property rights.

This debate has yet to be settled. As a consequence, industrialised States claim that they are still not compelled to actually transfer technology.

(63) See principle 9 of the Rio Declaration :

« *States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through the exchanges of scientific and technical knowledge and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies* » ;

See also Article 16 of the Convention on Biological diversity :

« *1. Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment* ».

See also the entire part XIV of the UN Convention on the Law of the Seas which is dedicated to the development and transfer of technology for promoting capacity building, particularly, of developing countries.

As far as the EC is concerned, see the many specific scientific and technical research programmes in the field of environment sponsored by the EC to strengthen technical cooperation with third countries (Stanley P. JOHNSON, Guy CORCELLE, *The Environmental Policy of the European Communities*, second edition, Kluwer Law International, 1995, pp 395 and foll. See also the policy statements contained in the Communication of the Commission to the Council and to the European Parliament « Industrial Competitiveness and Protection of the Environment », 4 November 1992, SEC(92) Final, 8, confirmed by the Council on 4 May 1993 (Resolution 6062/93, Press 66-G Annex) : *Industrial and economic cooperation with third countries offers considerable opportunities to enhance the economic and environmental effectiveness of measures to protect the environment. For developing countries and the countries of Eastern and Central Europe, such cooperation would include action to encourage technology transfers and the formation of joint ventures in the context of industrial cooperation (...)*.

As far as the US are concerned, see Environmental Protection Agency (EPA), *Imposing Technology Diffusion for Environmental Protection*, Report and Recommendations of the Technology and Economics Committee, Doc EPA n° 130-R-92-001, Washington, 1992.

According to them, they merely committed themselves to an obligation of « all possible means », rather than of result (64).

Nevertheless, in the Convention on Biological Diversity, they agreed that access and transfer of technology « shall be provided *and/or facilitated under fair and most favourable terms* » (65).

They also agreed that they :

> « *(...)* shall *take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to joint development and transfer of technology (...) for the benefit of both governmental institutions and the private sector of developing countries (...)* (66) ».

Moreover, as far as the conditions of the transfer are concerned, under the Convention on Climate Change :

> « *The developed country parties and other developed parties (...) shall take all appropriate steps to promote,* facilitate and finance, *as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country parties,* to enable them to implement the provisions of the Convention. *In this process, the developed country parties* shall support *the development and enhancement of endogenous capacities and technologies of developing country parties...* (67) »

All these provisions, combined with the general obligation to cooperate and the general principle of international law of good faith (see below p. 230) suggest an actual *obligation to transfer environmentally sound technology, below market prices*, i.e. at subsidised rates. In other words, if industrialised States are expressly only obliged to take all possible means to transfer technology to developing countries, the result of this obligation and the path to it are clearly « emerging » as international law and are actual obligations under the above mentioned agreements, in the important subjects covered by them.

As far as intellectual property rights are concerned, the developing countries compromised the obligation of the industrialised States to transfer technology by committing themselves to the recognition of intellectual property rights :

> « *In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are*

(64) See wording of principles 9 of Rio Declaration : « *cooperate to strengthen endogenous capacity-building for sustainable development (...) by enhancing development, adaptation, diffusion and transfer of technologies...* ».

(65) Article 16 (1).

(66) Article 16 (4). It must be noted, that, in the practice of international negotiations, the terms « as appropriate » are used as a compromise to « soften » the obligation contained in the article.

(67) Article 4 (5).

consistent with the adequate and effective protection of intellectual property rights » (68).

However, the precise scope of such commitment is still to be defined (69) and is controversial (70).

Recognition of intellectual property rights means acceptance that, in principle, also environmentally sound technologies are covered by these rights and are thus not shared resources, but private property. This normally entitles private firms or governments that invented these technologies to the profits generated by their use.

The recognition of intellectual property rights over environmentally sound technology is however not contained in the Convention on Climate Change, nor in the Convention on the Law of the Sea. Also, article 27 of the TRIPS, which defines the « patentable subject matter », expressly authorises members to « *exclude from patentability inventions [that are] necessary to protect ... human, animal or plant life or health to avoid serious prejudice to the environment* » (paragraph 2). Paragraph 3 of this article also allows governments to exclude from patentability

(*a*) « *diagnostic, therapeutic and surgical methods for the treatment of humans or animals ;*

(*b*) *plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes...* »

Consequently, despite the adoption of the TRIPS, and the general acceptance and recognition of intellectual property rights (71), there are still reasons to believe that the acceptance by developing countries of intellectual property rights over environmental technology will be an issue in

(68) Convention on Biological Diversity, article 16 (2) ; see also art. 25 — 35 of the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed under the auspices of the World Trade Organisation (WTO). (The TRIPS became, after the the WTO came into existence on 1 January 1995 and the eclipse of the United Nations World Intellectual Property Organisation (WIPO), the pre-eminent intellectual property instrument. The TRIPS provides for the applicability among others of the Paris Convention for the Protection of Industrial Property (this also includes the Stockholm Act of this Convention of 14 July 1967) and provides effective means for the enforcement of intellectual property rights, including patents and industrial designs, and integrates them in the powerful system of the GATT) ; see Michael BLAKENEY, « Intellectual Property in World Trade », *Intl Trade L. & Regul.*, 1995, p. 76.

(69) See Alan E. BOYLE, « The Convention on Biological diversity » in *The Environment After Rio, op. cit.*, p. 123-124.

(70) It is interesting to note that the European Parliament considers it essential to draw up an international code of conduct for technology transfers, to be based on the right of the LDCs to sustainable development and conservation of their natural resources, *as having priority over patent rights, in the interest of North-South dialogue*, Resolution of 18 January 1994, *loc. cit.*, p. 47.

(71) It must be noted that in consideration of the least developed countries' entitlement to achieve economic development, a grace period of 10 years is granted to LDCs (TRIPS, article 66) while developing countries (not LDC) are entitled to delay until the year 2000 the implementation of property rights laws.

future agreements (72), even if the trend has already been substantially settled by the provisions of the Convention on Biological Diversity. It would indeed not be possible to promote research in this field without the incentives that property rights provide and the profits generated by them.

Regarding the profits generated by the exploitation of environmentally sound technologies, the Convention on Biological Diversity specifies that they should *equitably* be shared, « *on mutually agreed terms* » with the countries « which provide genetic resources (73). » In addition, under the same convention,

> « *the Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard (...) in order to* ensure that such rights are supportive of and do not run counter to its objectives » (i.e. the protection of biological diversity) (74). (This is in fact an application of the general principle of good faith).

In conclusion, the content of the obligation to transfer environmentally sound technology is rather vague, having been compromised to accomodate the desire of technology-leading governments and firms to protect their inventions with industrial and intellectual property rights. The transfer obligation must be specified by future international agreements. However, the principles that such transfers should occur and at favourable terms for the developing countries, i.e. below market prices, and that the profits generated by the exploitation of such technology, whether or not protected by intellectual property rights, should be equitably shared (75), are suf-

(72) See Mukul SANWAL, « Sustainable Development, the Rio Declaration and Multilateral Cooperation », *Colo. J. Int'l Env. L & Pol'y*, 1993, p. 61.

(73) Article 16 (3) ; see also article 15 (7) ; it can be argued that equitable sharing inevitably occurs in a free market (law of supply and demand) through negotiations with developing countries who have sovereign control over their natural resources and who may block access to them if favourable terms are not granted by those willing to exploit them (article 15 (4) of the Convention on Biological Diversity). However, favourable terms for developing countries usually imply prices that are below the supply curve of the possessors of technology.

(74) article 16 (5) ; see also, for reference, article 7 of the TRIPS (« Objectives ») which states : « *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations* » (emphasis added).

(75) An interesting development in this regard is the partnership agreement that has been concluded between a major American pharmaceutical firm and Costa Rica's National Biodiversity Institute (INBio). Kirstin PETERSON, in her article « Recent Intellectual Property Trends in Developing Countries » (*Harvard Intl. L. Journal*, 1992, p. 288.) describes this Agreement as follows : « *In exchange for INBio's systematic analysis of plants and insects in Costa Rica's parks and reserves, the Company has given NBio $ 1 millon to help it develop into a chemical prospecting business, and has agreed to pay royalties on future drug sales. Under the agreement, INBio will screen species for medical potential and send the Company samples of all promising extracts derived from biological material. The Company will then have exclusive rights to develop into pharmaceutical all extracts it receives from INBio. If the product becomes a marketable drug, the Costa Rican Government, in addition to INBio, will receive a share of the royalties, which will be used for the country's conservation program... This was the first direct collaboration between a major drug manufacturer and a tropical country to search for new medicines... The governments of several other tropical countries*

ficiently clear throughout the texts signed before, at and after the Rio Conference that they are an integral part of international law as well as the legal notion of sustainable development.

7. *Transfer by industrialised countries of financial resources and the establishment of financial mechanisms*

Similarly to the transfer of technology, it has been agreed that the transfer of financial resources by industrialised countries is a necessary pre-condition to enable developing countries to undertake the prescribed preventive or adaptive measures to achieve sustainable development. It is also an intrinsic aspect of the present international economic order (76). Although this principle is not expressly included in the Rio Declaration it is clearly mentioned in the Convention on Climate Change, article 4(7) and the Convention on Biological Diversity, article 20(4) both directly relating to sustainable development (77). It is also a corollary to the principle of common but differentiated responsibilities (78).

In addition to the transfer by industrialised States of net flows of resources to developing countries, the Conventions signed in Rio contain, for the first time, the principle of additionality which means that environmental aid should be supplementary to other forms of development aid, i.e., « separated from agreed Official Development Assistance (ODA) levels » (79).

have asked INBio for advice on setting up similar transactions ». This type of agreement provides a real incentive for a developing country to protect its natural resources while it is apparently conducive to economic development.

(76) See, for instance, article 10 of the Montreal Protocol to the Ozone Convention and article 203 of the Convention on the Law of the Seas ; see also, as far as the New International Economic Order is concerned, article 22 of the UN Charter of Economic Rights and Duties of States (UN, General Assembly, Resolution 3281 (XXIX) of 12 December 1974). The UN requirement to dedicate 0,7 % of GDP to official development aid by the year 2000 has also been reaffirmed at the first session of the UN Commission on Sustainable Development (CSD) held on 14 to 25 June 1993 in New York. The European Parliament confirmed a similar undertaking in its above-mentioned resolution A3-0001/94 of 18 January 1994.

(77) Article 20 (4) of the Convention on Biological Diversity :

« *The extent to which developing country Parties will effectively implement their commitment under the convention will depend on the effective implementation by developed country Parties of their commitments under this convention related to financial resources and transfer of technology* » Article 4 (7) of the Convention on Climate Change is drafted in the same terms.

(78) China and the G-77 proposed to include in Principle 7 of the Rio Declaration relating to this principle the obligation of developed countries to « *provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development* ». The non inclusion of these elements made it difficult for China and some delegations of the G-77 to accept the final version (Jeffery D. KOVAR, *loc. cit.*, p. 129), eventhough they appear, less clearly perhaps, in the other texts adopted at Rio (see below).

(79) See the Resolution of the European Parliament of 18 January 1994 that deplores that no additional resources have been earmarked for implementation of Agenda 21 in the budget for the European Union for 1994 and that calls on the Commission and the Member States to provide, « *in addition to the ECU 3 000 000 already agreed in Rio, new and supplementary funds*

Article 20(2) of the Convention on Biological Diversity states indeed :

> « *The developed country Parties* shall *provide* new and additional financial resources *to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention (...)* ».

The Convention on Climate Change contains a similar provision in its article 4(3).

The modalities of this additional transfer are however still unclear and will have to be negotiated in future arrangements. For instance, the questions of which additional costs should be reimbursed, how, in what conditions and how much, remain unsettled and are covered by equally vague provisions, that are subject to contradicting interpretations, in both conventions (80).

The obligation of transfer of financial resources also implies the obligation to implement financial mechanisms destined to ensure that the resources are made available (81).

Again, the modalities, and particularly the relations between the two usual institutional components of these financial mechanisms, the Conference of the Parties (to a multilateral convention), which decides on the policies (established in particular by the Convention on Climate Change and the Convention on Biological Diversity), and the « *one or more existing international entities* » (82), which carry out the operations of the mechanisms (international organisation), are controversial and subject to many interpretations (83).

for the implementation of Agenda 21 » ; see Jean-François PULVENIS, « The Framework Convention on Climate Change », *loc. cit.*, p. 99 ; see also Alan E. BOYLE, « The Convention on Biological Diversity », *loc. cit.*, p. 124 ; and their references.

(80) For instance, there is the question of which measures for implementing the goals of the conventions will be financed by the industrialised countries : those (and the costs of which) that have been agreed upon by a developing country and the donor entities (article 4(3) of the Climate Change Convention) or those of which costs only are agreed by a developing country and the donor entities (article 20(2) of the Biodiversity Convention). There is also the question as whether or not the Conferences of the Parties of international conventions that implement sustainable development principles should receive the authority to dictate the contributions to donor states. The debates around these issues once again reflect the bipolarisation between the North and the South. See Jean-François PULVENIS, *loc. cit.*, p. 99 ; Alan E. BOYLE, *loc. cit.*, p. 125 ; Melinda CHANDLER, « The Biodiversity Convention : Selected Issues of Interest to the International Lawyer », *Colo. J. Int'l Env. L. & Pol'y*, 1993, pp. 169-170.

(81) Convention on Biological Diversity, article 21 and Convention on Climate Change, article 11.

(82) Convention on Climate Change, article 11(1).

(83) It is thus not clear whether or not, for the implementation of sustainable development, the Conference of the Parties and the international entity should be on a equivalent legal footing or if the latter should be subservient to the first. Developing countries desire a mechanism by which the Conference of the parties has full decisionmaking power (system of the Convention on Biological Diversity) rather than merely providing guidance to the financial entity (system of the Convention on Climate Change). Industrialised countries desire the reverse. The issue is not yet settled but appears to be marginal in the process of indentifying the obligations contained in Sustainable Development. On this subject, see Melinda CHANDLER, *loc. cit.*, p. 171-173 ; Jean-

There are also continuing discussions on whether or not the financial organisation, the second component of the above-mentioned financial mechanism, to which the operations of the mechanism shall be definitely entrusted, should be the Global Environment Facility (GEF), established in the World Bank (84).

In any case, the accepted rule is that, whatever the final arrangements are on this issue, the financial mechanism shall function according to « *an* equitable and balanced representation *of all parties within a* transparent *system of governance* » (85).

As a conclusion, we note that the absence of clear provisions in international law concerning the extent and modalities of the obligation to transfer financial resources to developing countries, constitutes a serious gap in the international legal system, which may hinder the long term implementation of sound development practices. However, notwithstanding this flaw, the obligation to transfer resources, as it is described in the conventions signed at Rio, combined with the obligation to cooperate and that of good faith (see below), should allow developing countries to claim substantial transfers of resources from industrialised countries that are above the present levels of developmental aid, as well as to require that they are fairly represented and that there is transparency in the institutions that determine the allocation of these resources (86).

8. *Duty to cooperate to achieve sustainable development and good faith*

The obligation to cooperate and the one of good faith are two general principles of international law that are derived from the United Nations Charter and are widely recognised as being customary law (87).

They are obviously an intrinsic aspect of sustainable development.

François PULVENIS, *loc. cit.*, p. 106-107 ; Daniel BODANSKY, « The united Nations Framework Convention on Climate Change : A Commentary », *The Yale Journal of Int'l. L., 1993, p. 451.*

(84) At present the Parties to both conventions agreed that the GEF shall operate the financial mechanisms « *on an interim basis* » (Convention on Climate Change, article 21(3) ; Convention on Biological Diversity, article 39), « *provided* », in the case of the latter convention, « *that it has been fully restructured* » to ensure adequate transparency. Concerning this controversy, see the Resolution of the European Parliament A3-0378/93 of 18 January 1994 on the Global Environmental Facility (GEF), in favour of European participation in the GEF but desiring reforms to better « *meet the challenges of present and future global environmental problems* », *O.J.*, 1994, No C 44/44.

(85) Convention on Climate Change, article 11(2) ; see also Convention on Biological Diversity, article 22(2).

(86) A decision of the International Court of Justice on transfer of technology and of resources would be welcomed. Indeed, through legal interpretations, the above obligations can be further clarified to acquire increased levels of normativity, especially when texts are unclear or subject to many interpretations. According to article 65 of the Statute of the International Court of Justice, « *the Court may give advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such request* ». Consequently, UNEP or the UNCED might be able to bring the issue before the Court.

(87) United Nations' Charter, articles 1.3. and 2.2. See A. KISS, *loc. cit.*, p. 57.

In particular, principle 27 of the Rio Declaration specifies that the duty to cooperate shall also include «*further development of international law in the field of sustainable development*» (88). This also includes the adoption of international environmental standards as suggested by the WTO agreement on Technical Barriers to Trade and the agreement on Sanitary and Phytosanitary Measures (89).

9. *Peaceful settlement of disputes*

The rule that parties must resolve their conflicts peacefully and in accordance with the principles of the Charter of the United Nations is obvious and is a fundamental aspect of the international legal order and of sustainable development.

It must be noted, however, that no instrument signed in Rio contains a compulsory and binding procedure for the resolution of conflicts that would be similar to the one existing under the auspices of the World Trade Organisation. Principle 26 of the Rio Declaration merely restates the general principle contained in the UN Charter, and the Conventions on Climate Change and Biological Diversity refer to binding procedures, such as arbitration, merely as an option which is available to the parties (90).

The fact that no other compulsory procedure was settled in both binding texts signed at the Rio Conference is probably attributable to the fact that many provisions remain unclear and subject to different legal interpretations. States manifestly prefer to settle such problems themselves by political means and negotiation.

However, States, in their efforts to further the evolution of the international law related to sustainable development, should resolve their conflicts within a single institution, whether or not judicial, where all rules of international law, and especially those of sustainable development, would be combined together in a coherent global regime. A suggestion would be to

(88) See also Rio Declaration, principle 5, 7, 14; the Convention on Climate Change, Preamble and articles 3, 4, and 12; the Statement on Forests, articles 1 and 3; the Convention on Biological Diversity, articles 17 and 18; and the whole Agenda 21.

(89) i.e. uniform technical, sanitary or phytosanitary standards aimed at protecting certain aspects of the natural or human environment. See below, p. 250.

(90) Convention on Climate Change, article 14; Convention on Biological Diversity, article 27. The majority of the other major multilateral environmental agreements (MEAs) contain provisions that are similar to those of the Rio Conventions (for instance, the Vienna Convention for the Protection of the Ozone Layer, 1985, art. 11). There are also certain MEA in which the dispute settlement provisions are more compelling, without, however, reaching the compulsory level of the WTO procedures (for instance the Convention on the Regulation of the Antartic Mineral Resources Activities, art. 55 and foll.). The number and variety of MEAs and their dispute settlement procedures lead, however, to a «treaty congestion» (E. Brown Weiss) which is generally detrimental to the overall strength and coherence of the institution of the protection of the environment and thus also to sustainable development. See E.-U. PETERSMAN, «International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT», *J. of W.T.L.*, 1993, vol. 27, p. 47.

integrate in the dispute settlement mechanisms of the WTO, which also include consultation and negotiation procedures, all international conventions to which WTO members are parties (see below). Another idea would be to create a new or strenghten an existing international environmental organisation that would be granted with similar dispute settlement structures as the WTO (91).

Nevertheless, the International Court of Justice remains competent to issue binding decisions on all issues relating to sustainable development for all countries which previously accepted its compulsory jurisdiction (article 36 of the ICJ's Statute). In addition, the United Nations' General Assembly or other specialised bodies might still refer legal questions to the ICJ pursuant to article 65 of the latter's statute.

10. *Promotion of an open international economic system, i.e. Free Trade*

Free trade is promoted as a policy guideline to achieve sustainable development. It is integrated in the Rio Declaration in the form of a non-binding rule :

> « *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. Trade policy measures for environmental purposes* should not *constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country* should *be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus* » (92).

These principles have been drafted along the rules and jurisprudence under the WTO (93) (see below). They are, however, not yet inserted as binding normative rules in the legal definition of sustainable development, since many believe they are, in certain cases, in conflict with the other principles mentioned above. The contradictions that apparently exist between the WTO system and sustainable development hinder the adoption of a final normative rule that would indisputably integrate the system of free trade with the right to development, environmental protection and the

(91) D. Esty (*Greening the GATT. Trade, Environment and the Future*, Institute for International Economics, Washington DC, 1994) advocates for the creation of a Global Environmental Organisation coordinating international and national environmental policy (p. 78). See below, pp. 49-50.

(92) See also Convention on Climate Change, article 3.4.

(93) Since 1 January 1995, with the entry into force of the Uruguay Round Agreements, the World Trade Organisation (WTO) is the guardian of the international trade system. The 1994 Agreement establishing the WTO includes in its Annex A the General Agreement on Tariffs and Trade (GATT) and integrates the jurisprudence built on it into the WTO system. When referring below to the present international trade system as a whole, the WTO terminology is used and reference made to WTO Members. The term « GATT » is used herein to refer merely to the General Agreement as subsequently rectified, amended or modified.

institution of sustainable development, aiming at promoting the latter as the end goal (94).

The following chapter will confront the institutions of free trade and sustainable development, in order to clarify the relationship between these two major institutions of international law, assess their compatibility and suggest ways to integrate them.

V. — FREE TRADE AND SUSTAINABLE DEVELOPMENT

As a principle, free trade is believed to be supportive and essential to sustainable development, since it enables, through the optimal allocation of resources, countries to develop their economic structures without spoiling their resources and improve, in principle in a sustainable way, the standard of living of their populations (95). However, since free trade also purports to foster growth, it may lead to overconsumption and fast depletion of natural resoures.

It is therefore relevant to analyse the relationship between the actual institutions of free trade, embodied essentially in the WTO agreements, and the promotion of sustainable development. Pertinent issues include the relationship between free trade and economic development (A), the particular situation of the sector of commodities (B) and the relationship between free trade and environmental protection (C). Suggestions to further integrate free trade with sustainable development and an agenda for future developments are also set forth below (D and E).

A. — *Free trade and economic development*

This is probably the least controversial issue in the evaluation of free trade. The latter is indeed supposed to boost economic development by

(94) This was especially acknowledged by Arthur Dunkel, the Director-General of GATT, in his presentation to the UNCED on 11 June 1992 (E. Brown WEISS, « Environment and Trade as partners in Sustainable Development : A Commentary », *A.J.I.L.*, 1992, p. 728, note 1).

(95) Free trade is indeed supposed to be supportive to both economic development and the environment. It is supportive to economic development in creating additional wealth due to the increased efficiency in the utilisation of global production based on comparative advantage. It is also intended to boost environmental protection since, through an increased efficiency in the allocation of natural resources, it would avoid their waste and their rapid depletion. In addition, by increasing the standard of living of populations in developing countries, it would generate a demand for reversing environmental degradation as well as the capacities to deal with such demand. Finally, trade exchanges are deemed to lead to a deeper understanding between the peoples of the world and fruitful governmental cooperation in many different areas, including environment. See, for further explanations : « Preparations for the United Nations Conference on Environment and Development on the Basis of General Assembly Resolution 44/228 and Taking into Account other Relevant General Assembly Resolutions », A/CONF.151/PC/100/add.3, Nicholas A. Robinson editor, Oceana Publ. 1992, vol. I., p. 95 ; see Agenda 21, section 1, chapter two.

creating additional wealth by the opening of new markets and the increased efficiency in the utilisation of global production. In addition, WTO rules accord a special treatment to developing countries in order to achieve their economic development and allow the formation of a national production capacity. (96).

Pursuant to article XVIII of the GATT, developing countries are authorised to take protective or other measures affecting imports or exports in so far as they facilitate the attainment of the objectives of the GATT. They thus may modify or withdraw a concession included in their Schedule (section A of Article XVIII) and/or apply quantitative restrictions or take measures that are not otherwise consistent with the GATT (section B of Article XVIII) in order to promote the establishment of a particular industry, with a view to raising the general standard of living of its people or to face balance of payment difficulties (section B : this exception applies however only to allow quotas (97)) (98). Differential treatment favourable to developing countries is also granted in other WTO instruments, such as the TRIPs (article 66), the Agreement on Technical Barriers to Trade (TBT) (article 12), the Agreement on Subsidies and countervailing measures (article 27), the Agreement on Safeguards (article 9). It is further strengthened by the generalised system of preferences, authorised by GATT's enabling clause (99) and adopted by market economies in favour of certain developing countries.

WTO rules thus do not, in principle, limit the capacity of developing countries to fully benefit from free trade and are not necessarily liable to lead to developing countries becoming dependent upon industrialised countries.

There are, however, certain circumstances where WTO rules limit the development capacities of States by allowing policies that are detrimental to exports of developing countries or that are conducive to an unsustainable exploitation of natural resources. The sections below address these issues.

(96) See Article XVIII and Article XXXVI-XXXVIII (Trade and development added by an amending Protocol in 1965).

(97) See also Gatt article XII.

(98) Developing countries must follow strict procedures to successfully invoke the exception of Article XVIII. See also the WTO's « Understanding on the Balance-of-Payment Provisions of the General Agreement on Tariffs and Trade 1994 ».

(99) Articles 1 to 4 of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries. This decision of the Contracting Parties confirms one of the framework texts adopted during the Tokyo Round of Multilateral Trade Negotiations, *Doc. GATT BISD 26S/203*, 1980.

B. — *Commodities*

One of the most obvious contradictions between WTO rules and sustainable development has been the lack of attention that was given to the commodities sector including agricultural products. This is one example where insufficient liberalisation has been detrimental to sustainable development.

Protectionist measures in the sector of commodities were authorised by GATT, article XI, paragraph 2 and maintained by market economies (100). This affected developing countries' trade capacities in areas where they had distinctive comparative advantage and international competitiveness. Industrialised countries subsidised their national commodities' production and exports, restricted imports and maintained high tariff levels (101). Such policies generated oversupply and reduced international demand for these goods, which in turn resulted in medium to long term price depression. As a consequence, developing countries adopted unsustainable patterns of production to respond to such market conditions. Neither the commitments in favour of the least developed countries contained in GATT,

(100) Although this exception is narrowly drawn and was never successfully invoked, for many years, agricultural restrictions were not attacked in the GATT. This is probably due to the fact that the United States obtained in 1955 a special exemption of their obligations under GATT for agricultural products pursuant to a derogation granted on the basis of article XXV : 5. In addition, the European Community, in constructing its Common Agricultural Policy, (CAP) unbound most of its tariffs on agricultural products (see Emmanuel Opoku Awuku, How do the Results of the Uruguay Round Affect the North South Trade ?, *Journal of World Trade*, vol. 28, 1994, p. 75 ; D.C. HATHAWAY, *Agriculture and the GATT : Issues in a new Trade Round*, Washington D.C., Institute for International Economics, 1987, 120 p. quoted in J.J. REY, *Institutions économiques internationales*, Précis de la Faculté de Droit, U.L.B., Brussels, 1988, p. 69). In the field of textiles, much of the trade remained outside the GATT and was regulated by the Multifibre Arrangements which authorised the negotiation of specific quotas for numerous textile products as well as other restrictive measures (see N. BLOCKER, *International Regulation of World Trade in Textiles*, Martinus Nijnhoff Publishers, Dordrecht, 1989 ; William J. DAVEY, « THE WTO/GATT WORLD TRADING SYSTEM : AN OVERVIEW », IN *Handbook of WTO / GATT Dispute Settlement*, edited by Pierre PESCATORE, William J. DAVEY and Andreas F. LOWENFELD, Transnationale Juris Publications Inc, Irvington-on-Hudson, New-York, 1995, pp. 48-49 ; The Multifibre Arrangements are published in GATT, *Basic Instruments and Selected Documents (BISD)*, 21st Suppl.).

(101) See the EC's Common Agricultural Policy and the practice of a majority of countries to subsidise their agricultural exports. Although Agricultural Export Subsidies are limited by GATT Article XVI :3 to avoid that they are used to obtain a « *more than equitable share of the world export trade* » in a product, a concept which was further refined in the Tokyo Round Subsidies Code (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariff and Trade), in practice, the use of export subsidies was not effectively controlled, especially following a much criticised decision of a Panel appointed by the Subsidies Code Committee who concluded that the language of the GATT was too imprecise to be applied to world wheat trade (EEC-Subsidies on Exports of Wheat Trade, *Doc. GATT BISD* 31S/259, 1983 ; see for an extended explanation of this issue and references, William J. DAVEY, « The WTO/GATT World Trading System : An Overview », *op. cit.*, pp. 46-47).

article XXXVII paragraph 1 (102), nor the generalised system of preferences, authorised by GATT's enabling clause and adopted by market economies in favour of certain developing countries were sufficient to reverse this trend (103). Moreover, article XVIII.5 of the GATT merely requires Contracting Parties to « give sympathetic consideration » (104) when exports of primary commodities by developing countries are seriously affected by measures taken by them. Clearly, this is not a strong commitment.

It is doubtful that the new Agreements negotiated under the Uruguay Round would be sufficient to withdraw the negative effects of protectionism on commodities. WTO members did not formally agree to liberalise trade in the sector of commodities at a fast enough pace. They agreed to reduce agricultural tariffs (105) and to cut domestic and export subsidies to agricultural products to certain maximum levels (106). In the textile sector, they also agreed to phase out gradually the quotas defined under the Multifibre Arrangements (107). However, these commitments are limited in

(102) This clause reads as follow : « *The developed contracting parties shall to the fullest extent possible — that is, except when compelling reasons, which may include legal reasons, make it impossible — give effect to the following provisions : (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms ; (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties...* »

(103) See Report of Committee on Trade and Development, *GATT doc. BISD 24S/48*, 1978 at 53 ; Agenda 21, section I, Chapter 1 ; Charles ARDEN-CLARCKE, « South-North Terms of Trade, Environmental Protection and Sustainable Development, WWF Discussion Paper (1992) », *Int'l Env. Aff.*, 1992, p. 122. The GSP accorded by the EU to ACP countries for bananas under the Lomé Conventions was successfully challenged by Latin American countries whose bananas' production was mainly held by multinational enterprises adopting unsustainable patterns of production (large scale plantations, wide use of pesticides and encroachment upon tropical forests). Latin American countries successfully invoked the most favoured Nation provision (GATT article I), the national treatment provision (GATT article III), the prohibition of quantitative restrictions (GATT article XI) and the violation of the provisions relating to customs unions (Part IV of the GATT) during two GATT disputes (Non adopted Gatt Panels EEC — Member States' Import Regimes for Bananas, *GATT Doc DS32/R*, 3 June 1993 and *GATT Doc DS38/R*, 18 January 1994). The main criticism to the Panel Decisions was that they prohibited a differentiation between the least developed countries and countries more advanced in their develoment process whereas the enabling clause would allow such differentiation. The Panel's decisions thus ran counter the objective of sustainable development and demonstrated a lack of attention to questions that fall outside the strict and limited scope of free trade (see R. HAYNES and B. CHAYTOR, « Free Trade and Sustainable Development : The European Community's Internal Market in Bananas », in *Trade and Environment. The Search for Balance*, Cameron, Demaret & Geradin Eds, Cameron May, London, 1994, 459 ; see also below, pp. 49-50) .

(104) This sentence is contained in GATT article XXII referred to in GATT article XVIII.

(105) By 36 % over a six years period (24 % over a 10 years period for developing countries. See Emmanuel Opoku Awuku, *loc. cit.*, p. 88 ; see William J. DAVEY, « The WTO / GATT World Trading System, an Overview », *op. cit.*, p. 46, quoting GATT Focus, December 1993, 6 ; see also commitments taken under Article 4 of the 1994 Agreement on Agriculture.

(106) Article 3 and Annex II of the 1994 Agreement on Agriculture.

(107) 1994 Agreement on Textiles and Clothing, articles 2, 3 and 9 ; see Niels BLOKKER and Jan DEELSTRA, « Towards a Termination of the Multi-Fibre Arrangement ? », *Journal of World Trade*, vol. 28, 1994, N° 5, p. 97.

scope and in time. It is presently still uncertain whether or not commodities will benefit from a fully liberalised system since many countries still consider the issue of their food and commodity supply as a security concern.

Agenda 21 includes as a plan for action the liberalisation of trade in such sectors as agriculture, textiles and clothing, tropical products and natural resource-based products. It also fosters the adoption of bilateral agreements by States to regulate supply and demand in these sectors and provide compensation mechanisms for shortfalls in commodity export earnings of developing countries (108). A multilateral convention recalling these goals is therefore desirable to support sustainable development.

C. — *Trade and environment / sustainable use of natural resources* (109)

1. *Traditional GATT jurisprudence*

The free trade system does not forbid the contracting parties to adopt internal policy measures aimed at protecting the environment. However,

(108) Agenda 21, Section 1, Ch. 1 and Ch. 2, 2.12 and 2.16.

(109) The section below is a rough summary of the main legal and institutional points in the very complex discussion on the relationship of free trade and the environment. This discussion usually involves technical and policy issues, political controversies and legal and institutional problems. The intention of the author is to provide a basic understanding of this debate to non-specialists, in the light of the States' commitments under the institution of sustainable development, and to recall to policy makers the presently accepted goal of sustainable development. The author apologises for the lack of completeness in the following discussion which must be kept short for the purposes of this article. There have been numerous books and articles written on this subjet, among which we recommend : Jeanette MC DONALD, « Greening the GATT : Harmonizing Free Trade and Environmental Protection in the New World Order », *Environmental Law*, 1993, p. 231 ; Steve CHARNOVITZ, « The Environment VS. Trade Rules : Defogging the Debate », *Id.*, 475 ; Thomas J. SCHOENBAUM, « Agora : Trade and Environment, Free International Trade and Protection of the Environment : Irreconcilable conflict », *AJIL*, 1992, p. 700 ; Edith BROWN WEISS, « Environmental Trade as Partners in Sustainable Development, A Commentary », *AJIL*, 1992, p. 728 ; Olivier PAYE, « La protection de l'environment dans le système du GATT », *RBDB*, 1992, p. 67 ; Steven Y. PORTER, « The Tuna/Dolphin Controversy : Can the GATT become environmental friendly ? », *Georgetown Intern'l Env. Law Review*, 1993, p. 91 ; Peter L. LALLAS, Daniel ESTY et David J. VAN HOOGSTRATEN, « Environmental Protection and International Trade Toward Mutually Supportive Rules and Policies », *The Harvard Env. L. Review*, 1994, p. 271 ; WALKER, *Environmental Protection and Trade Liberalisation : Finding The Balance*, 1993 ; D. ESTY, *Greening the Gatt — Trade, Environment and the Future*, Institute for International Economics, Washington DC, 1994, 319 p. ; *Trade and Environment, The Search For Balance*, edited by CAMERON, DEMARET & GÉRADIN, Cameron May, London, 1994 ; ZAELKE, ORBUCH & HOUSMAN, Editors, *Trade and the Environment — Law, Economics and Policy*, 1993 ; E.-U. PETERSMANN, *International and European Trade and Environmental Law after the Uruguay Round*, Kluwer, London, The Hague, Boston, 1995 ; Steve CHARNOVITZ, « New WTO Adjudication and its Implications for the Environment », *International Environmental Reporter*, 1996, 851 ; Shinya MURASE, *Unilateral Measures and the WTO Dispute Settlement*, presentation to the Asia Conference on Trade and the Environment, Singapore, June 28, 1996.

the jurisprudence built upon GATT principles, including the specific environmental exceptions contained in Article XX (110), has been heavily criticised as not allowing sufficient environmental protection and as protecting more the interests of exporters than those of the environment.

The most relevant and well-known case in this regard was the Tuna-Dolphin dispute (111). This dispute concerned a US legal provision (112) banning the imports of yellowfin tuna from Mexico (and other nations) caught using techniques that were indiscriminately killing dolphins and other ocean mammals. The GATT Panel first found that such provision was in violation of GATT article XI(1) which forbids quantitative restrictions on imports (or exports) other than a duty, tax or other charge (113), and GATT article III which imposes a rule of non-discrimination between goods that are domestically produced and those that are imported once they reach the customs territory of a Contracting Party. The Panel considered that the rule of non discrimination between like products contained in Article III (114) applied to products as such, and therefore no differentiation was allowed on the basis of the techniques or processes by which

(110) Article XX of the GATT states :

« *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures :*

... *(b) necessary to protect human, animal or plant life or health.*

... *(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption* ».

(111) Cfr. the Dispute Settlement Panel Report (not adopted) on United States Restrictions on Import of Tuna, 16 Aug. 1991, 30 *I.L.M.*, 1594 (1991) ; there are at least five other cases brought to GATT Panel's attention relating to the relationship between trade and environment : U.S. Prohibitions of Imports of Tuna Products from Canada (1982 Report in *BISD* 29 S/91 ff), U.S. Taxes on Petroleum and Certain Imported Substances (1987 Report in *BISD* 34 S/136 ff), Canada's restrictions on Exports of Unprocessed Herring and Salmon (1988 Report in *BISD* 35 S/98 ff) ; Thailand's Restrictions on Importation and Internal Taxes on Cigarettes (1990 Report in *BISD* 35 S/98 ff) ; United States — Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 29 April 1996, reprinted in 35 *I.L.M.*, 603 (1996). There have also been complaints against the use of trade restrictions for environmental purposes which did not lead to formal dispute rulings (Canada complaint in 1985 against the EEC's ban on importation of skins of certain seal pups, the US complaint in 1987 against the EEC's import restrictions on beef produced from hormone-fed animals. See Ernst-Ulrich PETERSMANN, « International Trade Law and International Environmental Law — Prevention and Settlement of International Environmental Disputes in GATT », *J.W.T.L.*, 1993, p. 54-55) and Steve CHARNOVITZ, « The WTO Panel Decision on US Clean Air Act Regulations », *International Environmental Reporter*, 1996, 191.

(112) The Marine Mammal Protection Act, 16 U.S.C.A. para. 1371 (a) (2) (e).

(113) Dispute Settlement Panel Report (not adopted) on United States Restrictions on Import of Tuna, 16 Aug. 1991, 30 *I.L.M.*, paragraph 5.18.

(114) In the *Dolphin Tuna* case, the Gatt Panel actually applied Gatt Article III(4) relating to non-discriminatory regulations. However, there is no reason to believe that the jurisprudence defined for Article III(4) would not also be applicable to Article III(2) relating to non-discriminatory taxes.

like products were obtained (115). Consequently, tuna fished using dolphin safe harvesting techniques could not be distinguished from tuna caught with methods that killed dolphins (116).

Concerning the environmental exceptions of Article XX(b) and (g), the Tuna-Dolphin Panel ruled that these exceptions applied only to non-arbitrary or justifiable discriminatory measures (i.e. measures applying as much as possible equally to all States (117)) that had effect exclusively within the jurisdiction of the country adopting the measure. Therefore, the US provision banning imports of tuna from Mexico was not covered by article XX (b) and (g) since it was aimed at protecting dolphins outside the US and had an extra-jurisdictional effect by requiring Mexican exporters to adopt dolphin-safe harvesting techniques in order to benefit from their rights under the General Agreement.

This jurisprudence was further clarified by the second Tuna-Dolphin Panel (118) : Gatt Article XX does actually not forbid the adoption of protection measures with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure, if such measures regulate the conduct of the nationals or the vessels of such country and are able to achieve their environmental objective by themselves (119). The rationale of GATT jurisprudence relating to the extra jurisdictional effect of measures taken pursuant to article XX seems therefore to be that a country may adopt any environmental measure justified under article XX unless it compels other countries to modify their own policies with respect to persons and things located within their own jurisdiction in order to benefit from their rights under the GATT (120).

(115) The prohibition in GATT Article III to consider production processes is however not absolute. There are certain cases where Article III may authorise a differentiation on the basis of the composition of like finished products. For instance, a tax on imported products containing other components than their like national finished products may be compatible with Article III(2). The tax would in this case apply to the components, proportionally to the value of the taxed component in the final product, provided it is a national tax applying to all similar components (see Report of the Special Group US-Taxes on petrol and certain import products, adopted on 17 June 1987, *BISD* 34S/136). Also, in the Uruguay Round Agreement on technical Barriers to Trade, an importing country may adopt a technical standard on the basis of processes or production methods that are « product related » because non observance of such standard « would leave a trace in the product or entail health and environmental product risks » (These standards cannot, however, constitute unnecessary obstacles to trasde) (see Ernst-Ulrich PETERSMANN, *op. cit.*, p. 28).

(116) The principle of Gatt blindness to production processes was also confirmed in the *Belgian Family allowances* case (*BISD* 1 S/59-62) and in the 1994 Tuna II Panel report (GATT *Doc DS* 29/R) of 20 May 1994 (not yet adopted), para. 5.8.

(117) See Report US — prohibition on imports of Tuna and Tuna products originating from Canada para. 4.8.

(118) United States — Restrictions on the Imports of Tuna, 20 May 1994, *GATT Doc. DS 29/R*, reprinted in 33 *I.L.M.* 839 (1994) ; on this second *Tuna-Dolphin* case, see S. CHARNOWITZ, DOLPHINS and TUNA, « An Analysis of the Second P&anel Report », *Envtl. L. Rep.*, 1994, 10567.

(119) United States — Restrictions on the Imports of Tuna, 20 May 1994, *loc. cit.*, para. 5.8 to 5.10.

(120) *Idem*, para. 2.26 and 5.27.

The restrictive interpretation given to environmental exceptions by the GATT Panels has also been illustrated by the interpretation of the word « necessary » in GATT article XX(b) (allowing measures that are *necessary* to protect human, animal or plant life or health). Similarly to the interpretation given to the same word in article XX(d) (121), GATT Panels ruled restrictively that « necessary » means that to accept an exception to GATT principles under article XX (b), there must be no other option available that would be non-discriminatory or less non-discriminatory within the meaning of the General Agreement, that the contracting party « could reasonably be expected to employ to achieve its objectives » (122). In other words, a measure imposing, for instance, eco-taxes or limiting the import of products damaging the environment would be forbidden if its objective can be achieved by other means such as the negotiation of international cooperation arrangements (123) or commercial marketing methods (commercial advertising, eco-labelling (124))(see below). This restrictive interpretation however only applies to article XX(b) protecting human, animal or plant life or health. It does not apply to article XX(g) where the measures must only « *relate* » to the conservation of exhaustible natural resources. This requirement was interpreted by Panels as obliging measures to be « primarily aimed » at addressing a conservation goal (and invoked in conjunction with comparable restrainst on domestic production) (125).

2. *Criticisms of the traditional GATT jurisprudence and GATT rules*

Environmentalists (126) object to GATT Panels' restrictive interpretations on the grounds that they are inconsistent with the objective of

(121) United States — Measures affecting alcoholic and Malt beverages (Beer II Panel Decision), *GATT Doc. DS23/R*, paras 5.41-.43, 5.52.

(122) Thailand-Restrictions on Importation of and internal taxes on Cigarettes, *GATT Doc DS 10* at 200 para 74 ; see also *Tuna-Dolphin* case and *US-Restrictions on alcoholic and malt beverages, BISD 39 S / 205*, 283, paras. 5.43 and 5.52.

(123) *Tuna-Dolphin* Case para 5.28 ; see, in this regard, the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures adopted for the application of the provisions of GATT Article XX(b).

(124) Thailand-Restrictions on Importation of and internal taxes on cigarettes, para. 78.

(125) Canada's Restrictions on Exports of Unprocessed Herring and Salmon, paragraph 4.6 ; see also the report of the WTO Appellate Body in the case United States — Standards for Reformulated and Conventional Gasoline, cf. note 111.

(126) The term environmentalist loosely refers to those individuals and groups of interest that advocate environmental protection over the goals of free trade. Of course, there are many divergences among environmentalists on the goals and political priorities within environmental protection and the means to achieve these goals. The criticisms summarised hereafter are generally those on which environmentalists mostly agree. This section is generally inspired from readings of Steve CHARNOVITZ, « Exploiting Environmental Exceptions in GATT Article XX, *J. of W.T.*, 1991, 37 ; STEVE CHARNOVITZ, « The Environment VS. Trade Rules : Defogging the Debate », *loc. cit.* ; Thomas J. SCHOENBAUM, « Agora : Trade and Environment, Free International Trade and Protection of the Environment : Irreconcilable conflict », *Loc. cit* ; Edith BROWN WEISS, « Environmental Trade as Partners in Sustainable Development, A Commentary », *Loc.*

environmental protection and sustainable development (127). They also oppose specific GATT rules that seem to contradict existing international environmental conventions. Their objections are summarised in the five points below. The first four are based on the contents of the above-mentionned GATT Panels. The last is directly deduced from the text of the GATT.

1) The first objection concerns the Panel's interpretation of the principle of non-discrimination contained in GATT article III which prohibits differentiation of products or like products on the basis of their production methods. Environmentalists consider that such an interpretation hinders the Contracting Parties' ability to adopt and enforce pollution control measures on imports from foreign companies whose manufacturing processes generate pollution.

Pollution control measures on process and production methods (PPMs), such as process standards or taxes are, among others, based on the precautionary approach and the polluter pays principle and therefore should be adopted by all countries pursuant to principles 15 and 16 of the Rio Declaration (128). Despite these rules, certain countries may not adopt such measures and may build their own comparative advantage on the basis of the lack of environmental protection. Based on GATT jurisprudence, a country adopting pollution control measures cannot, in principle (129), restrict imports from a country which did not adopt them since this would be a discrimination made on the basis of production processes. Therefore, in order to protect its national production and to restore its original competitiveness, the country which adopted pollution control measures might be tempted to remove or reduce its environmental protection measures. This would jeopardize both the precautionary approach and

cit., 1992, p. 728 ; Peter L. LALLAS, Daniel ESTY et David J. VAN HOOGSTRATEN, « Environmental Protection and International Trade Toward Mutually Supportive Rules and Policies », *Loc. cit.* ; ESTY, *Greening the Gatt — Trade, Environment and the Future, op. cit.* ; and the contributions by DEMARET, THAGGERT, CAMERON and MAKUCH in *Trade & the Environment — The Search for Balance, op. cit.*

(127) See E. BROWN WEISS, « Environment and Trade », *loc. cit.*, pp. 730-731. Other authors are generally included among the « greens » : see previous note as well as, among others, T. LANG and C. HINES, *The New Protectionism*, The New Press, N.Y., 1993 ; J. JACKSON, *The World Trading System : Law and Policy of International Economic Relations*, MIT Press, Cambridge MA, 1992 ; A. HITTLE, « Trade and Environment at an Impasse », *The Environmental Forum*, 1992, 26 ; R. BATRA, *The Myth of Free Trade*, Macmillan, N.Y., 1993.

(128) See also Principle 8 of the Rio Declaration : « *To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriatre demographic policies* ».

(129) Measures based on PPMs that fall within the scope of one of the exceptions of article XX could theoretically be GATT compatible. However, this is almost impossible pursuant to the current interpretation of article XX, since PPMs have extra-jurisdictional effects (see below para. 2).

the polluter pays principle with the consequence that the community would bear all the costs of pollution, without being able to limit them (130).

2) The second objection is based on the « extra-jurisdictional » interpretation of the exceptions of GATT Article XX, which further limit States' capacity to implement environmental protective policies. The fact that unilateral trade restrictions can only apply to protect the environment within the area of a country's own territorial jurisdiction (with the exception of measures applicable to the actions of national citizens or vessels outside the territorial jurisdiction of that country) seems to overlook the fact that pollution often has transboundary effects and that therefore pollution created in one country might affect the environment in many other countries. For instance, manufacturing processes that involve the use of chemicals, which deplete the ozone layer or kill bacteria, generate detrimental spillovers to neighbouring countries or pollute international rivers. Wildlife also is in essence transnational. In the Tuna-Dolphin case, for instance, it was argued that dolphins' movements in the territory of Mexico were not limited by human borders and that they might easily enter American territory and fall under the latter's jurisdiction during any of their peregrinations. Therefore, reducing the environmental considerations to purely national jurisdictions is incompatible with the nature of ecosystems and thus environmental protection (131).

Furthermore, GATT's jurisprudence on « extra-jurisdictionality » might not allow protection of those resources that are outside the jurisdiction of any country in the absence of a formal international agreement (132).

Therefore, according to environmentalists, the jurisprudence on article XX of the GATT protects to some extent more the interests of those exporting countries that tolerate polluting production methods than those of the environment.

3) The third objection relates to the interpretation given by the GATT Panels to the word « necessary » in GATT article XX (b). According to this jurisprudence, a measure that is intended to protect human, animal or plant life or health that would restrict trade would be prohibited if it is

(130) See Thomas J. SCHOENBAUM, *loc. cit.*, p. 721. This phenomenon is usually referred to as the « race to the bottom » problem.

(131) This concern might however not be justified under a loose interpretation of the second Tuna-Dolphin Panel. Indeed, this decision could be interpreted as forbidding those extra jurisdictional measures only if they compel other countries to modify their policies with respect to persons and things located within their own jurisdiction in order to benefit from their rights under the General Agreement. Consequently, import restrictions on species, plants or other resources, located outside a country's jurisdiction could be adopted even with respect to non-national exporters, if such measures do not compel another country to modify its policies to benefit from its rights under the GATT. It is difficult, for instance, to imagine how a country would modify its policies in order to avoid an import restriction on natural resources.

(132) This includes marine living resources, outer space or aspects of the ozone layer not covered by the Montreal Protocol. See also previous note.

avoidable, i.e. if there are other GATT compatible (or less in-compatible) options available such as the negotiation of international cooperation arrangements or marketing methods (see above). It has been argued (133) that these alternative solutions might not be immediately sufficient to ensure effective protection and that it would be preferable to allow countries to determine themselves the necessity for protective measures so long as « they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade » (134).

In other words, pursuant to the principles of self-determination and precautionary approach, the appreciation of the necessity of adopting a specific measure, whatever its type, protecting human, animal or plant life should be left with States provided that they respect the basic requirements contained in the first paragraph of article XX (135).

(133) See S. CHARNOVITZ, « The Environment VS. Trade Rules : Defogging the Debate », *loc. cit.*, pp. 513-514.

(134) Preamble of Article XX. Concerning the notion of State's autonomy in evaluating the « necessity », the text of articles 2.2, 5.6 and 5.7 of the 1994 Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) could be used by States as a guideline to evaluate necessity : any sanitary or phytosanitary measure that is applied « *to the extent necessary to protect human, animal or plant life or health* » must be « *based on scientific principles and is not maintained without sufficient scientific evidence* » (article 2.2). Furthermore, « *Members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility* » (emphasis added to stress a certain level of discretion allowed to the States) (article 5.6) and « *In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other Members* » (article 5.7). The notion of sufficient scientific evidence is very difficult to apply. It is the author's view that it should be interpreted as to allow measures that are not necessarily « necessary » within the meaning given by GATT Panels, taking into account the principle of precautionary approach contained in Principle 15 of the Rio Declaration. Because of *sufficient* scientific evidence, certain trade restrictive provisions should immediately be taken in order to ensure a minimum degree of effectiveness. This degree of effectiveness should be assessed by the states themselves and not by trade specialists who tend to favour less restrictive measures that may not be as effective. Therefore, the WTO system should allow that the least trade restrictive mesures, although they could represent an alternative option, be discarted on the grounds of the lack of scientific evidence for their timely effectiveness. Presently, however, this interpretation is not the most likely to be adopted. See also note 167.

(135) In the TBT and the SPS, States are granted a certain degree of flexibility in evaluating the risks on which measures are based (SPS, article 5.7. and TBT article 2.2 last sentence and article 2.4). However, as a rule, in both agreements, States should adopt standards and sanitary or phytosanitary measures that conform to international standards, guidelines or recommendations (SPS article 3.2, TBT article 2.5), and not adopt measures if less trade restrictive measures are available to reach the same level of protection. Generally speaking, the many nuances and criteria in both the TBT and SPS could, in theory, allow a decent level of protection. However, on the one hand the SPS and TBT only apply to sanitary and phytosanitary measures and standards, excluding, for instance eco-taxes, and on the other hand, the practical control of these criteria could be a difficult exercise for a WTO Panel which could overstate the effectiveness of the least trade restrictive measures and unduly favour a free trade approach over a protective one.

As regards the requirements of article XX(g) (i.e. the environmental measures must « relate » to the conservation of exhaustible resources) these are somewhat less stringent since they allow policies that « aim primarily » at conservational purposes. However, the scope of article XX(g) is seriously limited by the prohibition on extrajurisdictional effects of environmental measures. This results in excluding measures aimed at protecting the oceans and their living resources (dolphins for instance), the ozone layer or the outer space (136). Furthermore, the second sentence of article XX(g) seriously hampers environmental initiatives by developing countries, as explained below.

4) The fourth objection, based on GATT rules and Panel's interpretation of article XX (b) and (g), relates to the fact that the GATT, as interpreted, does not allow a country to adopt unilateral export restrictions on primary products not covered by international commodity agreements and not made in conjunction with a restriction on domestic production or consumption (137).

This objection is justified on the grounds that developing countries are presently faced with the choice of either restricting exports in conjunction with restrictions on domestic production or consumption, thus limiting their development capacities, or not restricting exports of primary resources at all (138). Such a choice places environmental concerns in opposition to development objectives and might hinder environmental protection in developing countries (139).

5) The last main substantive objection (140) relates to the fact that the GATT rules and the interpretation thereof by the Panels are not com-

(136) D. ESTY, *op. cit.*, p. 49.

(137) Indeed, export restrictions are normally forbidden by Article XI. Except specific circumstances set forth in articles XI(2a) (export prohibition or restrictions temporarily applied to prevent or relieve critical shortage of foodstuffs or other essential products) and 2(b)(export prohibition or restrictions necessary to the application of standards or regulations for the clarification, grading or marketing of commodities in international trade), export restrictions that not covered by international commodity agreements (Export restrictions covered by international commodity agreements are allowed by GATT article XX(h)) cannot be allowed under articles XX (b) and (g), unless they are made in cunjunction with restrictions on domestic production or consumption. Concerning article XX (b), export restrictions are not necessary in the meaning of this provision since export *taxes* are generally considered as less trade restrictive and, concerning article XX (g), export restrictions would be allowed only if they are made in conjunction with restrictions on domestic production or consumption (see the 1988 Panel Report on Canada's Restrictions on Exports of Unprocessed HERRING and SALMON, *loc. cit.*, para 4.6). Therefore, export restrictions that do not simultaneously impose or render effective reductions of domestic production or consumption are not allowed under present GATT rules.

(138) The alternative of export taxes, allowed under article XX(b), may not always be as effective as export restrictions (see Vinod REGE, *loc. cit.*, p. 142).

(139) The opposition between the goals of the environment and of economic development is intrinsically incompatible with the notion of sustainable development.

(140) This is indeed probably the last objection to GATT substantive rules. There are other objections that relate to the nature and history of GATT itself such as the « institutional imbalance » between free trade and environment and the fact that GATT procedures are generally biased towards trade concerns (GATT panellists are ususally more trade oriented and

patible with trade restrictive provisions which are necessary for the enforcement of certain international environmental agreements. For instance, the prohibition of trade on species contained in Annex I of the Convention on International Trade in Endangered Species and Flora (CITES) is contrary to the Tuna-Dolphin first Decision' findings as it affects natural resources outside the scope of national jurisdiction (see above). Also the Montreal Protocol's (141) prohibition of imports of controlled substances depleting the ozone layer and of products which contain these substances from nonparty States is contrary to the GATT's Most Favoured Nation principle and is a restriction on trade which is extra-jurisdictional and may not be necessary within the meaning of article XXb, since less restrictrise means to meet the environmental objective may be available, such as technological and financial assistance (142). Pursuant to the rules of priority contained in the Vienna Convention on the Law of Treaties (143)(article 30), a later treaty containing provisions that are inconsistent with those of an earlier treaty prevails for parties that are parties to both treaties. The GATT, included in the WTO agreements, was adopted later than most international environmental conventions and should thus prevail in situations of conflict (144). In addition, if a party to

do not include environmentally sensitive specialists) (D. ESTY extensively develops these issues, *op. cit.*, ch. 4, p. 73).

(141) The 1987 Montreal Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer, *op. cit.*.

(142) See articles 4.1 to 4.3 af the Montreal Protocol. It must be noted, however, that on export or import loin against non-party States for environmental purposes could arguebly fall under the exception clause of article XX(g), which requires measures to be « primarely aimed » at the conservation of natural resources. Nevertheless, it would still not pass the test of the prohibition of extra-juridictional measures, although this must be balanced with the comment in note 131. Also, it must be noted that article 4.4 of the Montreal Protocol alloued the Parties to « *determine the reasability of measures* lanning imports of products produced with, but not containing, controlled substances. These measures, if adopted, would have been a serious violation of GATT, since it would have constituted a restriction on trade based on process and production methods. However, the Parties decided not to adopt these measures, since it is apparently technically impossible ti identify products produced with, but not containing, controlled substances (See W. LANG, « Les mesures commerciales au service de la protection de l'environnement », *R.G.D.P.*, 1995, p. 555).

There are other multilateral environmental agreements (MEA) whose trade provisions are trade restrictive and are deemed to violate the GATT, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposals, article 4.5 (trade restrictions against non-parties) or the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movement within Africa (see above, note 41), article 4.1 (on the Bamako Convention, see : F. OUGERGOUZ, « La convention de Bamakosur l'interdiction d'importer en Afrique des déchets dangereux et sur le contrôle des mouvements transfrontaliers et la question des déchets dangereux produits en Afrique », *A.F.D.I.*., 1992, p. 871). For a thorough study of the GATT compatibility of trade provisions in MEAs, see *Agenda 21 and the UNCED Proceedings*, Nicholas A. ROBINSON Editor, Oceana Publications, 1992, vol. III, 1565 ; see also W. LANG, 1995, pp. 553 and foll.

(143) *I.L.M.*, 1969, 679.

(144) Of course, the reverse was also true before the conclusion of the Uruguay Round as the GATT was initially signed in 1947. It must also be noted that the application of the rule « *lex specialis derogat generali* » could arguably reverse the prevalence of GATT over specific MEAs.

one treaty is not party to the other, the parties' mutual rights and obligations are determined by the treaty to which both parties are parties, i.e. the GATT. The effectiveness of the international environmental agreements concluded after the Marrackech agreement embodying the WTO could thus also be hindered when parties and nonparties to them might successfully challenge their trade discriminatory provisions under the GATT.

3. *Evaluation of the criticisms of the traditional GATT rules and jurisprudence from the point of view of sustainable development*

Although the first two objections, namely the prohibition of trade restrictions based on production processes and/or having extra-jurisdictional effects is not compatible with effective environmental protection are based on the objective of strenghtening environmental protection, in order to ensure a sustainable use of natural resources, they tend to overlook certain of the most important components of the legal notion of sustainable development as it was defined in Rio de Janeiro in 1992. Furthermore, they contribute to a debate that is misoriented in essence, as the question is not how to « green the GATT » (145), but how to integrate free trade and environment in a global legal context.

a) *Pursuant to principle 21 of the Stockholm Declaration, the GATT cannot tolerate unilateral measures that violate the sovereignty of States over their natural resources. It is not the role of the GATT to protect the environment. This role must be assigned to other international instruments*

Pursuant to principle 21 of the Stockholm Declaration, which is presently accepted as international customary law, each state has a sovereign right over its national resources and freely adopts its own policies and standards (or production methods) within its area of jurisdiction. Pursuant to this principle, which itself is a corollary to the right to development, States are able to determine themselves, within the limits described below, their own comparative advantage in relation of their needs and stage of economic development. No State, in its trade relations, has the right to impose on other States its own policies or standards (production methods). The GATT's rules and jurisprudence are a strict and correct application of these principles. To object to them would legitimise developing countries' concerns regarding a new form of eco-imperialism allowing industrialised States to interfere with the South's development plans and industrialisation programmes. It would also disregard the precedence given in the Rio Declaration (Principle 4) of development over environmental protection.

(145) D. Esty, « Greening the Gatt », *op. cit.*

Nevertheless, all countries, whether or not developed, have the responsibility, pursuant to the second aspect of principle 21, to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Compensation mechanisms for damages arising from activities that cause transfrontier pollution have been set forth in specific international conventions and are the subject of a wider project of the International Law Commission, in accordance with principle 13 of the Rio Declaration. In addition, as a corollary to the notion of sustainable development, States must not seek to build their comparative advantage on production methods that generate pollution. The majority of States are also bound by numerous international conventions, as well as by the instruments adopted at Rio which require them to adopt specific measures to protect many aspects of their own environment and of the Commons.

Therefore, the goal of environmental protection, although not addressed in the GATT, is and should be secured in other legal sources, pusuant to which States accepted to limit their regulatory sovereignty. It is not the role of the GATT to allow States to adopt unilateral measures that violate the principle of sovereignty without being supported by other international agreements.

The GATT is an instrument intended to support and ensure the proper functioning of free trade. If it should not, and in fact does not, forbid the adoption by the States of non-discriminatory policies regarding health, safety and pollution in their area of jurisdiction, it should also not be requested to include provisions that fall outside of its scope and capacity, i.e. that subordinate free trade in favour of the environment or that blatantly allow illegal unilateral measures.

b) *Unilateral measures that are taken to enforce international environmental rules can be legal under specific circumstances even if they are contrary to the GATT*

Unilateral measures can be acceptable under international law even if they violate the GATT if they are taken in accordance with international rules and procedures relating to counter-measures (146). Thus, if unilateral measures based, for instance, on PPMs that violate the GATT, are needed

(146) These rules and procedures are as follows : if the counter-measures do not violate by themselves a rule of international law, they are legal and not subject to limitations. If counter-measures violate an international treaty or any rule of international law, they should be taken in accordance with the conditions of validity of reprisals in international law, i.e. 1) respond to a prior violation of international law, 2) not constitute a violation of a mandatory rule of international law, 3) be proportional to the initial illicit act, 4) be preceded by an injunction addressed to the responsible State to stop the illicit act and 5) the breached rule must authorise such measure (R. Ago, « Rapport de la Commission de droit international sur la responsabilité des Etats », *ACDI*, 1979/II 1re partie, pp. 39-49 and *ACDI*, 1979/II 2e partie, pp. 128-135).

to enforce valid international environmental obligations, they should be tolerated, provided they do not violate mandatory provisions of international law (147) and the violation of the GATT by the measures is proportional to the gravity of the initial violation of the environmental rules (and fulfills the other conditions of legitimate reprisals). The major difficulty with this exercise arises with the issue of how to determine the proportionality of a GATT incompatible counter-measure with the gravity of the initial illicit act (see below).

c) *Since the environment can be protected under specific conditions notwithstanding the GATT, the controversy between free traders and environmentalists is misplaced and should be reoriented*

The core of the controversy between environmentalists and free traders often lies on a wrong assumption in the case when trade restrictive unilateral measures are taken to enforce international environmental obligations. Indeed, the debate is generally based on the belief that only counter-measures, which either fulfil the conditions set forth in GATT exception clauses, such as articles XIX, XX or article XXI (national security), or that are taken pursuant to the waiver procedure (article XXV.5), are legal, when in fact other measures that are legitimate reprisals constitute another legal exception to GATT (subject of course to the test of proportionality).

Counter-measures that are subject to the tests of legitimate reprisals actually cover numerous aspects of environmental protection (148), among which the second rule contained in principle 21. Measures, based for instance on PPMs, can be taken to restrict spillovers from a neighbouring country or avoid destruction of resources that may be needed in the country taking the measure (dolphins or the waters of an international river). These measures are often dismissed because of their GATT incompatibility, when in fact they should be tested pursuant to the criteria for legitimate reprisals, since their alledged objective is to enforce principle 21 (149). Thus, critique on the GATT Panels should not focus so much on the intepretation by the Panels of GATT provisions, but on the fact that the

(147) We do not believe that the rules of free trade or even those included in principle 21 are such type of provisions.

(148) There are more than nine hundred international environmental agreements.

(149) These measures would also be compatible with the polluter pays principle applied in international relations. See E.-U. PETERSMAN, « International Trade Law and International Environment Law : Prevention and Settlement of International Evironmental Disputes in GATT », *J. of W.T.*, 1993, 27, 70. See also, as one of the conventional applications of principle 21, the International Convention on Civil Liability for Oil Pollution Damage, signed at Brussels on 29 Nov. 1969. This convention specifically allows States to take preventive measures, i.e ; « *reasonable measures ... to prevent or minimise pollution damage* » (article 1.7).

Panels did not take into consideration other rules of international law such as those regulating counter-measures (150).

The most difficult test to evaluate the validity of counter-measures is the one of proportionality, which requires the measures not to be excessive in relation to the gravity of the illicit act and of the damage suffered. The application of the proportionality test to the relationship between free trade and the environment deserves a thorough study per se. This is precisely the issue that should direct controversies between environmentalists and free traders (151), since many questions as to means and criteria to achieve this test remain open. Directions on this debate can be found in the jurisprudence of the US Supreme Court applying the US Constitution's Commerce Clause (152) and in the jurisprudence of the European Court of Justice on articles 30 and 36 of the EC Treaty (153). Other directions can

(150) It must be recalled that the use of legitimate reprisals is itself subject to procedural rules either pursuant to the international environmental agreements themselves or within the WTO. It is not because a State may be authorised in specific conditions to violate a rule of international law that it is dispensed with respecting the mandatory rules of peaceful resolutions of conflict. Their violation would indeed not resist the proportionality test. Therefore, it is particularly important to ensure that the current rules for the resolution of conflicts meet the requirement to integrate free trade, development and environment. This has obviously not been the case with the GATT Panels. See D. ESTY, *op. cit.*, 123. An interesting recent development may be found, however, in the WTO Panel decision on US Clean Air Act Regulation (US — Stadards for Reformulated and Conventional Gasoline), in which the Appellate Body recognised that « the General Agreement is not to be read in clinical isolation from public international law ».The Appellate Body cited decisions of the ICJ, the European Court of Human Rights, the Inter-American Court of Human Rights and authors of public international law. It used the rules of interpretation of the Vienna Convention on the Law of Treaties. International law was used, however, only for the interpretation of the text of the GATT (as required by article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes) and not as a complementary source of law (see Shinya MURASE, « Unilateral Measures and the WTO Dispute Settlement », *loc. cit.*, p. 3 and Steve CHARNOVITZ, New WTO Adjudication and its Implications for the Environment », *loc. cit.*, p. 854.

(151) As a thoughtful contribution to this debate, see D. ESTY, *op. cit.*, pp. 114 and foll.

(152) The US Supreme Court analysed in certain cases whether the burden on interstate commerce « is clearly excessive in relation to the putative local benefits » and applied a more strict scrutiny on the expected benefits of the measure protecting the environment when it was obviously and seriously burdening trade. See Richard B. STEWARD, « International Trade and Environment : Lessons From the Federal Experience », *Washington and Lee Law Review*, 1992, 1329 ; see next note.

(153) The European Court of Justice applied a « rule of reason » weighing the benefits and legitimacy of the environmental measure against its impact on trade. See among others : *Cassis de Dijon* Case, 120/78, *E.C.R.*, 1979, 649 ; *Waste Oils* Case, 240/83, *E.C.R.*, 1984, 531 ; *Danish Bottles* Case, *Common Mkt.L.R.*,1988, 618 ; *Belgian Waste* Case, 2/90, *E.C.R.*, 1992 ; For a comprehensive view of both the European and American federal jurisprudence, see D. GÉRADIN, « Free Trade and Environmental Protection in an Integrated Market : A Survey of the Case Law of the United States Supreme Court and the European Court of Justice », *Florida State University Journal of Transnational Law and Policy*, 1993, 141-197. See also P. DEMARET, « Environmental Policy, The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community » in M. MARESCEAU, *The European Community's Commercial Policy After 1992 : The Legal Dimension*, Norwell MA, Kluwer Publishers.

be found in Agenda 21 (154). In public international law, the proportionality test cannot be used to weigh the legitimacy of the objective of the measure against the impact on trade since the objective is in essence legitimate as it purports to enforce a binding international rule. The balancing test must therefore focus on the gravity of the violation of the environmental rule against the negative impact on trade of the countermeasure. The jurisprudence of the Courts of integrated markets is helpful, if not to build a theoretical framework, at least as a guide in the resolution of specific cases when they arise. An international jurisprudence or new international rules, which would provide accepted principles for a proper balancing of free trade with environmental policies within the principle of proportionality, would be an important development of international law which deserves greater attention.

d) *Certain criticisms of the GATT remain valid, however, as far as unilateral measures, not taken to enforce international environmental rules, are concerned*

Unilateral measures, which are taken on the basis of a unilateral policy, even if pro-environmental and cannot be supported by international conventions or rules, are illegal if they violate the principles of non-discrimination, sovereignty and self-determination. It is normally not the role of the GATT to validate them even for the purpose of environmental protection.

However, in certain very exceptional circumstances, extra-jurisdictional measures can be justified in order to prevent major and imminent damage to the environment or to correct, on a temporary basis, important delays in the establishment of an expected international environmental regime (155). Such measures, although not supported by international rules, should be tolerated by the GATT provided they are taken on a reasonable basis (see below) and in exceptional circumstances. In the light of sustainable development and the principle of precautionary approach, the following rules are not reasonable. These are the test of « necessity » of

(154) Agenda 21 helps in scaling the means used to achieve an environmental goal, to be balanced with their impact on trade. For instance, regarding ecotaxes, Agenda 21 suggests that « governments should seek to avoid the use of trade restrictions *to offset differences in cost arising from differences in environmental standards and regulations* » (Agenda 21, ch. 2, sec. 2.22(e)).

(155) Examples of prohibited measures (such as those based on PPMs) that could be justified in extreme circumstances, could be for instance related to the protection of tropical forests against an imminent threat of massive destruction. These measures could be justified under the Rio Non Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests. Another example could be the protection of endangered species or plants not yet protected by international conventions and whose important benefits to human health have just been discovered. In such case, provisional measures must be adopted before any coordinated international action is taken. States should be granted with a certain discretion to adopt the measures that they consider to be the most effective.

article XX(b), as interpreted by the Panels (objection 3) (156), the *absolute* prohibiton to adopt extra-jurisdictional measures and the obligation to restrict national production in connection with export restrictions of national primary resources (objection 4). If these tests are generally acceptable in the general framework of international law, as expressed above, a certain degree of subtlety is however missing in the GATT, with the consequence that major imminent threats to the environment cannot be overcome (157).

The objections of the environmentalists are thus justified in the situation described above, which is, however, rather exceptional (158). The other criticism of GATT which also remains valid, is based on the formal and obvious contrast of certain GATT rules to certain trade provisions contained in international environmental conventions (objection 5).

To meet the general environmental concerns relating to the GATT regime, certain openings and specifications appeared necessary to the international community. The section below discusses how the WTO agreements somewhat soften the rigidity of the GATT and further tolerate specific unilateral action by the States to protect natural resources. The WTO agreements also indicate and support the adoption of international standards as the direction to be taken by the international community to achieve full integration between free trade and environmental protection.

4. *WTO's directions and openings to avoid pollution as a feature of comparative advantage*

To avoid building States their comparative advantage from differences in cost arising from differences in environmental standards and regulations, the 1994 Uruguay Round Agreements (Agreement on Technical Barriers to trade (TBT) and Agreement on Sanitary and Phytosanitary Measures (SPS)) encourage countries to harmonise domestic regulations and adopt

(156) This criterion may have been slightly softened by the SPS for sanitary and phytosanitary measures. See notes 135 and 167.

(157) It must be noted that the TBT provides for an accelerated procedure for the adoption of standards in case « where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member » (article 2.10). However, the emergency situation only allows a Member not to abide by certain procedural rules, and does not allow it to adopt trade measures that, even if they would be effective, could be more trade restrictive than « necessary » or extra-jurisdictional.

(158) Indeed, many (maybe the majority of the) controversial unilateral measures can be assessed in the light of the proportionality principle, outside the GATT, as they purport to enforce the second rule of principle 21 or any other international rule or standard. Other unilateral measures that would be based on more stringent standards than international standards do not necessarily respond to a major imminent threat. They are thus illegal if they are discriminatory and extra-jurisdictional. They are legal if they are non discriminatory and limited to national jurisdiction such as product standards.

international environmental standards (159). Both the TBT and the SPS admit that standards may, in certain circumstances, take into account « related process and production methods », although article 2.8 of the TBT comples States, whenever appropriate, to base technical regulations on product requirements in terms of performance rather than design or descriptive characteristics (160). The TBT and SPS do not, however, mandate the countries to adopt such international agreements and do not compel them to harmonise standards at the highest practicable levels of protection for the environment (161). This may be regrettable, although the obligation to adopt high standards, provided it does not hinder developing countries' development capacities (principle 3 to 5 of the Rio Declaration (162)), is an application of the polluter pays principle (internalisation of the costs to environment), and is indirectly included in Principle 27 of the Rio Declaration, which states that the duty to cooperate to achieve sustainable development and the duty of good faith also include « further development of international law in the field of sustainable development » (163).

In order to further facilitate the adoption of environmental protection measures, the Uruguay Round Agreement on Subsidies and Countervailing Measures prohibits the application of countervailing duties on certain subsidies aimed at enforcing environmental regulations (164). Although sub-

(159) TBT, preamble and articles 2.4 and 2.5 ; SPS, articles 3.2, 9 and 12. See W. LANG, *loc. cit.*, pp. 550-553.

(160) See TBT, annex 1, and especially, SPS, art. 5.2. and Annex A. See also above, footnote N° 115.

(161) Moreover, article 12 of the TBT in particular provides that, when higher standards may compromise economic development of Least Developed Countries, these countries should not be expected to use these international standards (see also differential treatment given to least developed countries pursuant to article 10 of the SPS). It must be noted, however, that the 1972 Stockholm Declaration on the Human Environment states that « all countries agree that uniform environmental standards should not be expected to be applied universally by all countries with respect to given industrial processes or products *except in cases where environmental disruption may constitute a concern to other countries* » (emphasis added). See Vinod REGE, « Gatt Law and Environment Related Issues Affecting the Trade of Developing Countries », *Journal of World Trade*, vol. 28, N° 3, 1994, p. 103 and followings.

(162) See also article 12 of the TBT and art. 10 of the SPS.

(163) International standards taken pursuant to the procedures of the TBT are mostly desirable since the legality of compatible national standards would no longer be questionable under GATT. Higher or different national standards can be legal but subject to the requirements of the TBT or SPS, and GATT articles III, XI and XX or of other applicable GATT exceptions. If higher or different standards would not satisfy the GATT, the TBT or SPS, they could nevertheless be taken to avoid detrimental spillovers pursuant to the second rule of principle 21, and thus be subject to the proportionality test. The chances of success would, however, be extremely slim.

(164) These are so called 'non-actionable subsidies', i.e. « *assistance given by the states to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burdens on firms* » (article 8.2(c) and 8.9). These rules apply to the industrial sector. Subsidies in the agriculture sector are regulated in the Agreement on Agriculture where countries may claim exemptions from their subsidies reduction commitments for certain type of environmental subsides.

sidies are contrary to the Polluter Pays Principle (Principle 16 of the Rio Declaration), it is generally recognised that permitting the use of environmental subsidies in exceptional circumstances may in fact result in the improvement of a country's overall socio-economic policy (165).

The Agreement on Technical Barriers to trade also allows and regulates the adoption of environmental labels and/or ecolabelling systems. These marketing techniques are generally licit and may relate to production processes provided they do not cause unnecessary obstacles to trade (166).

Also, to a certain extent, the SPS may mitigate the rule of « necessity » contained in article XX(b) (see above note 135) (167).

The WTO Agreements, therefore, slightly « soften » the principles defined in the GATT Panels' previous jurisprudence insofar as they authorise, in certain circumstances, environmental subsidies and trade restrictions related to production process methods. WTO instruments also indicate to the international community that full integration of free trade and environmental protection is to be achieved through the negotiation of international agreements that would define harmonised standards.

It must be noted, however, that there may be a drawback in the TBT and the SPS regarding unilateral product standards. Product standards relate to the quality of a product, its packaging or its components, and differ from process standards insofar as they are not related to production methods. Unilateral product standards, aiming at protecting, among others, the environment, are usually authorised under GATT article III if they apply to all like products in a non-dicriminatory way. However, since

(165) See OECD Recommendations on the PPP, Annexes I to III, 1993.

(166) Article 2 and 5 to 8 of the TBT. These principles are in line with the jurisprudence defined by the first *Tuna-Dolphin* case. Usually, ecolabels and other marketing techniques represent the least restrictive option available to protect against certain forms of environmental degradation and are thus « necessary » in conformity to the Tuna-Dolphin jurisprudence. The TBT also contains rules intended to avoid that local industry influences in a discriminatory way the choice of product criteria and threshold levels for awarding eco-labels. In addition, special attention and most favourable treatment in awarding eco-labels must be given to products of export interest to developing countries (TBT, art. 12 ; see also Ernst-Ulrich PETERSMANN, *loc. cit.*, pp. 45-46 ; Vinod REGE, *loc. cit.*, pp. 128 and foll.). Unsurprisingly, the best results of the work of the WTO Committee on Trade and Environment are expected on the issue of ecolabels and the last clarifications that are needed to ensure full transparency in their usage (see article of M. REITERER, *Gatt, the WTO and the Environment : The Agenda of the CTE, in particular MEAs, Eco-labelling and Trade Liberalisation*, Department for European Integration and Trade Policy, Austrian Federal Economic Chamber, 1996).

(167) The language of the SPS makes clear that States are generally free to adopt sanitary and phytosanitary measures that respond to their own levels of risks. However by requiring that a sanitary or phytosanitary measure is based on sufficient scientific evidence, this could be interpreted either as allowing a certain discretion of the States as to what is « sufficient scientific evidence » or as requiring a strict proof of both the risk combatted and the effectiveness of the measure. In the latter case, the criterion could be more stringent than the GATT interpretation of what is « necessary » since for the GATT, a measure that is not necessarily based on scientific evidence is acceptable provided it is the least trade-restrictive measure available. It is thus the responsability of a future GATT Panel discussing this issue to be sensitive to the various implications of their interpretation, and not only its impacts on trade.

unilateral product standards may have trade restrictive effects by creating technical barriers to trade (168), they may be prohibited by article 2 :2 of the TBT or article 2 :2 of the SPS as unnecessary obstacles to trade, if there are less restrictive options available, such as advertising or labelling (TBT), or if they are not based on scientific eveidence (SPS). Certain criticisms of the WTO system, as being too trade oriented, thus remain valid and are as yet unresolved.

Given that the full achievement of sustainable development requires further international cooperation and active coordination and given the remaining criticisms to the WTO system, suggestions are constantly made to implement in the WTO additional provisions aimed at correcting disturbances arising from differences in environmental protection. Certain of these suggestions are useful and should be positively considered by the international community. The section below adresses them.

D. — *Suggestions to further integrate free trade with sustainable use of natural resources*

It has been suggested to implement a system aimed at internalising costs to the environment and reflecting them in final or export prices, by which violations of international minimum environmental standards or differences in standards might be treated as countervailable subsidies under the GATT (169). Objections to this approach have been raised in that it would be difficult to apply since, on the one hand, countries might be in different stages of development or have different structures, with the consequence that international standards would not always be effective for them (see article 12 of TBT) and, on the other hand, it is technically difficult to compare environmental standards between them (170). This suggestion, although it would have facilitated the enforcement of international standards promoted under the TBT and SPS, was rejected in Agenda 21 and in the Rio Conference on the grounds that « governments should seek to avoid the use of trade restrictions to offset differences in cost arising from differences in environmental standards and regulations » (171). Enforcement of international environmental standards should thus be achieved

(168) In the context of EC law, see the Opinion of Advocate General Van Gerven that explains the impact on trade of product standards (Joined Cases C-401/92 and C-402/92, *Boermans, E.C.R.*, I, 1995, 2199, 2215).

(169) T. Schoenbaum, *loc. cit.*, p. 723 ; see also Senator David Boren's proposal to impose countervailing duties against countries that impose less stringent environmental standards than those in existence for US producers, quoted in Steve Charnovitz, *loc. cit.*, p. 486, note 50 ; see also Konrad Von Moltke, « Free Trade and Mutual Tariffs : A Practical Approach to Sustainable Development », *Ecodecision*, June 1992, pp. 45-46.

(170) E. Brown Weiss, « Environment and trade as partners in sustainable development », *loc. cit.*, p. 733.

(171) Agenda 21, ch. 2, sec. 2.22(e).

by an effective system of dispute settlement procedures and the application of compensation rules under the principles of international liability law.

Another suggestion was to grant the benefits of the Generalised System of preferences to nations adopting appropriate pollution control measures (172). This suggestion has however the drawback of perverting the meaning of the GSP system intended to grant special benefits to developing countries and to place environmental protection over economic development which is contrary to Principle 4 of the Rio Declaration.

Another suggestion which, in contrast with the above, is overwhelmingly supported is the express validation in the WTO instruments of trade restrictions « relating to the enforcement of international environmental agreements ». Indeed, as the realisation has grown that international norms could represent a solution to environmental distortions to trade, it is essential that the institutions of free trade ensure their full effectiveness. Accordingly, specific modifications to GATT are necessary and could be agreed during the next Ministerial Meeting in Singapore in December 1996 (173).

There are other complements or modifications to GATT that should be made in order to ensure the effectiveness of unilateral measures taken in case of environmental emergency. As stated above, emergency measures may be required, on the basis of the principle of precautionary approach, to avoid major imminent threats to the environment. Currently, extra-jurisdictional and/or discriminatory measures, if they are not supported by international environmental rules, are automatically dismissed on the grounds that they infringe the principle of sovereignty and are not necessary in the meaning of article XX(b) — in the view of GATT Pannels, less trade restrictive measures are available. As environmental conditions and priorities may vary from state to state, and since there is no certainty as to the effectiveness of all possible measures, States should have discretion in evaluating the emergency of a situation and the necessity of a measure in order to provide for swift action (174). However, to ensure that « eco-imperialism » is reasonably avoided while major threats to environment are fought, criteria must be defined that severely control the discre-

(172) T. SCHOENBAUM, *loc. cit.*, p. 723.

(173) In the meetings of the WTO Committee on Trade and Development, the relationship between multilateral environmental agreements (MEA) and the trade system have met the concerns of all delegations which could produce the most concrete results on this issue in the next Singapore Ministerial Meeting of December 1996. Propositions currently range from a waiver or ex-port approach (adaptation of GATT article XXV.5 to change the burden of proof) to an amendment (or an interpretative statement) of GATT article XX to specifically address the issue of MEAs (ex-ante approch). See M. REITERER, *loc. cit.* ; G. VAN CALSTER, « The World Trade Organisation Committee on Trade and Environment : Exploring the Challenges of the Greening of Free Trade », *European Env. L.R.*, 1996, p. 44 ; T. SCHOENBAUM, *loc. cit.*, p. 720.

(174) States are provided with a certain degree of discretion in evaluating their own levels of risk under the SPS (paragraph 20) and the TBT (article 2.3). However, such freedom in determining the objectives is hampered by the rule of necessity which restricts the means to achieve the objective.

tion of States, but that are less stringent than the « necessity » test of article XX(b) and that overcome the limit of extra-jurisdictionality. Possible requirements could be the existence of exceptional circumstances such as a major and imminent threat to the environment and the existence of declarations of intentions (175) or provisions of « soft » international law against which the measures may be evaluated. A rule of reason or a severe test of proportionality should also be applied (176) and a system of notification and consultation within the WTO ensuring transparency could be set (177). Preliminary Court rulings actionable by any damaged party should also be possible in a framework of an integrated judicial proceeding (178).

The new « emergency » rules (179) could also be complemented by explicit rules allowing developing States, under specific circumstances and on a temporary basis, to adopt export restrictions of their primary resources without restricting their national production.

Finally, and in complement to the above, the institution of sustainable development would require the integration of the WTO principles and possibly its dispute settlement structures into a coordinated regime controlling and enforcing both sustainable development and free trade as part of the same objective. Currently, the institution of free trade has a structural advantage over the rules aimed at protecting the environment, since free trade is probably the only institution which has been given a compelling dispute settlement mechanism and which is coordinated into a single set of obligatory norms in international law (180). GATT Panels' decisions can therefore be troubling, as they exclusively focus on trade mechanisms

(175) These declarations of intentions often precede the negotiation of major mutilateral agreements.

(176) One type of measures that would not be supported by binding international environmental rules and that could be tested with the criteria above could be those taken by non-tropical countries to protect tropical forests. These measures, among which probably the most effective are those based on PPMs, could be tested in the light of the Rio Non Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests. Also, a severe test of proportionality would also be applied weighting the benefits of the measures against the impacts on trade, the sovereignty of tropical countries and their right to development. There should be of course a marginal control of these tests in the framework of a multilateral procedure for the settlement of conflicts which could well be the one established under the WTO (see above note 150).

(177) See for instance the emergency procedure organised by the TBT (article 2.10).See also above note 157.

(178) Waivers granted under article XXV.5 and the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes might already provide for such situations. However, decisions on waivers require the votes of two third of the Members present and of at least half of all the members (Article XXV.5 of GATT). This may imply lengthy diplomatic negotiations that might block any decision until the adoption of a final consensus. Also, the WTO Understanding on Rules and Procedures does not really organise the possibility to obtain preliminary rulings taken on the basis of urgence.

(179) These rules could either be inserted in the GATT, in the form of a new clause or a statement of understanding, or be the object of a new WTO agreement.

(180) See D. ESTY and his comments on the « institutional imbalance », *op. cit.*, p. 77.

and seem to overrule the other rules of international law, such as environmental protection, while the latter do not benefit from such an effective institutional framework. If certain multilateral environmental agreements do include compelling, but generally less stringent, rules for the resolution of conflicts (181), they only concentrate on specific aspects of the environment without providing for coordinated environmental action that would serve as a counterbalance to the GATT. Nevertheless, a vision of balancing trade and environment through institutional rivalry (182) could also be ineffective from the point of view of sustainable development, as coordination of policy and the administration of conflicts might be very difficult in two organisations whose management and underlining culture would be radically different.

By integrating free trade mechanisms, environmental protection and the right to economic development in a single global organisation dedicated to sustainable development, States would be obliged to integrate environmental and development considerations in their trade negotiations and in their consultations preceding dispute settlement. In a coordinated dispute settlement structure, the Panels would confirm their predecessors' jurisprudence concerning free trade and at the same time apply the other multilateral instruments related to the protection of the environment and sustainable development. For instance, in a litigation procedure such as the Tuna-Dolphin case, Mexico would be, on the one hand, entitled to object to the US Marine Mammal Protection Act on the grounds that it is discriminatory and extra jurisdictional, but, on the other hand, the US would also be entitled to require the respect by Mexico of its commitments, if any, regarding the protection of dolphins. Mexico would in turn be able to claim differential treatment on the basis of its stage of economic development. The rules contained in principle 21 could also be referred to as a way to avoid interference in national policies and at the same time as a means to enforce, through legitimate reprisals, the obligation not to damage the environment of other States. Special procedures would be set up to face specific emergencies. In several circumstances, the rule of proportionality may be used. It would thus be useful if the Panel members include both trade and environment specialists.

Apart from being in accordance with the general principles of international law, a unique and binding dispute resolution mechanism would have the advantage of combining the many existing rules into a coordinated and integrated system of jurisprudence. A unique organisation for sustainable development would also ensure institutional coordination of trade and

(181) See above, IV B 9 and note 90.

(182) D. Esty proposes the establishment of a Global Environmental Organisation whose task would be to coordinate international and national environmental policies and provide a framework that would ensure « symetry » between free trade and the protection of the environment (*op. cit.*, p. 78 and foll.).

environment « cultures » and ensure that international uniformisation of policies would be made keeping in mind the unique objective of sustainable development (183).

E. — *An agenda to integrate WTO rules and principles in the legal definition of sustainable development*

We mentioned above that the text of Principle 12 of the Rio Declaration promoting free trade, although being compatible with the WTO rules and jurisprudence, is not yet inserted as a binding rule in the legal provisions defining sustainable development. Many countries were not convinced at the Rio Conference that they could commit themselves to integrating into the Rio Declaration the GATT principles and their interpretation as they existed in 1992.

Certain aspects of the institution of free trade still need to be challenged and perhaps revised in the light of sustainable development and further environmental protection. Both the texts of Agenda 21 and the Uruguay Round Ministerial Decision on Trade and Environment (attached to the Marrackech Agreement) recognise « *that the interactions between environment policies and trade issues are manifold and have not yet been fully assessed* » (184).

Therefore, much work is still to be carried out in analysis and comparison between the relevant institutions of international law, assessment of their coherence, and, perhaps, modification or creation of new legal principles. The Uruguay Round Ministerial Decision on Trade and Environment, adopted at the closure of the Marrackech Ministerial Meeting implementing the WTO, sets forth an agenda and defines the actions to be taken to pursue the objectives of Agenda 21 (185). A WTO committee on Trade and Environment (CTE) was established to draft a comprehensive report for the December 1996 Ministerial Meeting according to the agenda defined by the Ministerial Decision. At the May meeting of the CTE, it was obvious that many issues required further analysis and discussion, such as the relationship between trade in services, intellectual property rights and the environment, and the « crucial issue of the PPMs » (186). It seems so far

(183) The practical structure and division of tasks within such organisation would, by itself, require a thorough study integrating political and public administration considerations.

(184) Agenda 21, chapter 2.8.

(185) Agenda 21 defines in Principle 12 of the Rio Declaration the objectives to be achieved and the major principles on which the international community already agreed, albeit without committing itself to them. The Uruguay Round Ministerial Decision on Trade and Environment defines the means and actions to be taken to pursue the objectives defined in Agenda 21. Both programmes are compatible and supportive of each other. The Ministerial decision provides for extended public participation in conformity with Principle 10 of the Rio Declaration and in accordance with chapters 27 and 38 of Agenda 21.

(186) M. Reiterer, *loc. cit.*, p. 4.

that only the clarification of rules for ecolabels and the issue of the GATT compatibility of the trade provisions of multilateral environmental agreements could be agreed on in Singapore (187).

In view of the comments above, it is not certain that many modifications to WTO rules will have to be adopted in order to increase their compatibility with sustainable development (188). It is the author's view that WTO rules must essentially be complemented with the other rules existing in international law (to be progressively completed by new rules, such as new international standards and new environmental international conventions), and by provisions allowing unilateral extrajurisdictional trade restrictive action under exceptional circumstances or export restrictions suitable to developing countries. As to the issue of GATT compatibility with multilateral environmental agreements, it should be resolved ar a rather early stage. The focus of the international community should thus be to provide the necessary institutional and substantive means to complete and coordinate the legal framework surrounding sustainable development, without necessarily drastically changing the GATT or the other WTO instruments, or formally subjugate them to the single goal of environmental protection.

VI. — Conclusion : THE POSITION OF SUSTAINABLE DEVELOPMENT IN THE PRESENT INTERNATIONAL LEGAL ORDER

There is little doubt that the notion of sustainable development shapes a new international order, according to which all subjects of international law are entitled to pursue the objectives of economic development and growth while obligated to preserve a sound and healthy environment. Sustainable development is also presented, with peace, as one of the final goals to be achieved by the international community. Such a framework relegates the other institutions of international law to be the means towards the end. This new structure of the international legal system has been under gradual construction, coupled with constant refinement since the United Nations Conference on Human Environment in Stockholm in 1972. First, the connection between development policies and the protection of the environment was made in the Stockholm Declaration. It was further reinforced by numerous international instruments, which recognize both developing countries' rights to eradicate poverty and achieve economic development and the obligation of States to protect numerous aspects of their environment. Presently, many elements of the legal defini-

(187) id. p. 20.
(188) See also J. Jackson, *loc. cit.* ; D. Palmeter, « Environment and Trade : Much Ado about Little », *Journal of W.T.*, 1993, 55-70.

tion of sustainable development are well integrated in the international legal order, in many important international conventions :

— the obligation of States to eradicate poverty and their entitlement to achieve economic development ;
— the general obligation for States to protect their environment ;
— the corollaries to the latter principle (189), described in the Rio Declaration, even if certain of them are still emerging rules of international law (190) ;
— an enormous number of environmental treaties and conventions ;
— the principle 21 recognising the sovereignty of States over their natural resources and their concomitant obligation to refrain from harming the environment of other States ;
— the obligation to facilitate the transfer of technologies and net financial resources ;
— the principles of cooperation and good faith that complete many of the above principles, the legal effect of which is consequently increased, and that provide grounds for other precepts, such as that of common but differentiated responsibility and the actual obligation to transfer technology at below market prices ;
— the principle of peaceful conflict resolution ; and
— the promotion of free trade.

All these principles, which balance each other out, contribute to shape the general thrust of sustainable development. The merger between development and environmental protection and preservation is thus definitive and forms an integral part of the international legal order (191). Moreover, the obligation to pursue sustainable development as a final policy goal is grounded on so many repeated declarations by States, which indicate the existence of an « *opinio juris sive necessitatis* », and insertions in normative binding rules that it shapes a new international custom.

There are still certain specific rules, such as those of the WTO that seem to contradict the objectives of sustainable development. Most of them can be resolved by legal interpretation. Therefore, an integrated dispute settlement mechanism, where all rules of international law would be deliberated and the objective of sustainable development promoted, would be an asset

(189) These include, for instance, the obligation of all the States to enact effective environmental legislation, the implementation of international environmental treaties, the drafting of environmental impact assessments when designing public policies and public participation, the precautionary approach principle, the adoption of legislation regarding liability and compensation for the victims of pollution, the prevention of the transfer of harmful activities and substances, and the notification in the case of emergencies and activities with significant transboundary effect.

(190) Such emerging rules include the duty to eliminate patterns of production and consumption that are not sustainable in the long term, the adoption of appropriate demographic policies and the full implementation of the polluter pays principle.

(191) See A. KISS, *loc. cit.*, p. 64.

in the progress of international law. The benefits would be equivalent to those created by the jurisprudence of the European Court of Justice in European Community law. Procedural rules, however, should be those of the WTO, since, different societies being involved, States must keep an open political forum where sensitive controversies on specific cases can be discussed.

Certain other contradictions between existing rules and the objective of sustainable development cannot be resolved by legal interpretation. These contradictions include tolerances of protectionism in the commodity sector and the possibility left to countries, which are not parties to certain important environmental agreements, to hinder their effectiveness on the basis of trade rules. The absence of rules allowing certain unilateral restrictions to trade based in cases of environmental « emergencies », on production processes that generate pollution, is regrettable, even if such restrictions have an extra-jurisdictional effect. Finally the prohibition of certain types of export control measures hamper the possibility of certain States to exploit their natural resources for themselves while preserving them from external consumption. Therefore, in such circumstances where law and legal interpretation are incapable of resolving conflicts between contradicting rules, the States must re-negotiate and agree on ways to resolve, politically and proactively, these contradictions.

As a conclusion, notwithstanding the general loose normativity of many of its precepts, the presence of many obligations of all means rather than results, the multiple gaps still to be settled by the international community and the difficulties in implementation, the progress achieved at the Rio Conference is considerable and promising. It is certainly not the end of a process, but rather the starting point of new patterns of behaviour within and between the States. It also consecrates the emergence of an international civil society composed of citizens and NGOs who, under the principle of participation, would take part in the drafting of future rules and sooner or later in the surveillance of the compliance of the behaviours and policies of States with their international obligations (192).

This gives hope for the future fulfilment of more balanced societies both in the North and the South.

(192) A. Kiss, *loc. cit.*, p. 64.