

THE CONCEPT OF COMPENSATION IN THE FIELD OF TRADE AND ENVIRONMENT*

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I. BACKGROUND OF STOCKHOLM RECOMMENDATION 103

Recommendation 103 of the United Nations Conference on the Human Environment (Stockholm, June 1972),¹ in treating certain questions of international trade and measures for the protection of the environment, proposed *inter alia*

that where environmental concerns lead to restrictions on trade, or to stricter environmental standards with negative effects on exports, particularly from developing countries, appropriate measures for compensation should be worked out within the framework of existing contractual and institutional arrangements and any new such arrangements that can be worked out in the future²

The recommendation called for an examination of the problems in this context and an adjustment of trade differences, cooperation and coordination in elaborating environmental standards, and assistance in meeting the consequences of stricter environmental standards.

The primary preoccupation quite obviously motivating Recommendation 103 was expressed in its first paragraph, which stated

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¹ The United Nations Conference on the Human Environment was held in Stockholm from 5 to 16 June 1972. It is referred to throughout this article as the Stockholm Conference.

² Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), reprinted in UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, THE RESULTS FROM STOCKHOLM 1, 70 (E. Verlag ed. 1973) [hereinafter cited as RESULTS]. For the complete text of Recommendation 103 see the appendix to this paper.

that all countries present at the Conference agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets and recognize further that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries.³

In fact, the differences in approach and priorities made it difficult for most developing countries to understand fully the extent to which industrialized countries were concerned with their own particular environmental problems. They had experienced too many negative effects occurring in industrialized countries not to fear that this "new problem," and the manner in which industrialized countries would cope with it, would adversely affect their efforts for economic development and further increase their difficulties in the international economic system. They had suffered from technological and industrial progress in the already industrialized countries and the ensuing deterioration of their terms of trade, from the disruptions in the world monetary system and even, to some extent, from the economic integration among industrialized countries. Concern with the environment in the industrialized countries, it was feared, might again adversely affect the efforts for development in the developing countries.

This preoccupation is justified, at least as far as regulations for the protection of the environment will affect international trade and the allocation of resources. Some cases have occurred already; they range from industrial products such as cars, detergents, etc., to agricultural products which have been treated with certain chemicals. The question as to whether the effects on trade and the allocation of resources will be beneficial or detrimental to the economic/trading position of developing countries is discussed below.

At an early stage in the preparations for the Stockholm Conference, this preoccupation with the adverse effects of environmental regulations on the trading position of developing countries was expressed. Already, the Founex Report (June 1971) states in paragraph 4.3, that there "are growing fears in the developing world that the current environmental concern in the developed countries will affect them adversely in the fields of trade, aid and transfer of technology."⁴

³ See appendix to this paper; RESULTS, *supra* note 2, at 70.

⁴ Secretary-General of the U.N. Conference on the Human Environment, Report of the Panel of Experts on Development and Environment, 4 to 12 June 1971 (mimeographed conference paper) [hereinafter cited as Founex Report]. The meeting was held in Founex, Switzerland. The Founex Report is reprinted in Annex I, U.N. Doc. A/C.48/10 (1971). It may also be found in *Development and Environment*, 1972 INT'L CONCILIATION No. 586, at 7.

Six months after the meeting at Founex, the U.N. General Assembly passed its Resolution 2849 which, *inter alia*:

4. *Stresses* that both the action plan and the action proposals to be submitted to the United Nations Conference on the Human Environment must, *inter alia*:

...
(b) Recognize that no environmental policy should adversely affect the present or future development possibilities of the developing countries;

...
(e) Avoid any adverse effects of environmental policies and measures on the economy of the developing countries in all spheres, including international trade, international development assistance and the transfer of technology;

...
10. *Requests* the Secretary-General of the United Nations Conference on Trade and Development [UNCTAD] to prepare a comprehensive study, to be submitted to the Conference at its third session, on the effects of environmental policies of developed countries which might adversely affect the present or future development possibilities of developing countries, by means of, *inter alia*:

...
(b) A further deterioration in the trading prospects of developing countries by the creation of additional obstacles, such as the new non-tariff measures, which might lead to a new type of protectionism.⁵

The UNCTAD study⁶ called for by the General Assembly resolution was prepared in March 1972 and submitted to the Third Session of the United Nations Conference on Trade and Development (UNCTAD III) in Santiago de Chile in May 1972. The report deplored the "scarcity of data and detailed studies in this field" (paragraph 3) and was able to conclude that "environmental actions by developed countries may thus have a profound and multiple impact on the growth and external economic relations of developing countries" (paragraph 57).

Resolution 47 adopted at UNCTAD III recommended to the United Nations Conference on the Human Environment that it bear in mind relationships between the environment and trade and development, especially of developing countries, and called the attention of the Confer-

⁵ G.A. Res. 2849, 26 U.N. GAOR, Supp. 29, at 71-72, U.N. Doc. A/8429 (1971).

⁶ UNCTAD Secretariat, Report on Impact of Environmental Policies on Trade and Development, in Particular of the Developing Countries, U.N. Doc. TD/130 (1972) [hereinafter cited as UNCTAD Report]. The UNCTAD Report was prepared for the third session of UNCTAD held in Santiago de Chile in May 1972.

ence to the report of the UNCTAD Secretariat.

Parallel to the UNCTAD activity, GATT conducted research in this field and in June 1971 issued a study on industrial pollution control and international trade.⁷ This study was primarily concerned with trade effects caused by environmental regulations concerning industrial processes rather than those concerning products, but it also stressed the considerable influence which environmental regulations may have on international trade and capital flows.

In a number of preparatory meetings to the United Nations Conference on the Human Environment, and in particular in the regional seminars, the question of trade effects of environmental regulations was also extensively discussed, frequently on the basis of the Founex Report. The specific notion of compensation was first developed at the All-African Seminar on the Human Environment (one of five regional seminars held in preparation for the Stockholm Conference) in Addis Ababa from 23 to 28 August 1971. The report⁸ states:

Additional funds would be required to subsidize research into the environmental problems of the developing countries to compensate for major dislocation in the proceeds of their exports, to cover the additional costs of development projects, to restore their investment or production patterns, etc.⁹

The Founex Report (to which the discussion in this passage from the African Regional Seminar refers) did not refer expressly to any direct form of compensation, but only suggested that "action should be taken to cushion the disruptive effects of such measures on the trade of the developing countries through a system of prior consultation and warnings by the developed countries of environmental actions contemplated by them." However, the Founex Report did suggest that "in certain cases, the possibility of channelling additional aid towards adapting export industries in developing countries to the new requirements in developed countries or towards diversification of their exports should also be studied" (paragraph 4.5).

The Report on Development and Environment for the Stockholm

⁷ Secretariat of GATT, *Industrial Pollution Control and International Trades* (GATT Studies in International Trade No. 1, 1971) [hereinafter cited as GATT Report]. This was the Background Paper No. 4, submitted to the Founex Conference.

⁸ First All-African Seminar on the Human Environment, Report, U.N. Doc. E/CN.14/532 (1971). The seminar was held in Addis Ababa, Ethiopia, from 23 to 28 August 1971 and was jointly sponsored by the Economic Commission for Africa and the U.N. Secretariat, Geneva.

⁹ *Id.* para. 26.

Conference¹⁰ takes up more specifically the concept of compensation; its Recommendation 32, later submitted as a proposal which was transformed into Stockholm Conference Recommendation 103, calls for "appropriate measures for compensation" in cases of restrictions on trade or negative effects on exports due to stricter environmental standards.

This proposed recommendation¹¹ was the subject of long debates during the Stockholm Conference, and a number of industrialized countries opposed the provision concerning compensations either on grounds of principle (e.g., the United States of America and Japan) or because of their doubts as to the applicability of this concept (e.g., the United Kingdom and Italy); France, which voted for the recommendation, expressed doubt that it could be implemented and stressed that many problems raised in the recommendation still needed to be resolved.

Some countries, like the United States and Canada, although opposed to the concept of compensation, suggested financial or technical assistance to aid the developing countries to bring their export products into compliance with the stricter environmental standards of developed countries.

In the final text¹² of Recommendation 103, some passages were added to the proposal, but these additions did not contribute to a clarification of the concept of compensation nor did they give any clear indication as to its implementation.

In the final form of Recommendation 103, the notion of compensation then appears in two forms:

- a. Paragraph (b) of the recommendation in a broad and general manner calls for "appropriate measures of compensation"¹³ for trade restrictions and for negative effects on exports due to stricter environmental standards.
- b. In a much narrower sense, paragraph (d) calls for "[a]ssistance in meeting the consequences of stricter environmental standards," but it should be noted that this assistance, according to the recommendation, "ought to be given in the form of financial or technical *assistance for research* with a view to removing the obstacles that the products of developing countries have encountered."¹⁴

¹⁰ Founex Report, *supra* note 4.

¹¹ The proposed and adopted texts of Resolution 103 are set out in the appendix to this paper.

¹² References cited note 3 *supra*.

¹³ *Id.*

¹⁴ *Id.* (emphasis added).

II. COMPENSATION AS A CONCEPT IN INTERNATIONAL ECONOMIC RELATIONS

Recommendation 103 presents the concept of compensation only in very general terms and mentions only one particular measure which could be considered as one of the forms in which compensation should be granted. The indication that measures for compensation "should be worked out within the framework of existing contractual and institutional arrangements," was an amendment to the original proposal, but does not serve to delineate clearly the concept of compensation since the passage continues by referring to "any new such arrangements that can be worked out in the future." Nevertheless, a brief look at existing contractual and institutional arrangements may help give an understanding of the concept.

In the absence of clear criteria in the recommendation itself for determining the notion of compensation, it is necessary to deduce the meaning of this concept from the underlying principles and the purposes it is to serve. This paper will examine the circumstances under which the trade positions of developing countries may be affected adversely by "environmental concerns" of industrialized countries and the possibilities for redressing these adverse effects. The purpose, therefore, is to investigate the possibilities for most effectively implementing the recommendation after considering the preoccupations which have motivated it. In this paper, *compensation* will be understood as any action taken to redress adverse effects caused to the trading position of the developing countries by measures which industrialized countries have taken in their concern for their environment. It is granted that this definition has, in some aspects, a wider scope than the terms expressly used in the recommendation indicate.

Before dealing specifically with compensation in the context of trade and environment, a glance at the use of the concept of compensation in related fields may be useful. The concept of compensation is frequently invoked in international commercial relationships. The best known example is the case of article 19 of the General Agreement on Tariffs and Trade (GATT) which provides the contracting parties in certain emergency situations with the possibility of raising a particular tariff. In such an event, the contracting party which wishes to avail itself of this provision has to advise the other contracting parties and, in particular, those affected by its intention, and consult with them in respect of the proposed action. This consultation should lead to a compensatory adjustment so that the general level of reciprocal and mutually advantageous concessions in GATT is maintained. The adjustment may take the form

either of compensatory concessions on the part of the contracting party taking action under this provision, or of the withdrawal of concessions by the contracting parties affected by this action.

A similar provision is contained in article 24 of GATT, which permits derogations of the most-favored-nation clause in case of customs unions. If a contracting party not joining the Customs Union is faced with higher tariffs in its exports to a member of the Customs Union, negotiations for compensatory arrangements are required (article 24, paragraph 6). This provision played a considerable role in the negotiations accompanying the formation of the European Economic Community (EEC) and, recently, has again been invoked by some nonmembers requesting compensation for trade losses due to the enlargement of the Community.¹⁵

In a different context, the concept of compensation has been invoked in UNCTAD. Thus, Resolution 58 adopted at UNCTAD III noted the adverse effects of major currency realignments on the terms of trade of a number of developing countries and recommended compensation in the form of additional aid, alleviation of debt service, and compensation for losses in monetary reserves due to currency realignments.

A more detailed investigation into this aspect may reveal further examples of compensation for trade losses; for example, reference may be made to negotiations for the reduction of poppy plantations in view of more efficient drug control and adaptation mechanisms provided for the agricultural regions concerned.

These few examples may show that certain mechanisms for compensation in the case of new trade barriers are already provided in the framework of existing arrangements. The study by GATT therefore concluded that "any conflicts of trade interests arising from variations in national standards (resulting from environmental regulations of products) or from testing and certification problems in their enforcement may be resolved through existing and evolving arrangements and procedures relative to problems posed by standards in general."¹⁶

This conclusion is based on a somewhat traditional outlook on international trade relationships. Such traditional concepts of international trade to a large extent leave it to the importing state to decide on the standards of imported goods, provided that such standards are not discriminatory or do not aim at trade advantages for the importing state. In general, an exporting state has no claim to protection and preservation of a certain trading position. During the debates at the Stockholm

¹⁵ See G. CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY* 118 (1965).

¹⁶ GATT Report, *supra* note 7, at 22.

Conference, the United States stressed this traditional conception and opposed, as a matter of principle, the notion of compensating nations for declines in their export earnings, regardless of cause.

In trading relations between partners of comparable economic situations, such a position appears quite reasonable. One may even hold that it is not contradictory to this position if the United States, together with other countries such as Japan, Canada, and Australia, requests compensation for the adverse effects on its trade with the United Kingdom, Ireland, and Denmark, caused by the entry of these countries into the European Common Market. Such requests for compensation, as pointed out above, are based on article 24, paragraph 6, of GATT and are justified on the grounds that the relations in the different national customs systems are the result of previous negotiations and mutual concessions. If one of the partners, by entering into a customs union raises its tariffs vis-à-vis another partner not entering, and thereby withdraws some of its concessions, the other partner should be compensated for such withdrawal.

In the case of compensation referred to in Recommendation 103, the situation is quite different. Compensation in this context precisely does not provide for cases of discriminatory trade barriers (in fact countries have agreed "not to invoke environmental concerns as a pretext for discriminatory trade policies"), but provides for cases where trade barriers are perfectly justified due to legitimate environmental concerns; nor may a developing country requesting compensation invoke previous tariff concessions, as can be done in the context of article 24, paragraph 6, of GATT. The traditional framework of international trade does not seem to justify any request for such compensation referred to in Recommendation 103.

Such compensatory requests are justified by different considerations. The international community has recognized its responsibility for the economic development of less developed countries and has endorsed it in the proposals set out by the United Nations for the Second Development Decade providing for an international development strategy. The United Nations and the member states are expected to support efforts for the achievement of this objective and to abstain from any action which might jeopardize its success. In the context of development and environment, this has been confirmed again by U.N. General Assembly Resolution 3002 of 15 December 1972.¹⁷

It is quite evident that adverse trade effects due to environmental

¹⁷ G.A. Res. 3002, 27 U.N. GAOR, Supp. 30, at 47, U.N. Doc. A/8730 (1972).

measures will aggravate the economic position of an exporting country and adversely affect its efforts for development. The difficulties with which developing countries are faced are already great, and it appears doubtful whether these countries should also have to bear the additional burden of a reduction in vital foreign earnings by trade restrictions based on environmental concerns of industrialized countries.

The concept of compensation, as endorsed in Recommendation 103, is based on the international objectives of economic development of the less developed countries and expresses the responsibility of the international community for the achievement of the objectives of the Second Development Decade.

This difference in justification for compensation under Recommendation 103 should be borne in mind when reference to existing contractual and institutional arrangements is made. Nevertheless, these existing arrangements may be valuable as a basis and starting point for the elaboration of new arrangements to fit the requirements of a new form of compensation.

Before examining the adequacy of existing systems to provide the measures called for by Recommendation 103, it is necessary to discuss those measures which may affect the trade position of developing countries; that is, the circumstances in which the need for compensation may arise.

III. MEASURES POSSIBLY AFFECTING THE TRADE POSITION OF DEVELOPING COUNTRIES

The question of possible effects of environmental regulations on international trade does not seem to have been studied in sufficient detail to allow well-founded conclusions. Studies on this subject rely heavily on general considerations, or extrapolate from the few existing data. It appears essential to conduct detailed investigations into the flow of certain goods and capital and into the possible effect which existing or envisaged environmental regulations may have on these flows. In the absence of such detailed information, the present paper can deal only with general considerations.

A. *Exports from Developing Countries*

Some studies¹⁸ examining the trade effects of environmental measures distinguish three categories:

¹⁸ See, e.g., GATT Report, *supra* note 7; Walter, *Environmental Control and Patterns of International Trade and Investment: An Emerging Policy Issue*, 100 BANCA NAZIONALE DEL LAVORO Q. REV. 82 (1972).

- a. industrial products in their intended use,
- b. products after they have been used, and
- c. production processes.

Measures of environmental control and the regulations which governments may pass in this context may affect international trade in different ways. Therefore, each of these three categories is analyzed separately below.

1. *Products in Their Intended Use*

Governments have started to examine products on their national markets for their possible effects on the environment. An increasing number of goods are subject to national regulations requiring certain standards. These standards may range from the content of lead and sulfur in gasoline to the biodegradability of detergents and from requirements for automobile construction (reduction of exhausts) to the conditioning of certain foodstuffs (traces of antibiotics in meat, traces of DDT in food and vegetables). The measures may consist of levying additional charges on the distribution of products not conforming to the standards or of forbidding their distribution on the national market altogether. The intended object in all cases is to restrict, or eliminate entirely, the use of products not conforming to the standards.

The trade effects of such measures may occur on two levels: they may either affect a given product directly and restrict its imports or have an indirect effect in instances where the product in question is produced nationally with imported raw materials.

As concerns restricted products, it appears at first sight that mainly trade between industrialized countries is involved and the cases cited in the studies on this subject seem to confirm this impression. The notable exceptions are agricultural products, which may be affected by regulations concerning the content of certain chemicals in foodstuffs. The UNCTAD study¹⁹ cites the case that importation of fruit and vegetables carrying traces of some DDT and some other pesticides has already been banned in a number of Western European countries.

In view of the considerable role played by agricultural products in the exports of developing countries, such measures may have serious effects on the trading position of certain developing countries. In the absence of any detailed studies on this subject, the extent of these effects cannot be fully assessed.

Mention should be made of some of the difficulties which arise when

¹⁹ UNCTAD Report, *supra* note 6, para. 29.

environmental and health standards are applied to agricultural products. Frequently, it is not the use of certain chemicals in the agricultural product which is considered harmful by the importing country but rather the residue of such a chemical in the agricultural product if it exceeds a certain concentration. The concentration of such residues in turn depends on a number of factors, some of which (such as meteorological conditions) are beyond human control (e.g., the concentration of residues of fertilizers and pesticides may depend on the amount of rainfall after treatment). Thus, it may depend on the season, the region, or the technique of the individual farmer whether a crop meets the environmental standards of the importing country. Upon arrival in the country of destination, a shipment of agricultural products may be found contrary to standards and it may be too late to dispose of it; so it has to be destroyed.

The effect of product standards on imports of raw materials used in the national production of goods subject to environmental restrictions is as difficult to assess as that on imports of finished products. In the case of certain raw materials, in particular those for which demand is inflexible, such restrictions may have a considerable effect. It may be true that in certain cases one raw material may be replaced by another,²⁰ but this is often of little consolation to the developing countries directly affected by the consequences of these restrictions.

It should be noted that such measures are basically of the same kind as those for the promotion of health and safety, and that the state in principle does not contravene its international obligations if it enacts such restrictions provided they are nondiscriminatory. A number of principles and procedures to be followed in the field of non-tariff barriers have been elaborated by the international community, particularly in the framework of GATT. The question of whether and how these principles and procedures may be further developed in the field of trade and environment will be examined below.

2. *Products After They Have Been Used*

This item refers primarily to questions of waste disposal and the increasing costs created thereby for the communities. The GATT study expressed the opinion that "problems posed by solid waste disposal are mainly local or national in character."²¹ This statement does not take into account the effects on international trade of measures taken on a

²⁰ In particular there is a tendency in favor of countries producing oil with a low sulfur content. See *id.* para. 13.

²¹ GATT Report, *supra* note 7, at 5.

local or national level. There are tendencies to put the costs for waste disposal not on the community as a whole but on those of its members which in the process of production, packing, and consumption have caused the waste. This would mean that products which after their use create for the community additional costs for their disposal should be subject to additional taxes. Such taxes should either discourage the use of the product altogether or compensate the community for the additional costs created by the disposal of these products.²²

Measures of this nature concern primarily the packaging industry but include those producers who, for questions of conservation, presentation, or easy distribution, depend on certain forms of packing. As far as the packaging industry is concerned, measures of the above-cited nature would probably affect primarily producers of plastic packaging and may thereby favor the replacement of plastic by other raw materials, possibly also from developing countries, such as paper and wood products.

Agricultural products should be cited among the products for the distribution of which packaging is of particular importance. The larger the distance between the farm and the consumer, the greater the importance of adequate packaging. This holds as true for perishable foods and vegetables as for meat and dairy products. Increases in packaging costs due to environmental regulations of the above-cited nature may reduce the comparative advantages of developing countries in agricultural products and thereby adversely affect their trade position. It will be even more difficult to evaluate trade losses of this nature than it is to evaluate trade losses directly resulting from restrictive environmental regulations.

3. *The Production Process*

Producers in countries with higher environmental standards show themselves increasingly preoccupied with the additional costs which they incur in meeting these higher standards. This creates fears that countries introducing environmental regulations will contribute to their own industry being priced out of certain key world markets, the resultant loss of jobs, and an unfavorable trend in the balance of payments.²³ Two kinds of reaction may be envisaged.

²² The Swedish taxes on bottles and cans are in this category.

²³ See Halpern, *A Major Obstacle to World Environmental Accord*, 1972 ATLANTIC COMMUNITY Q. 239, 241 [hereinafter cited as Halpern]. This aspect receives extensive treatment in the GATT Report, *supra* note 7, and the UNCTAD Report, *supra* note 6.

In the first place, countries continue to set their environmental standards according to their own policy objectives, taking into consideration in particular the "pollution level." This conception is expressed in Recommendation 103, recommending that governments take the necessary steps to ensure

(e) 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 those cases where environmental disruption may constitute a concern to other countries.²⁴

The normal consequences of such policy, *i.e.*, in the absence of government intervention, could be "an accelerated transfer of industries or processes causing the most pollution to countries facing a less urgent pollution problem."²⁵

This possible effect of different environmental regulations in different countries has been pointed out in various studies on the subject and was referred to at the Stockholm Conference and in the preparatory meetings for that Conference. It was considered generally as a beneficial and advantageous process. However, it should not be overlooked that a transfer of polluting industries, if it takes place at all, for reasons of infrastructure and labor force may tend to favor the most developed regions of developing countries, thereby aggravating the present environmental problems which exist in some of these regions.

Another reaction becomes of growing importance in certain countries with higher environmental standards. It calls for a system of protective subsidies for national industries on the one hand, or such trade "equalizers" as tariffs, surcharges, or selective import duties on the other.²⁶ The mechanisms and the implications of such policies have been examined and discussed by Walter²⁷ and by the GATT study. The latter concluded that "[g]overnment assistance can assume many forms, including direct import limiting measures. In the latter form, however, it would be likely also to give rise to international commercial policy disputes."²⁸

Import-restricting measures based on different environmental standards concerning the production processes would deprive developing countries of one of their few competitive advantages and create consid-

²⁴ See appendix to this paper; RESULTS, *supra* note 2, at 71.

²⁵ GATT Report, *supra* note 7, at 23.

²⁶ See Halpern, *supra* note 23, at 141.

²⁷ See authorities cited note 18 *supra*.

²⁸ GATT Report, *supra* note 7, at 23.

erable trade damages. The point has been argued quite adequately by Beckerman who states:

Thus poorer countries may have an increasing comparative advantage in the production of pollution-intensive goods, in the same way as they have had an increasing comparative advantage in the production of goods that are intensive in unskilled labour. They must be allowed to reap the benefits of the former comparative advantage as of the latter, and they can only do so if prices in international trade reflect the higher pollution abatement costs that are generally appropriate in the wealthier countries. It is no more unfair for a poor country to obtain some comparative advantage from the production of some pollution-intensive goods, if, indeed, its optimal pollution abatement costs are lower than in a rich country—than it is for France to have a comparative advantage in the production of wine, or the United States to have a comparative advantage in the production of wheat, or of goods that require a lot of modern technology.²⁹

Thus, import restrictions based on a difference in environmental standards concerning production processes do not only entail adverse effects on international trade, but also may be considered contrary to traditional rules in international trade and, at least to a certain extent, inconsistent with states' rights and obligations; for instance, under the GATT rules. Claims for compensation may in some cases possibly be based already on these GATT rules. The need to complement these rules and provide for protection in particular of the developing countries appears evident; Recommendation 103 is a step in this direction.

4. *Standardization*

The previous sections refer to action taken on a national level. Action on an international level may also affect the position of developing countries. The position taken in Recommendation 103 appears to be contradictory. Referring to industrial processes and products, paragraph (e) of the recommendation states that "uniform environmental standards should not be expected to be applied universally by all countries." However, the recommendation goes on to state that "[i]n addition, in order to avoid an impairment of the access of the developing countries to the markets of the industrialized countries because of differential product standards, governments should aim at worldwide harmonization of such standards."³⁰ This latter passage, in fact, was inserted

²⁹ Beckerman, *Economic Development and the Environment: A False Dilemma in Environment and Development*, 1972 INT'L CONCILIATION No. 586, at 51, 68.

³⁰ References cited note 3 *supra*.

in the final text as an amendment by the Federal Republic of Germany, France, and Canada. In order to resolve the contradiction in paragraph (e), one would have to assume that "harmonization" of product standards does not aim at "uniform environmental standards" with respect to products.

It may be assumed that the purpose of harmonizing product standards is to facilitate export planning for developing countries and to avoid adverse trade effects by what may be considered "excessive" environmental standards for products.

Understood that way, harmonization in the long run may have favorable effects on the trade position of developing countries, although the above-mentioned difficulties concerning agricultural products should not be overlooked. In the short run (*i.e.*, during the time developing countries may need to adapt their production to a certain environmental standard in the countries to which they export) such harmonization may in certain cases prevent developing countries from exporting to a country with lower product standards those goods which are barred from another country that raised its environmental product standards.

In summing up the explanations concerning measures possibly affecting the trade position of developing countries, it should be repeated that it is by no means certain that increasingly strict environmental regulations adversely affect the overall trade position of developing countries. As shown above, in a number of instances individual measures will adversely affect the trade position of particular developing countries and are likely to lead to considerable disturbances in their trade relationships.

B. *Imports*

Recommendation 103 refers to "access to markets" and exports but does not seem to refer to effects of environmental measures on imports. It appears to be quite likely that the trade position of the developing countries may also be affected on the import side. The increased production costs due to environmental regulations would increase the price of goods thus produced without in any way ameliorating the quality. This effect may be comparable to that of wage increases in the industrialized countries.

On the product side, it is likely that environmental standards of products produced in industrialized countries may frequently be above the requirements of developing countries. In cases where given products are available only in industrialized countries, developing countries will have to pay for such "excessive" environmental standards, without requiring

such standards themselves, unless manufacturers in industrialized countries can be persuaded to produce a "line" of goods meeting the special environmental requirements and conditions of developing countries. Harmonized environmental requirements in developing countries on a regional level may be an incentive for such special "lines" of products in providing a sufficiently large market for them. Such special lines of products for developing countries may even lead to a transfer to the developing countries of the production of some of these goods. These goods should not be considered in any way as second-class, but rather as adapted to the particular circumstances.

The problems relating to increases in import costs may be considered as part of the problem referred to generally as "deterioration of terms of trade," and it appears extremely difficult to evaluate even in an approximate manner the effects of such increases in costs and prices on the trading position of the developing countries.

IV. FORMS OF COMPENSATION

With the exception of the reference to "financial or technical assistance for research," Recommendation 103 stipulates the principle of compensation without stating in any way the forms in which this compensation should be granted. The forms in which compensation should be provided have to be deduced from the notion of compensation itself, from general international practice in this field, and from the purposes which it is to serve.

"To compensate" generally is defined as "to be equivalent to" or "to make up for" (Webster's Dictionary), or "to counterbalance" or "to make amends" (Oxford Dictionary). To compensate for negative effects on exports implies, therefore, that the country claiming compensation should be placed in a position as if these negative effects had not occurred.

The term compensation generally does not imply any judgment on the cause for which compensation is granted: in international trade relations a state may be obliged to grant compensation for damages caused by an illegal act just as for measures it is authorized to take (*e.g.*, in principle, nationalization of foreign property). Thus, in order to claim compensation in a given context, it does not necessarily have to be shown that the measures taken by the state owing compensation as such were contrary to international obligations.

Within the framework of existing arrangements, and in particular in GATT, compensation is provided for under certain circumstances. However, such compensation as provided for in articles 19 and 24,

paragraph 6, of GATT refers only to the withdrawal of certain trade concessions, such as an increase in tariff rates, and their compensation by concessions of a similar nature. As pointed out above, a reference in Recommendation 103 to existing contractual and institutional arrangements does not imply that compensations should be granted only in the form provided by these existing arrangements: new arrangements can be worked out in the future. In working out such arrangements, the following forms may be envisaged.

A. *Comparable Trading Concessions*

The GATT rules provide that the withdrawal of a concession in trading relationships may be compensated by granting a comparable concession or by permitting the beneficiary of the withdrawn concession to withdraw in turn a comparable concession. In view of existing trade relationships between developing and industrialized countries, the second alternative is not likely to have much practical effect in the context of trade relationships envisaged in the present study. The granting of compensatory concessions, on the other hand, may create a number of problems.

Unilateral tariff reduction by industrialized countries, especially where finished and semifinished products are concerned, is frequently demanded by developing countries. However, in a given case of compensation, many developing countries may compete for a product eligible for compensatory import facilities. It is likely to be quite difficult to find an arrangement providing for sufficient import facilities in order to compensate for the losses incurred by a particular country in another trade position without discriminating against other developing countries.

It appears that any arrangement effectively compensating a developing country, for a specific case of reduced access of one of its products to a given market by granting facilities for the access of another of its products to the same market, will be confronted with the problem of discrimination. While the notion of unilateral trade advantages for the developing countries as a whole is gaining ground, a treatment differentiating between developing countries generally is not admitted, and even preferential treatment in the framework of association agreements is being heavily criticized.

It appears that the granting of trade preferences to developing countries in compensation for reduced access to a given market for some of their products should also be envisaged in the wider context of the negotiations for unilateral trade advantages to developing countries. Besides this, additional measures appear necessary.

B. *Assistance in Adapting Export Industries*

Recommendation 103 provides expressly for "assistance in meeting the consequences of stricter environmental standards" but states that they should be given "in the form of financial or technical assistance *for research* with a view to removing the obstacles that the products of developing countries have encountered."³¹ It is quite evident that assistance for research is not sufficient to permit the necessary adaptation in the export industry of the developing country suffering from certain negative effects of environmental regulations. Assistance should be given in selecting the goods which are to be produced in the developing country affected by the trade restrictions and which may find access to the market in the restricting country. The assistance should be in selecting the product, in the development of its production, in the marketing, and above all in the financing of investment for its production.

The notion of assisting sectors of the economy to adapt to new situations in international trade is quite familiar also to national economic policies. A number of countries provide such assistance. Reference may be made in this context to the system of adjustment assistance provided for under the United States Trade Expansion Act of 1962.³² The experiences of such national programs may be useful for the elaboration of international arrangements.

In certain cases the adaptation process may be less onerous, in particular, in cases when relatively simple changes in their production methods (*e.g.*, use of different chemicals) may make the product conform to the standards of the importing country.

In cases where environmental regulations have increased the costs of packaging and transport, the assistance may be channeled to developing more economical forms of packaging and transport or providing other ways for lowering the production costs.

In the case of agricultural products the need for assistance may be considerable: where necessary, it should not only be limited to the production process by research, training, and advice as to the appropriate use of certain chemicals, but also extended to the control and supervisory service in the exporting country. In fact, for many agricultural products it may be most advantageous if arrangements could be elaborated through which the agricultural goods are examined and tested

³¹ References cited note 24 *supra* (emphasis added).

³² Pub. L. No. 87-794, 72 Stat. 872 (1962); see D'Arge & Knesse, *Environmental Quality and International Trade*, 26 INT'L Q. 419, 455 (1972).

already in the exporting countries, thus saving costs for packaging and transportation of goods which would be rejected by the authorities of the importing countries. For some agricultural products, like meat, some arrangements exist already.

C. *Subsidies*

In view of the fact that the primary aim of compensation should be to restore the trade position of a developing country which has been adversely affected by environmental regulations, continuous subsidy payments should not be envisaged. However, from the time at which the restricting measure is introduced to the time the affected developing country has gained a comparative position in another field, a trade loss will have been incurred by the developing country. The notion of compensation would imply that this loss should also be made up. It could be envisaged that in compensation for the trade losses incurred, financial contributions will be made to the adaptation project.

V. PROCEDURES AND FINANCING

Existing institutional arrangements provide that in principle a country should consult with its trading partners if it intends to take measures affecting their trading position. This principle should also be applied in the case where environmental regulations may lead to negative effects on the trade position of developing countries.

Recommendation 103 expressly provides that "countries should inform their trading partners in advance about the intended action in order that there might be an opportunity to consult within the GATT Group on Environmental Measures and International Trade, among other international organizations."³³ Such consultations should place particular emphasis on the forms in which the countries primarily affected by the measures in question should be compensated and work out an action plan for restoring that country's previous trade position. The program and the development projects necessary in this context may find a place in the framework of the bilateral program for technical and financial assistance but the funds for such projects should not impinge on the existing funds.

This raises the question of how the funds for such operations could be provided. The funds required, particularly in the case of adaptation projects, may be considerable and since they should make up for trade losses suffered by a particular country, they should be over and above

³³ References cited note 3 *supra*.

the amount this country would receive otherwise in the form of technical and financial assistance.

In cases where restrictions result from higher tariffs or taxes on particular goods one may well envisage that at least part of the increased revenue of the importing state should be devoted to compensation payments. But, in general, the purpose of the increased charges levied by the importing state on a particular product are either intended to discourage imports or sales of this product altogether or are designed to cover the additional costs to communities resulting from the distribution of these particular goods.

One may also be tempted to try to find the beneficiary of the restrictive measures: if a country restricting the import of a certain good replaces this good with imports from a third country, the third country may to a certain extent be considered the beneficiary of the operation. In some cases (*e.g.*, perishable goods) there may not be a beneficiary at all.

In general, it may be held that the country imposing restrictions on imports from a developing country should be aware of the damage it causes to the development of the latter. Even if these restrictions are fully justified and inevitable for the protection of the environment and the population of the importing country, this country should be aware of its responsibility as a member of the international community for the achievement of the basic objectives which this community has set in the field of economic development. It appears that the primary burden for compensation should be on the country causing the adverse effects on trade.

Nevertheless, the question of financing cannot be resolved once and for all. The particularities of each case of compensation must be taken into consideration. In most cases the relationships in question will not just be bilateral, but a number of countries will be concerned and affected by the measures in question in varying ways. The situation will be even more complicated when the negative trade effects do not result from the decision of one individual government but are the consequence of standards agreed upon internationally. It may then be asked whether in this case the international community as such should not compensate those of its less developed members who suffer losses in their trade position and their economic development.

VI. INSTITUTIONAL FRAMEWORK

The various measures that have to be taken concerning compensation may require the intervention of a number of different existing or new

international institutions. Recommendation 103 mentions on two occasions the GATT Group on Environmental Measures and International Trade and suggests that consultations take place within this body. Negotiations concerning consequences of trade restrictions due to environmental regulations may be conducted within this body or within the framework of UNCTAD. Questions relating to research and adaptation projects may be referred to UNDP, to a special program to be set up, to UNCTAD, to UNEP, or again, to the GATT Group; for the standards and control of agricultural goods, FAO and WHO may best be suited to provide for or channel the necessary assistance.³⁴ The question of compensatory financing as well as a certain number of other questions mentioned above may also be dealt with bilaterally, or a new body administering the compensation payments may need to be created.

Regional institutions, especially in the field of standardization, but also for assistance programs and financing, may have a role to play. In this context, reference may be made to the activities of the OECD,³⁵ the EEC, and the Council of Europe.

At any rate, a considerable number of international organizations, U.N. bodies, or specialized agencies may have to intervene in one way or another in the context of the compensation operation. It appears indispensable to have one organization particularly entrusted with coordinating the various activities in this field. Here again, one may think of the GATT Group; however, UNEP in view of its general coordinating function in the field of environment and the universality of its membership, or UNCTAD for its traditional concern with this problem, may best be suited for this purpose.

VII. CONCLUSION

In spite of Stockholm Recommendation 103 calling clearly for compensation, the implications of this concept and its practical application in the field of trade and environment have not yet been sufficiently elaborated. The reasons that have led the Stockholm Conference to provide in Recommendation 103 for compensation for trade losses appear quite clearly. In view of the enormous problems with which the developing countries are faced in attaining the objectives of the Second

³⁴ The acronyms not already explained are: (1) FAO—United Nations Food and Agriculture Organization; (2) UNDP—United Nations Development Programme; (3) UNEP—United Nations Environment Programme; (4) WHO—World Health Organization.

³⁵ OECD—Organization for Economic Cooperation and Development. A procedure for notification and consultation by states on measures for the control of substances affecting man or his environment was elaborated by the OECD Committee on Environment and approved by the council of the OECD in 1971.

Development Decade, compensation for trade losses due to environmental measures appears as justified and requiring an act of international solidarity and responsibility. The conditions and methods of the practical application of this concept have to be further elaborated and it would appear that the funds that may be required and the additional efforts necessary should be obtained without reducing the funds provided for in the framework of other programs. In addition to these efforts, the concept of compensation in a general way may have a useful effect in helping to persuade the industrialized countries to support further the efforts of the developing countries for an amelioration of their trading position and in evidencing a general recognition by the industrialized countries of their responsibilities for the consequences which their preoccupation with their own environment may have for the developing countries.

APPENDIX

PROPOSED AND ADOPTED TEXT OF STOCKHOLM RECOMMENDATION 103

A. *Recommendation 103(32) as Proposed*

In order to ensure that the growing concern with the environment does not lead to major disruption in international trade, *it is recommended that* governments take the necessary steps to ensure that:

—all countries present at the Conference agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets and recognize further that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries;

—where environmental concerns lead to restrictions on trade, or to stricter environmental standards with negative effects on exports, particularly from developing countries, appropriate measures for compensation should be worked out;

—the GATT could be used for the examination of the problems, specifically through the recently established Group on Environmental Measures and International Trade and through its general procedures for bilateral and multilateral adjustment of differences;

—whenever possible (*i.e.* in cases which do not require immediate discontinuation of imports), countries should inform their trading partners in advance about the intended action in order that there might be an opportunity to consult within the GATT Group on Environmental Measures and International Trade. Assistance in meeting consequences of stricter environmental standards ought to be given in the form of financial or technical assistance for research with the aim to remove the obstacles that the products of developing countries have encountered;

—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 those cases where environmental disruption may constitute a concern to other countries. Environmental standards should be established at whatever levels are necessary, to safeguard the environment, and should not be aimed at gaining trade advantages.

B. *Recommendation 103 as Adopted*

It is recommended that governments take the necessary steps to ensure:

(a) that all countries present at the Conference agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reduced access to markets and recognize further that the burdens of the environmental policies of the industrialized countries should not be transferred, either directly or indirectly, to the developing countries. As a general rule, no country should solve or disregard its environmental problems at the expense of other countries;

(b) that where environmental concerns lead to restrictions on trade, or to stricter environmental standards with negative effects on exports, particularly

from developing countries, appropriate measures for compensation should be worked out within the framework of existing contractual and institutional arrangements and any new such arrangements that can be worked out in the future;

(c) that the General Agreement of Tariffs and Trade, among other international organizations, could be used for the examination of the problems, specifically through the recently established Group on Environmental Measures and International Trade and through its general procedures for bilateral and multi-lateral adjustment of differences;

(d) that whenever possible (that is, in cases which do not require immediate discontinuation of imports), countries should inform their trading partners in advance about the intended action in order that there might be an opportunity to consult within the GATT Group on Environmental Measures and International Trade, among other international organizations. Assistance in meeting the consequences of stricter environmental standards ought to be given in the form of financial or technical assistance for research with a view to removing the obstacles that the products of developing countries have encountered;

(e) 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 those cases where environmental disruption may constitute a concern to other countries. In addition, in order to avoid an impairment of the access of the developing countries to the markets of the industrialized countries because of differential product standards, governments should aim at worldwide harmonization of such standards. Environmental standards should be established, at whatever levels are necessary, to safeguard the environment, and should not be directed towards gaining trade advantages;

(f) that the governments and the competent international organizations keep a close watch on medium- and long-term trends in international trade and take measures with a view to promoting:

- (i) the exchange of environmental protection technologies;
- (ii) international trade in natural products and commodities which compete with synthetic products that have a greater capacity for pollution.