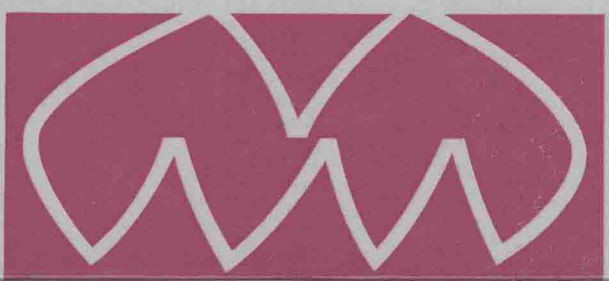
ENVIRONMENTAL SOVEREIGNTY AND THE WTO

Trade Sanctions and International Law

Bradly J. Condon



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PREFACE

We live in an age of increasing interdependence and increasing inequality. Environmental and economic interdependence require increasingly sophisticated approaches to international cooperation. As the pace of economic change has increased, so has global environmental degradation. At the same time, global poverty and economic inequality threaten the security of nations and make international cooperation increasingly difficult to achieve. Against this backdrop, debates regarding unilateral and multilateral approaches to managing the global economy and the global environment have become increasingly significant.

The World Trade Organization (WTO) is only ten years old. The growth in world trade has the potential to raise millions out of poverty. The broad coverage of the WTO agreements have an increasingly significant impact on economic activity, both nationally and internationally. Its dispute settlement system has been singularly successful. In only ten years, the judicial decisions of the WTO have had a greater impact on the development of international law than the GATT did in half a century. While the mandate of the WTO is restricted to addressing the issues in its own branch of international law, WTO decisions increasingly draw upon other sources of international law to interpret WTO rules. Yet little research has been done to define the relationship between WTO law, international environmental law and the wider body of international law.

One of the major challenges currently facing the WTO is how WTO rules should compensate for the economic inequality among WTO members. Legal rights that are available to all WTO members on their face do not provide equal access to WTO rights in practice where access to the right is dependent on market power. This reality has raised serious concerns regarding the use of unilateral trade measures in the environmental context, access to compulsory licensing for patents and the use of trade sanctions in dispute settlement. The analytical framework developed in this book provides a principled

basis for promoting equal access to WTO rights while maintaining the flexibility needed to address urgent international environmental concerns.

Many of the arguments presented in this book will prove controversial. Trade lawyers and environmental lawyers often have irreconcilable opinions regarding the proper treatment of environmental trade measures. Public international law experts rarely mention trade law, if at all. International relations specialists engage in passionate debates over the pros and cons of unilateralism and multilateralism. The simple mention of the word "sovereignty" provokes strong reactions on all sides—from realists to idealists to those who simply throw their hands up in despair. The politically charged nature of the debate makes agreement difficult to achieve. However, these issues are extraordinarily pressing as a matter of theory, legal doctrine and state practice and merit a great deal of attention on the part of all scholars of international law.

ACKNOWLEDGMENTS

This book represents the culmination of several years of research and writing on the topic of trade and environment. Prior to the creation of the World Trade Organization, I wrote an LL.M. thesis, *Making Environmental Protection Trade Friendly Under the North American Free Trade Agreement* (University of Calgary, 1993). I thank Professor Owen Saunders at the University of Calgary for helping me to get started in this subject. Some of the early analysis of this topic in the NAFTA context has been incorporated into this book, with substantial revisions that reflect the developments that have occurred in both jurisprudence and academic debate in the ensuing decade.

This book is based on my Ph.D. thesis. I am indebted to Kenneth W. Abbott, Jeffrey L. Dunoff and Jeffrey Waincymer for their extremely helpful comments on earlier drafts of this book. Their critiques helped me to improve the final product to a great degree.

I thank my boss, Carlos Alcérreca, for allowing the time to do this book and encouraging me to get it done. I thank my colleagues and students at ITAM for providing a rich intellectual environment, valuable feedback and encouragement. I especially want to thank Ernesto Corzo Aceves and Fernanda Garza Magdaleno for making trade and environment such a fun topic. I thank Mónica Hernández for her good humor and faithful administrative assistance. I thank ITAM the Asociación Mexicana de Cultura SA for their support of my research.

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I thank my good friend, Tapen Sinha, who introduced me to Ross, offered constant encouragement and lent me his ear when I needed it. I also thank Rebecca Benedict for being a good friend and neighbor and lending me her ear while Tapen was away on sabbatical. I thank Ali DuBose for forgiving my obsession with getting this book completed. María de la Luz S. de Uriarte has patiently awaited a long-promised trip to the garden center in Xochimilco. My neighbors in Garden Bay have helped me balance the task of writing with the pleasures of the summer cottage, especially Bob and Reni Ducich and Michael Vaughan. Likewise, many thanks to Stephen Heeney, Mark and Annemarie Nordman and Susan Gfellner for their hospitality en route.

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ABOUT THE AUTHOR

Bradly J. Condon (B.A., University of British Columbia, 1985), (LL.B., McGill University, 1988), (LL.M., University of Calgary, 1993), (Ph.D., Bond University, 2004), is Professor of International Law and Business at ITAM and is Senior Fellow, Tim Fischer Centre for Global Trade and Finance, Australia. He has written over 50 articles on various business and legal topics. He is author or co-author of three books: *NAFTA, WTO and Global Business Strategy: How AIDS, Trade and Terrorism Affect Our Economic Future* (Westport: Quorum Books, 2002), *Drawing Lines in Sand and Snow: Balancing Border Security and North American Economic Integration* (Armonk, NY: M.E. Sharpe, 2003) (with Tapen Sinha), and *Insurance Regulation in North America* (London and the Hague: Kluwer Law International, 2003) (with Joyce Sadka and Tapen Sinha). His research focuses on North American integration, international trade law and the effect of trade agreements on business strategy. He has served as Director of the Centre for North American Business Studies at Simon Fraser University, expert witness before the Canadian Parliament, advisor for the Commonwealth Law Association and guest of the U.S. Congress on international trade issues. In 2001, Professor Condon won the Lumina Award for Outstanding Research in law and regulation. In 2005, he was named National Researcher Level II by the Mexican government.

LIST OF ABBREVIATIONS

CITES	Convention on International Trade in Endangered Species
COP	Conference of Parties
CTE	WTO Committee on Trade and Environment
DSB	WTO Dispute Settlement Body
DPCIA	Dolphin Protection Consumer Information Act
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
FTA	Canada-United States Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
MEA	multilateral environmental agreement
MFN	most-favored nation
MMPA	Marine Mammal Protection Act of 1972
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
PPM	production and processing methods
SDT	Special and Differential Treatment for Developing Countries
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
STO	specific trade obligation
TBT	Agreement on Technical Barriers to Trade
TED	turtle exclusion device
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property
WTO	World Trade Organization

CONTENTS

CHAPTER 1

TRADE, ENVIRONMENT AND WTO LAW

A. INTRODUCTION

The academic debate in the field of trade and environment is a relatively recent phenomenon. The early 1970s saw significant international legal developments regarding the intersection of trade and environmental issues, notably the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). International efforts to address environmental concerns on a global basis also began in this period, the most notable being the Declaration of the United Nations Conference on the Human Environment. Prior to this period, international environmental protection efforts generally took the form of agreements to conserve exhaustible natural resources for their economic value, rather than their ecological value. Thus, in 1947, the General Agreement on Tariffs and Trade (GATT) made room for the conservation of exhaustible natural resources by providing a general exception to GATT obligations in Article XX(g). However, the wording of this GATT provision did not limit the exception to conservation for economic value alone.

Article XX(g) was not tested in a modern environmental context until a GATT dispute occurred between Mexico and the United States over an American ban on Mexican tuna imports that was meant to protect dolphins from Mexican tuna fishermen. This case raised a host of issues regarding the proper interpretation of GATT Article XX(g), as well as Article XX(b) (which permits measures necessary to protect humans, animals and plants). The GATT Panel struck down the American measure as a violation of GATT obligations and ruled that it did not fit either exception. However, the ruling of the Panel was never adopted and thus lacks normative value.[1] This 1991 decision, together with the numerous academic articles

[1] See *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body) at 16.

the dispute spawned, marks the beginning of sustained academic interest in the trade and environment debate.

A central issue in the trade and environment debate concerns the use of trade barriers by one country to induce changes in the environmental policies of another. Such trade barriers might be used in the context of a multilateral environmental agreement (MEA), such as CITES, which requires restrictions on trade in endangered species, or the Montreal Protocol on Substances that Deplete the Ozone Layer, which requires signatories to restrict trade in ozone-depleting chemicals. When such trade barriers are applied to other signatories of the same MEA, their use is not controversial. However, when trade barriers are imposed unilaterally by one country to induce another country to change its domestic environmental law, the matter becomes much more complicated, both in terms of international politics and international law.

Two rulings of the WTO Appellate Body in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp* and *Shrimp 21.5*) have tackled this issue by interpreting Article XX(g) to permit the United States to unilaterally impose trade barriers to pressure Malaysia to change its domestic environmental regime for the protection of sea turtles. These rulings have been described as a "revolution in WTO jurisprudence."[2] Given previous interpretations of Article XX(g) in the Mexican tuna cases (which occurred under the old GATT dispute resolution system), the conventional view held by many trade experts before the *Shrimp* rulings, and the lack of consensus on this issue among the WTO membership, a revolution has indeed occurred. The *Shrimp* rulings raise important questions regarding the proper interpretation of Article XX, the relationship between trade law, environmental law and the general principles of public international law, and the role of the WTO judiciary in the development of international law. As such, these rulings have important implications not only in the field of trade and environment, but more generally in the realm of public international law and global governance.

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[2] Louise de La Fayette, *Case Report: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 96 Am. J. Int'l L. 685, at 685 (2002).

The *Shrimp* "revolution" suggests that the interplay between trade law and public international law will have significant consequences for the future evolution of both. In recent years WTO jurisprudence has increasingly turned to non-WTO sources of international law to interpret the provisions of the WTO agreements. The rulings in *Shrimp* and *Shrimp 21.5*, which examined several MEAs in the course of interpreting Article XX(g), are perhaps the most dramatic example of this trend. The ruling in favor of the use of trade measures to induce changes in the internal laws of a sovereign country challenged widely held views regarding principles of public international law such as the jurisdictional competence of states and the principle of non-intervention. At the same time, the WTO Appellate Body has taken the view that principles of public international law must influence the interpretation of the WTO agreements. However, the relationship between international trade law and other branches of international law remains anything but clear.[3]

The potential impact of decisions rendered by the WTO judiciary on the evolution of different branches of international law raises the issue of how best to allocate decision-making authority between the legislative and judicial branches of the WTO and the limits of the WTO's authority *vis-à-vis* other international institutions. While many mechanisms are available to WTO members to clarify the relationship between WTO law and other sources of international law, the size and diversity of the WTO membership makes it increasingly difficult to achieve the necessary degree of consensus to make this happen through the legislative process. Indeed, lack of progress in the WTO Committee on Trade and Environment, on its mandate to clarify the relationship between international trade law and international environmental law, was one of the elements that

[3] One author who has made an outstanding effort to put a dent in the monumental task of clarifying this relationship is Joost Pauwelyn. See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003). Also see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001), Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 J. INT'L ECON. L. 27 (2000) and Donald McRae, *The*