

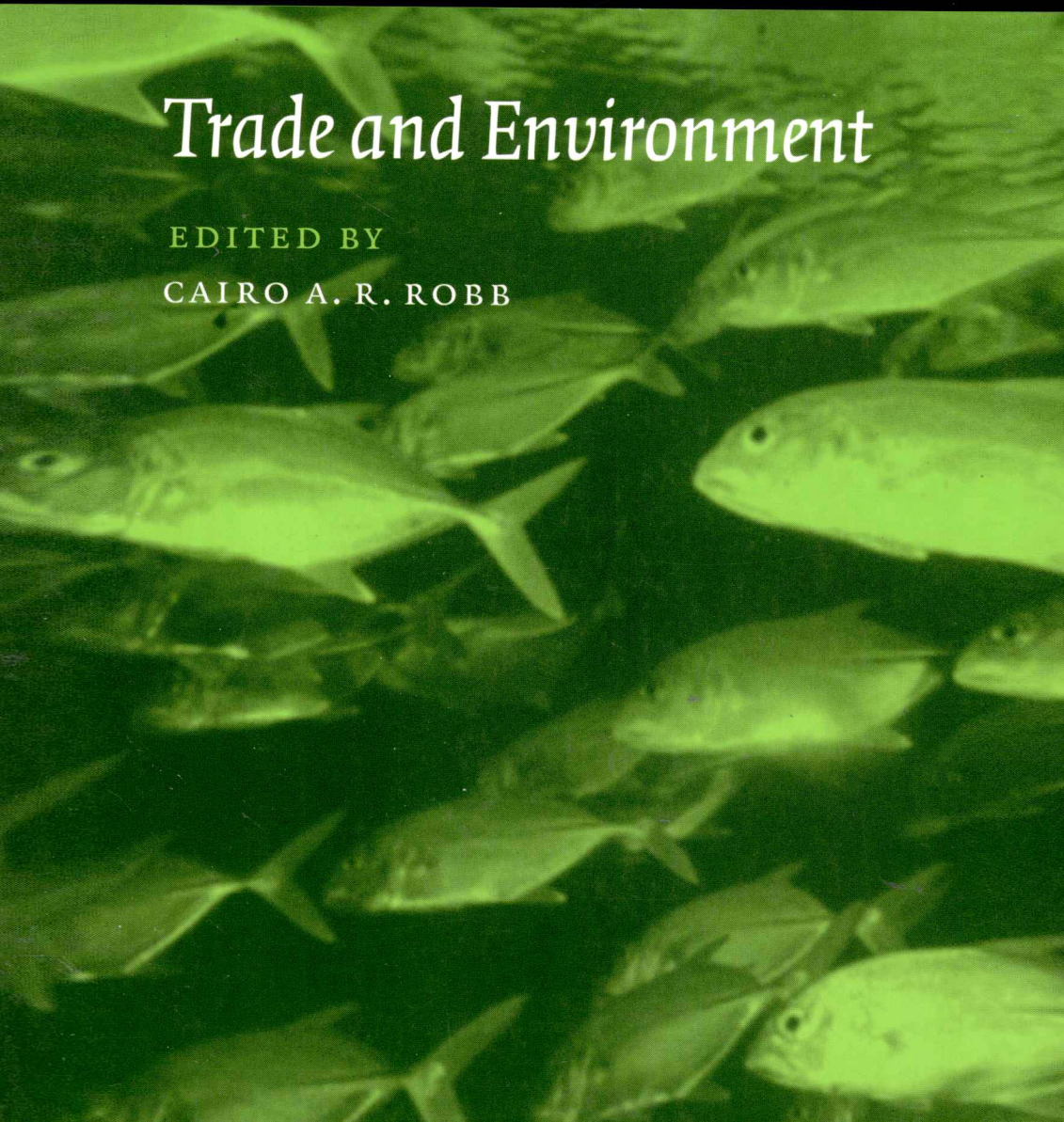
INTERNATIONAL ENVIRONMENTAL LAW REPORTS

Volume 2

Trade and Environment

EDITED BY

CAIRO A. R. ROBB



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TRADE AND ENVIRONMENT

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Preface

While there are a few well-known cases in international law considered as laying down general principles relevant to the environment – notably the *Trail Smelter* and *Lake Lanoux* cases – international environmental law is at present to be found predominantly in treaties and other international instruments. It can be expected, however, that judicial decisions will play an increasingly important role in clarifying the scope of such instruments and in developing underlying principles. The overwhelming emphasis on treaties in textbooks on international environmental law belies the fact that there is at present a considerable and growing body of relevant jurisprudence. It is with this in mind that the *International Environmental Law Reports* have been compiled. The objectives of the *Reports* are two-fold: first, to reproduce in one easily accessible collection the key decisions from international and national tribunals and, second, to provide source material that will assist in the further development of the law in this field.

A major difficulty in preparing a project such as the present lies in establishing the parameters of the subject matter the *Reports* are intended to cover. The editors decided to focus initially on preparing five volumes, each corresponding to a particular field or theme.

The first volume contains decisions dating from the 1880s to the 1960s that are regarded, with varying degrees of justification, as significant in the development of international environmental law. It includes all the well-known and some less well-known decisions of international tribunals (with the exception of the decisions of the International Court of Justice, to which volume 5 of the *Reports* will be devoted). It also includes a number of national decisions, either because they were the background against which international decisions were taken (as in the case of certain Swiss and US decisions referred to in the *Trail Smelter* case) or because they are illustrative of states' views of the content and direction of international law in this domain at the beginning of the twentieth century.

Volume 2 focuses on the evolving relationship between trade and environment. It deals with the settlement of environment-related trade disputes under the original General Agreement on Tariffs and Trade ('GATT'), and its successor the Agreement Establishing the World Trade Organization ('WTO'); under the Canada–USA Free Trade Agreement ('Canada–USA FTA'), which preceded the North American Free Trade Agreement ('NAFTA'); and under the agreements establishing the European Community ('EC'), up to and including 1998.

Volume 3 focuses on the theme of rights in relation to the environment. It brings together the growing number of decisions of international tribunals before which attempts have been made to use human rights to achieve environmental objectives or to contest environmental measures. Decisions have been drawn from the American, European and United Nations human rights systems.

Volume 4 focuses on international environmental law in national courts. It contains decisions explicitly and implicitly applying or otherwise dealing with aspects of international law as it relates to the environment. It features the growing number of decisions of national courts on subjects such as the 'precautionary' and 'polluter pays' principles, inter-generational equity, and sustainable development, as well as decisions drawing upon and interpreting the ever-increasing number of international environmental agreements. Decisions have been drawn from courts around the world in Africa, the Americas, Asia, Australasia, and Europe.

Volume 5 is devoted to the jurisprudence of the International Court of Justice ('ICJ'). Environmental cases may well form a larger part of the Court's workload in the future. There have already been a number of cases before the ICJ in which environmental considerations have played a significant part, though attention has not always been focused on those aspects of the decisions. Given the considerable length of ICJ decisions, only key extracts of the relevant decisions are reproduced.

Thanks are due to a number of people for their assistance in the preparation of volume 2 of the *International Environmental Law Reports*.

Special thanks go to Amelia Porges, formerly Senior Legal Counsel, GATT Secretariat, and Damien Geradin, University of Liège, Belgium, for their considerable work as contributing editors of this volume.

Amelia Porges prepared the summaries and accompanying notes for all the GATT Panel Reports, for the WTO Panel and Appellate Body Reports in *United States–Standards for Reformulated and Conventional Gasoline*, and for the Canada–USA FTA Panel Reports. She retains copyright in all her work contained in this volume. Her attention to detail is impeccable and she was

a pleasure to work with. We are extremely grateful to her for all the work, patience and generosity of spirit that she has devoted to this volume.

Damien Geradin prepared the summaries of the ECJ decisions (with the exception of Cases C-405/92 and C-284/95). He too was a pleasure to work with and we are most grateful to him for finding time in his busy schedule to contribute to this volume.

Thanks are also due to Nicholas Sinclair-Brown, Fellow, Lauterpacht Research Centre for International Law, for summarising the WTO Panel and Appellate Body Reports in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. The remaining summaries and notes were prepared by the Editor, as were the digest entries, the prelims and the appendices.

Additional thanks are extended to the members of the Editorial Advisory Board for their advice and assistance; to Professor Akio Shimizu, Beatrice Chaytor, Edward Helgeson and Nancey Foster for their constructive comments and help at various stages of preparation of the manuscript; to Anne Skinner and Glen Howard for their kind secretarial and administrative support; to the staff at the WTO, the NAFTA Secretariat, the Court of Justice of the European Communities and the Squire Law Library, especially Lesley Dingle, for their assistance; and to the Commission of the European Communities and the Isaac Newton Trust for their financial support toward the project. Finally, our thanks go to Miss Maureen MacGlashan, CMG, for her thorough preparation of the index and the table of treaties, to Frances Nicholson for cheerfully and tirelessly undertaking the copy-editing of this volume, to Finola O'Sullivan for her dedication to the project, and to everyone else at Cambridge University Press who has worked on the project and helped bring it to fruition.

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Editorial Note

Volume 2 of the *International Environmental Law Reports* contains the environment-related decisions of GATT panels established under the General Agreement on Tariffs and Trade 1947 ('GATT 1947'); of WTO panels and the WTO Appellate Body established under the agreements annexed to the Agreement Establishing the World Trade Organization 1994 ('WTO Agreement'), including the General Agreement on Tariffs and Trade 1994 ('GATT 1994') which succeeded GATT 1947; of Canada–USA FTA panels established under the Canada–USA Free Trade Agreement 1988 ('Canada–USA FTA'), the precursor to the North American Free Trade Agreement 1992; and of the Court of Justice of the European Communities ('ECJ'), up to and including 1998.

The terms 'GATT panel' and 'GATT Panel Report'; 'WTO panel' and 'WTO Panel Report'; 'WTO Appellate Body' and 'WTO Appellate Body Report'; and 'Canada–USA FTA panel' and 'Canada–USA FTA Panel Report' are used throughout the editorial text in the volume to denote the various types of panel and the Appellate Body, and their respective reports.

Except in the first paragraph above, throughout the editorial text in this volume the abbreviation 'GATT' has been used to denote both the GATT 1947 and the GATT 1994. The reader may on occasion have to determine which is being referred to by the context: GATT 1947 was terminated on 1 January 1996, one year after the WTO Agreement and the agreements annexed to it, including GATT 1994, entered into force on 1 January 1995. On the other hand, in the context of the decisions of the ECJ, care has been taken in the editorial text to distinguish between the original Treaty Establishing the European Economic Community 1957 ('EEC Treaty'), the EEC Treaty as amended by the Single European Act 1986, which entered into force on 1 July 1987, and the Treaty Establishing the European Community ('EC Treaty'), i.e. the EEC Treaty as further amended and renamed by the Treaty on European Union 1992, which entered into force

on 1 November 1993, as such distinctions may be less easy to determine from the context.

In reconciling the objectives of providing both a comprehensive and portable volume difficult decisions had to be taken regarding what should and should not be included. Particularly difficult, but ultimately necessary, was the decision to omit the often lengthy arguments of the parties from the various Panel Reports reported. Annexes from those Reports have also been omitted. Thus for the environment-related cases the reader will find in this volume the 'facts', 'findings' and 'conclusions' of the various Panel Reports, the full text of WTO Appellate Body Reports, and the full text of the decisions of the ECJ together with the accompanying Advocate General's opinion. In addition, the reader will find in a separate section summaries only of three cases that might more properly be regarded as health-related cases (*Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, *EC Measures Concerning Meat and Meat Products (Hormones)*, and *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec*). While it was not possible to include the Panel or Appellate Body Reports in these cases due to space constraints, it was felt important to provide a summary of them, as much because of the connection between health and environment, as because they may be illustrative of how a more environment-focused case might be looked at under the same or similar provisions in the future.

While some efforts have been made to standardise typefaces, decisions have been reproduced to the greatest extent possible in the form in which they were originally reported. The reader may thus find some inconsistencies in the style and layout of decisions from the same jurisdiction as reporting style from that jurisdiction may have changed over time. Omitted material is indicated by the word 'omitted' in square brackets, or is indicated in a footnote.

The source from which the decision has been reproduced is cited at the end of each decision. In the case of decisions reproduced from the European Court Reports ('ECR'), the bold page numbers in square brackets throughout the decision refer to the pagination of the ECR. Much of the material for this volume has been downloaded from the websites of the various jurisdictions covered. Further information on decisions from these jurisdictions can be found by following links from <http://www.wto.org> (for the GATT/WTO); <http://www.nafta-sec-alena.org> (for the Canada–USA FTA); and <http://www.europa.eu.int> (for the EC).

Each case has been summarised and each summary is preceded by italicised digest entries. The digest entries are collected together in the

Digest at the beginning of the volume to give the reader an overview of the issues covered in the volume. The Summary summarises the facts and decision(s) in the case and aims to draw attention to those points which are or might be of environmental interest. The facts are taken from the decision itself unless otherwise indicated. The numbers in round brackets at the end of each item in the 'Held' section indicate the corresponding paragraphs of the original report, or pages in the *IELR*.

Immediately after the Summary is a list of the documents that follow, and the pages on which they commence. Often an editorial Note concerning subsequent or related events or cases is included at the end of a case.

The Appendices contain relevant provisions of the GATT 1947, the WTO Agreement and the agreements annexed thereto, the Canada–USA FTA, and the EEC Treaty and relevant subsequent amendments that the reader may find useful to have to hand.

Footnotes cross-refer to other cases in the *IELR* or in the *International Law Reports*. Such referencing is normally made only on the first mention within any particular document of the item being referenced. Where footnotes appear in a document, those with roman numerals are editorial insertions. Others are part of the original text.

For the reader's convenience this volume also contains tables of cases reported, a table of treaties and an index.

The cases in this volume may be cited as 2 *IELR* followed by the relevant page number e.g. 2 *IELR* 7.

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Abbreviations

ADBHU	Association de Défense des Brûleurs d'Huiles Usagées (Association for the Defence of the Interests of Burners of Waste Oils)
ADI	acceptable daily intake
ALT	atmospheric lifetime
BArtSchV	Bundesartenschutzverordnung (Federal Regulation on the Protection of Species)
BISD	GATT Basic Instruments and Selected Documents
BNatSchG	Bundesnaturschutzgesetz (Law on the Protection of Nature)
CAFE	Corporate Average Fuel Economy
Can. Bus. Law J.	Canadian Business Law Journal
CDN	Canadian
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CIT	United States Court of International Trade
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973
COP	Conference of the Parties
CTE	WTO Committee on Trade and Environment
DFO	Department of Fisheries and Oceans
DPCIA	Dolphin Protection Consumer Information Act
DSB	WTO Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, annexed to the Agreement Establishing the World Trade Organization, 1994
EC	European Community
EC Treaty	Treaty Establishing the European Community (i.e. EEC Treaty as amended and renamed)
ECJ	Court of Justice of the European Communities

ECR	Reports of the Court of Justice of the European Communities
EEC	European Economic Community
EEC Treaty	Treaty Establishing the European Economic Community, 1957
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
ETP	Eastern Tropical Pacific Ocean
F.Supp.	United States Federal Supplement
FDA	United States Food and Drug Administration
Fed. Reg.	United States Federal Register
FTA	Free Trade Agreement (here Canada–USA FTA)
GATT	General Agreement on Tariffs and Trade, 1947 General Agreement on Tariffs and Trade 1994, annexed to the Agreement Establishing the World Trade Organization, 1994
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
GWP	global warming potential
HCFC	hydrochlorofluorocarbons
IATTC	Inter-American Tropical Tuna Commission
IELR	International Environmental Law Reports
IUCN	World Conservation Union (formerly International Union for the Conservations of Nature)
MGA	melengestrol acetate
MMPA	Marine Mammal Protection Act
mpg	miles per gallon
MRL	maximum residue level
NAPE	Danish National Agency for the Protection of the Environment
NCIMS	United States National Conference on Interstate Milk Shipments
NMFS	United States National Marine Fisheries Service
NTB	non tariff trade barriers
ODP	ozone depleting potential
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Communities
PCP	pentachlorophenol
PMO	Pasteurised Milk Ordinance

ppm	parts per million
QRs	quantitative restrictions
SARA	Superfund Amendments and Reauthorization Act
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures, annexed to the Agreement Establishing the World Trade Organization, 1994
TBT	Agreement on Technical Barriers to Trade, annexed to the Agreement Establishing the World Trade Organization, 1994
TED	turtle excluder device
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USITC	United States International Trade Commission
VOC	volatile organic compound
WHO	World Health Organization
WTO	World Trade Organization

Tables of cases reported

The tables of cases reported are arranged alphabetically, by popular name or subject matter, and according to tribunal. Those cases which are reported only in summary form are indicated by the insertion of the word 'summary only' in parentheses. The date in parentheses indicates the year in which the various Panel or Appellate Body Reports were circulated, or, for decisions of the Court of Justice of the European Communities, the year in which judgment was delivered. A chronological list of reports and decisions is also provided. Reports and decisions reproduced only in extract are indicated in the chronological list by the insertion of the word '*extract*' in parentheses.

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- Belgian Waste Case: *see* Commission of the European Communities v. Belgium
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ACCORDING TO TRIBUNAL

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