RECONCILING ENVIRONMENT AND TRADE

Second Edition

Edited by
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John H. Jackson
Nathalie Bernasconi-Osterwalder

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PREFACE

The UN Millennium Report warns that "[w]e now face an urgent need to secure the freedom of future generations to sustain their lives on this planet—and we are failing to do it." Today's world faces two urgent imperatives: to protect the environment globally and to ensure continued economic growth and the eradication of poverty. Two of the bodies of international law most relevant to these goals—international environmental law and international trade law—often appear to clash. Trade law focuses mainly on providing a level trading field for products. Environmental law focuses on the environmental soundness of the process by which resources are harvested and goods produced, as well as on the harmfulness of particular products. The clashes between the two efforts are evident in disputes over such issues as food safety and the presence of hormones in beef, the catching of shrimp by methods that ensnare endangered species of turtles, public health and the limitations on tobacco imports and the advertising of tobacco products, and the reliance on reformulated gasoline to control air pollution. More recently, clashes have become evident in the area of biosafety and genetically modified organisms, as well as with respect to efforts to deal with short-life or recycled products, such as retreaded tires.

Yet, many environmentalists and trade specialists believe that environment and trade can, and indeed must, be reconciled in order to achieve sustainable development. These considerations motivated two of the editors of this volume, who are professors of law vitally concerned with these subjects, to conduct, during the fall of 1999, a seminar on this topic for advanced and graduate law students at the Georgetown University Law Center (GULC) in Washington, D.C. We were privileged to be joined also by Prof. (adjunct) Christopher Parlin, who has extensive experience working on General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) cases with the U.S. government and more recently as a law firm partner working on WTO cases for various governments or private clients.

The seminar, entitled "International Environment and Trade Law," was structured to explore in depth the clashes outlined above, particularly by focusing on some of the key WTO Dispute Settlement cases faced by governments and societies around the world. Five cases were chosen as the central focus, namely the GATT case on Thai Cigarettes, the WTO cases on U.S. Reformulated Gasoline, the European Union case on Beef Hormones, the U.S. Regulations regarding Shrimp Imports and Turtle protection, and the case of genetically modified organisms (GMOs), which

was the subject of a WTO panel decision in 2006. At the end of chapter 1, we describe in more detail the reasons for the importance and choice of these cases as the core of the seminar work.

Our discussions included invited guests, who participated as advocates or policymakers connected with each of the cases. A team of three to five students produced research papers on each of these cases, and the seminar considered the overall meaning and significance of the evolving WTO jurisprudence dealing with the clash of policies involved. With considerable pride in this student work, the editors as professors present in this volume the papers produced under the supervision of the seminar conductors. We hope that readers will discover information and ideas about these cases, and their relationships to the clashes of policy we were exploring, which will advance their knowledge and appreciation of those policies in the precise and often perplexing context of real cases. All seminar participants found it eye-opening to realize how the members of the WTO dispute panels and appellate bodies had to struggle with the facts and important legal principles involved. As one often hears, "the devil is in the detail." Broad generalizations and pontificating shibboleths began to retreat under the scrutiny brought to bear by this seminar. The professors learned at least as much as the students!

This second edition of the book reflects developments that have occurred since the seminar. Nathalie Bernasconi-Osterwalder, who provided invaluable assistance with the initial book, has joined as a co-editor of the new edition. She has updated the introductions to the five case studies to set the stage and put the individual chapters into context. The editors thank Margaret Prystowsky, Daniel Fromm, Camille Paldi, and E. Rania Rampresad for their excellent research assistance.

Many people have helped to make this book possible. We are grateful to the many experts who participated in seminar discussions, and shared their invaluable insights with us. These included Lee Ann Breckenridge, William Busis, Steve Charnovitz, Paul Jaffe, James Lyons, Dale McNeil, Nancy Perkins, Timothy Reif, Paul Rosenthal, Andrew Shoyer, the late Paul Szasz, Allyn Taylor, Charles Weiss, and Steve Wolfson. The seminar also benefitted greatly from the participation of Barbara Eggers, Prof. Tsuyoshi Kawase, Prof. Yohei Matsunobu, and Sylvia Rhodes, all of whom were associated with GULC during fall 1999. Marci Hoffman, then the International Law Librarian at GULC, provided very helpful research assistance throughout the seminar, and Jill Ramsfield, then professor of legal writing, provided essential writing guidance. Cathy Strain, Joanna Sokolow, and Ima Hicks provided expert administrative services in the production of the manuscript. We are indeed grateful to then Dean Judith Areen for her support of this effort. For the second edition, we

are especially grateful to Dean Alex Aleinikoff for his support, Rania Rampersad for research assistance, and Lydia McDaniel for assistance with the index. To the many other people not mentioned who contributed in a variety of ways, both directly and indirectly, to the seminar and to the publication of this manuscript, we offer our sincerest appreciation.

The second edition of this book is published in association with the Institute for International Economic Law at the Georgetown University Law Center.

Edith Brown Weiss
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Contents

CHAPTER 1

THE FRAMEWORK FOR ENVIRONMENT AND TRADE DISPUTES

Edith Brown Weiss and John H. Jackson

> We now face an urgent need to secure the freedom of future generations to sustain their lives on this planet—and we are failing to do it. We have been plundering our children's heritage to pay for unsustainable practices. Changing this is a challenge for rich and poor countries alike. . . . Peoples, as well as Governments, must commit themselves to a new ethic of conservation and stewardship.[1] (Kofi A. Annan, former UN Secretary -General).

The world's environment is facing global changes at a pace and on a scale unknown to humankind. The UN Environment Program (UNEP) assessed the state of the world's environment in 1997.[2] The statistics are distressing. Between 1980 and 1990, the world's forests and wooded land declined by about 2%, with natural forest cover in developing regions declining by 8%. The rate of species extinction increased, even though, of a working figure of 13 million species, only 13% have been scientifically described. Every day, 25,000 people die as a result of poor water quality, and 1.7 billion people are without safe water supply. One quarter of the world's population is predicted to suffer from chronic water shortages in the beginning of this century. About one-third of the world's coastal regions are at high risk of degradation, particularly from land-based sources of pollution and infrastructure development. Moreover, over 60% of marine fisheries are heavily exploited worldwide, leading to declining stocks of commercial fish species. Air pollution is a problem in all major cities in the world. Large regions are at risk from the effects of climate change and acidification, with the demand for energy to fuel economic

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[1] KOFI A. ANNAN, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY, ch. 1, at 4–5 (2000) [hereinafter the Millennium Report].

[2] UNEP Global State of the Environment Report 1997, *available at* http://www.unep.org/eia/geo1.

development rapidly rising. In Asia and the Pacific alone, a 100% increase in energy use is predicted for 1990–2010. Waste generation continues to increase.

There is an urgent need for national, international, and local measures to control pollution and to conserve natural resources and ecosystems. The body of both national and international law that has emerged is diffuse and expanding. The focus is as much, or more, on the process by which resources are harvested and goods produced as on the harmfulness of particular products.

At the same time that environmental concerns grow, there is an urgent and defined need for continued economic growth worldwide. Poverty continues to pervade many parts of the world and some areas within even the wealthiest countries. The international trading system, which is built upon the principle of comparative advantage, is intended to promote economic growth. It obligates countries to reduce barriers to efficient trading, such as tariffs, import quotas, subsidies, and other non-tariff barriers, so as to enable economies to grow. In contrast to environmental law, trade law is almost exclusively concerned with reducing barriers to trade in products and services and has not often addressed processes by which products are produced or resources harvested. Trade law thus has not been as concerned with whether the processes of production are environmentally sustainable and indeed is worried about environmental regulations directed to process as being barriers to trade. Increasingly, there is disagreement over the values of globalization and open trade. Whether the disagreement mainly reflects anger by some at not receiving a larger share of economic benefits or a deeper unease about globalization is unclear.

Not surprisingly, the two efforts—to protect the environment and to promote liberal trade—clash. The intersections between environment and trade provoke clashes among governments, non-governmental organizations, corporations, and other actors, and within each of these communities, e.g., between federal and state or provincial governments, or between different non-governmental organizations. While many environmentalists and proponents of liberalized trade regard environmental protection and trade liberalization as compatible, if not essential to realizing the goals of both in the long term, there are nonetheless important differences in outlook between the environmental and the trade communities.

Environmentalists are concerned that the World Trade Organization (WTO) will decide that national (including local) and international measures to protect the environment are inconsistent with the General Agreement on Tarrifs and Trade (GATT) 1994 and other WTO agreements, and will hold them invalid. They fear that liberalized trade will run roughshod over environmental robustness and integrity. Environmental

protection operates on the time scale of decades, even centuries, whereas open and liberalized trade operates in a much shorter time frame. Environmentalists argue that a century or two from now, when people look back at this time, they will condemn us most for the rapid destruction of the planet's biological diversity. The renowned biologist Edmund O. Wilson has observed that the loss of the world's biological diversity would be worse than "energy depletion, economic collapse, limited nuclear war, or conquest by a totalitarian government. As terrible as those catastrophes would be for us, they could be repaired in a few generations. The one process ongoing in the 1980s that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us."[3]

The proponents of liberalized trade and open markets argue that they produce the economic growth that lets people meet basic economic needs and achieve a decent, even high, standard of living. Only if people are able to meet basic economic needs will they have the economic resources and the will to protect the environment. Many would acknowledge that environmental problems are important but would argue that they should not be solved by distorting the trading system. In this view, distorting the trading system to protect the environment is a practice that is counter-productive both for protecting the environment and for facilitating economic growth.

These philosophical clashes play themselves out in concrete disputes: over advertising and sale of tobacco, over the catching of yellowfin tuna that nets dolphins, over the production of reformulated gasoline, over hormones added to beef to promote growth, over requirements that shrimp be caught with turtle exclusion devices to save the endangered sea turtles, and over the new genetically modified seeds, food crops, and derivative products such as soybean oil.

In these clashes, trade law has an advantage based on seniority. The body of international trade law is longstanding, well-defined, and backed by a powerful business constituency. By contrast, the large collection of international environmental legal instruments is largely unconnected and has only a diffuse public behind it. Thus, it is not surprising that the issues are normally framed as a discussion of whether efforts to protect the environment are consistent with international trade law.

The clash between those in favor of free trade, on the one hand, those concerned with the environment and sustainable development, on the other, was broadcast around the world when, in 1999, at the Third World Trade Organization Ministerial in Seattle, Washington, more than 700

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[3] Edmund O. Wilson, *quoted in* ROBERT GOODLAND, C. WATSON & GEORGE LEDEC, ENVIRONMENTAL MANAGEMENT IN TROPICAL AGRICULTURE 207 (1984).

non-governmental organizations pressed for member governments to consider environmental, labor, and social issues. They held their own demonstrations and teach-ins outside the WTO Ministerial building. Two years later, in 2001, at the WTO Ministerial meeting held in Doha, Quatar, WTO member governments launched a new round of negotiations: the Doha Development Round. The Ministers at the Doha Conference agreed, among other things, to negotiations on the the relationship between existing WTO rules and multilateral environmental agreements (MEAs); on procedures for regular information exchange between MEA Secretariats and the relevant WTO committees; on the issue of environmental goods and services;[4] and WTO disciplines on fisheries subsidies.[5] Unfortunately, these negotiations have been very difficult. It is unlikely that they will yield significant results, at least in the near term, except perhaps in the area of fisheries subsidies where UNEP and environmental groups continue to be particularly active. Given the difficulties in the overall negotiations (which were suspended in July 2006 and revived in November of the same year), it is unclear what will happen to any of the discussions relating to trade and environment, which are part of the so-called "single package" of negotiations.

THE HISTORICAL CONTEXT OF THE LEGAL REGIMES

The legal regimes for environmental protection and for liberal trade have developed on separate tracks and at different time periods. Understanding the historical context and the primary characteristics of each body of law makes it easier to reconcile them in addressing specific issues.

Development of International Trade Law[6]

In 1929, the world suffered an economic depression. As part of the response, the United States passed the 1930 Smoot Hawley Tariff Act,[7] which provided for the raising of national tariffs, a form of retaliation for the imposition of rising tariffs by other states. In 1934, the U.S. Congress, responding to the effects of the 1930 Act, enacted the 1934 Reciprocal Trade Agreements Act,[8] which delegated to the U.S. president the power to enter into reciprocal agreements to lower tariffs. By 1945, under this authority, as renewed from time to time, the United States had entered

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4 Doha Ministerial Declaration, para. 31, *available at* http://www.wto.org.

5 *Id.*, para. 28.

6 This section is based on JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION, chs. 2 and 3, at 12–58 (Royal Institute of International Affairs, 1998).

7 Tariff Act of 1930, 46 Stat. 685 (1930).

8 The Reciprocal Trade Agreements Act of 1934, 19 U.S.C. §§ 1351–1354.

into 32 bilateral agreements to reduce tariffs. These agreements contained most of the substantive provisions later found in theGATT.[9]

During World War II, states looked back at the period between 1920 and 1940 and realized that they had made serious mistakes in their economic policies, which were a major cause of the disasters that led to the war. These included the policies leading to the Great Depression, the harsh reparations policy towards Germany after WW I, and the many protectionist measures that states took, which choked off international trade. Political leaders of the United States and of other countries spoke about the importance of establishing international economic institutions that would prevent these mistakes from happening again.

In July 1944, as World War II drew to a close, delegates from many countries met in New Hampshire for The Bretton Woods Conference. At the conference, states established the Charters of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD). While the states present at the conference did not address the trade problem explicitly, they recognized the need for a comparable institution for trade to complement the IMF and IBRD.

The international efforts to establish a charter for an international organization for trade proceeded on a separate track from that of the IMF and IBRD. In December 1945, the same year the United Nations was established, the United States invited other countries to enter into negotiations for a multilateral agreement to mutually reduce tariffs. Two months later, the UN Economic and Social Council adopted a resolution calling for a conference to draft a charter for an International Trade Organization (ITO). The United States published a draft ITO Charter, which was followed by inter-governmental meetings from 1946 to 1948. While the Havana Conference in 1948 completed the draft ITO Charter, it never came into effect, because the US Congress failed to approve it. Instead, the GATT, the document intended to reduce trade barriers, which was to have been subordinated to the ITO, became the *de facto* trade regime for the next 50 years.

The GATT was completed by October 1947. In the face of pressures to put it into force even before the draft ITO Charter was completed, countries adopted the Protocol of Provisional Application, which brought the GATT into force "provisionally" on and after January 1, 1948, for the 23 original "contracting parties." Although the GATT served as a forum to handle an increasing number of problems concerning trading relationships, it never formally had the legal status of an international organization, and it had no secretariat of its own. Countries were designated "contracting parties" to indicate that they had not become "members" of

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[9] The General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947].

an organization. The GATT limped along for nearly 50 years with almost no basic "constitutional" provisions regulating its organizational activities and procedures, although through practice and trial and error it evolved fairly elaborate procedures for conducting its business.

The basic purpose of the GATT is to liberalize trade so that the market can work to achieve the policy goals established for the system. It does this by constraining governments from imposing or continuing any of a variety of measures that restrain or distort international trade. Such measures include tariffs, quotas, internal taxes and regulations that discriminate against imports, subsidy and dumping practices, and state trading, as well as customs procedures and a variety of other non-tariff measures that serve as barriers to trade.

The GATT sets forth several important rules that have become informally known as the principles of trade law. The first principle is the most favored nation (MFN) clause of Article I, which provides that government import or export regulations should not discriminate between other countries' products. The second is the national treatment obligation in Article III, which provides for non-discrimination for like products against imports. The third, the prohibition of import quotas, Article XI, is well known in environmental cases. If there is a violation of the provisions of the GATT, Article XX(b) provides exceptions for measures necessary to protect human, animal, or plant life or health, and Article XX(g) provides for measures relating to the conservation of exhaustible natural resources. Article XX(a) also provides an exception for measures necessary to protect public morals, and Article XX(f) excepts measures relating to products produced by prison labor. All the exceptions are qualified by the chapeau to Article XX, which requires that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

The GATT operates through a series of negotiations among member states that are called "rounds." Through these negotiations, states assumed new or revised obligations directed to more open trade. The most significant success of the GATT was in reducing tariff levels among the contracting parties. Between 1947 and 1994, the GATT held eight negotiating rounds, with the result that tariffs on industrial products imported into the industrial countries were reduced to a point where, in the eyes of some economists, they were no longer significant, with a few exceptions.

As tariffs were reduced, many domestic producer interests began to turn to a variety of non-tariff barriers to minimize economic competition from imported products. These eventually numbered more than a thousand. The Tokyo Round, in which 99 states participated from 1973–79, made non-tariff barriers its priority objective. The round resulted in nine different special agreements, six or seven of which were sometimes called

"codes," as for example, the Subsidies Code or the Standards Code. Contracting parties to the GATT had to indicate their separate agreement to each of the "codes."

Soon after the Tokyo Round finished in 1979, countries began discussing the need for a new round of negotiations. In part this was because of concern that if there were no initiatives on trade policy, national governments might be tempted to backslide. In part it reflected a recognition that the world had become more complex and inter-dependent, and that the GATT rules were not providing the measure of discipline necessary to prevent tensions and damaging national actions. In September 1986, states launched the Uruguay Round of negotiations, which ultimately resulted in 1995 in the establishment of the World Trade Organization. The Punta del Este Declaration of 1986, which launched the round, did not mention a new organization to replace the GATT. By midway through the round, however, some governments recognized the need for a new institutional structure. In early 1990, Canada put forward the first official government proposal for a new organization to be called the "World Trade Organization." A draft charter was included in the late 1991 rough draft of the Uruguay Round negotiation final text, and it was subsequently extensively revised. The final treaty (April 1994) embodied the new organization as the "World Trade Organization." The treaty, which is 26,000 pages in length (including extensive annexes), was the single agreement, or package, resulting from the Uruguay Round. The overall treaty is termed the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations"; it contains many components. The first element is the WTO Agreement,[10] often referred to as the WTO Charter. This charter contains four important annexes, which comprise most of the treaty's pages and all of the "substance," as contrasted with the charter clauses, which address institutional and procedural matters.

Annex 1 to the WTO Agreement contains the Multilateral Trade Agreements (in three parts), which are mandatory in the sense that they impose binding obligations on all members of the WTO. This reinforces the "single package" notion of the negotiators. The Annex 1A texts include the GATT 1994 (the revised and all-inclusive GATT agreement with related agreements or "codes" and the "schedule of concessions") and 12 other multilateral agreements, including, *inter alia*, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, and the Agreement on Subsidies and Countervailing Measures. Annex 1B is the services agreement, General Agreement on Trade in Services (GATS). Annex IC is the intellectual property agreement, Trade-Related Intellectual

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[10] The Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 33 I.L.M. 1144, 11153 (1994) [hereinafter WTO Agreement].