

Trade and the Environment

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Trade and the Environment

Law and Policy

Second Edition

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To Sue, Zach, and Mats
C.W.

I dedicated the first edition to my wife Cassandra. We jointly dedicate this second edition to the next generations—our children Ingrid and Seth, their spouses Jeremiah and Amy, and our granddaughter Sadie Margaret—with the fervent hope that, as we face urgent challenges today, we will build for them economically sound and environmentally sustainable societies, at home and around the world.

S.G.

To Rosemary Vila, Andrea, and Anton
G.B.

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Preface

General Introduction

In 1991, the *Tuna/Dolphin* dispute brought international trade law to the attention of environmental advocates in many countries. In 1998, with protesters lining the streets of Seattle in turtle costumes in reference to the *Shrimp/Turtle* dispute, the relevance of the World Trade Organization to environmental policy was brought to the attention of citizens worldwide. As the first edition of this book went to press, the United States and Europe were about to become engaged in another trade dispute, this one over trade in genetically modified foods. In late 2010, as this second edition goes to press, the United States is contemplating a possible trade complaint against China for rules and subsidies giving an advantage to Chinese manufacturers of solar panels and wind turbines. Mexico has initiated a dispute over U.S. “dolphin-safe” labels for tuna.

Despite these and other high profile cases, or perhaps because of them, the intersection of trade law and environmental policy remains poorly understood. It is still often portrayed as a struggle between good and evil. In this simplified view, trade experts think liberalized trade is good because it promotes economic efficiency and raises standards of living, and they fear environmental trade measures because they threaten to undo hard-won gains for open market access. For environmental advocates, the simplified view is that trade’s promotion of growth increases pollution and depletion of natural resources, open market competition drives standards down, and trade rules limit policy options for pursuing environmental objectives in an environmentally challenged world. By immersing our readers in the detail of the law we hope to challenge these simplified constructions of the relationship between international trade law and the law of environmental protection.

The ambition of this textbook, then, is to present students and other readers with the complexity and ambiguity of the real world where trade and environment meet. Trade law leaves space for environmental trade measures, but trade measures have commercial consequences, so there are pre-conditions for such measures to be allowed. Are those pre-conditions overly stringent? On the other side, open international trade can help with diffusion of green technology and with the environmental battle against agricultural and natural resources subsidies, but governments have proven reluctant to live up to their free trade principles on these matters. The text deals repeatedly with these difficult issues.

The complexity and ambiguity runs deep. Environmental effects of production of traded goods vary from product to product, and are mostly mediated through national regulations that vary from country to country. Equally, the specific effects of trade law on environmental protection efforts depend on the details of regulatory implementation. Sensitive issues also arise in the relationship between international cooperation and independent national action, between harmonization of policy in global markets

and national prerogatives to set national goals and requirements. For all these reasons, sweeping generalizations about trade and environment are often misleading. Only a detailed examination of the law and the factual circumstances in each situation will yield meaningful understanding and insight. Extensive excerpts from WTO dispute settlement reports are designed to give readers that detail. In the process, we hope that each community will not only understand the other but with that understanding can earn the confidence and respect of the other.

Trade and the environment is not a subject for specialists only. It is an element of a larger (and endless) discussion about the organization and objectives of our social, economic, and political systems and their situation in the world of natural ecological systems. When and to what extent should the pursuit of nontrade values such as labor rights, human rights, or environmental protection be freed from, or be subject to, the stringent market-opening disciplines of international trade law? In the quest for sustainable development, how are trade and nontrade values balanced and blended? To what institutions—national or international, can we turn for rules and guidance? Such issues are already topics of national discussion and international negotiation. We hope this book encourages teachers and students alike to become participants in that discussion.

Teaching Trade and the Environment

The field of “Trade and Environment” law and policy demands a lot from students—and from professors—because it requires some basic mastery of principles, concepts, and legal doctrines in both the trade realm and the environmental realm. The primary objective of this textbook is to provide the material for students to gain such basic mastery. Each realm has a broad sweep and myriad details; the combination can be daunting, but is at the same time fascinating and, more importantly, an element of the ongoing struggle by international policy makers to forge rules and institutions for a sustainable world.

Study of trade and environment is not made easier—though perhaps teaching is made more interesting—by the clash of cultures and by the endless, occasionally fruitless, debate about how these two realms should best co-exist, if not achieve the ideal state of becoming “mutually supportive.” Our textbook presents much of that debate and the cultural differences that underlie it, but tries at the same time to ask critical questions about the arguments presented by all participants in the debate. We hope in that way to provide a reliable and yet provocative introduction to the field and a foundation for further study by both students and professors.

Although all three authors are from the United States and the text material is presented in the style customary for law textbooks at U.S. law schools, we have tried to give the book an international cast so that it can be easily used by teachers around the world who are teaching classes in English. Some of the major WTO cases involve the United States, but others center on environmental issues and trade practices in other parts of the world, providing material to engage the interest of students in all regions of the world. Apart from the WTO cases, the reading selections encompass economics and political science as well as law, and reflect a variety of national and regional perspectives. At appropriate places there are materials specific to U.S. law, EU law, and Canadian law that can be used to give a particular local orientation to the course or as a basis for comparative law analysis of national trade law and policy.

Overall Approach

The numerous linkages between trade and environmental policy made this a rather large book. Chapter 1 begins by exploring the underlying principles of free trade and sustainable development. It sets out the trade and environment debate by highlighting the criticisms and defenses of free trade through a “debate” between Herman Daly, a prominent ecological economist who views trade liberalization as “uneconomical,” and Jagdish Bhagwati, a well-known trade economist who believes that trade liberalization is the world’s most powerful force for social good. It also explores the goal of sustainable development and asks whether trade liberalization can help achieve that goal.

Chapter 2 takes a close look at the institutions and decisionmaking process of the World Trade Organization (WTO). Because so much of the trade and environment debate is framed by the decisions of trade panels, it also explores in detail the structure and composition of the WTO’s Dispute Settlement Body and the legal standards used to decide trade disputes.

Chapters 3 through 8 examine the substantive law of the General Agreement on Tariffs and Trade (GATT) and other WTO agreements. Chapters 3 and 4 introduce the core components of trade law that are central to the trade and environment debate. This material is organized to be taught consecutively, though not all sections of each chapter need to be covered. Chapter 3 explores the GATT rules on tariffs, quotas, and other import and export restrictions and the environmental implications of such measures. It focuses on timber policy—quotas, bans, and taxes—to highlight the environmental implications of these GATT rules.

Chapter 4 examines the GATT’s core nondiscrimination obligations: the most favored nation and national treatment obligations. These two obligations are at the heart of the trade and environment debate because they require WTO Members to tax and regulate foreign and domestic “like products” with equal favor. Because environmental advocates want to tax and regulate “green” products more favorably than similar products they deem environmentally harmful, the GATT consistency of such measures hinges on whether those products are considered “like.” This chapter assesses whether countries may and should tax or regulate products differently depending on the processes and production methods (PPMs) used to make them.

Chapter 5 looks at the evolving nature of the exceptions to GATT’s core obligations for measures necessary to protect human, animal, and plant life or health and measures relating to the conservation of exhaustible natural resources. Early interpretations of the exceptions by trade panels, such as in *Tuna/Dolphin*, made it very difficult for countries to justify their trade-related environmental policies under the GATT. The *Shrimp/Turtle* decisions, however, appear to have opened the door to many of the trade-related environmental policies sought by environmental advocates—provided certain steps are followed.

Chapters 6, 7, and 8 look at specialized agreements within the WTO from which students and professors may wish to select: the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Each agreement focuses on unique environmental issues that require an understanding of Chapters 3 to 5, but the Chapters in this set stand independently of each other. Chapter 6 examines the TBT Agreement and its effect on ecolabeling efforts. Chapter 7 asks whether the SPS Agreement adequately balances the public interest in a safe

food supply with trade interests in health and safety regulations that do not protect domestic producers. Chapter 8 tackles subsidies and agricultural subsidies by assessing the environmental soundness of subsidies and their economic rationale.

Chapter 9 explores the complicated relationship between international trade agreements and multilateral environmental agreements. This important trade and environment issue receives close scrutiny, because policymakers at the highest levels have been debating whether environmental treaties should be allowed to use trade restrictions in light of the WTO's antipathy to trade restrictions. Because this chapter describes the trade measures used in environmental agreements, it also offers a means to review earlier chapters, particularly Chapters 3, 4, and 5. It also briefly introduces two additional WTO agreements that have unique linkages to specific environmental agreements: the Agreement on Trade-Related Aspects of Intellectual Property Rights and its relation to genetic resources under the Convention on Biological Diversity; and the General Agreement on Trade in Services and its relation to implementation of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Because these trade and environment concerns are more speculative than other trade-MEA linkages, they are not given full treatment.

Chapters 10 and 11 turn to substantive and environmental provisions of regional agreements and entities, particularly the North American Free Trade Agreement (NAFTA) and the European Union. Chapter 10 focuses on the investment provisions of the NAFTA, which grant rights to private, foreign investors to challenge governmental measures that they believe discriminate against them or their investments or that "expropriate" their investment. Environmental advocates have found investment provisions of free trade agreements particularly pernicious, and we explore whether those concerns have merit. Chapter 11 reviews the specific ways the NAFTA and the European Union incorporate environmental decisionmaking into a trade framework or into trade decisionmaking, something the WTO has so far refused to do.

Chapter 12 closes with an examination of the role of public participation. Environmental advocates have long fought against the culture of confidentiality that dominates trade decisionmaking. Looking at the United States and the European Union, this chapter tracks the strategies that environmental advocates have used to pry open the door to the trade world, sometimes with success and other times with failure. It also reviews the use of environmental impact assessment as a means to evaluate the potential effects of trade agreements.

Because of the complexity and ambiguity of the trade-environment linkage and because of the depth of trade-environment linkages, we have opted not to provide a synthesis or conclusion at the end of this book. Instead, each chapter offers some ideas on how a particular component of trade law can be reshaped to better achieve environmental goals while also achieving trade goals. These sections are entitled, for example, "Rethinking Article XX(g)" or "The Way Forward." We hope that this strategy helps make learning trade law *and* imagining how trade law and environmental law can be made mutually reinforcing more manageable.

The breadth of the subject matter made limiting the scope of this book challenging. In the end, we omitted important influences on trade and environmental issues, such as the role of the International Monetary Fund, the World Bank, and the regional development banks. Although these institutions have played important roles in promoting liberalized trade, the development of environmental law, and the financing of projects that have significant impacts on the environment, we chose to adhere more closely to environmental issues more directly affected by trade rules rather than globalization issues.

In addition, we have not covered in any detailed or systematic way the skewed distribution effects of liberalized trade policies that have failed to alleviate poverty in the least developed countries. Poverty alleviation can have significant impacts on the environment, both positive and negative. This particular issue, while enormously important and closely associated with the defense of globalization, liberalized trade policies, and the achievement of sustainable development, encompasses a broader range of issues and policies than the law related to the trade and environment debate. Nevertheless, we incorporate issues of equity, differential and special treatment, and poverty throughout the book. We also highlight the distinctive perspectives that developed and developing countries bring to bear on trade and environment issues, such as ecolabeling and regulatory distinctions based on processes and production methods, among others. These perspectives of course are often tightly linked to a country's development status or unique economic interests.

A third issue that this book does not explicitly cover is the use of economic power in the development of trade rules and in resolving trade disputes. Until recently, developing countries have found it difficult to use their advantage in numbers to overcome their economic disadvantage. This may be changing, however. Developing countries have stalled negotiations of the Free Trade Area of the Americas and derailed negotiations on multi-lateral trade issues until the developed countries agree to concessions concerning their agricultural subsidies and other measures restraining market access.

We close with a note of heartfelt thanks to the large number of people who have made important contributions to this book. We would like to thank Ashlee Albies, Candice Rutter, Debby Scott, Josh Smith, Erica Thorson, and Mario Williams, all students at Lewis & Clark Law School, for their valuable research and editing talents. A special thanks to Jessica Yeh and Eleanor Garretson for their fantastic work on this second edition. The staff of the Boley Law Library at Lewis & Clark Law School have provided tremendous assistance; thank you Tami Gierloff, Kim Journey, Rob Truman, and Lynn Williams. We also thank Andy Marion and Lisa Frenz for assisting with word processing. We would also like to thank our colleagues who took the time to carefully review draft chapters: David Downes, David Gantz, Geoffrey Garver, Patti Goldman, Eban Goodstein, David Markell, John Knox, Richard Tarasofsky, Martin Wagner, Jake Werskman, David Wirth, and Durwood Zaelke. Finally, we would like to particularly note the valuable contributions of Stephen Powell and Errol Meidinger, whose detailed comments on the first edition have improved this second edition. Finally, we are most grateful to our wives—Sue, Cassandra, and Rose—who have patiently endured a seemingly endless writing process.

We welcome comments on the strengths of this book as well as where it can be improved. Comments can be sent to Chris Wold (wold@lclark.edu).

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November 2010

A General Note on Information and Research Sources

The textbook has a selected bibliography, starting at page 893. We offer here some general notes and commentary on a few of the items in that bibliography, and general guidance on sources for further research.

General Texts

In spite of an active academic and advocacy literature on trade and environment, there are only a few general texts on the subject. Our book remains, as far as we know, the only published text for teachers and students that attempts to cover the whole subject from a legal perspective. The other single comprehensive book on trade and environment policy is the dated but still enormously valuable analysis of the issues by Daniel Esty, now a professor at Yale: *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* (1994). In addition, attorneys with the Center for International Environmental Law have recently published a book which provides short summaries and commentaries on, together with large excerpts from, trade-environment reports and other reports with jurisprudential significance. *BERNASCONI-OSTERWALDER ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE* (2006). Another book covers much of the same material as included in this textbook, but from a human rights perspective: *BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS* (2009).

A number of books, some from the early years and some more recent, are less comprehensive but nevertheless address the broad interface between trade and environment. Among the more recent is a compendium of views from various experts under the title *TRADE AND ENVIRONMENT: RECENT CONTROVERSIES* (2003), edited by Singer, Hatti & Tandon, available from the Indian publishing house Vedams. For a more idiosyncratic theoretical analysis, see *OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT* (2004). An earlier edited volume presenting various perspectives is *TRADE AND ENVIRONMENT: CONFLICT OR COMPATIBILITY*, Duncan Brack, ed. (1998), available from Earthscan. For Francophones, a rare text in French is *SANDRINE MALJEAN-DUBOIS, DROIT DE L'ORGANISATION MONDIALE DU COMMERCE ET PROTECTION DE L'ENVIRONNEMENT* (2003).

Some very useful volumes focus on trade and environment in a regional context. In particular, there are a number of books examining the North American Free Trade Agreement and its associated environmental agreement. We draw your attention to two of them.

On a general level, for a very useful and up-to-date assessment of NAFTA's environmental consequences by an economist, see KEVIN GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND* (2004). The best available examination of the operation of the environmental side agreement is JOHN KNOX & DAVID MARKELL, EDs., *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION* (2003). In addition, two journals have recent volumes dedicated to trade and environment in a regional context: 45 *WAKE FOREST L. REV.* (2010) and 28 *ST. LOUIS UNIV. PUBLIC L. REV.* (2008).

There are a few general texts on trade law that have significant coverage of trade and environment. In our opinion, the best and most current of these is: MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* (2d ed. 2006). Another valuable general text is: RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* (1998).

In the environmental literature, the best that exists are relatively short chapters on trade and environment in some environmental law teaching texts, including DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (3d ed. 2006) and PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* (5th ed. 2006). For serious study of trade and environment issues, the obvious limitation of these environmental textbooks is that they do not, and do not claim to, treat trade-environment issues in a comprehensive way.

At the general level, there are also some reports and a number of advocacy statements. A significant general report that was inadvertently omitted in the Selected Bibliography was prepared by two economists on the WTO secretariat staff: Nordstrom & Vaughan, *Trade and the Environment* (1999), available through the WTO website.

General Sources

There are many different sources of information and analysis available through the Internet. Here is a sampling of major sites that have substantial materials:

Official

www.wto.org A very complete site with full text of all WTO agreements, dispute settlement reports, minutes of meetings of the Committee on Trade and Environment, and many other documents, reports, data sources, and news items.

www.oecd.org The Organisation for Economic Cooperation and Development has prepared a number of papers and reports on different issues in the trade and environment subject area.

www.unep.org The United Nations Environment Programme has participated on occasion in the international policy deliberations and negotiations on trade and environment issues.

www.cec.org The North American Commission for Environmental Cooperation has been a pioneer in the rigorous analysis of the environmental effects of trade liberalization in North America.

www.nafta-sec-alena.org This is the official website of the NAFTA Secretariat, with full text of NAFTA and NAFTA dispute settlement rulings.

www.worldbank.org/icsid The official site of the International Center for the Settlement of Investment Disputes, which handles many investor-state arbitrations under trade agreements.

Many national trade agencies, maintain sections of their websites devoted to trade and environment. A few environmental agencies do the same. Some examples:

U.S.: www.ustr.gov (U.S. Trade Representative)

www.epa.gov (U.S. Environmental Protection Agency)

Canada: www.international.gc.ca/international/index.aspx
(Foreign Affairs and International Trade Canada)

EU: europa.eu/pol/comm/index_en.htm
This is the English language portal to all EU activities and bodies dealing with “external trade.”

Australia: www.dfat.gov.au/trade/

Academic/Research

www.gets.org (Yale Global Environment and Trade Studies)

www.ictsd.org (International Centre for Trade and Sustainable Development)

www.trade-environment.org A component of the ICTSD website with an interesting collection of studies, news, and other useful information.

ase.tufts.edu/gdae (The Global Development and Environment Institute at Tufts University)

www.iisd.org (International Institute for Sustainable Development)

www.ciel.org (Center for International Environmental Law)

www.american.edu/TED/ted.htm (A website from American University, Washington, DC, devoted to trade, environment, and development)

www.wti.org (The World Trade Institute is an educational and research organization devoted to the law and economics of world trade, based in Switzerland)

Advocacy

Depending on the organization or the particular study, these may include references to reports or other substantive analysis.

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List of Acronyms

AIT	Canadian Agreement on International Trade
APA	U.S. Administrative Procedure Act
BECA	U.S.-Mexico Border Environment Cooperation Agreement
BECC	Border Environmental Cooperation Commission
BISD	Basic Instruments and Selected Documents
BITs	Bilateral Investment Treaties
CAFE	Corporate Average Fuel Economy
CFCs	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CEC	Commission for Environmental Cooperation (of North America)
CTE	Committee on Trade and Environment
DR-CAFTA	U.S.-Dominican Republic-Central American Free Trade Agreement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EA	Environmental Assessment
EC	European Communities
EIA/EIS	Environmental Impact Assessment/Statement
EPA	U.S. Environmental Protection Agency
ESI	Environmental Sustainability Index
EU	European Union
FAO	U.N. Food and Agriculture Organization
FACA	Federal Advisory Committee Act
FDI	Foreign Direct Investment
FOIA	Freedom of Information Act
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GMF/GMO	Genetically Modified Food/Organism
GSP	Generalized System of Preferences
HTS	Harmonized Tariff System

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ISO	International Organization of Standardization
ITO	International Trade Organization
JPAC	Joint Public Advisory Committee
MMPA	U.S. Marine Mammal Protection Act
MEAs	Multilateral Environmental Agreements
MFN	Most Favored Nation
NAAEC	North American Agreement for Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGOs	Nongovernmental Organizations
NEPA	U.S. National Environmental Policy Act
OECD	Organization for Economic Cooperation and Development
PCBs	Polychlorinated Biphenyls
PPMs	Processes and Production Methods
PPP	Polluter Pays Principle
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TEDs	Turtle Excluder Devices
TNCs	Transnational Corporations
TPA	U.S. Bipartisan Trade Promotion Authority Act
TRIPs	Agreement on Trade-related Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	U.N. Conference on Trade and Development
UNDP	U.N. Development Program
UNEP	U.N. Environment Program
USTR	U.S. Trade Representative
WHO	World Health Organization
WTO	World Trade Organization