PART 3

# LITERATURE REVIEW

# BOOK REVIEWS

Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory*, International Economic Law Series (Oxford: Oxford University Press, 2009).

Trade and environment has been, over the last decade, one of the most prominent crosscutting topics, addressing the complex relationship of trade liberalization and the protection of the environment—both equally important areas of international law. The classical, consent-based structure of international law and the long tradition, until 1995, of treating the 1947 General Agreement for Tariffs and Trade (GATT) as a system of its own quite outside the mainstream of international law, has produced complex and unresolved issues in interfacing the two areas. Recent years show considerable efforts to bring about greater coherence, and the present book amounts to an important contribution to this effect. In approaching the topic, the author expounds a number of core issues that are relevant and of importance for international law in general. He first deals with relevant theoretical concepts in general public international law, in particular, the doctrine of conflict of international rules (Part 1). He turns to the problem of extraterritorial jurisdiction, unilateralism, and proportionality (Part 2). The book then addresses fundamental issues in World Trade Organization (WTO) law, in particular, non-discrimination (Part 3). The author concludes his analysis with two studies on ozone protection and climate change regulation and WTO law (Part 4). Each chapter is designed to provide the foundations for the subsequent ones, and each claims, at the same time, to offer a self-standing contribution in its own right. The book concludes with an epilogue, summarizing the results and providing a summary of the main theses. It is carefully researched and written, offering important insights. It expounds detailed analysis and arguments on a great number of pertinent issues and problems. A brief review cannot possibly do justice to the rich contents of the book.

In Part 1, the author offers an interesting discussion in legal theory, elaborating on the difference between prescriptive and permissive rules. He prepares the ground for critically assessing WTO jurisprudence, operating under a prevailing definition of conflict of norms in international law. He takes issue with the view of narrowly defining conflict, subordinating permissive to prescriptive rules. The author argues on the basis of legal theory and refers to WTO dispute settlement. He opts, on the basis of the Vienna school of jurisprudence and Kelsen, for a broader

concept of conflict.[1] He eventually brings the maxims of *lex posterior* and *lex specialis* in treaty interpretation to application. The book not only discusses the pertinent literature on the subject but also the difficulties in applying these doctrines within the multilateral system. They only apply to the extent that they do not affect third party rights.[2] The problem is closely related to the legal nature of WTO rights and obligations within the multilateral trading system and the topic of jurisdiction in WTO dispute settlement, which is addressed in subsequent chapters of Part 1. These issues largely determine to what extent panels and the Appellate Body are obliged, and entitled, to take into account international law other than WTO agreements. The point, of course, is of crucial importance to multilateral environmental agreements. Upon expounding the different schools of thought and jurisprudence, the author adopts the view that most WTO norms are bilateral in nature and thus may be modified bilaterally among parties by non-WTO-related rights and obligations and that they need to be taken into account, subject to third party rights, in dispute settlement within the WTO.[3]

Part 2 deals with the problem of extraterritorial jurisdiction. It comprehensively expounds the problem beyond the bounds of environmental law. The author analyzes different schools of thought and the case law. He concludes that neither the concept of sovereignty nor the principle of non-intervention prevent states from applying laws affecting conduct or circumstances abroad. Essentially, it is a matter of balancing interests concerned and respecting the principle of proportionality. The chapter offers interesting insights into the concept of extraterritoriality for which, somewhat surprisingly, no generally accepted notion exists in international law. The problem of delimitating jurisdiction is largely unresolved and controversial. Instead of returning to balancing interests, which are predominant in jurisprudence and the literature, the author suggests that the focus should be placed primarily on the notion of extraterritoriality and the inclusion of measures that only regulate conduct abroad.[4] Mere effects produced by domestic measures abroad do not fall under the category. Whether or not the regulatory measure is justified under international law depends upon legitimate interests and proportionality and, thus, upon extensive legal argumentation.[5] A brief chapter on unilateral measures affecting other states or persons concludes Part 2. On substance, it builds upon the doctrine of extraterritoriality, offering a framework,[6] yet without including constraints imposed by the multilateral trading system, which are only dealt with later in the book.[7]

[1] Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory*, International Economic Law Series (2009) at 38.

[2] *Ibid*. at 68. [3] *Ibid*. at 76–7. [4] *Ibid*. at 168.
[5] *Ibid*. at 170. [6] *Ibid*. at 183. [7] *Ibid*. at 281.

Part 3 turns to the fundamental issues in law that are at the heart of the interface of trade and environment in WTO law. The book offers a comprehensive discussion and an admirably concise analysis of non-discrimination in Articles I and III of the GATT. In particular, the author addresses the controversial *aims and effects test* expounded by doctrine and GATT panels in Article III, paragraph 2 and paragraph 4. In essence, it allows for a broader product differentiation in addressing other legitimate policy objectives, including environmental protection. The author rejects this approach as it arguably erodes the disciplines of Article XX of the GATT. Instead, he emphasizes the importance of protecting legitimate expectations as to the conditions of competition in de jure and de facto discrimination analysis.[8] This reading somewhat contrasts with a deferential approach to Article XX, which, according to the author, also allows for the application of the precautionary principle.[9] While principles are narrowly defined, it seems that exceptions are given more leeway and policy space. The subsequent chapter deals with the application and interpretation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement). It offers interesting and new insights, in particular, in defining the relationship of the GATT and the TBT Agreement.[10] The following chapters deal with the problem of production and process methods (PPMs), which are of key importance in environmental law. The author again offers a thorough and careful analysis of the problem. Of particular importance is his insight that based upon *Canada—Automotive Industry*, non-product related PPMs are consistent with Article I of the GATT when they do not incur disparate impacts on imported products. He argues that there is no need to resort to regulatory purpose doctrine in order to defend PPMs. To the extent that they are of a discriminatory nature, they need to stand the test of Article XX in order to prevail.[11] This finding also influences his assessment of PPMs in the TBT Agreement, which textually is not conclusive but which, according to the author, should be interpreted by taking into account the 1994 GATT.[12] A subsequent chapter is dedicated to the analysis of border tax adjustment and its relation to the imposition of tariffs. Of particular importance—in light of current challenges in the field of climate change mitigation—is the question to what extent border tax adjustment requires physical incorporation or whether taxes levied on production processes could also be compensated for. The author concludes that based upon the SCM Agreement there is serious doubt whether taxes on PPMs could be levied.[13] A final chapter sets out the law of environmental labelling in the WTO, concluding that there is no fundamental difference between product-related and PPM-based labelling under the GATT and the TBT Agreement.[14]

[8] *Ibid*. at 226. [9] *Ibid*. at 262–3. [10] *Ibid*. at 298. [11] *Ibid*. at 326–7.
[12] *Ibid*. at 339. [13] *Ibid*. at 337. [14] *Ibid*. at 349.

Part 4 offers two chapters addressing the relationship of WTO law to, on the one hand, the Vienna Convention for the Protection of the Ozone Layer, which was adopted in 1985, and, on the other hand, to the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC). While the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol) prescribes trade restrictions that may potentially collide with WTO law, the Kyoto Protocol does not contain particular trade policies and thus leaves members leeway to implement the protocol in a WTO consistent way. It is interesting to note that potential clashes between WTO law and the Montreal Protocol have not materialized.[15] The book then examines implementation measures on climate change mitigation adopted by the European Community. Without offering a firm assessment as to the compatibility of these measures with WTO law, the chapters ably depict the prospects of challenges and problems impending in future potential litigation on climate change mitigation measures.[16]

The book by Dr. Vranes, based upon a habilitation thesis submitted to the Vienna University of Economics and Business Administration in 2007, makes an important contribution to both the doctrine of public international law and to WTO law in particular. Indeed, Parts 1 and 2 address problems of fundamental importance, which are way beyond the field of trade and environmental law. They are of key importance to general public international law. The chapters on the notion of, and debate on, conflict of international law rules, the problem of extraterritorial jurisdiction, and unilateralism offer a complex and in-depth analysis from the point of view of legal theory. The author purports to build upon these theories in expounding the relationship of trade and environment in subsequent chapters.[17] These theories provide an important legal framework, upon which additional insights—for example, in defining the relationship of the GATT and the TBT Agreement—could have been drawn and developed. While the ambition to build all arguments bottom up and thus to inform subsequent chapters is met only partially, the strength of the book clearly consists in the rigour and in-depth analysis of its individual chapters. It is highly recommended to scholars interested in public international law and the interface of trade and environmental law.

Emphasizing conflicts of rules at the outset of the book—and enlarging the scope of conflict—may create the wrong impression that trade and the environment are essentially in conflict, while, in many respects, goals of liberalizing trade and environmental goals go hand in hand, for example, in current efforts to reduce subsidies in fisheries. The same is largely true in dismantling extensive protectionism in agriculture. Implications of conceiving the rights and obligations in the WTO in terms of bilateral relations,

[15] *Ibid*. at 372. [16] *Ibid*. at 394. [17] *Ibid*., chapter 5, 397.

which are thus modifiable among members, may not fully take into account the impact that such modifications will generally have on third party relations and on the multilateral system as a whole. The principle of progressive liberalization and individualized schedules of commitments in goods and services reflects the main trait of variable geometry in the system. It is doubtful whether it should be further enhanced by perceiving the overall system in terms of bilateral relations. The impact of this approach on legal security and precedents and the balance of rights and obligations and its impact on third party rights requires further analysis. The potential to take recourse to *lex posterior* and to *lex specialis*, in particular, may be more limited as third party rights are much more affected within the multilateral trading system than anticipated by customary international principles essentially built upon bilateral relations. The difficulties encountered in defining the relationship of the GATT and specialized agreements tend to support, in the end, a view that defines conflict in narrow terms and seeks coherence and mutual support of different agreements rather than stressing divergences and conflict, which are more difficult to cope with in the contours of the present WTO dispute settlement system.

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Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Farham, UK: Ashgate, 2008).

## THE 'NEW PATH' OF SUSTAINABILITY

In his latest book *The Principle of Sustainability: Transforming Law and Governance*, Klaus Bosselmann sets the course for legal scholarship on sustainability for many decades to come. This important work challenges a number of fundamental concepts of contemporary international and national law and proves their failure to promote a sustainable future for humanity. Yet, he does not stop here. For every single shortcoming, which he concisely analyzes, Bosselmann readily has an answer at hand of how to improve the current situation by transforming traditional legal structures. Instead of being stuck in critical discontent, Bosselmann suggests concrete changes to law and legal thinking—some minor, some shifting paradigms.

Despite the gravity of the situation, the book emanates a much welcome aura of optimism. Transformation of society at large towards a state of ecological sustainability seems at once logical, necessary, and