

Summer 2018

INTERNATIONAL TRADE AND THE ENVIRONMENT

COURSE OUTLINE AND SYLLABUS

Instructor: David A. Wirth
Office hours: see below

E-mail: wirthd@bc.edu
Class sessions: Monday-Thursday, July 9-19
9:00 AM – noon

I. OBJECTIVES

This course is an up-to-the-minute, in-depth treatment of the intersection and frequent clash between two areas of policy and law, both of which are intended to promote human welfare and sustainable development: trade liberalization and environmental protection. The course will address cutting-edge questions in the field, including (1) protection of natural resources through unilateral trade-based measures; (2) the legality of multilateral environmental agreements employing trade measures; (3) utilization of science-based trade tests; and (4) subsidies. The course will analyze all the major junctures in the evolution of this area of the law, including the dolphin/tuna, shrimp/turtle, beef hormone, asbestos, and GM crops. Students will be exposed to the major international trade agreements and institutions, such as GATT, NAFTA, the World Trade Organization, the Transpacific Partnership and draft Transatlantic Partnership, in some detail. There are no prerequisites for this course, and no prior familiarity with either trade law or environmental law is necessary or assumed. Depending on the number of students enrolled, the course may include a simulated multilateral negotiation on the subject of exports of hazardous chemicals and pesticides.

II. OFFICE HOURS

I generally plan to be available for the hour immediately after class, noon to 1 PM, Monday through Thursday. *If you would like to meet with me then, please be sure to let me know immediately before or after class or during a break.* Students who wish to agree a different, mutually convenient time with me should talk to me before or after class or during a break.

III. TEXTS

The required text for this course is CHRIS WOLD, SANFORD GAINES & GREG BLOCK, *TRADE AND THE ENVIRONMENT: LAW AND POLICY* (Carolina Academic Press 2d ed. 2011), ISBN 978-1-59460-816-2, which will be available from the Barrister's Book Shop. Be sure to purchase the second edition dated 2011, as the earlier first edition (some used copies of which may be

available) will not be acceptable. Some optional readings may also be placed on reserve. Please check with the library for the list of reserve materials.

IV. SIMULATED MULTILATERAL NEGOTIATION

The course will include a simulated multilateral negotiation of an international environmental agreement. Students will be assigned roles as governmental representatives or non-state observers. The purposes of the negotiation include the assimilation of the course material through active learning techniques and exposure to the real-world dynamics of international diplomacy.

The negotiation will be conducted over three sessions during the span of the course. Detailed instructions will be distributed in writing and explained in advance of the first session. The negotiation itself will not be graded, but all course participants are expected actively to contribute to the exercise.

V. COURSE WEBSITE

A TWEN website will be established for this course, which can be accessed from lawschool.westlaw.com using your Westlaw password. The website will contain this syllabus; an initial course announcement in advance of the first meeting; a cumulative list of assignments to date; supplemental handouts; and web links to the texts of relevant international instruments discussed in the course. If you are uncertain of the current assignment, consult the documentation on the website.

Note that you are ***not*** automatically registered for the website by virtue of your registration in the course and must manually sign up to obtain access. The instructions for adding a course are set out at lawschool.westlaw.com. If you have any difficulties registering for the website, please consult the library staff.

VI. EXAMINATION AND GRADING

The principal component of the grade in this course will be a take-home, open-book, open-notes final examination. The time period for the examination will be announced in class; the examination will most likely be due on Sunday, July 23, at 4:00.

The examination and your preparation for it should be learning experiences. Accordingly, the examination will emphasize broad-gauge synthesis of the subject matter from the beginning to the end of the course in a problem solving context. Although the format is subject to change, the examination will most likely consist of two or more essay questions in each of the following two categories: fact-based scenarios that will require application of the principles discussed in

class and in the readings to concrete situations to test your mastery of both the depth and breadth of the course material; and "jurisprudential" questions that will require an evaluation, criticism, or critique of an area of the law discussed in class and in the readings. Of the two, the former category of questions will likely count more heavily.

Once you have received your copy of the take-home examination, you may consult *only* the course text, other handouts distributed in connection with this course or referenced on the course website, your own notes, and any other materials you or you, together with others, prepared yourself. You may *not* use other published materials once the examination period has begun. Obviously, you are welcome to consult any sources you wish prior to picking up your copy of the examination.

The examination will be graded anonymously. It is expected that you will routinely attend, be prepared for, and participate in all class sessions. In borderline cases, adjustments to final grades will be made to reflect the quality of individual class participation.

VII. READING ASSIGNMENTS

Reading assignments will be given in two components each:

- material identified to be read closely, principally primary documentation. You should be familiar with the operative significance of this material and, accordingly, should read it with some attention to detail; and
- background material intended to provide context for the operative significance of the "read closely" material.

Note that the following reading assignment is to be prepared in advance of the first day of class:

Read closely: text pp. 16-33 and pp. 169-180.

The following are the TENTATIVE daily assignments for the first five classes of the course. "Text" indicates an assignment to the course text, Chris Wold, Sanford Gaines & Greg Block, *Trade and the Environment: Law and Policy*, 2nd edition. Check the actual assignment sheet every day for updates, which will be clearly marked.

We will move through the assignments and the syllabus in sequential order, covering all of the material in class by the end of the course. Material that may not be completed in class one day will be held over until the next. In other words, we will complete discussion of all the material, even if the class discussions do not correlate precisely with the assignments. *When the reading assignment includes discussion questions, you should come to class prepared to answer*

those questions.

Class 1: Monday, July 9, 2018

I. **INTRODUCTION AND BASIC PRINCIPLES**

Read closely: text pp. 16-33 and pp. 169-180. (This is the same assignment as the first day assignment noted above.)

Class 2: Tuesday, July 10, 2018

II. **NON-TARIFF BARRIERS**

III. **BASIC DISCIPLINES**

IV. **EXTRAJURISDICTIONAL RESOURCES**

Closely: Text pp. 245-265

Wallonia waste case (Download from “Supplemental Course Materials” on website)

Compare the Wallonia case with the Chem Waste Management case on page 255. Why the different result in the two cases?

Text pp. 199-208

Then read paragraphs 5.22-5.38 of the first tuna/dolphin panel report, which can be accessed on the web at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf>

I would also like to initiate a “readings” series relating the legal learning in the course to larger policy considerations. Along those lines, please read Cathy Young, "The Fuzzy Goals of Antiglobalization Activists," Boston Globe, Oct. 1, 2000, at E7, posted on the website under "Supplemental Course Materials."

Background:

Text pp. 215-231 (PPMs)

Text pp. 275-287 (background on Article XX)

Also scan the general instructions for the simulation, posted under “Simulated Negotiation” on the course website.

Class 3: Wednesday, July 11, 2018

The entirety of the second portion of this class will be devoted to the first round of the simulated negotiation.

Read closely:

Text pp. 210-214, 304-309 & 320-324 (reformulated gasoline)

George E. Warren Corp. v. U.S. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998). Clicking on the link on the website should get you to the case. Read from the beginning through part I only, focusing on part I.B.2, “Factors Other Than Air Quality.”

Text pp. 309-326 & 324-340 (turtle/shrimp). How does the outcome in this case compare with that in tuna/dolphin? (Hint: Your answer can safely begin “They are dramatically different because . . . “)

Text pp. 190-199 (asbestos)

Background:

Text pp. 82-100 (dispute settlement)

Class 4: Thursday, July 12, 2018

China – Rare Earths (to be supplied)

V. THE MULTILATERAL ENVIRONMENTAL AGREEMENT PROBLEM

VI. PUBLIC PARTICIPATION IN THE WTO

Begin reading pp. 641-673 as background, then focus closely on pp. 673-684.

Read closely: pp. 101-109.

Readings series: Please read Jagdish Bhagwati, The Case for Free Trade, (somewhat unfortunately) distributed by your authors on pp. 49-50, another excerpt on pp. 50-51, and pp. 54-56 (including the excerpt on “Fair Trade”). Bhagwati draws certain conclusions about the policy implications of the rules we are studying. What are those conclusions, and do you agree with them or not?

Class 5: Monday, July 16, 2018

VII. ENVIRONMENTAL ASSESSMENT OF TRADE AGREEMENTS

Text pp. 847-853 (background)

Text pp. 860-863 (background)

Then read *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994). Clicking on the link in Westlaw should take you to this case. **Note that this case is not the law because it was reversed by the U.S. Court of Appeals for the D.C. Circuit.** Our purpose in reading the case is to gain an understanding of what an EIS for a trade agreement would look like, were one to be prepared.

Text pp. 863-867 (closely, focus on text of E.O. 13,141).

Final Guidelines on Environmental Reviews of Trade Agreements, 65 Fed. Reg. 79442 (Dec. 19, 2000). Clicking on the link in Westlaw should take you to this document, which elaborates the requirements of E.O. 13,141. (The Westlaw link contains two documents, choose no. 1.) To what extent does the process and product of an environmental review of a trade agreement differ from the NEPA process set out in the Public Citizen case? (Hint: focus on section 7 of the Executive Order, and parts IV.B and VI of the guidelines. Treat the remainder of the guidelines as background.)

Class 6: Tuesday, July 17, 2018

VIII. SCIENCE AND THE SPS AGREEMENT

Text pp. 431-521. Focus on primary materials - text of the SPS agreement and Appellate Body report on beef hormones. Class discussion will focus on the hormones Appellate Body report. Treat the remainder of this assignment, including excerpts from other panel and Appellate Body reports, as background. Use the “Beef Hormone Discussion Questions,” posted on the course website under “Supplemental Course Materials,” to guide your reading.

Readings series: Nader, 10 Reasons the TPP Is Not a 'Progressive' Trade Agreement, <http://www.huffingtonpost.com/ralph-nader/ten-reasons-the-tpp-is-no-b-7536770.html>. President Trump has effectively killed the TPP, in stating that the United States will not become party to it. However, Nader’s criticisms are generally valid to most modern regional trade agreements. Come to class prepared to discuss the merits of *each*.

Russia – Pork and Pigs, to be supplied

Optional background reading:

Wirth, *The World Trade Organization Dispute Over Genetically Modified Organisms: The Precautionary Principle Meets International Trade Law*, 37 Vermont L.R.1153 (2013), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1605&context=lsfp/> Read from the beginning through page 1172, stopping at “The Quarantine Disputes.” Begin reading again at page 1177 “The GMO Dispute” to the end.

IX. TBT AGREEMENT

Skim pp. 351-430. Focus on pp. 364-372 (sardines).

United States – Tuna Labelling (Tuna II), to be supplied

“The WTO Appellate Body Knocks Down U.S. “Dolphin-Safe” Tuna Labels But Leaves a Crack for PPMs, <http://www.asil.org/insights/volume/16/issue/25/wto-appellate-body-knocks-down-us-%E2%80%9Cdolphin-safe%E2%80%9D-tuna-labels-leaves>

Class 7: Wednesday, July 18, 2018

A reminder that the third and last round of the simulated negotiation will be held today.

X. DOMESTIC LAW

Text pp. 124-128 (background)

Uruguay Round Agreements Act § 102, [Pub. L. No. 103-465, 19](#) U.S.C. § 3512. Clicking on the link should connect you to this document in Westlaw. Read **only** the indicated section (i.e., section 102).

XI. SUBSIDIES

Assignment, including India – Renewables, to be supplied.

X. NAFTA ENVIRONMENTAL SIDE AGREEMENT

The reading materials for this subject matter are posted folder "Supplemental Course Materials" on the course website.

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