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THE INTERNATIONAL LAW OF FOOD

Professor David A. Wirth

July 2020

COURSE INFORMATION AND SYLLABUS

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Class sessions: Monday-Thursday, July 6-16
Hours TBA

I. OBJECTIVES

Food is essential to human survival. It is also a source of interest, pleasure, concern, and profit to individuals, industry, and governments. Inevitably, we make decisions about the food we eat, some with great particularity such as those who describe themselves as vegans. Food quality and dietary choices are a major issue, with the obesity epidemic that originated in the United States now spreading abroad. Many of us have preferences about where our food comes from, as demonstrated by the "Farm to Fork" and "locavore" movements. The popularity of organic food responds to a concern among some about how food is grown. And all of us are concerned about the purity and safety of the food we eat, with outbreaks of foodborne illness in cantaloupes and contamination such as the European horse meat scandal dominating headlines.

Increasingly, issues related to food are international in dimension. For example fifteen percent of the total U.S. food supply is imported, including 50% of fresh fruits, 20% of fresh vegetables, and 80% of seafood. Food insecurity continues to be a serious problem in the twenty-first century, as 870 million people **i**n the world do not have enough to eat. In 2011, nearly 4 billion tons of food aid was provided internationally, reaching more than 65 million people. At the same time, our own country produces significant food surpluses – nearly 3 billion metric tons in 2008 -- largely as a result of agricultural subsidies, and the United Nations reports annual food surpluses globally.

As the numerous issues connected with food have become ever more international, there has been a commensurate need for the adoption of rules and the creation of institutional infrastructure to govern interactions between governments, to regulate the behavior of food suppliers, and to protect public health and safety. This course examines those issues on the international level through the lens of law and governance.

There are no prerequisites, and no prior familiarity with either public international law or domestic regulatory law is assumed in this seminar-style course. Basic principles in both areas will be elaborated by the instructor as necessary to facilitate discussion, and every component is designed to include all background necessary to a complete understanding of the material.

Much of the course addresses basic analytical skills associated with the study of the law governing the relations between states, and to that extent provides an introduction to international law. The course also provides an introduction to some substantive areas of international law, such as trade and human rights, as well as exposure to international institutions such as the UN Food and Agriculture Organization and the World Trade Organization. It is also designed to familiarize students with working with the texts of primary legal materials, such as treaties, statutes, and regulations. Depending on the number of students enrolled, the course may include a simulated multilateral negotiation on the subject of food labeling, in the context of the UN Codex Alimentarius.

This preliminary syllabus is based on experience in prior years and is representative of the schedule students can anticipate. The actual schedule may vary, depending on the particular situation at the time of delivery. This preliminary syllabus will be updated to reflect developments in the coronavirus crisis, which is unfolding at the time of drafting.

II. 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.

III. SIMULATED MULTILATERAL NEGOTIATION

The course will include a simulated multilateral negotiation of a Codex Alimentarius standard on labelling for "natural" products of agricultural origin. 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. ***Each round of negotiations will require a written work product in advance*** (an opening statement or a negotiating proposal, as the case may be) as indicated on the schedule below.

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.

IV. FOOD SAFETY NEWS ONLINE SUBSCRIPTION

This publication is what is known in the biz as a "trade paper." Typically these are small operations with low circulation often to a narrow industry niche, and consequently high costs. Not surprisingly, subscription rates have tended to be quite high, often prohibitively so even for academic libraries. Somewhat to my surprise, apparently one can get a free subscription to this one, by going to http://www.foodsafetynews.com/. Enter your email address, and click “Subscribe” on the right-hand side of the page. Highly recommended – but not necessarily over lunch!

V. OFFICE HOURS

Because this course is being delivered entirely on-line, I will be glad to arrange office hours individually, upon request, at a mutually convenient time.

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 examination will be due to the course website on Sunday, July 19, by 11:59 PM.

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

There is no published text on this subject matter, and consequently none for purchase. The bulk of the readings will be excerpts from the professional legal literature, most of which is available to the public without copyright restriction. The readings will be available generally on the internet, or published to the

Westlaw TWEN website.

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 there is a reading assignment is to be prepared in advance of the first day of class, Monday, July 6.

The following are the TENTATIVE daily assignments for the first five classes of the course.

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 6, 2020

This introductory class provides basic background that supports the analytical subjects presented in the remainder of the course. In the first class, we will as a group construct a typology of the international law of food, in anticipation of the remainder of the course. Please think about the following questions beforehand:

- What kind of issues would you expect to be dealt with internationally, as opposed to domestically, or perhaps some combination of both? Give some thought not just to substantive subject matter areas (e.g., food safety), but also the attributes or criteria that such issues (which are multiplying rapidly even as the course takes place) might have in common.

- What food-related issues would you expect to benefit (or suffer, for that matter) from the application of public policy in the form of law? Specifically international law? (Don't worry about what "international law" is for the time being, we'll deal with that as we go along).

This class will also include an introduction to the negotiation simulation, the first round of which will be conducted on Wednesday, July 8.

Then, the following:

The International Human Right to Food

Read closely:

- Universal Declaration of Human Rights article 25, http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng

- David Martin, "How Rhetoric Became Rights" ("Web Links" folder on course website). Through what analytical transformation did "rhetoric" become "rights?" What is the difference between them?

- International Covenant on Economic, Social and Cultural Rights, article 11, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

- Committee on Economic, Social and Cultural Rights General Comment No 12, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f5&Lang=en. Click on the pdf document under "English." This document will also be posted on the course website under "Course Documents."

- FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, ftp://ftp.fao.org/docrep/fao/meeting/009/y9825e/y9825e.pdf. Read only the actual text of the Guidelines, beginning at page 9. What do the Guidelines aim to achieve, and how from and institutional, structural, and legal point of view would they accomplish those goals?

Also take a look at the UN organagram, http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf.

Background:

- "Food," in Andrew Clapham & Susan Marks, International Human Rights Lexicon (OUP, 2005). TWEN course website under "Course Documents."

- Olivier De Schutter, United Nations Special Rapporteur on the Right to Food, http://www.srfood.org/en/special-rapporteur. Read just this introductory page. (The current special rapporteur is Hilal Elver, http://www.ohchr.org/EN/Issues/Food/Pages/HilalElver.aspx, but De Schutter's web page describes the role in greater detail).

- Contribution of the Special Rapporteur, Mr. Olivier De Schutter, to the inquiry launched by the International Development Committee of the Parliament of the United Kingdom in advance of the June 2013 G8 Summit, http://www.srfood.org/images/stories/pdf/otherdocuments/2012.12.17%20-%20srrtf_uk%20inquiry%20global%20food%20security.pdf

Class 2: Tuesday, July 7, 2020

Food Security

This class will address issues of food aid and international assistance, as well as the role of multilateral institutions (UN Food and Agriculture Organization, World Bank) national and supranational institutions (U.S. Agency for International Development, EU institutions) and other international institutions (Intergovernmental Panel on Climate Change). While not part of the readings as such, give some thought as to how non-governmental organizations (NGOs) such as Oxfam, Care, and Save the Children fit into a broader understanding of agenda-setting and implementation of food security policy.

Read closely:

- Rome Declaration on World Food Security, http://www.fao.org/wfs/index_en.htm. This is a short document. Please read the entire thing. What is the policy purpose of this instrument? Its legal status?

- Sustainable Development Goals (excerpted) (Website, "Course Documents"). Focus on Goal 2 (food).

- Text of 2009 G-8 communique on food security, http://www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Food_Security[1],0.pdf. Scan the document to get a sense of its purpose and legal force. How does this instrument mesh structurally, if at all, with the UN and FAO instruments?

Background:

- World Bank Food Security Strategy, http://www.worldbank.org/en/topic/foodsecurity/overview#2.

- FAO, 1996 Rome Declaration background, Lessons from the Green Revolution, http://www.fao.org/docrep/003/w2612e/w2612e06a.htm

- 7 U.S.C. § 3103, http://www.law.cornell.edu/uscode/text/7/3103, skip to subsection (19), which defines "sustainable agriculture." How does this definition differ from the approach of the green revolution, addressed in the two previous items?

- Laudato si', the Pope's encyclical on climate change, http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html. Skip to paragraph 157, in which the encyclical mentions food security. How in Francis's view is food security related to climate change? What policy responses does he recommend to assure the poor of the world an adequate supply in a world in which climate will almost certainly be significantly disrupted by climate change that is already occurring and will continue to occur?

- Intergovernmental Panel on Climate Change, 5th Assessment Report, Working Group II,

http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap7_FGDall.pdf. Read just the executive summary, pp. 2-4.

- Paris Agreement, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf. Search for "food" in this instrument to see how the global community proposes to address the relationship between climate change and food security.

Class 3: Wednesday, July 8, 2020

Food Safety in the United States: The Food Safety Modernization Act

Closely:

- Food Safety Modernization Act (FSMA) ("Course Materials" on website). This is now the principal legal vehicle currently protecting the integrity of the food supply in the U.S., including imported food. How, as a legal and analytical matter, does it address the issue of the integrity of imported food?

- Foreign Supplier Verification Program (FSVP) ("Course Materials," on website). This is FDA's proposal for implementing regulations with respect to imported food. (You should assume for our purposes the proposed and final regulations are the same, which is to a considerable extent the case). Who or what is the primary audience at which this document is directed? (Probably not you or the instructor in this course.) How does FDA flesh out the basic requirements of the statute so as to give life to its mandate of protecting the American public from the hazards of imported food?

- Wirth, Private Voluntary Standards and New U.S. Food Safety Legislation The Food Safety Modernization Act and Imported Food (powerpoint, "Course Materials" on website).

Background:

- To get a sense of the shape of the food safety problem in the U.S., take a look at 10 Deadliest Food Contaminations in U.S. History, http://www.everydayhealth.com/healthy-living-pictures/deadliest-foodborne-illness-outbreaks-in-us-history.aspx#/slide-1. If you're interested in the "big 10" from a previous year, have a look at Food Safety News, The 10 Biggest Foodborne Illness Outbreaks of 2015, http://www.foodsafetynews.com/2015/12/the-10-biggest-u-s-foodborne-illness-outbreaks-of-2015/#.V0Ts0fkrKUk (including one homegrown in Boston.) What do these incidents have in common? How are they different? What challenges do they present to investigators, such as the Centers for Disease Control, in identifying the source of the outbreak and curtailing it?

- U.S. Department of Agriculture: http://www.usda.gov/wps/portal/usda/usdahome?navid=food-safety

- Food and Drug Administration: Federal Food Drug and Cosmetic Act (FFDCA), first adopted

1906. Here is an overview of its application in the Peanut Corp. Case: http://www.marlerblog.com/legal-cases/the-federal-food-drug-and-cosmetic-act-overview-of-food-adulteration-and-criminal-sanctions/#.U4VkDnJdUrV. FSMA is an amendment to this statute.

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The second half of this class will be devoted to the first round in the Food Simulation.

Consult the "Simulated Negotiation" folder on TWEN for general instructions. You will be given confidential instructions tailored specifically for your role individually beforehand. Come prepared to make an opening statement on behalf of your delegation, including an opportunity for each member of the delegation to speak.

Class 4: Thursday, July 9, 2020

This class examines the potential for divergences in national regulatory policies to manifest as trade disputes. In particular, these sessions address the WTO Agreement on Sanitary and Phyotosanitary Measures, as applied in the GATT Tuna-Dolphin, EC-Hormones and EC-Biotech disputes, and the WTO Agreement on Technical Barriers to Trade, as applied in the Tuna II labeling dispute, protected designations of origin, and the COOL case.

The important thing to understand about these disputes is that they focus on whether a food safety standard is **too rigorous** (i.e., excessively protective of public health or natural resources), and **not** whether it is too weak. Why would the international trade regime address this seemingly counter-intuitive issue? How does the Agreement on the Application of Sanitary and Phytosanitary Measures distinguish between those measure that are acceptable under the trade regime, and those that are not? (Beginning of answer: science).

Read Closely:

- "The World Trade Organization" ("Course Materials" on website). This includes the famous tuna/dolphin dispute.

- Risk assessment general background & Risk assessment, low dose extrapolation ("Course Materials" folder on website) What public policy responses would you consider appropriate for each of the curves in the second of these documents? What is the graph telling us about the behavior of a "threshold" pollutant or food contaminant at low doses? Of a chemical characterized by the "supralinear" curve?

Background:

- 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.

- "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

- "The WTO Ruling on U.S. Country of Origin Labeling ("COOL")," http://www.asil.org/insights/volume/16/issue/23/wto-ruling-us-country-origin-labeling-%E2%80%9Ccool%E2%80%9D

Class 5: Monday, July 13, 2020

Resources of the Global Commons: Fisheries

This class addresses fisheries agreements as challenges to the collective management of common resources. The class also addresses alternative means of protecting commercially important species, such as listing bluefin tuna (used in sushi) and endangered sharks (commercially harvested for their fins) by the Convention on International Trade in Endangered Species (CITES).

Read closely:

- FAO, State of the World's Fisheries, 2012, Read pp. 52-62, "The Status of Fishery Resources",http://www.fao.org/docrep/016/i2727e/i2727e.pdf

Background:

- The Economist, Governing the Oceans, Feb. 22, 2014 (posted on website under "Course Materials")
- A net with holes: the regional fisheries management system, http://www.savethehighseas.org/publicdocs/RFMO.pdf

- Regional Fisheries Bodies, http://www.igfa.org/Conserve/RFBs.aspx

- Pauley, et al., Global Trends in World Fisheries: Impacts on Marine Ecosystems and Food Security, http://rstb.royalsocietypublishing.org/content/360/1453/5.full.pdf+html

- S. Cullis-Suzuki, et al., Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations, http://scholar.google.com/scholar_url?hl=en&q=http://www.vliz.be/imisdocs/publications/211447.pdf%26embedded%3Dtrue&sa=X&scisig=AAGBfm38dFK2Hd3BizkL6kSohHUjYacCCw&oi=scholarr

- With respect to bluefin tuna and shark fins, see http://www.wwf.org.hk/en/?10160/WWF-

Applauds-Government-for-Issuing-Shark-Fin--Bluefin-Tuna-Internal-Ban. What is the relationship between this action by the Hong Kong government and the larger multilateral process?

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The second round of the simulated negotiation will be held during the second half of class today. Written proposals should be posted in advance on the course website under the folder "Forums/Delegation proposals."

Class 6: Tuesday, July 14, 2020

[TBA]

Class 7: Wednesday, July 15, 2019

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The third and final round of the simulated negotiation will be held during the second half of class today. Written proposals should be posted in advance on the course website under the folder "Forums/Delegation proposals."

Class 8: Wednesday, July 16, 2019

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