

## A. BOOK REVIEWS

Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (Washington: Institute for International Economics, 1994), 319 pages.

Within the past four years, trade and the environment has leaped from being an unmapped concern to being a hot topic in both trade law and international environmental law. Daniel C. Esty's *Greening the GATT* is not the first book on the subject, but it is the most comprehensive and readable. Esty, now an associate professor at Yale Law School and the Yale School of Forestry and Environmental Studies, was a policy official in the U.S. Environmental Protection Agency during the Bush Administration and was a negotiator of the North American Free Trade Agreement.

*Greening the GATT* presents a vivid portrayal of the views of the trade policy community and of environmentalists, and shows why these two groups began to clash in the early 1990s. There have been misunderstandings, Esty explains, but there are other philosophical, cultural, and institutional factors that have led to real conflicts between the goals of free trade and environmental protection.

Esty is an internationalist and a consensus builder. He is at his best in pointing out the mutually reinforcing goals of "free traders" and "environmentalists." Both camps seek to improve the efficiency of resource use and to add to worldwide social welfare. Good trade policy and good environmental policy complement each other.

The book contains several insights. The most important is Esty's recognition that an institutional contribution of the General Agreement on Tariffs and Trade (GATT) can be applied to environmental politics. Esty explains the history of the GATT and highlights what trade law theorist E.U. Petersmann calls the "constitutional" function of the GATT. So viewed, the GATT fulfills more than its obvious roles as a facilitator of trade liberalization and as a forum for settling disputes. The GATT also "provides a mechanism for addressing the collective-action problems that plague domestic policymaking."

The syndrome of trade policy being shaped by rent-seeking, special-interest groups has been well documented since E.E. Schattschneider's landmark study of 1935. Using the work of contemporary political economists, Esty explains how the GATT responds through international rules that help lawmakers resist protectionist pressures. There have been countless occasions when members of the U.S. Congress have responded to pleas for import

protection by saying that they would really like to help, but cannot because of the GATT.

Esty claims that a similar mechanism could help lawmakers resist special interest pleading on the environment. In a play on words, he calls this "GATTing the greens." Quoting Gifford Pinchot's warning that "special interests" could "nullify the will of the majority," Esty suggests that environmental policymaking is often warped, not only by polluters, but also by over-eager environmental groups. To remedy this, Esty calls for "an institutional structure to protect the environment the way the GATT guards free trade." He calls it the Global Environmental Organization or GEO.

Esty's portrayal is accurate, but he draws only part of the picture. The GATT was established to deal with government failure, not market failure. Protectionism is a non-cooperative government policy — bad for the nation doing it and bad for that nation's trading partners. Environmental problems, on the other hand, are largely the result of market failure.

Viewing environmental problems mainly as manifestations of government failure, because governments do not regulate properly, oversimplifies the issue. The GATT is a set of negative directives — for example, do not enact tariffs that discriminate between countries. Surely, some negative directives are needed for the environment, but more needed are positive directives (*e.g.*, cost internalization).

Unlike other social problems, like unemployment, underdevelopment, and pollution, the problem of trade protectionism can theoretically be solved on a permanent basis. Environmental policy is far more complex. No permanent solution is imaginable. Thus, the GATT analogy does not take us as far as we need to go.

Esty is right to perceive institutional problems in international environmental governance, and his recommendation for a GEO is very timely in that regard. But he weakens his own case in describing the GEO as a "counterweight" to GATT's "market-access oriented rules." The best reasons for a GEO are the points that Esty lays out elsewhere in the book. He explains that the international environmental regime remains thin (UNCED notwithstanding), and notes that there is no institution where concepts like life-cycle analysis, pollution prevention, the precautionary principle, and cost internalization can be debated and turned into operational standards.

Esty discusses the existing international environmental institutions, like UNEP and the Commission on Sustainable Development, and notes their weaknesses. However, he does not help the reader understand why the institutions were created with such weaknesses. In other words, he offers little analysis of the political forces that have engendered the current incoherence in international environmental governance and that will continue to stand in the way of reform proposals such as a GEO.

The thinness of governance for the environment is not as exceptional as Esty sometimes implies. There is very little global-governance at all. If one looks at the major forces driving the world economy such as the flows of money, information, services, and products, it is noteworthy how much of this occurs without international rules. Esty might also have devoted more discussion to the supervisory and assistance roles of the International Monetary Fund. Some "IMFing" of the greens may be needed as well as the "GATting" of them.

Esty examines the compatibility of environmental taxes, regulations, and trade restrictions with the GATT, and points out where the use of these measures might clash with GATT rules. He is not a promoter of trade restrictions; Esty notes that they "are a poor substitute for proper environmental policies", but that in some cases they may be the best option available. His explanation of GATT's complex rules is lucid and informative. He is critical of recent GATT panel decisions that seek to require that trade measures be based on product characteristics and disallow trade measures based on the process by which a product is made. According to Esty, this artificial distinction "makes no sense in an ecologically interdependent world, where pollution spillovers in the manufacturing process can have global consequences."

He is also critical of the way that GATT panels have narrowed the treaty's general exception for human, animal, or plant life or health. He calls the "least-GATT-inconsistent" test in GATT Article XX (which contains the exceptions for health and conservation) an "inappropriately high hurdle" for ascertaining GATT legality, "since there are almost always policy mechanisms available that would be less inconsistent with the GATT." One minor criticism: Esty himself takes too narrow a view of GATT Article XX when he says that its scope "fails to cover important natural resources such as the atmosphere, the oceans, the ozone layer, and other elements of the global commons." The recent decision by GATT's Tuna-Dolphin II panel clarified Article XX a bit in this regard.

In a very ambitious effort, Esty presents a new juridical framework for how the GATT should handle complaints about environmental measures. Borrowing from U.S. Constitutional jurisprudence under the interstate commerce clause, Esty would have the GATT (or the GEO) "weigh the commercial benefits of trade against competing environmental ends." Esty introduces a number of new tests to balance the two interests. There is an "intent and effect" test, an "environmental legitimacy" test, and a "clearly disproportionate" test. For environmental legitimacy, Esty would ask panels to use "science" to separate what he calls "bona fide environmentalism" from "moral choices" like dolphin-safe tuna. Esty seems to side more with the tuna fishermen than with the dolphins in that dispute. That may be a reasonable position. Yet it is hardly more "scientific" than the pro-dolphin position.

The "clearly disproportionate" test is the most innovative of the three tests. Esty wants the GATT to act like the U.S. Supreme Court or the European Court of Justice when they determine the legality of internal trade barriers, but recognizing that the GATT would be making judgments about sovereign nations, Esty would give nations the benefit of the doubt. As he explains: "close calls are not second-guessed; only obvious off-base decisions are overturned."

Of course, one person's off-base call may be another person's close call. Esty suggests that the U.S. Corporate Average Fuel Economy (CAFE) program would fail his test as "disproportionate to the significant trade impacts on European automakers." Yet a recent GATT panel rejected an identical argument by the European Union. Esty would also have the GATT rule against the U.S. EPA's ban on asbestos as being too costly to Canadian asbestos producers. The total ban may have been too blunt an instrument — it was overturned by the U.S. Court of Appeals — but it is not clear that the GATT should be judging the bluntness of non-discriminatory national laws.

Esty devotes an entire chapter to the controversial issue of economic competitiveness and the "race to the bottom." He points out that there is little evidence that high environmental standards degrade competitiveness. Instead of stopping there, as many analysts have done, Esty goes on to explain that perceptions may be just as important as reality. If corporations are worried that higher environmental standards will make them uncompetitive, and if they transmit this worry to policymakers, then a phenomenon Esty calls "political drag" will occur, as countries settle for suboptimal standards. This situation results in part from the interest group lobbying noted above. But it also results from the fact that nations may have to pay the full costs of their environmental regulation even though some of the benefits may spill over to other countries.

Esty discusses several policy proposals to deal with political drag including eco-taxes, border tax adjustments, green subsidies, eco-labeling, and harmonization. He sees some benefit in all of these proposals when implemented in a multilaterally-agreed way.

The book is lucidly written, well-documented, and moderate in tone. Esty argues persuasively that growing ecological interdependence calls for the GATT and the new World Trade Organization to be updated to reflect global realities. Shortly after its publication, the book drew two critical reviews in *The Economist* (July 9, 1994) and the *Financial Times* (July 21, 1994). Both argue that Esty strays too much from economic orthodoxy and take him to task for recommending changes in GATT rules. The two reviews should become exhibits in the next edition of Esty's book. They show how resistant the trade camp is to meeting the environmental camp even halfway.

*Greening the GATT* also contains chapters on "offensive" trade measures for the environment and on the particular problems of developing countries. The book is a goldmine of information including an 18-page appendix providing short descriptions of all the important trade and environment cases (e.g., tuna-dolphin, Danish bottles, etc.) and a 22-page bibliography on trade and environment, the most extensive one compiled so far. The book is very well organized, in the style of all books from the Institute for International Economics. The policy recommendations are highlighted throughout the book and everything is summed up in a detailed final chapter.

At a time when world politics and international law have largely succeeded in safeguarding the integrity of territorial borders, it is ironic that this security has been somewhat negated by the permeability of national borders to environmental threats. *Greening the GATT* is a very useful book because it tries to develop a framework for thinking about the interaction between economic and environmental spillovers. The management of these problems will remain a critical issue for several years at least.

Steve Charnovitz

Serge Pannatier, *L'Antarctique et la protection internationale de l'environnement* (Zürich: Schulthess Polygraphischer Verlag, 1994), 323 pages.

In its thirty-five years of history, the Antarctic Treaty System has undergone considerable transformation and expansion. From a security arrangement designed to prevent competing territorial claims from creating international conflicts, it has evolved into a complex regulatory network of scientific cooperation, resource management, conservation and, more recently, environmental protection and institutional development. Antarctica is becoming a microcosm of international legal issues ranging from sovereignty claims, jurisdiction, law of the sea, and, naturally, environmental protection. It is not surprising that the process has attracted increasing attention from international legal scholars, including those from countries that do not have a long history of presence in Antarctica or specific national interests in its legal-political regime. This development must be welcomed. It signals the importance of the Antarctic legal regime to the international community as a whole, beyond the restricted circle of specially concerned States. It also contributes to the intellectual pluralism that is needed to expand and strengthen the acceptance and legitimacy of the Antarctic Treaty regime worldwide.

Pannatier's book, published as a doctoral dissertation in Switzerland, reflects this trend. Switzerland only recently acceded to the Antarctic

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