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Lakshman D. Guruswamy

University of Colorado Law School

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Book Review

ASIAN DRAGONS AND GREEN TRADE. Simon S. C. Tay* and Daniel C. Esty,** Eds., Singapore: Times Academic Press, 1996. Pp. 206; US\$22.50, S\$25.00.

Lakshman D. Guruswamy***

The financial turmoil surrounding the seemingly inexorable economic ascent of the Asian tigers or the Asian dragons renders the timely issues raised by this anthology on environment, economics, and international law even more relevant. In this collection of essays an impressive group of international and interdisciplinary thinkers, rooted in economic theory, address the clash between the export-led economic growth of the Asian dragons based on free trade and the constraints on growth created by the need for environmental standards sometimes backed by trade sanctions. The "dragons" belong to the Asian Pacific Economic Cooperation (APEC) area and the Association of Southeast Asian Nations (ASEAN) and include Indonesia, Malaysia, Philippines, Thailand, South Korea, Hong Kong, and Singapore.¹

Although the present Asian economic crisis postdates the international environmental conference upon which *Asian Dragons* is based, the book offers a valuable road map for understanding the underlying economic

* Faculty of law and instructor in international environmental law, University of Singapore. Executive Committee member of Asia-Pacific Centre for Environmental Law and director of Singapore Environmental Council.

** Professor of law, Yale Law School and Yale School of Forestry and Environmental Studies. Director of Yale Center for Environmental Law and Policy, founding member of Global Environment and Trade Study, member US Trade and Environment Policy Committee.

*** Professor of law and director, National Energy-Environment Law & Policy Institute, University of Tulsa. Professor Guruswamy has published extensively in the field of international environmental law. Recent publications include: LAKSHMAN D. GURUSWAMY, *LEGAL CONTROL OF LAND BASED SEA POLLUTION* (1982); LAKSHMAN D. GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER* (1993); LAKSHMAN D. GURUSWAMY AND BRENT D. HENDRICKS, *INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL* (1997); and LAKSHMAN D. GURUSWAMY ET AL. EDS., *PROTECTION OF GLOBAL BIODIVERSITY: CONVERGING INTERDISCIPLINARY STRATEGIES* (1998).

1. See *Asia-Pacific Economic Cooperation (APEC) Member Economies* (visited Apr. 15, 1998) <<http://www.apecsec.org.sg/member/apecmemb.html>>; *Web Sites of Member Countries, ASEAN Centre* (visited Apr. 15, 1998) <http://www.asean.or.jp/e_ne/eto.html>.

context, theories, and dialectic surrounding trade and the environment among upwardly mobile Asian nations. The editors have attempted the difficult task of organizing their rich material into four parts: Theories; Experiences and Attitudes; Issues and Institutions in the WTO; and Future Challenges. These rubrics serve only as rough guidelines, because the strength of the book lies in the individual essays, a number of which cross over from their designated sections into others.

The book takes an economic approach to the problems of trade and the environment and deals, *inter alia*, with the implications of two underlying issues: "externalities" and "comparative advantage." After reviewing the main concepts of externalities and comparative advantage, the review goes on to focus on these themes. Externalities or external costs are losses inflicted on others by a producer whose product price does not reflect its full costs. Such externalities usually arise when public goods or common property (for example, property not privately owned) such as rivers and the atmosphere are used as free sinks for pollutants, or publicly owned resources such as national forests are cut down for timber without regard to the true price of that natural resource. The product's bottom line price does not reflect the social costs or the damage caused to rivers, the atmosphere, or forests. If externalities can be confined within national boundaries, arguably, they are the concern of the country within which they are caused. If, however, externalities spill over or cause damage to the environment of other states or to the international environment, they become an interstate problem or even a more public problem for the community of nations as a whole.

The theory of comparative advantage is premised upon the fact that the countries of the world are possessed of differing human and natural resources, such as cheap labor, abundant sunshine, fast-flowing rivers, and forest or mineral reserves. It makes sense for each country to maximize the utility of its environmental resources by producing goods or services that it can trade for goods that can be produced more efficiently in a different country. Thus, in the United States, Florida can avail itself of the comparative advantage of bright sunshine that enables oranges to be grown in abundance. Similarly, fast-flowing rivers that carry away and dilute pollutants provide a comparative advantage to the countries that have them by providing for the cheap disposal of some pollutants. So too can large forests be exploited for timber. These are comparative environmental advantages that economically rational nations should exploit. Resulting trade will then make all parties better off in the aggregate.

These comparative advantages, however, may have transnational environmental impacts. Fast-flowing rivers may carry dangerous effluents to estuaries and damage the feeding and breeding grounds of fish that

constitute a significant food source of another country. Local deforestation may result in the depletion of global biological diversity. Or again, even though a country may see chemical poisoning as a logical comparative advantage, goods from that country may become impregnated with these chemicals, thereby causing harm to consumers in other countries.

There have been differing reactions to these problems. First, some problems have been addressed by international environmental treaties dealing, for example, with ozone, toxic wastes, biodiversity, and climate change.² Second, some countries have banned goods containing these chemicals,³ while others, like Austria, have called for labeling affecting tropical timber.⁴ The United States has enacted domestic laws that prevent biologically harmful fishing practices affecting tuna and sea turtles.⁵

In addressing these issues, even as strong a suit as this book can contain some weaker cards, and the introduction and conclusion are two of them. Although the task of synthesizing and clarifying fourteen diverse essays is a daunting one, it is a task that Dan Esty is quite capable of undertaking, as evidenced by the striking display of interdisciplinary skills in his penetrating essay on "Environmental Regulation and Competitiveness" in *Asian Dragons*⁶ and his considerable prowess in another work.⁷ It is disappointing,

2. See, e.g., Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]; Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 [hereinafter Basel Convention]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085 (entered into force July 1, 1975) [hereinafter CITES] (covering in part biodiversity); United Nations Conference on Environment and Development, Framework Convention on Climate Change, May 9, 31 I.L.M. 849, (entered into force Mar. 21, 1994).

3. For example Germany banned leather and leather products containing pentachlorophenol. See Mike Meier, *What to Do with Dangerous Products That Are Technically Not Regulated as "Hazardous Chemicals" or "Pesticides"?* *The Pending European Directive on "Biocidal Products,"* COLO. J. INT'L ENVTL. L. & POL'Y 1997 Y.B. 27, 35-37 (1998).

4. See *Government Called on to Alter Law Requiring Labels on Tropical Wood Products*, Int'l Env't Daily (BNA), Mar. 24, 1993, available in WESTLAW, BNA-IED Database.

5. See Clay Fong, *Trade Restrictions on Harvesting Aquatic Life*, COLO. J. INT'L ENVTL. L. & POL'Y 1996 Y.B. 32, 33-36 nn.14 & 23 (1997) (citing Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, tit. VI, §609, 103 Stat. 1037 (1989) (codified at 16 U.S.C. §1537 (1994)); International Dolphin Conservation Act of 1992, Pub. L. No. 102-523, 106 Stat. 26 (codified in scattered sections of 16 U.S.C. (1994)).

6. See Daniel C. Esty, *Environmental Regulation and Competitiveness: Theory and Practice*, in ASIAN DRAGONS AND GREEN TRADE 33 (Simon S.C. Tay & Daniel C. Esty eds., 1996) [hereinafter ASIAN DRAGONS].

7. See DANIEL C. ESTY, THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (1997).

therefore, that the introduction by Simon Tay and Dan Esty⁸ does not get the book off to a better start. In addition, Simon Tay's concluding chapter on "The Way Ahead in Asia"⁹ is not only inconclusive, it also lacks the felicity of expression demonstrated by the other authors. Any hesitation about the quality of the book, however, is quickly dispelled by the other essays. Most of them are of a high quality and illuminate the discourse in the subject they address.

Section 1, "Theories," has three insightful essays by Charles Pearson, Dan Esty, and Rene Vossenaar and Veena Jha.¹⁰ Pearson and Esty lay the theoretical economic groundwork, explaining the extent to which environmental factors may affect international competitiveness. Pearson surveys both economic theory and empirical studies about the effect of environmental standards on competitiveness, while Esty offers a sophisticated analysis of how harmonization of environmental standards might be adjusted to differing circumstances. Vossenaar and Jha, joined by Ponciana Intal, shed an illuminating Asian perspective on competitiveness. They examine the extent to which it would be in the self-interest of Asian dragons to incorporate environmental standards nationally. Significantly, they conclude that—subject to significant exceptions—the internalization of external costs may not affect competitiveness. The exceptions occur especially within the leather, footwear, and garment industries, where internalizing environmental externalities might be expected to adversely affect competitiveness. Furthermore, despite serious environmental impacts, developing countries would find it difficult to give up their comparative advantage in trading agricultural raw materials like palm oil, forest products, and mined metals.

Given the difficulties of synthesizing trade and environmental policy, how should the task be approached, and what have we to learn from existing models? Treaties or conventions are the primary tool used by the international community of nations to address common challenges even though they suffer from a deficiency endemic to the international legal system: a lack enforcement agencies. Section 2 of *Asian Dragons* on "Experiences and Attitudes" examines NAFTA¹¹ and the European Union

8. See Simon S. C. Tay & Daniel C. Esty, *Trade and the Environment—Context and Controversy*, in *ASIAN DRAGONS*, *supra* note 6, at 1.

9. Simon S. C. Tay, *The Way Ahead in Asia*, in *ASIAN DRAGONS*, *supra* note 6, at 189.

10. Section 1 of *ASIAN DRAGONS* includes the following essays: Charles Pearson, *Theory, Empirical Studies and Their Limitations*; Daniel C. Esty, *Environmental Regulation and Competitiveness: Theory and Practice*; René Vossenaar & Veena Jha, *Competitiveness: An Asian Perspective*.

11. See North American Free Trade Agreement, Dec. 17, 1992, Can.–Mex.–U.S. 32 I.L.M. 605 (entered into force Jan. 1, 1994).

to see if they have any lessons to offer the wider international community.¹² Gustavo Alanis-Ortega points out that NAFTA, unlike GATT and the WTO, has not only embraced environmentalism within the framework of sustainable development but also has provided for the enforcement of environmental norms.¹³

NAFTA explicitly provides that the Montreal Protocol on Substances that Deplete the Ozone Layer,¹⁴ the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,¹⁵ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹⁶ which provide for trade sanctions to enforce their provisions, take precedence over NAFTA. Unlike the WTO, NAFTA has gone even further by establishing a Commission on Environmental Cooperation to supervise the enforcement of environmental laws within the three nations. The fact that Mexico is a developing country makes NAFTA very relevant, because it provides an example of developed and developing countries working together toward free trade and environmental protection.

Damien Geradin attempts to draw lessons from the European Union (EU). It is, however, difficult to see how Asian dragons that are enthusiastic members of the GATT/WTO can learn much from the EU. The jurisprudential character of the European Union approximates more to a confederation of states than an international organization. Unlike ASEAN, the EU possesses a court with compulsory jurisdiction as well as enforcing agencies.¹⁷ In addition, the provisions of its constituent treaties carefully strike a balance between free trade and environmental protection. Therefore, it is doubtful if the EU experience can be analogized to the GATT/WTO, which does not recognize environmental protection, does nothing to strike a constitutional balance between environmental protection and free trade, and does not possess a judicial system that upholds and interprets both environmental and trade law.

12. Section 2 of ASIAN DRAGONS includes the following essays: Gustavo Alanis-Ortega, *What Can We Learn from NAFTA*; Damien Geradin, *Lessons From the European Community*, Ponciano S. Intal Jr., *Perspectives from the Philippines and ASEAN*; Mari Pangestu & Kurnya Roesad, *Experiences from Indonesia and Other ASEAN Countries*.

13. Alanis-Ortega, *supra* note 12, in ASIAN DRAGONS, *supra* note 6, at 71.

14. See Montreal Protocol, *supra* note 2.

15. See Basel Convention, *supra* note 2.

16. See CITES, *supra* note 2.

17. See Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485, 512 (1993); Tara C. Stever, *Protecting Human Rights in the European Union: An Argument for Treaty Reform*, 20 FORDHAM INT'L L.J. 919, 941-43 & n.128 (describing the European Community Judicial Branch and describing EC jurisdiction) (citing EC Treaty art. 177).

Section 3 of *Asian Dragons*, titled "Issues and Institutions in the WTO," deals with the implications flowing from the lack of recognition given to international environmental protection by the WTO.¹⁸ The corpus of international law is made up not only of trade law but of other specialized bodies of law such as international environmental law (IEL), human rights law, telecommunications law, and many others. It is important, therefore, that the GATT/WTO should recognize the existence and applicability of IEL. Unfortunately, as Shinya Murase points out in his essay on "Unilateral Measures and the WTO Dispute Settlement," the "intention and aspiration"¹⁹ of the drafters of the WTO's Dispute Settlement Understanding (DSU) was to create a self-contained regime. This is confirmed by Steve Charnovitz, whose outstanding essay, "Improving the Trade and Environment Regimes," points out that many within GATT/WTO view it as "a sealed, self contained set of relationships that have little to do with public international law or international civic society."²⁰

In the absence of countervailing judicial forums to adjudicate upon trade and environment disputes, more use has been made of the GATT dispute settlement system than any other dispute settlement mechanism.²¹ Environmentalists may well see this as a travesty of justice, because measures to protect the environment, whether occurring in national or international contexts, have been adjudicated by a self-contained set of GATT/WTO judicial forums that refuse to recognize the existence of IEL beyond what is found in the exceptions to Article 20, and by judges who are judicially blind to IEL, or who recognize IEL only to the extent that it is a threat to free trade.

The WTO Committee on Trade and the Environment (CTE) was set up to review this situation, and Michael Reiterer, who wrote his essay in *Asian Dragons* before the December 1996 meeting of the WTO, thought that it was "optimistic" to expect the CTE to recommend an amendment to Article 20 of the GATT. He was right. The CTE did nothing of the kind. His own "realist's scenario" of an interpretation from WTO recognizing that the provisions of IEL treaties empowering trade sanctions could have been justified in defined circumstances, however, proved incorrect. The WTO did no such thing. It is time, therefore, to look to fairer, more just

18. Section 3 of *ASIAN DRAGONS* includes the following essays: Michael Reiterer, *The WTO's Committee on Trade and the Environment*; Robert Heine, *Business Concerns with Trade and the Environment*; Shinya Murase, *Unilateral Measures and the WTO Dispute Settlement*; Winfried Lang, *WTO Dispute Settlement: What the Future Holds*; Steve Charnovitz, *Improving the Trade and Environment Regimes*.

19. Shinya Murase, in *ASIAN DRAGONS*, *supra* note 6, at 141.

20. Steve Charnovitz, in *ASIAN DRAGONS*, *supra* note 6, at 156.

21. *Id.* at 163 (citing ERNEST-ULRICH PETERSMANN, *INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND (1995)*).

forums such as those of UNCLOS.²² Among the others dealing with this subject, Charnovitz makes a cogent case as to why the WTO should cooperate with environmental organizations and persuasively argues for the participation of nongovernmental organizations (NGOs) in both policy making and dispute settlement within the WTO.

A postscript is in order. An influential body of economic theorists believe that pollution follows the path of an inverted "u" in which pollution at first increases with economic growth, then levels off, and begins to decline as per capita incomes continue to increase. According to this view, endorsed by some of the contributors to this volume,²³ development and economic growth are needed to ensure that countries achieve the per capita income that allows for the taking of pollution control measures.

The essays in this book were written during the boom in which the economies of the dragons were the fastest growing in the world, and their share of world trade had increased at twice the world average. Many thought this sensational growth heralded a "Pacific Century" in which Asia would equal Europe and the United States in economic might.²⁴ The somber thought that now arises is whether countries that had difficulty in reconciling economic growth and environmental protection during boom times can continue to do so in the face of economic tribulations that have led to currency devaluation, stock market crashes, and even near bankruptcy.²⁵

Overall, this volume is an important and timely addition to the literature on trade and the environment. Despite the dramatic changes in their economic circumstances, and the new dilemmas facing the Asian dragons, this anthology contains analysis and information that is of considerable value. It offers informed, reasoned, and insightful perspectives on the ongoing discourse about how to strike the balance between export-generated economic growth and environmental protection.

22. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994); Lakshman Guruswamy, *The Promise of UNCLOS: Justice in Trade and Environment Disputes*, ECOLOGY L.Q. (forthcoming 1998).

23. See Pearson, *supra* note 10; Intal, *supra* note 12.

24. See Simon S. C. Tay, *The Way Ahead in Asia*, in ASIAN DRAGONS, *supra* note 6, at 189.

25. See *Business Last Year*, ECONOMIST, Jan 3-9, 1998, at 5.

