Comments on Shrimp/Turtle *and the Product/Process Distinction*

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Abstract

This article provides comments on a paper by Professors Robert L. Howse and Donald H. Regan entitled 'The Product/Process Distinction — An Illusory Basis for Disciplining "Unilateralism" in Trade Policy.' The author suggests that, despite Howse and Regan's comment, there is a textual basis for the product/process distinction in the GATT/WTO, citing the word 'product', which occurs in various provisions of the WTO agreements, and cases interpreting such text; but, of course, this basis is subject to interpretation. He submits that an analogy between domestic and international cases does not work well, because the WTO institutional framework differs from that of a national court system. The question, according to this author, is how to prevent abuses if one abandons the product/process distinction or otherwise opens the possibility of trade-restricting measures tied to process of production. He concludes that the product/process distinction remains useful because it is a bright-line rule, but he agrees that such distinction should not be too rigid. The real question, still to be addressed, is how far to relax the distinction and in what areas.

In their article on the product/process distinction in international trade, Robert Howse and Donald Regan provide very many interesting ideas, with many facets to consider and reflect upon. However, I have a number of difficulties with some of their detailed propositions and (to some extent) the broad thrust of the article. These brief comments will seek to outline those difficulties in a somewhat abbreviated form.

The proposition that there is no 'justifiable text' to support the essence of the product/process distinction is questionable. There is 'justifiable text'. It is debatable whether the interpretation of that text, manifested in several cases, including the recent *Shrimp/Turtle* case, is correct, but the very word 'product' (occurring in many parts of the WTO agreements, including Article III of the GATT) is text upon which an

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interpretation could be justified. Such an interpretation would require focus on the characteristics of a *product,* instead of the *process* of producing the product. See, for example, the *Belgian Family Allowances* case,[1] which was also mentioned by another commentator. It is a very interesting case that bears upon this problem.

The article also seems somewhat remote from reality, and particularly remote from the institutional context of the WTO and its relationship to trade policy. The institutional context is very important. The second part of the paper, apparently based upon Professor Donald Regan's work on US constitutional law, contains much that is admirable. However, the analogy between the domestic context and the international context (such as the WTO) does not work well. The institutional context of the WTO is extremely different from that of the United States. Questions that arise within the context of the WTO include: whether there is a realistic possibility of legislative revision of a 'court case', to what extent measures are enforceable, and to what extent there is a cultural consensus on certain moral assumptions. Some of these institutional aspects are referred to in the papers by Philippe Sands and Bernhard Jansen.

The discussion by Howse and Regan about the product/process distinction generally misses the real issues that the trade policy institutions are forced to address. Sands and Jansen raise some of these issues. With respect to the product/process problem, the issue is not so much whether this distinction can be justified in all contexts (the authors rightly say that it cannot), but rather how to develop some constraints on the potential *misuse* of process-oriented trade barriers (i.e. the 'slippery slope'). The real question is: If one abandons the product/process distinction or otherwise opens up the possibility of trade-restraining measures tied to process of production, how does one draw an appropriate line to prevent abuses?

Jansen considers that the product/process distinction is worthwhile, even if it is somewhat artificial. It can prevent more harm than its demise might introduce as good. The harms could be pointed out by a series of hypotheticals about how the term 'process' could be misused in dozens — even hundreds — of particular situations, to inhibit and depress international trade. These are issues that governments face all the time and that lawyers are paid to struggle with — namely, to get some kind of a rule or norm that is not only justifiable, but can, in fact, be administered in the institutional and factual context that it addresses. Some of the arguments or line-drawing processes in the Department of Commerce may seem a bit too simplistic, but a rule cannot be made viable in that context if only people with Ph.D.s can administer it. The procedure must enable ordinary people to come to grips with some of these issues. That is part of the problem here.

The *Shrimp/Turtle* case[2] is extraordinarily interesting, and requires a few preliminary observations. Indeed, it is one of the two most profound cases in about 26 cases that have come through the WTO appellate process so far, the other being the

[1] *Belgian Family Allowances (Allocations Familiales)*, 7 November 1952, GATT BISD (1st Supp.) (1953) 59.

[2] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, WTO Appellate Body Report, 12 October 1998.

Hormones case.[3] The *Hormones* case, in some situations, raises more important questions of the relationship of sovereignty to the international system in the area of domestic economic regulation. *Shrimp/Turtle* raises a somewhat different aspect of that question. Of course, one of the questions is how to define 'unilateralism' to embrace these cases.

With respect to *Shrimp/Turtle*, Sands and Jansen are both absolutely right that the Appellate Body did a splendid job in trying to move the process a couple of steps further. One of the mistakes, though, is to blame everything on the *Tuna I* case.[4] The *Shrimp/Turtle* case has to be examined in the context of the particular institutional structure. Roughly paraphrased, the last paragraph of the *Tuna I* case says:

> We recognize that there is a problem about how the environment and the process question relate and how process characteristics should be applied in this context. We don't think it's appropriate for us in our role as a Panel or 'judicial tribunal' to solve that. This really should be solved by the negotiators in a variety of possible formats.

This raises the question of judicial activism or judicial restraint, in other words, the question of whether the Panel is the appropriate place to frame an appropriate rule to accommodate the opposing policy motives involved or, alternatively, whether this task more appropriately belongs to the negotiators.

At the time of that case, it could be argued (and I have so argued) that the Panel took an appropriate approach. But it is my belief (and I believe that Sands would agree) that if after ten years no progress has been made using other procedures, then there is an institutional argument that there should be more accommodation within the 'judicial process'. This may not be the only way, but there is certainly an argument for it.

With regard to the *Shrimp/Turtle* case itself, the Appellate Body has laid out a series of procedural prerequisites in this case, which is very healthy. Furthermore, it is true that the Appellate Body is embracing the GATT legal system and putting it into the context of general international law. However, it is not true that general international law is a separate regime. In the very first case before the Appellate Body,[5] the Appellate Body report stated flatly that WTO/GATT law is part of international law generally. It proceeded to rely heavily on the language of the Vienna Convention on the Law of Treaties, particularly the treaty interpretation rules of Articles 31 and 32. That is also what the Appellate Body did in *Shrimp/Turtle*. It may be that Judge Florentino Feliciano influenced the approach taken by the Appellate Body, but there were two other members of that Appellate Body division, one of whom was a former US Congressman, who was not a Member of Congress when this particular Act was passed. So it is clear that there might be elements of understanding of a parliamentary process that went into that particular decision, because the Appellate Body did not say the US *statute* was wrong. It said that the *administrative execution* of that statute was

[3] *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, WTO Appellate Body Report, 16 January 1998.

[4] *United States — Restrictions on Imports of Tuna from Mexico*, GATT BISD (39th Supp.) (1993) 155 (report not adopted by the GATT Contracting Parties).

[5] *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, WTO Appellate Body Report, 26 April 1996.

wrong. In addition, if that is true, it looks as if the result of the *Shrimp/Turtle* case can be implemented by executive action only, without going to Congress. But, unfortunately, there are also US courts in the picture, and it appears that the courts may have really begun to complicate the issues. There is an arguable insensitivity on the part of US courts to some of these dilemmas to international legal process. Because of the US domestic court interpretations, the Administration may be forced to go to Congress for an ultimate change, although at the moment, the United States is arguing that it can conform to the Appellate Body's report without legislation. This is the institutional setting that complicates some of these issues.

The language in the *Shrimp/Turtle* case follows the international law approach and finds that 'environmental policies' are part of the interpretative material that the panels and the Appellate Body should use. This seems very sound, and well based on the Vienna Convention, but brings the environment into the picture of what could be described as a 'clash of policies'. Although it is possible to word your way around a clash of policies, sometimes it is not worthwhile to do so. We have to recognize that, occasionally, there are policies that clash — just like those that occur in every part of government, including tax laws. Thus the Appellate Body says (paraphrasing): 'We have to weigh these policies; we have to look in the context and weigh these a bit.' Then it goes through the aspects that affect the weighing. There is one sentence that merits quotation from the *Shrimp/Turtle* case, because it raises the question of whether unilateralism will prevail (even after all the other hoops have been jumped through). It is evidence of jurisprudence in process, and we do not yet know the answer to the question of whether a unilateral measure can be justified under Article XX of the GATT. This sentence reads as follows:

> It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.[6]

This is a very nuanced sentence. The three members of the Appellate Body division probably argued over it for hours. Note the word 'may.'

As a final comment, I would like to outline the 'policy landscape' on this issue, and consider how to proceed. There is a policy clash here. One of the worries, which has also been expressed by Bernhard Jansen, is that if you try by 'tribunal action' to shoehorn the environmental policies into the Article XX exceptions (including Article XX(b), the human and animal health exception), it might work. But if you shoehorn in the *process* side of that — which has up to now been sort of a bright-line barrier against abuse (recognizing that, in some cases, it could be warranted) — that is the start of a slippery slope. The question then becomes: What other conditions could be addressed (such as minimum wage standards or gender discrimination) and what other process possibilities should we consider? One could think of thousands of them, and they could

[6] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 2, at para. 121.

become serious obstacles for the trade policies we are trying to promote. What do you do about slippery slopes? What do lawyers do about such things? We need handholds on this slippery slope. There are two dimensions to these handholds. One is the substantive dimension: What would we put into a handhold? For instance, would we somehow believe that only environmental issues warrant exceptions to trade rules and thus can be the handhold that we could use to prevent sliding further? Should we also build in the notion of externalities? This part of the principal paper — namely, the part saying that externalities are really something that we need to internalize, makes an important point. However, the authors have yet to face the issue of the extent to which a country can force another country to internalize 'externalities' that the other country may not think are 'externalities'.

Should the process exceptions be allowed only in the context of an emergency situation crisis, in cases where there is no time for diplomacy, or where diplomacy fails to achieve accommodation even after ten years? In other words, a couple of turtle species may be headed for extinction within a year or so. Maybe there is an emergency in this particular case. You have to weigh the costs and benefits of one approach or the other. On one hand, the benefits may be that of continuing trade despite the demise of a couple of species, or, on the other hand, the cost may be that of the demise.

A second dimension to this handhold landscape is procedure. Having tried to formulate the substantive criteria, the question then becomes: Who should decide substance? Should it be the Appellate Body? Is the Appellate Body the appropriate body? Or is the appropriate approach some kind of a negotiated settlement? If the latter is the answer, can the system cope? I have previously raised the issue of how much of a burden can be put on the judicial system of the WTO and whether or not there are other ways or means that should be being used to try to solve these issues.[7]

There may indeed be a possible convergence between various approaches to the problems mentioned here, including the other articles in this part of the Symposium. But it will certainly take more work.

[7] Jackson, 'Dispute Settlement and the WTO: Emerging Problems', 1 *JIEL* (1998) 329–351.