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-An Evolutionary Role the Appellate Body Can Play in Resolution
of 'Trade and Environment' Disputes-**

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Live with a Quiet but Uneasy Status Quo?

—An Evolutionary Role the Appellate Body Can Play in Resolution of
‘Trade and Environment’ Disputes—

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Abstract

Whether a trade ban on a product imposed because of the fact that the process-and-production-method (PPM) of that product is harmful to the environment can be consistent with the WTO law? The purpose of this paper is to trace what the panels and the Appellate Body of the WTO have done in settlement of disputes concerning this problem and especially to think about a possible ‘evolutionary’ role the Appellate Body can play in resolution of ‘trade and environment’ disputes.

This paper begins first to consider generally the essential characteristics of the problem of so called ‘trade and environment’ and then to identify a special problem which is raised by these characteristics in the context of the dispute settlement system of the WTO. Second, in a more substantial level, this paper will consider what a trade related environmental measure (TREM) based on a PPM is and then identify the issues of its possible inconsistency with the WTO law. Third, we will trace how the panels and the Appellate Body have disposed of these issues in practice and also make some analysis of a new approach adopted by the Appellate Body in interpreting the WTO law in recent two cases. In conclusion, this paper will affirmatively evaluate this new approach and remark that the Appellate Body does not need to ‘live with a quiet but uneasy status quo’ in the ‘trade and environment’ disputes.

I. Introduction

How is it possible to reconcile trade liberalization with environmental protection? This is among the most urgent questions facing the new trade round negotiation, the Doha Development Agenda, of the World Trade Organization (WTO).¹ In particular, the issue of the permissibility of process-and-production-method (PPM)-based trade measures under the WTO law is the most difficult and controversial one afflicting WTO lawyers. The problem can be described in a nutshell as follows: whether a trade ban on a product imposed because of the fact that the PPM of that product is harmful to the environment can be consistent with the WTO law?²

The purpose of this paper is to trace what the panels and the Appellate Body of the WTO have done in settlement of disputes concerning the above problem and especially to think about a possible evolutionary role the Appellate Body can play in resolution of 'trade and environment' disputes.

In order to do so, this paper begins first to consider generally the essential characteristics of the problem of so called 'trade and environment' and then to identify a special problem which is raised by these characteristics in the context of the dispute settlement system of the WTO (II). Second, in a more substantial level, this paper will consider what a trade related environmental measure (TREM) based on a PPM is and then identify the issues of its possible inconsistency with the WTO law (III). Third, we will trace how the panels and the Appellate Body have disposed of these issues in practice and also make some analysis of a new approach adopted by the Appellate Body in interpreting the WTO law in recent two cases (IV). In

¹ The Doha Ministerial Declaration adopted on 14 November 2001 (WT/MIN (01)/DEC/1, 20 November 2001), which launched the new trade round negotiation called the Doha Development Agenda, provides the mandate for negotiation, among others, 'with a view to enhancing the mutual supportiveness of trade and environment, on the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements.' See Paragraph 31 of this declaration.

² There are many comments and articles on this problem. See, among others, Markus Schlagenhof, *Trade Measures Based on Environmental Process and Protection Methods*, 29 JWTL 123 (1995); Robert Howse & Donald Regan, *The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EJIL 249 (2000); Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 187 (Marco Bronckers and Reinhard Quick eds., Kluwer Law International, 2000); Sanford E. Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?*, 27 COLUM. J. ENVIRON'L L. 383 (2002); Steve Charnovitz, *The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002); Satoru Taira, *Trade and the Environment: The Possible Consistency of PPM-Based Trade Measures with GATT1994*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 309 (Chi Carmody, Yuji Iwasawa & Sylvia Rhodes eds., American Society of International Law, 2003).

conclusion, this paper will consider a possible evolutionary role that the Appellate Body can play in resolution of 'trade and environment' disputes by evaluating this new approach (V).

II. The Characteristics of the Problem

1. The Characteristics of the Problem of 'Trade and Environment'

The essence of the controversy concerning the problem of 'trade and environment' is summarized as follows.

On the one hand, environmentalists argue that the values of free trade conflict with the values of environment. According to them, trade liberalization creates new market opportunities and enhances economic activity. Trade also generates wealth, which allows consumers to acquire higher economic outputs. But freer trade and economic growth, if they go without fair payments of the costs('internalization'³), result in the unsustainable consumption of natural resources and waste production and lead to increased pollution and other environmental harm('externality'⁴). Trade agreements contain market access provisions that can be used to override domestic environmental regulations. Environment represents a higher-order and a more emergent value than trade. TREMs to enforce environmental standard are justified as leverage to promote worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements as in treaties designed to protect the ozone layer,⁵ manage hazardous waste trade,⁶ and preserve endangered species,⁷ without regard to disruption to trade or any cost/benefit analysis. Countries with lax environmental standards have a competitive advantage in the global

³ 'Internalization' means inclusion of pollution-related damages into a product's price. As to the 'Polluter Pay Principle', the Principle 16 of the Rio Declaration says as follows:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The Rio Declaration on Environment and Development, June 14, 1992, *reprinted in* 31 ILM 876 (1992).

⁴ As to a definition of 'externality', Samuelson, for an example, says as follows:

[A]n externality is an effect of one economic agent's behavior on another's well-being where that effect is not reflected in market transactions.

SAMUELSON AND NORDHAUS, *ECONOMICS*, at 331(16th ed. 1998).

⁵ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 ILM 1550(1987).

⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 28 ILM 657(1989).

⁷ Convention on International Trade in Endangered Species, 3 March 1973, 993 UNTS 243.

marketplace and put pressure on countries with high environmental standards to reduce the rigor of their environmental requirements. TREMs make the latter countries possible to avoid such a pressure. In the context of the North-South problem, TREMs are also justified by the urgent necessity not to make the South follow the wrong way the North took at the crisis of the global commons.⁸

On the other hand, free traders argue mainly as follows. Environmental values and trade values are complementary and the latter serves the former. If consumption of a country's environmental resources is correctly priced, liberal trade improves a country's overall welfare and leads to more efficient use of natural resources. Increased economic growth stimulates the demand for environmental protection, generates additional income to pay for it and leads to improve environmental standards and protection techniques. Problematic is not the harm that free trade does to the environment but the harm that TREMs do to free trade. TREMs undermine the concept of comparative cost advantages⁹ upon which the basic principles of liberal trade rest and bring inefficiency and reduction of economic welfare.¹⁰ In the context of the North-South problem, TREMs of the North applied to imports from the South can be equated with unilateral exportation of the North's own environmental policy to the South. They infringe the sovereign right of developing countries to dispose their own natural resources. Many environmental problems in the South can largely be attributed to the lower income level and the complex problems of poverty. TREMs would make it more difficult for those countries to earn foreign exchange income of their exports and, therefore, disturb their economic development. They would aggravate environmental problems in these countries.¹¹ Free traders criticize that environmentalists have not proved the causal link between the deterioration of the environment and free trade and that they also have not established that TREMs are the most efficient way to change the environmental policy of the exporting country. Trade *per se* is not the source of environmental problems, but rather various forms of 'market failures'¹² and 'government failures.'¹³ Therefore, TREMs cannot be

⁸ See Schlagenhof, *supra* note 2, at 123; see also Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EJIL 739-740(1999); ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE, Institute for International Economics, at 43(1994).

⁹ The theory of comparative cost advantages can be briefly explained as follows: the difference of resource endowment among nations makes the difference of the cost of production and results in comparative cost advantageous and disadvantageous industries in each country. In this case, each country should specialize its production in the comparative cost advantageous industries to make international division of production. By doing so, the most effective and proper use and allocation of resources can be realized. Then, if countries can, by free trade, exchange the products that are fruits of international division of production, all these countries can maximize their economic welfare.

¹⁰ See Schlagenhof, *supra* note 2, at 123-124.

¹¹ See *id.*, at 124.

¹² For example, the failure to internalize external costs or the absence of the concept of

the appropriate instrument to achieve environmental goals. There is also danger that unilateral TREMs become a disguised protectionist instrument for domestic competitors seeking relief from international competition.¹⁴ The use of TREMs may also undermine the cooperation necessary for the continued functioning of the trade regime.¹⁵

Despite of this controversy between environmentalists and free traders, respecting both the environmental value and the trade value seems to be essential for sustainable development and welfare of human beings. Therefore, both values should not be considered as inherently conflicting, but as mutually complementary.¹⁶ And in this sense, the essence of the problem is how to best strike a balance between the environmental value and the trade value.

It is well said, however, that this very striking the balance between these two values presents issues that are among the most ‘contested’ in trade policy and that are currently contested in a way that appears to remove them from the legal domain, and place them squarely in the political domain. Professor Dunoff expresses appropriately this point as follows:

To be sure, many trade policy issues are contested in the sense that they are subject to disagreement and dispute, but the claim here is that the many ‘trade and’ issues are ‘contested’ in a much more fundamental way. They are ‘contested’ in the sense that fundamentals of the debate—say, the balance to be struck between economic and environmental interests—are ‘up for grabs’ and that participants in these debates acknowledge the legitimacy of disagreement over these fundamental issues. In this sense, the question of basic GATT policy towards tariffs is not contested, while that of GATT policy regarding, say, competition [*or environmental*] issues, is highly contested.¹⁷(*Some added by this author*)

2. A Special Problem Raised in the Context of the Dispute Settlement System of the WTO

If we grasp the problem of ‘trade and environment’ as having such

‘right to environment’ as a property right. *See also id.*, at 124, n. 11.

¹³ For example, agricultural subsidies leading to excessive use of chemical fertilizer polluting soil and water. *See also, id.*, n.12.

¹⁴ *See id.*, at 123-24; *see also*, Petersmann, *International Trade Law and International Environmental Law, Prevention and Settlement of International Environmental Disputes in GATT*, 27 *JWT* 43, at 43 and 48.

¹⁵ *See* Dunoff, *supra* note 8, at 740.

¹⁶ *See* Paragraph 31 of The Doha Ministerial Declaration, *supra* note 1, for the mutual supportiveness of trade and environment.

¹⁷ *See* Dunoff, *supra* note 8, at 755.

characteristics, a special problem is raised also in the context of the dispute settlement system of the WTO. When a WTO negotiating body considers the problem of 'trade and environment,' it is both expected and appropriate for it to declare that it has weighted and struck a balance among all appropriate interests and values, and resolved political and policy issues through consensus or at least majority process.¹⁸ But, as Professor Dunoff acutely pointed out, the same is not true for the WTO dispute settlement panels and the Appellate Body. According to him, while there has long been debate over whether GATT dispute settlement should be a legalistic, rule-based system or a more flexible diplomatic mechanism, the WTO Dispute Settlement Understanding (DSU) represents an unequivocal victory for the legalists. WTO panels and the Appellate Body are not intended to be simply another forum for the political settlement of controversial value conflicts. Rather, they are to apply settled law to the facts, to resolve disputes according to pre-existing principle. The legitimacy of the dispute settlement system would be undermined if panels and the Appellate Body were understood to engage in either policy-making or deal-making.¹⁹

But once disputes concerning the problem of 'trade and environment' are submitted to the dispute settlement system of the WTO, panels or the Appellate Body would be in effect asked to draw principled line in the midst of larger political struggles. Professor Dunoff continues to say, following the above cited expression:

[I]t is precisely this contestedness that renders it almost impossible for panels and the Appellate Body to apply any nuanced test in a manner that appears to produce consistent results. Inconsistent results in these controversial areas would invite the criticism that the outcome are simply political....And any perceived 'delegalization' of WTO dispute settlement proceedings would threaten to delegitimize these proceedings.²⁰

Indeed, it should be noted that even the WTO's Director-General pleaded recently that the WTO not be asked to serve as 'judge, jury and police' on international environmental matters. He warned that

[a]sking the WTO to solve issues which are not central to its work, especially when these are issues which governments have failed to address satisfactorily in other contexts, is not just a recipe for failure.

¹⁸ *Id.*, at 754.

¹⁹ *Id.*, at 754; see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AJIL 596, at 606(1999).

²⁰ See Dunoff, *id.*, at 755.

It could do untold harm to trading system itself.²¹

Given the institutional constraints on WTO panels and the Appellate Body, and the highly politically controversial characteristics of the problem of 'trade and environment,' it is argued that it is politically naïve to urge WTO panels and the Appellate Body to 'struggle openly' with the value conflicts raised by the problem of 'trade and environment.'²²

Then, the questions are as follow; should the WTO panels and the Appellate Body refuse to decide disputes concerning the problem of 'trade and environment' when such disputes are submitted to them?; and should the WTO lawyers 'live with a quiet but uneasy status quo'²³ until a WTO political body decides a matter?²⁴ By tracing what panels and the Appellate Body have done in settlement of the 'trade and environment' disputes, these questions will be considered below.

III. Trade Related Environmental Measure Based on a PPM

1. *Substantial Issue to Be Considered Here*

Among substantial issues related to 'trade and environment,' the issue of consistency of a TREM based on a PPM with the WTO law has been addressed by Panels and the Appellate Body. In order to trace and evaluate how they have addressed this issue, it is convenient first to consider here what is a TREM based on a PPM.

2. *Two Categories of PPM*

As domestic environmental problems become more serious and world concern about the global environment grows, there is increasing recognition that 'production externalities' arising from a PPM in the production process of a product often affect the environment more significantly than 'consumption externalities' coming from the use and consumption of a product. As a result, in addition to environmental regulations on products, States have also had a tendency to concern themselves with how a product is produced, manufactured, or obtained.

PPMs can be classified analytically into two categories, depending on whether the resulting product causes an environmental effect during its

²¹ 'WTO Cannot be "Judge, Jury, Police" of Environment Issues, Top Official Says,' *BNA International Environmental Daily*, 18 March 1998, reproduced from *id.*, at 756.

²² *See id.*

²³ *See id.*

²⁴ Professor Dunoff answers affirmatively to these questions. *Id. See also* CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 45-56(AEI Press, 2001).

consumption or production.²⁵ Some PPMs cause ‘consumption externalities.’ They change the product’s performance to such an extent that the product causes, or threatens to cause, damage to the importing country’s environment when it is consumed, used, or disposed of. It is sometimes said that these PPMs are ‘materialized’ into the product as such. This category of PPMs is directly related to physical characteristic of the product concerned and is called a ‘product-related-PPM.’ For example, pesticides used on food crops may produce harmful chemical residues; cattle raised on growth hormones can produce meat with hormone residues.²⁶

On the other hand, the second category of PPMs causes environmental effects in the production process of a product but neither transmits such effects to the product itself nor affects the product’s characteristics. These PPMs may lead to ‘production externalities’ not only in the producing country but also by their spillover effect in other countries and even in the global environment. This category of PPMs is therefore called a ‘non-product-related PPM.’ Examples include, as referred to below, the practice of catching tuna by fishing methods causing high dolphin mortality and the incidental capture of large numbers of sea turtles by shrimp trawling. In addition, methods of cutting woods without a program of sustainable development and cleaning of semi-conductors and other electric parts with CHCs are also among these PPMs.²⁷

3. TREM Based on a PPM Regulation

In international trade, product-related PPMs are less problematic in that importing countries that are also consumption countries can regulate them through internal regulations on the product as such. So long as imported products are treated the same as domestic like products, they will meet the discipline of ‘national treatment’ under Art. III of GATT 1994.²⁸

Non-product-related PPMs should be properly regulated by process standards in producing countries. But if a PPM regulation of a producing country is insufficient or ineffective, other countries that suffer from production externalities due to transboundary spillover effects may want to enforce their own regulation to halt the damage caused by the PPM in issue. It is here that a TREM plays its role as a measure to regulate the non-product-related PPM. Indeed, the TREM normally takes a form of import regulation by an importing country of the good produced by the PPM

²⁵ See *OECD Conceptual Framework for PPM Measures*, in OECD, TRADE AND ENVIRONMENT: PROCESSES AND PRODUCTION METHODS, at 149-162(1994).

²⁶ See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AJIL 268, 288(1997).

²⁷ See *id.*

²⁸ See Schlagenhof, *supra* note 2, at 126.

in question, but the purpose of the TREM in this case is to make the producers of the producing country stop using the PPM in issue, and thus, without any agreement among concerned countries, this TREM would be seen as extraterritorial and unilateral application of a regulation of this importing country and further even criticized as so called 'eco-imperialism' because the TREM is equated with an unilateral imposition of an environmental standard by the importing country.

The problem becomes further complicated when a non-product-related PPM causes production externalities in a more extended jurisdictional scope including many countries. The more the number of affected countries increases, the more to agree on a suitable sharing among the affected countries of the required internalization of environmental externalities becomes difficult because of the difference of policy stances of the countries concerned on the environmental problem. Thus, the circumstances under which TREMs based on a PPM are taken can be distinguished according to the degree of attainment of agreement among the countries concerned:²⁹ in one case, a country may be obliged to take a TREM under a multilateral environmental agreement (MEA); and in another case, a country may unilaterally take a TREM arguably based upon some general principles of international law, such as the principle of state responsibility for transboundary environmental harm. And even in the former case, it is necessary to take note that if the target country of the TREM is not a party to the MEA, the TREM taken against it can not escape from being criticized as an unilateral measure. In the next sections, we will focus on TREMs based on a non-product-related PPM and consider the issue of their consistency with the WTO law.

IV. The Issue of the consistency of a TREM based on a PPM with the WTO Law

1. Identification of Some Substantial Issues

Since there are, as was said above, a variety of circumstances under which TREMs based on a PPM are taken, it will be expected that the appraisals of the TREMs under international law and the WTO law are delicately different case by case depending on each of circumstances. For present purposes it is sufficient to identify simply some substantial issues that may be raised when a TREM based on a non-product-related PPM taken unilaterally by one nation whether by virtue of a MEA or not is appraised under the GATT 1994.

Since a TREM based on a non-product-related PPM is taken usually

²⁹ See *OECD Conceptual Framework for PPM Measures*, *supra* note 25, at 157.

in the form of import regulation of the product in question in the importing country, the most relevant agreement as the framework of regulation under the WTO law is the GATT 1994, which is the core of the regulations of trade in goods among the WTO agreements.³⁰ The GATT provides, as the basic principles for constructing the liberalized world trading system, non-discrimination principles and trade liberation principles, including the general prohibition provision of quantitative restrictions and other non-tariff measures. The GATT, however, permits departures from these principles in exceptional cases that meet certain criteria.³¹ In the case where a TREM based on a non-product-related PPM is taken unilaterally by one nation, such a TREM may well raise issues of inconsistency with, among others, the ‘product-based regulation approach’ and the ‘multilateralism’ in the framework of regulation under the GATT.

2. Inconsistency with the ‘Product-Based Regulation Approach’ under the GATT

The non-discrimination principles of the GATT are: the most-favored-nation principle of Article I and the national treatment principle of Article III. The former prohibits discrimination among ‘like products’ coming from different states of origin. The latter prohibits discrimination between domestic and foreign ‘like products.’ The ‘product-based regulation approach’ appears in the criteria of likeness according to which the concept of ‘like products’ is defined. The GATT itself does not define the concept,³² but certain kinds of criteria have been adopted as a legal practice through many dispute settlement panel cases. These are: (i) the nature and physical characteristics of competing products as they appear at the importer’s border; (ii) tariff classifications based on them; (iii) the product’s end-use; and (iv) the

³⁰ Among the WTO agreements, the Agreement on Technical Barriers to Trade (so called TBT Agreement) is also relevant here. This agreement, in respect of technical regulations, not only provides non-discrimination principles like as the GATT (Article 2.1), but also provides that they shall not be more trade-restrictive than necessary to fulfil “legitimate objectives” including protection of the environment (Article 2.2). However, since a technical regulation is defined as a “document which lays down product characteristics or *their related processes and production methods(emphasize added)*”(Annex I), it is interpreted that regulations of non-product-related PPMs are excluded from this definition. As a result, it should be noted that the TBT Agreement is interpreted not to be applied to the regulations of non-product related PPMs. *See* Schlagenhof, *supra* note 2, at 132.

³¹ *See* Article XX of the GATT.

³² However, under Article 2.6 of the so called Antidumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), there is a definition of the term like follows:

Throughout this Agreement the term “like product”(“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

consumers' taste and habits.³³ Except this last criterion, the finding criteria of likeness, in the last analysis, are pursued in the character of a product itself, and the factors involved in production, especially the PPM, are made irrelevant for the like-product determination. Indeed, product related PPMs are in fact taken into account as far as they are materialized into the character of the product, but non-product-related PPMs are not taken into account at all. As the result, discriminating based on the difference of the PPM between products that are found as 'like products' by the criteria other than the PPM, will be not permitted. As far as one product produced by a PPM harmful to the environment and another product produced by a PPM friendly to the environment are considered to be 'like products', all these products must be treated equally.

3. Inconsistency with the 'Multilateralism' under the GATT

Article XX of the GATT provides general exceptions to the trade liberalization principles of the GATT and permits under certain conditions deviation from these principles to realize certain values that have priority over trade values. Among these values are included the environmental values. Therefore, there is a room for TREMs based on a non-product-related PPM being legalized under the GATT by fulfilling the requirements of this Article, even if they are otherwise against the trade liberation principles under the GATT.³⁴ It is, however, in the interpretation and the application of this Article XX that the 'multilateralism' in the framework of regulation under the GATT has been prominently expressed. Since TREMs based on a non-product-related PPM are, as are already said, essentially unilateral and extraterritorial in their nature, there is the strong probability that such TREMs cannot fulfill the requirements for applying these exceptions and thus can not acquire the legalization under Article XX.

V. The Approaches Adopted by the Panels and the Appellate Body

³³ For these criteria, some panels and the Appellate Body have referred to the Working Party Report on the Border Tax Adjustments adopted 2 December 1970, BISD 18S/97.

³⁴ The relevant part of Article XX is as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

1. Approaches Adopted by the Panels in Tuna/Dolphin Cases

Here, let's trace how the panels and the Appellate Body have actually disposed of our issues. The famous *Tuna/Dolphin* cases of 1991 and 1994,³⁵ which triggered first the controversy of the problem of 'trade and environment', were just concerned with the inconsistency of a TREM based on a non-product-related PPM with the GATT 1947. In these cases, panels declared a United States embargo on tuna caught by a fishing method causing high dolphin mortality to be inconsistent with the GATT 1947 and seemed to typically adopt the 'product-based regulation approach' and the 'multilateralism' in the framework of regulation under the GATT 1947.

The 1994 Panel noted in relation to the application of Article III providing the national treatment obligation that "Article III calls for a comparison between the treatments accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation."³⁶ The Panel, therefore, implied that according different treatments to like tuna products based on a criterion of a harvesting method which 'could not have any impact on the inherent character of tuna as a product' would not be permitted under Article III.³⁷ This means nothing but that the Panel adopted the 'product-based regulation approach' and that invoking non-product-related PPMs as a base for denying likeness between products would not be permitted.

The 1991 Panel, after having found the United States embargo to be inconsistent not with Article III but with Article XI,³⁸ continued to examine further the possibility of legalization of the embargo under Article XX. As to the territorial scope of (b) and (g) of Article XX, on which there is no express indication in the texts, the United States argued that (b) and (g) were applicable to a measure protecting environmental values outside the jurisdiction of the invoking country (like as dolphin in this case).³⁹ The Panel, however, dismissed these arguments and said as follows:

[I]f the broad interpretation of Article XX (b)[and (g)] suggested by the United States were accepted, each contracting parties could unilaterally determine the life or health protection policies [and the conservation policies] from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement; The General Agreement would then no longer constitute a

³⁵ *United States-Restrictions on Imports of Tuna* (hereinafter *Tuna I*), in 30 ILM 1594(1991); *United States-Restrictions on Imports of Tuna* (hereinafter *Tuna II*), in 33 ILM 839(1994).

³⁶ *Tuna II*, *id.*, para.5.8.

³⁷ *Id.*, para. 5.9.

³⁸ *Tuna I*, *supra* note 33, para. 5.18.

³⁹ *Id.*, paras. 3.36 and 3.42.

multilateral framework for trade among all contracting parties.⁴⁰

Further, the 1994 Panel declared clearly that Article XX as an exception to obligations under the GATT permitted no deviation from the ‘multilateralism’ of the GATT as follows:

If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.⁴¹

In short, these panels said that if the provision of Article XX were interpreted as permitting extraterritorial measures, one state could unilaterally decide its environmental policy and other states which did not comply with this policy would be denied their right under the GATT and that this would lead to the collapse of the multilateral framework of the GATT. It should be noted that the both panels cited above refused dauntlessly the unilateralism in order to keep the ‘multilateralism’ under the GATT. According to these panels, TREMs based on a non-product-related PPM having such a unilateral and extraterritorial character were doubtlessly incompatible with the ‘multilateralism’ under the GATT.

Thus, according to the panels of *Tuna/Dolphin* cases, TREMs based on a non-product-related PPM encounter obstacles of the ‘product-based regulation approach’ and the ‘multilateralism’ of the GATT and can not acquire their consistency with the GATT.

From our perspective, it is also interesting to note that the 1991 Panel underlined that its task was limited to the examination of this matter “in the light of the relevant GATT provisions”⁴² and added in its concluding remark that the adoption of its report would not affect “the right of the CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in

⁴⁰ *Id.*, paras. 5.27 and 5.32.

⁴¹ *Tuna II*, *supra* note 33, para. 26.

⁴² *Tuna I*, *supra* note 33, para. 6.1.

conflict with the present rules of the General Agreement.”⁴³ We can discover here that this Panel itself raised the question whether the panel is the appropriate place to frame an appropriate rule to accommodate the opposing policies involved or, alternatively, whether this task belongs more appropriately to a political organ.

2. New Approaches Adopted by the Appellate Body in the Asbestos and Shrimp/Turtle Cases

Two recent WTO cases, however, deserve attention in that they imply that the above approaches adopted by *Tuna/Dolphin* cases should be amended. First, in the *Asbestos* case of 2000,⁴⁴ Canada challenged a French ban on asbestos in construction materials. Asbestos has been long known to be a deadly carcinogen. Canada argued that the asbestos it exports was a ‘like product’ to the substitute products used in construction in France, therefore deserving no less favorable treatment under the national treatment obligation of Article III of the GATT. In this case, the Appellate Body made a noteworthy ruling that implies the amendment of the above ‘product-based regulation approach’ under Article III.

In assessing the ‘likeness’ between asbestos and the substitute products, the Appellate Body noted first that “a determination of “likeness” under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products” in the marketplace.⁴⁵ Setting this forth as a premise, the Appellate Body pointed out that the evidence relating to the health risks associated with asbestos might influence consumers’ behavior and might be relevant in assessing the competitive relationship in the marketplace between allegedly ‘like’ products in this case.⁴⁶ The Appellate Body, thus, reversed the Panel’s conclusion that the asbestos and the substitute products are ‘like products’ under Article III.⁴⁷

This ruling suggests that the evidence relating to environmental harm of a product may influence consumers’ behavior and competitive relationship of the product in the marketplace and that the likeness of an environmentally harmful product and an environmentally non-harmful product may be denied. And, further, this implies that even in the case of a product made by an environmentally harmful non-product-related PPM, if

⁴³ *Id.*, para. 6.4.

⁴⁴ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*(hereinafter *Asbestos*), Report of the Panel, WT/DS135/R, 18 September; Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, *adopted* 5 April 2001.

⁴⁵ *Asbestos, id.*, Report of the Appellate Body, paras. 99 and 103.

⁴⁶ *Id.*, paras. 113 and 122.

⁴⁷ *Id.*, para. 126.

consumers can identify such a PPM,⁴⁸ the likeness of the product and other product may be denied. If so, TREMs based on a non-product-related PPM, after all, may be able to avoid the inconsistency with Article III.

Second, in the *Shrimp/Turtle* case of 1998,⁴⁹ India, Malaysia, Pakistan and Thailand complained about a United States ban on the importation of shrimp caught by trawlers that do not employ a special device in their nets to protect sea turtles from being trapped and killed. Once again the problem of the unilateral and extraterritorial TREM based on a non-product-related PPM was the central question. In this case, the Appellate Body also made a noteworthy ruling that imply alleviation of rigorous application of the ‘multilateralism’ under Article XX, and showed its flexibility permitting a unilateral TREM under a certain condition.

In its 1998 report, the Appellate body, in examining whether the TREM in this case is justified under Article XX, considered that the requirements of the chapeau of Article XX maintain a balance between the right of a Member to invoke any of exceptions, on the one hand, and the substantive rights of the other Members under the GATT1994, on the other hand⁵⁰ and also observed that the chapeau of Article XX is but one expression of the principle of good faith.⁵¹ According to the Appellate Body, the United States failed to engage shrimp exporting countries in serious negotiations with the objective of concluding an international agreement for the protection and conservation of sea turtles, before enforcing the ban in this case.⁵² By this and other reasons, the Appellate Body concluded that the TREM in this case failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of GATT.⁵³

Afterwards, the United States corrected its discriminative application of the measure and negotiated an international agreement for the protection of sea turtles with the appellant and further offered technical assistances to the appellant in order to comply with the 1998 recommendations and rulings of the Dispute Settlement Body. The Appellate Body in the phase of the compliance examination under Article 21.5 of the

⁴⁸ Eco-label is a way to identify such a PPM.

⁴⁹ *United States- Import Prohibition of Certain Shrimp and Shrimp Products (hereinafter Shrimp/Turtle)*, Report of the Panel, WT/DS58/R, 15 May 1998; Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, *adopted* 6 November 1998; *United States- Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia (hereinafter Shrimp/Turtle 21.5)*, Report of the Panel, WT/DS58/RW, 15 June 2001; Report of the Appellate Body, WT/DS58/AB/RW, 22 October 2001, *adopted* 21 November 2001.

⁵⁰ *Shrimp/Turtle, id.*, Report of the Appellate Body, paras. 156 and 159

⁵¹ *Id.*, para. 158.

⁵² *Id.*, paras. 171-172.

⁵³ *Id.*, para. 184.

Dispute Settlement Understanding made forward further and observed that the chapeau of Article XX does not necessarily require the conclusion of an international agreement but only the serious and good faith efforts for the conclusion of it.⁵⁴ After all, the unilateral TREM of the United States in this case was permitted under Article XX and therefore under the GATT.

This ruling may suggest that a TREM based on a non-product-related PPM, even if it is unilateral one, would be permitted under the GATT under a certain condition. And if so, this case would show that the ‘multilateralism’ under Article XX adopted by the panels of *Tuna/Dolphin* cases was withdrawn.

VI. A Concluding Remark: An ‘Evolutionary’ Role of the Appellate Body?

Given the highly controversial characteristics of the problem of ‘trade and environment,’ some people argue that panels and the Appellate Body should not decide disputes concerning such a problem and avoid being involved in political conflicts between environmentalists and free traders. These people argued that any perceived ‘delegalization’ of WTO dispute resolution proceedings would threaten to delegitimize these proceedings.⁵⁵

One of the *Tuna/Dolphin* panels, as noted above, also expressed some doubt about the appropriateness of the panel’s deciding disputes concerning TREMs based on a non-product-related PPM. According to this panel, its task was limited to the examination of the matter ‘in the light of the relevant GATT provisions.’⁵⁶ After all, the panels of this case came to the conclusion unfavorable to environmental values by adopting the ‘product-based regulation approach’ and the ‘multilateralism’ in the framework of regulation under the GATT. The result of this case provoked deep antipathy against the GATT among environmentalists at the world wide level and threatened to delegitimize the GATT itself. It triggered the very controversy of ‘trade and environment’ of today.

In such a context, the behavior of the Appellate Body in recent two cases, the *Asbestos* and the *Shrimp/Turtle*, is noteworthy. The Appellate Body implied the possibility of breaking through the barriers of the ‘product-based regulation approach’ and the ‘multilateralism.’ The door is slowly being opened for TREMs based on a non-product-related PPM. Its ruling was more environmentally sensitive and welcomed by environmentalists.⁵⁷

⁵⁴ *Shrimp/Turtle* 21.5, *supra* note 47, paras. 124 and 134.

⁵⁵ *See supra* note 24.

⁵⁶ *See supra* notes 40 and 41.

⁵⁷ One commentator says that ‘the Appellate Body’s decision is sound from a political and

However, the door is also being opened for the ‘unilateralism.’ This has caused some to suspect that the Appellate Body may have exceeded the jurisdiction and mandate set forth in the DSU. After the *Shrimp/Turtle* decision, many developing Members of the WTO criticized the case and argued that the Appellate Body added to or diminished certain rights and obligations present in the covered agreements, and in so doing encroached upon the rights and responsibilities of the Members.⁵⁸ According to the Dispute Settlement Understanding, the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.⁵⁹

The WTO dispute settlement system depends on Member confidence. It will only remain legitimate and effective if the Members believe that the Appellate Body is interpreting the covered agreements as negotiated, as opposed to modifying them.⁶⁰ There is divergence of opinions whether the Appellate Body modified the rules of GATT in the recent two cases. If the Appellate Body remained, however, interpreting, instead of modifying the rules of GATT ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment,’⁶¹ its rulings may well deserve praising as ‘evolutionary’ interpretation.⁶² When we realize that due to the WTO’s insistence on the consensus decision making, the political bodies of the WTO were often unable to legislate clear rules resolving policy differences between Members, the evolutionary ruling of the Appellate Body, as far as it remains being within its jurisdiction and mandate, should be appreciated affirmatively. In this sense, It can be remarked that the Appellate Body does not need to ‘*live with a quiet but uneasy status quo*’⁶³ in the ‘trade and environment’ disputes.

policy perspective.’ Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 JIEL 477, 495(1999). See also GARY SAMPSON, TRADE, ENVIRONMENT, AND THE WTO: THE POST-SEATTLE AGENDA, at 110 (Overseas Development Council, 2000).

⁵⁸ See SAMPSON, *id.*, at 110-111; BARFIELD, *supra* note 24, at 48-49; Appleton, *id.*

⁵⁹ See Article 19.2 of Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁶⁰ See Appleton, *supra* note 55, at 496.

⁶¹ *Shrimp/Turtle*, *supra* note 47, Report of the Appellate Body, paras. 129-130.

⁶² As an example of ‘evolutionary’ interpretation of the rules of international law, see *Case of the Aegean Sea Continental Shelf* (Greece v. Turkey), International Court of Justice, paras. 78-80, at 4(1978).

⁶³ See *supra* note 23.