CHAPTER 9

A NEW ANALYTICAL FRAMEWORK

The division of measures under sub-sections (a), (b) and (g)—and in principle also the other measures—into three distinct categories (internal measures, non-product-related PPMs and product-related PPMs) can provide a systematic analytical framework for the analysis of the sub-sections and the \textit{chapeau} analysis. This framework, \textit{inter alia}, fills the gaps of the analytical problems regarding the analysis of extraterritorial and/or extrajurisdictional effect and the discussion of location of natural resources, which are sought protected.

1 UNDERSTANDING DIRECTIONS

Understanding \textit{directions} of a trade measure is the second step in the analysis of trade measures enacted to protect animals and these trade measures’ possible justification under GATT Article XX. It was suggested in Chapter 8 that unless the panels and the Appellate Body include some kind of screening mechanism or value judgment on moral measures, it could potentially lead to the dangerous situation where each country could enact numerous trade measures based on \textit{morals}, where there would be no means of second-guessing such a policy, i.e., a slippery slope. Chapter 8 also suggested that based on the value of the policy, the subsequent trade tests could be made easier or more difficult—which they to a large degree already are—as illuminated in the \textit{EC—Asbestos} case. This chapter illuminates how the slippery slope could be avoided by utilizing the systematic framework suggested in Thesis 2.

The verification of Thesis 2 is therefore essentially to illuminate how a systematic framework can assist in determining which measures should be scrutinized especially harshly—depending on the \textit{direction} of the measure—and to clarify issues in relation to extraterritoriality, extrajurisdictionality and the discussions surrounding outwardly directed trade measures.

1.1 Direction of Trade Measure

The starting point for creating a structural basis for the analysis of each sub-section of Article XX, is to understand in which \textit{direction} the policy of the trade measure is aimed.
The usual approach is to divide the measures into two categories: the internal ban and then another category of external measures. The latter, albeit being the more unusual measure, however, presents difficult analytical issues, which is, in most academic writings, analyzed under titles such as extraterritoriality, extrajurisdictionality, outwardly directed measures, external measures, etc.

External measures are analyzed in connection with process and production methods (PPMs) because the PPM, by its nature, demands a change of the process or production method inside another member’s jurisdiction, which is, e.g., illuminated in the U.S.—Shrimp case where other countries were forced to utilize turtle excluder devises (TEDs) in course of their shrimp harvesting in order to sell their shrimp to the United States.

1.2 Why Distinguish Between Inwardly and Outwardly Directed Measures?

Before getting into the analysis of the three different measures as proposed in Thesis 2, it is important to understand why the issue of PPMs has received so much specialized attention and what the analytical difficulties have been.

The main issue regarding PPMs is that they, by their nature, are outwardly directed trade measures, albeit Section 1.3 posits that the product-related PPM for certain analyses should be treated as an inwardly directed measure.

There are two major issues in relation to outwardly directed trade measures: the sovereignty issues in relation to general international law and the trade issues, where this author posits the former issue is based on a misunderstanding of general international law.

---


2 The difference between extraterritoriality and extrajurisdictionality is outlined in Section 1.2.2.2.


4 See also Arthur Appleton, Environmental Labelling Programmes 10 (1997), who defines PPMs in relation to mandatory labeling requirements as measures “designed to reflect how a particular product is manufactured.”

5 PPMs are in this book defined to encompass both categories of PPMs in Thesis 2.