

STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION

*Matthias Oesch**

ABSTRACT

This article explores the issue of standard of review in WTO dispute resolution. Standards of review have over the last years gained unprecedented political and systemic significance in panel and Appellate Body proceedings. They express a deliberate allocation of *vertical* power between WTO adjudicating bodies and national authorities to decide upon factual and legal issues. Therefore, this article contributes to the debate on the balance of powers between the judiciary of the WTO and its members. At the outset, it defines the issue of standard of review (Section I) and examines the commonly invoked rationales for deference towards members' perceptions of their obligations under the WTO (Section II). Then, it expounds the *Uruguay Round* negotiations (Section III) and turns to the current state of law and practice (Section IV). The analysis of the case law to date reveals that panels and the Appellate Body have in general applied intrusive standards of review. Such a conclusion holds true in particular for the interpretation of WTO law, but it also stands to reason with regard to factual findings. It is submitted that the policy of intrusiveness is correct from a *legal* perspective but contrasts with the various rationales speaking in favour of a more deferential attitude.

INTRODUCTION

Whenever panels and the Appellate Body are called upon to examine a WTO Member's measure or law, the question of the applicable standard of review arises. In some cases, the issue is clear and not controversially argued. In other cases, the substantive outcome of the dispute depends to a large extent on the standard of review deemed appropriate. Not surprisingly, it has over the years become a routine criticism by WTO Members that have lost disputes in Geneva to claim that panels or the Appellate Body have applied

* Senior Research Fellow, Department of Economic Law, University of Berne (matthias.oesch@iew.unibe.ch); Legal Adviser, Division of World Trade, Federal Government of Economic Affairs, Switzerland (matthias.oesch@seco.admin.ch). The views expressed here are strictly personal. The article is based on the author's book *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, forthcoming 2003). I am indebted to Thomas Cottier for invaluable comments and supervision. The case law and literature are considered until March 2003.

too intrusive or too deferential standards of review. Ehlermann who served as member and Chairman of the Appellate Body until 2002 noted at the end of his term in office that 'during the last months, the question of standard of review has thus become one of the most controversial aspects of the Appellate Body's jurisprudence.'¹

The issue of standard of review is very much part of procedural law in general. It plays an important role in the judicial review of administrative authorities' measures in both domestic and international jurisdictions. However, standards of review do not only accomplish a procedural function, but they also express a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it. In the context of the GATT 1947/WTO, the political and systemic significance of standards of review becomes particularly apparent. They are one of the elements with which the vertical relationship between international interdependence and national sovereignty can be appropriately determined.² Croley and Jackson state that 'during the past several years the standard-of-review question has become something of a touchstone regarding the relationship of "sovereignty" concepts to the GATT/WTO rule system.'³

Succinctly, standards of review subtly balance out the delicate conflict over legal and political authority between panels and national authorities in trade and trade-related matters governed by the WTO. They prominently determine, though not exclusively and 'through a relatively genteel language', as to which body – WTO adjudicating body or national authority – is empowered to ultimately decide on controversial matters of facts and law.⁴ The Appellate Body illustratively held in *EC – Hormones* that the standard of review

must reflect the balance established in that Agreement [the SPS Agreement] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do so.⁵

¹ Claus-Dieter Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO', Policy Paper RSC No. 02/9 (2002), para 64.

² See John H. Jackson, 'Sovereignty, Subsidiarity, and Separation of Powers: The High-Wire Balancing Act of Globalization', in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002), at 13, 23.

³ Steven P. Croley and John H. Jackson, 'WTO Dispute Settlement Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine', in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (London, The Hague, Boston: Kluwer Law International, 1997), at 187, 189.

⁴ Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *European Journal of International Law* 39 (2001), at 58.

⁵ *European Communities – Measures Concerning Meat and Meat Products ('EC – Hormones')*, WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998), para 115.

The decisive question is as to which level is appropriate for a decision to be taken. Should panels defer, to a certain degree, to factual and legal findings arrived at on the domestic level and test them, for instance, on a standard of reasonableness? Or should panels conduct a completely independent factual and legal assessment of the domestic measure in question and *de novo* examine whether state conduct is in compliance with WTO law? Accordingly, curiosity as to the *appropriate* standards of review in panel and Appellate Body proceedings stands at the beginning of this article. It seeks to undertake a stocktaking with respect to the issue of standard of review in WTO dispute resolution. The WTO dispute settlement procedures contain another standard of review-problem, namely that of Appellate Body review of panel reports. This standard concerns the institutional balance *within* the two-tier dispute settlement system of the WTO and is governed by Article 17.6 of the DSU. It is not dealt with presently.

I. DEFINITION

The issue of standard of review arises whenever a panel or the Appellate Body is called upon to review compliance of a member's measure or law with WTO law. When the examination of the domestic measure in question falls within their jurisdiction, the question then is with what *depth* or *intensity* the national policy determination should be reviewed.⁶ The standard of review deemed appropriate in a specific case defines the degree to which a panel should 'second guess' the measure in order to determine whether it is consistent with WTO law or not. Conversely, the standard of review defines as to whether, and to what extent, panels should respect a WTO Member's measure although they would prefer a different factual conclusion or legal interpretation. It can be observed in the GATT 1947/WTO *acquis*, and it is frequently argued in legal writings that panels should, in fact, respect national government determinations up to some point. The point to which they should

⁶ See for definitions of the notion of standard of review in GATT 1947/WTO dispute settlement proceedings Jacques H. J. Bourgeois, 'WTO Dispute Settlement in the Field of Anti-dumping Law', 1 JIEL 259 (1998), at 268, 272-73; Thomas Cottier, 'Risk Management Experience in WTO Dispute Settlement', in David Robertson and Aynsley Kellow (eds), *Globalization and the Environment: Risk Assessment and the WTO* (Cheltenham: Edward Elgar Publishing, 2001), at 41, 49; Joanna Gomula, 'The Standard of Review of Article 17.6 of the Anti-Dumping Agreement and the Problem of Its Extension to Other WTO Agreements', in *Polish Yearbook of International Law XXIII 1997-98* (Warszawa: Wydawnictwo Naukowe Scholar, 1999), at 229, 231; John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998), at 90; John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations* (3rd edn, St. Paul: West Publishing Co, 1995), at 364-66; Edmond McGovern, *International Trade Regulation*, looseleaf, issue 12 (Exeter: Globefield Press, 2002), § 2.2325; Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002), at 347-60; Stefan Zlepting, 'The Standard of Review in WTO Law', *European Business Law Review* 427 (2002), at 428-29.

not substitute their own findings for those of the national authority 'is the crucial issue that has sometimes been labelled the standard of review'.⁷

The issue of standard of review is a procedural instrument and shapes, *in addition* to substantive treaty rules and other procedural techniques developed by panels and the Appellate Body, the jurisdictional competence of the WTO adjudicating bodies *vis-à-vis* members. In literature, though, the term 'standard of review' is sometimes used in a broader sense in order to generally address the appropriate panel approach towards WTO Members' measures. Then, the notion of standard of review does not only relate to the review intensity of panels and the Appellate Body but also encompasses other criteria such as procedural requirements for the enactment of trade-restrictive measures, methods of treaty interpretation, panel activism or passivity in the process of fact-finding, judicial activism or restraint in filling legislative gaps, and 'issue-avoidance techniques'.⁸ This article, however, adopts the conceptual definition of standards of review in a narrow and purely procedural sense.

De novo review and 'total deference' are commonly referred to as the two most extreme standards on each side of the context-dependent spectrum of appropriate levels of deference.⁹ The former entails an independent examination of the domestic measure in question. A policy of full *de novo* review allows a panel to completely substitute its own findings for those of the national authority and to arrive at a different factual as well as legal conclusion. The standard of review of 'total deference' means that a panel shall not review in substance the investigations conducted by the national authority. Under such a policy, judicial review is limited to the formal examination of whether the relevant procedural requirements for the adoption of a measure in question were complied with. On the spectrum between these two most extreme forms of standards of review, various variants are conceivable as to where the benchmark of panel intrusiveness or deference can technically be set. A certain level of deference automatically requires a panel to disagree with a member's measure, either as regards its factual conclusions or its legal interpretations or both, in a qualified way in order to declare the measure inconsistent with WTO law. Domestic legal systems have usually developed a range of different standards of review with varying levels of

⁷ Croley and Jackson, above n 3, at 188. Frequently, one speaks of the 'margin of appreciation concept'. This concept, however, is commonly attributed to the European Court of Human Rights and its case law.

⁸ See McGovern, above n 6, § 2.2325; Gomula, above n 6, at 231; Waincymer, above n 6, at 358–60; for a comprehensive analysis as to the deference shown by panels and the Appellate Body towards WTO members in general see William J. Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques', 4 *JIEL* 79 (2001).

⁹ In *EC – Hormones*, above n 5, para 117, the Appellate Body explicitly used those terms, referring to the European Communities' submission.

deference.¹⁰ They are often either explicitly stipulated in statute law or developed by tribunals and courts in appeals of administrative and civil law actions. Dispute settlement in international law in general lacks such a tradition. This holds equally true for WTO dispute resolution.

II. RATIONALES FOR PANEL DEFERENCE

In the WTO legal framework, the issue of standard of review is traditionally divided into the two basic categories of *facts* and *law*. This distinction is an institutional convention which is rooted in general legal theory and shaped by legal tradition.¹¹ Equally, it is a generally recognized and useful tool for the systematic analysis of standard of review-questions in WTO panel proceedings and officially embodied in the WTO legal texts.¹² In *EC – Hormones*, the Appellate Body gave an illustrative description of the dichotomy:

The determination of whether or not a certain event did occur in time and space is typically a question of fact. . . . Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process. . . . The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.¹³

In the following, the standards of review of facts and law, respectively, and the potential rationales for panel deference are defined in turn.

A. Questions of facts

The standard of review of *facts* is twofold. It relates to both the process of fact-finding in the sense of ‘raw’ evidence and the factual conclusion which is subsequently drawn from the ‘raw’ evidence. The former concerns the

¹⁰ See for standards of review in trade matters before domestic courts in the United States, the European Communities, and Switzerland, Thomas Cottier and Matthias Oesch, ‘The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework’, in Thomas Cottier and Petros C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: The University of Michigan Press, forthcoming 2003), at 287, 290–95; Croley and Jackson, above n 3, at 197–200; Jackson, Davey, and Sykes, above 6, at 157–62.

¹¹ See for the distinction as a general problem of legal theory John H. Farrar and Anthony M. Dugdale, *Introduction to Legal Method* (2nd edn, London: Sweet & Maxwell, 1984), at 47–58; Richard B. Bilder, ‘The Fact/Law Distinction in International Adjudication’, in Richard B. Lillich (ed), *Fact-Finding before International Tribunals* (Ardsley, New York: Transnational Publishers, 1992), at 95–98; with regard to GATT 1947/WTO proceedings Andrew W. Stuart, ‘I Tell Ya I Don’t Get No Respect!: The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals’, 23 *Law & Policy in International Business* 749 (1992), at 752, 760–63.

¹² Article 17.6 of the AD Agreement explicitly prescribes a separate standard of review of both facts and law. Article 17.6 of the DSU limits appeals to the Appellate Body to ‘issues of law’ which necessarily requires distinguishing legal issues from factual findings.

¹³ *EC – Hormones*, above n 5, para 132.

issue as to how meticulously a panel should examine the scope and appropriateness of the relevant factual evidence. It is closely related to the role which panels play in undertaking and controlling the process of fact-finding; this role can be characterized by either an adversarial or an inquisitorial technique.¹⁴ The latter focuses on the plausibility of the factual conclusion which is subsequently drawn from the 'raw' evidence. The overall question is what standards of review panels should apply in reviewing the 'raw' evidence and the factual conclusion drawn therefrom.

On the one hand, it is obvious that panels need to be comprehensively informed on the relevant facts of a case. Therefore, an active role in the process of fact-finding and an intrusive standard of review are favoured from a functionalist perspective. Undue panel deference towards factual findings of a domestic authority could seriously jeopardize the mandate to objectively assess the legality of a domestic measure. As Mavroidis has put it: 'After all, the court's role is to look for the truth (its truth, of course). The pleadings by the parties to a dispute circumscribe the dispute; they should not be understood as the frontiers of truth.'¹⁵

On the other hand, a series of rationales – apart from general allocation of power-considerations – might speak in favour of a certain degree of panel deference. As regards panel review of the 'raw' evidence, purely practical considerations such as resource allocation problems¹⁶ and the panels' dependence on the goodwill of the defending party's authorities, as well as private industries and other actors involved, to submit the relevant evidence might stand in favour of a certain degree of panel deference. Greater expertise of national authorities in fact-finding and their more intimate familiarity with factual surroundings might additionally advise panels to adopt a less intrusive approach in the process of fact-finding.¹⁷ Whereas the GATT 1947 dispute settlement system was characterized by 'a relative dearth of fact-finding experience',¹⁸ the Dispute Settlement Body (DSB) in general, and panels in particular, has only begun to build up expertise and knowledge in fact-

¹⁴ See for the definitions of those techniques Cass, above n 4, at 60; Farrar and Dugdale, above n 11, at 59–64; under an inquisitorial technique, panels have the power, and are equipped with the necessary resources, to positively seek for information and to actively engage in factual investigations. Under an adversarial system, panels passively rely on the parties to be provided with the relevant factual material and limit themselves to base their assessment on that factual record.

¹⁵ Petros C. Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado about Nothing', Harvard Jean Monnet Working Paper 02/01 (2001), at 14.

¹⁶ See Jackson, above n 6, at 92; James Cameron and Stephen J. Orava, 'GATT/WTO Panels between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement', in Friedl Weiss (ed), *Improving WTO Dispute Settlement: Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (London: Cameron May, 2000), at 195, 200–01.

¹⁷ See Croley and Jackson, above n 3, at 205; Stuart, above n 11, at 769.

¹⁸ Judith H. Bello, 'Some Practical Observations about WTO Settlement of Intellectual Property Disputes', 37 *Virginia Journal of International Law* 357 (1997), at 361.

finding since the creation of the WTO. Moreover, the principle of *judicial economy* might also speak in favour of panel deference. Frequently, the WTO agreements require domestic authorities to guarantee procedural fairness and participation of interested parties during proceedings before them.¹⁹ Consequently, panels could refrain from *de novo* review of factual records and only interfere if a summary examination discloses proof of an egregious error in the establishment of the facts.

In contrast to the establishment of the relevant factual record (in the sense of 'raw' evidence), factual conclusions and ultimate decisions to adopt trade-restrictive policies and measures may well involve political, economic, ethical, and other societal considerations. Therefore, there might be circumstances in which more than only one factual conclusion drawn from the 'raw' evidence, and thus more than only one 'truth', to use Mavroidis' words, can legitimately coexist.²⁰ In such cases, panels and the Appellate Body are well advised not to decide on the prioritization of diverse political and societal values and priorities. They could leave room for domestic regulatory decision-making by establishing an 'institutional sensitivity' to the superior credentials which other institutions of governance potentially have in deciding substantive trade-offs between various policy preferences.²¹

Judicial restraint towards a factual record established by a national authority has the advantage that it cannot result in uniformity problems.²² Factual determinations are by nature case-specific and are capable of being generally and prospectively applicable only in exceptional circumstances. This holds true for both the establishment of the 'raw' evidence and the factual conclusions which are drawn therefrom.

B. Questions of WTO law

The standard of review of *law* addresses the consistency or inconsistency of a member's measure or law with the relevant provisions of the covered agreements. The issue here is to what extent panels and the Appellate Body should review legal interpretations of WTO law as submitted by national authorities.²³ While it seems clear from the terms of Article 3.2 of the DSU that

¹⁹ See Articles 6 and 13 of the AD Agreement; Articles 12, 13, and 23 of the SCM Agreement; Articles 3 and 12 of the Agreement on Safeguards; Article X.3(b) of the GATT 1994; Stuart, above n 11, at 751, 769.

²⁰ See above n 15.

²¹ See Robert Howse and Kalypso Nicolaidis, 'Legitimacy through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far', in Thomas Cottier and Petros C. Mavroidis (eds), above, n 10, at 307, 332ff.

²² See, as regards the 'uniformity problem argument', Stuart, above n 11, at 751, 769-70.

²³ See Bourgeois, above n 6, at 270; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London, The Hague, Boston: Kluwer Law International, 1997), at 225.

it falls, in principle, within the panels' and the Appellate Body's competence to interpret the provisions of the WTO agreements, it is far from settled whether they nonetheless should accord a certain degree of deference towards legal interpretations as chosen by domestic authorities. Although the WTO reflects a typically contractual and functionalist framework and is not constitutional in a conventional sense,²⁴ allocation of power-considerations and the principle of state sovereignty might well speak in favour of a limited standard of review of legal interpretations of WTO law. The overall objective of panels and the Appellate Body is, in essence, to find a balance between the members' interest in protecting their sovereignty and the more general interest in achieving uniformity of WTO law and its consistent application.²⁵ The WTO dispute mechanism is still building on its authority and legitimacy among the members that span the globe and show a wide range of political and ideological diversity. Acceptability of, and compliance with, panel and Appellate Body reports largely depends on whether they succeed in achieving a trade-off between appropriate deference to important national policy values and the need to strengthen the multilateral trading system and its disciplines.

However, two arguments speak against panel deference. Firstly, it is submitted that the application of the rules of treaty interpretation relevant for WTO adjudicating bodies, namely Articles 31 and 32 of the VCLT, arguably leads to a single, consistent interpretation of a treaty provision.²⁶ Such a view, albeit not uncontested,²⁷ is based on the closed set of interpretative tools stipulated in the VCLT and the prominent role attributed to the *wording* of a provision.²⁸ Moreover, this understanding is corroborated by the fact that

²⁴ See Cass, above n 4, at 56; Thomas Cottier, 'Limits to International Trade: the Constitutional Challenge', Proceedings of the 94th Annual Meeting of the American Society of International Law (2000), at 220–22.

²⁵ Cottier and Oesch, above n 10, at 297; see also Davey, above n 8, at 79; Natalie McNelis, 'The Role of the Judge in the EU and WTO: Lessons from the *BSE* and *Hormones* Cases', 4 *JIEL* 189 (2001), at 205–06; Donald M. McRae, 'The Emerging Appellate Jurisdiction in International Trade Law', in James Cameron and Karen Campbell (eds), *Dispute Resolution in the World Trade Organisation* (London: Cameron May, 1998), at 98, 106.

²⁶ Panels and the Appellate Body have consistently confirmed that Article 3.2 of the DSU makes reference to the rules of treaty interpretation as laid down in the VCLT, the latter for the first time in *United States – Standards for Reformulated and Conventional Gasoline* ('*US – Gasoline*'), WT/DS2/AB/R (adopted 20 May 1996), part III.B.

²⁷ See Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), at 153; McRae, above n 25, at 108; Gomula, above n 6, at 242–43.

²⁸ Similarly Croley and Jackson, above n 3, at 196; Gary N. Horlick and Peggy A. Clarke, 'Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO', in Ernst-Ulrich Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (London, The Hague, Boston: Kluwer Law International, 1997), at 313, 320; David Palmeter, 'A Commentary on the WTO Anti-Dumping Code', 30(4) *Journal of World Trade* 43 (1996), at 64; David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization* (The Hague, London, Boston: Kluwer Law International, 1999), at 108; see also Waincymer, above n 6, at 388, 740.

the methods of interpretation in the VCLT are of an essentially inflexible and functionalist nature.²⁹ Articles 31 and 32 of the VCLT, taken together, do not provide for a flexible, and thus potentially deferential, panel role nor do they allow for the application of inherent unwritten principles and exceptions within a particular wording commonly known in domestic constitutional settings. Therefore, any kind of judicial restraint towards legal interpretations must be warranted by an explicit treaty provision to this effect. Short of an appropriate reference, there is no legal possibility to grant a certain prerogative to domestic interpretations.³⁰

Secondly, the 'expertise argument'³¹ speaks in favour of panels and the Appellate Body. They possess greater expertise and institutional knowledge in WTO law and practice than domestic authorities, be they administrative agencies or courts, could seriously claim to be equipped with. Members might invoke the 'expertise argument' to their advantage when panels interpret domestic law whose meaning and application is most familiar to the competent domestic authorities. Equally, it might be advisable for panels to be guided by, and defer to, the expertise of other national and international bodies in interpreting international law stemming from sources other than the WTO agreements. In the context of interpreting WTO law, such an assumption, however, does not hold true. While it seems logical that members are interested in building up capacity and expertise in the field of WTO law to their own advantage, it seems equally amiss for members' authorities to claim greater legal expertise over WTO panellists and members of the Appellate Body.³² They are deemed to understand the principles and limitations of the multilateral trading regime, and thus the correct meaning and legal ramifications of WTO provisions, better and from a less subjective perspective than national authorities supposedly do. Such an understanding – greater legal expertise of panels and the Appellate Body – corresponds with the principle of *iura novit curia*. This principle is generally considered relevant for the assessment of legal interpretations in international law.³³ It reflects the assumption that courts are supposed to know and apply the

²⁹ Cottier and Oesch, above n 10, at 296–98; see also Ehlermann, above n 1, para 49; to the contrary apparently Howse and Nicolaidis, above n 21, at 331ff., who argue in favour of a 'model of global subsidiarity' and do not question the appropriateness of the means of treaty interpretation codified in the VCLT.

³⁰ Similarly Petersmann, above n 23, at 228.

³¹ Croley and Jackson, above n 3, at 203–05, stating this rationale as one of those commonly invoked for deference towards agencies in US administrative law (the so-called US *Chevron* doctrine).

³² Similarly Croley and Jackson, above n 3, at 204–05; Stuart, above n 11, at 770.

³³ See the statement by the ICJ in *Fisheries Jurisdiction (United Kingdom v Iceland)*, merits, judgment of 25 July 1974, para 17, *ICJ Reports 1974*, at 9; in general on the principle Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, London, Boston: Kluwer Law International, 1996), at 42–50; as regards WTO law Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?', 1 *JIEL* 227 (1998), at 230–33.

relevant law as it stands, and the interpretation of legal norms is not dealt with as a matter of evidence. This principle does not per se exclude deference towards interpretative conclusions of WTO law set forth by a member. What it does do, however, is to indicate that panels and the Appellate Body are deemed to be the appropriate fora for the interpretation of WTO law. For judicial restraint to be exercised, cogent rationales need to be positively put forward in order to deviate from this principle.

From a policy perspective, legal norms serve a multilateral and essentially contractual system best if they are *uniformly* interpreted by the authority that has the power, and the responsibility, to clarify the meaning of those rules.³⁴ Unlike questions of fact which are by nature case-specific, a policy of panel deference could easily lead to uniformity problems. Petersmann has illustratively painted the picture of a legal 'tower of Babel' into which the WTO could transform by assuming the legitimacy of diverging national interpretations of WTO law.³⁵ Diverging interpretations could seriously jeopardize the objective of the WTO to overcome problems concerning the co-ordination of international trade.

C. Excursus: deference through interpretation

It is important to note that *de novo* review of legal interpretations does not necessarily need to be inconsistent with panel awareness of national sensitivities and political preferences in sensible subject-matters. Some WTO rules are expressed in rather general terms and are far from offering a clear meaning at first sight. Then, panels and the Appellate Body are called upon to interpret and construe such provisions by means of interpretation that does not undermine national authority and state sovereignty. Such an approach can be termed a *state sovereignty conscious* method of treaty interpretation. Thus, the value of state sovereignty and institutional sensitivity can be respected through deferential methods of interpretation (rather than through a deferential standard of review). In fact, the case law to date reveals that panels and the Appellate Body have in general not assumed for themselves a too active role in interpreting and construing ambiguities and open-textured norms contrary to national interests. An illustrative example is the *in dubio mitius* method of treaty interpretation which the Appellate Body

³⁴ Similarly Gomula, above n 6, at 246; Horlick and Clarke, above n 28, at 320; Palmeter, above n 28, at 62–63; Petersmann, above n 23, at 227; Stuart, above n 11, at 751; Edwin Vermulst and Folkert Graafsma, 'WTO Dispute Settlement with Respect to Trade Contingency Measures: Selected Issues', 35(2) *Journal of World Trade* 209 (2001), at 211; Waincymer, above n 6, at 359–60. For the contrary opinion see Laurence R. Helfer, 'Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy', 39 *Harvard International Law Journal* 357 (1998), at 410–38; Jackson, above n 6, at 90; McRae, above n 25, at 110.

³⁵ Petersmann, above n 23, at 227.

³⁶ *EC – Hormones*, above n 5, para 165. This principle favours, as far as possible, interpretations which restrict obligations entered into by members rather than expand them.

explicitly endorsed in *EC – Hormones*.³⁶ In general terms, it is widely acknowledged that panels and the Appellate Body have developed a policy of deference in interpreting open-textured provisions.³⁷ Nothing in the case law suggests that they have ‘pushed the envelope of interpreting ambiguous clauses to suit certain policy preferences’ too far.³⁸

III. THE URUGUAY ROUND AND ARTICLE II OF THE DSU

Against the background of the standard of review’s political and systemic significance, it appears highly desirable that clear and handy rules exist by which all participants can be guided in deciding upon compliance of national authorities’ actions with WTO law. A consistent and well-established standard of review, or various standards depending on the respective agreements and circumstances involved, plays an important part in a dispute settlement mechanism which is of an essentially *legal* nature and deserves the characteristic *juridical*.

A. The *Uruguay Round* and subsequent developments

During the *Uruguay Round*, the issue of standard of review gained unprecedented public attention towards the endgame of the negotiations.³⁹ The United States consistently preferred a ‘reasonableness standard’ to be applied in panel proceedings, i.e. panels should be limited from ruling against a national authority if the latter’s factual findings and legal interpretations were considered ‘reasonable’.⁴⁰ Though, they had to accept that a generally applicable deferential standard of review was too strongly opposed by the vast majority of the delegates. Moreover, a highly deferential standard of review was categorically rejected by the majority even if such a standard was limited to anti-dumping and countervailing duty cases. Amid general opposition against an overly loose standard of review, the United States was able to turn refusal to adopt a deferential standard into a ‘deal-breaker’.⁴¹ Akao,

³⁷ According to Cameron and Orava, above n 16, at 241, ‘the Appellate Body has begun to articulate a constitutional doctrine of deference, linked to the substantive rules of the GATT’; similarly Cass, above n 4, at 63; see also Cottier, above n 24, at 221–22; Davey, above n 8, at 79–110; Howse and Nicolaidis, above n 21, at 334; M. Gregg Bloche, ‘WTO Deference to National Health Policy: Towards an Interpretative Principle’, 5 JIEL 825 (2002), at 843–48; to the contrary Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington DC: The AEI Press, 2001), at 45–56.

³⁸ See Jackson, above n 6, at 91.

³⁹ See for an overview on the issue of standard of review during the *Uruguay Round* Croley and Jackson, above n 3, at 194–97; Horlick and Clarke, above n 28, at 317–21.

⁴⁰ The United States argued that their administrative law jurisprudence, known as the US *Chevron* Doctrine, provided a useful and adequate model for appropriate judicial restraint under the GATT/WTO dispute settlement mechanism, see Croley and Jackson, above n 3, at 198–203.

⁴¹ John H. Jackson, ‘Remarks’, Proceedings of the 88th Annual Meeting of the American Society of International Law (1994), at 139: ‘The standard-of-review question was one of three or four issues that could have broken apart the WTO negotiations’; similarly Palmeto, above n 28, at 63.

Japan's chief negotiator during the *Uruguay Round*, described the potential deadlock as follows: 'we knew that unless the U.S. got something [with regard to panel deference], we may be killing the whole package.'⁴²

Eventually, compromise was reached on three points. Firstly, explicit language for a deferential standard of review of both facts and law was incorporated in the AD Agreement and is thus applicable only to disputes dealing with anti-dumping matters. Secondly, the term 'reasonable', which was prominently used in US proposals, was replaced by the word 'permissible' in Article 17.6(ii) of the AD Agreement. This change was thought to content those countries which categorically opposed a highly deferential standard. Thirdly, the door for a more general application of the deferential standard of review in Article 17.6 of the AD Agreement was left open an inch or two. The negotiators' divided views on the matter are mirrored in a Ministerial Decision according to which the standard of review stipulated in the AD Agreement shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.⁴³ The members have not made a decision on this matter to date. Thus, the final words on the general application of more deferential standards of review have not yet been spoken. Nonetheless, it is most unlikely that Article 17.6 of the AD Agreement will be declared generally applicable. The European Communities, for instance, strongly opposed the extension of Article 17.6 of the AD Agreement to other areas of WTO dispute settlement in a recent 'discussion paper'.⁴⁴ Moreover, the issue of standard of review is not mentioned in any of the Ministerial Declarations or formal proposals in connection with reform prospects of the DSU. It seems that the members do not intend, for the time being at least, to reopen the lengthy and grim negotiations on the issue.

B. Article 11 of the DSU 'bears directly on this matter'

Thus, the job of carving out appropriate panel intrusiveness or deference in specific circumstances has been tacitly delegated to the daily work of the WTO adjudicating bodies. In fact, panels and the Appellate Body soon began to focus on Article 11 of the DSU which they deemed most suitable to serve as legal basis for panel jurisdiction. In *US – Underwear* and *US – Wool Shirts*, the panels expressly relied on Article 11 of the DSU with regard to the

⁴² *Japan's Chief Negotiator, in Interview, Discusses GATT Round Endgame*, in *Inside U.S. Trade* (24 December 1993), at 7.

⁴³ Ministerial Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, made part of the *Uruguay Round Final Act* text.

⁴⁴ *EU Outlines Proposal for Changes to WTO Dispute Settlement System*, *Inside US Trade* (30 October 1998), at 12.

appropriate standards of review.⁴⁵ In *EC – Hormones*, the Appellate Body eventually made the fundamental ruling that Article 11 of the DSU stipulates a general standard of review applying to all cases for which the relevant agreements contain no specific provision on standards of review. It noted that, in the absence of a specific applicable standard of review, ‘Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.’⁴⁶ The Appellate Body stressed that Article 11 of the DSU is applicable to panel review of both factual findings and legal interpretations. With respect to the former, it stated: ‘So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor “total deference”, but rather the “objective assessment of the facts”’.⁴⁷ With respect to the standard of review of legal interpretations, it held: ‘In so far as legal questions are concerned, . . . it may be noted that the European Communities refrained from suggesting that Article 17.6 of the *Anti-Dumping Agreement* in its entirety was applicable to the present case. It is appropriate to stress that here again Article 11 of the DSU is directly on point, requiring a panel to “make an objective assessment of the matter before it” . . . ’⁴⁸

Ever since, panels and the Appellate Body have religiously repeated that Article 11 of the DSU sets forth the appropriate standard of review for panel proceedings.⁴⁹ The meaning of the ‘objective assessment doctrine’⁵⁰ appears to be quite clear at first sight. A panel should make an objective assessment of the whole matter before it in relation to three aspects: (i) the facts, (ii) the applicability of the relevant rules, and (iii) the conformity of the facts with the relevant rules. However, it remains doubtful whether a textual interpretation of the vacuous term ‘objective assessment of the matter’ does in fact help much to clarify its exact meaning. At least, it can be deduced from the wording of Article 11 of the DSU that it does not openly promote judicial

⁴⁵ *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (‘US – Underwear’), WT/DS24/AB/R (adopted 25 February 1997), paras 7.10, 7.12; *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (‘US – Wool Shirts’), WT/DS33/AB/R (adopted 23 May 1997), para 7.16.

⁴⁶ *EC – Hormones*, above n 5, para 116.

⁴⁷ *Ibid*, para 117.

⁴⁸ *Ibid*, para 118 (footnotes omitted).

⁴⁹ No other provision in WTO/GATT 1947 law offers grounds for a more appropriate approach to standard of review. There are only few alternative proposals in legal writings. Croley and Jackson, above n 3, at 195, were looking for relevant language in the DSU, mentioned as ‘most interesting, perhaps’ Article 3.2 and continued: ‘This language could be interpreted as a constraint on the standard of review, but possibly not to the extent of Article 17.6 of the *Anti-Dumping Agreement*.’

⁵⁰ Axel G. Desmedt, ‘Hormones: “Objective Assessment” and (or as) Standard of Review’, 1 *JIEL* 695 (1998), at 697.

restraint. In contrast to Article 17.6 of the AD Agreement which is clearly designed to preclude, under certain conditions, *de novo* panel review of both factual findings and legal interpretations of the AD Agreement, Article 11 of the DSU does not discernibly limit the authority of panels to comprehensively examine national measures.⁵¹ Therefore, panels are not straightforwardly obliged by law to defer to national authorities' factual findings and legal interpretations.⁵² Judicial restraint might well be considered imperative in certain circumstances, but it cannot be derived from Article 11 of the DSU alone.

IV. THE CASE LAW

Reliable guidance as to the panels' mandate under Article 11 of the DSU and Article 17.6 of the AD Agreement can only be found in the growing body of panel and Appellate Body practice. It looks as follows.

A. Standards of review of facts

At the end of 2001, the Appellate Body illustratively summarized the key elements of a panel's standard of review of facts pursuant to Article 11 of the DSU in *US – Combed Cotton Yarn*. It did so in the context of safeguard measures (thus the reference to data), but the paragraph enumerates the generally valid principles which are to be examined by a panel in assessing the factual evidence presented by a defending party:

[P]anels must examine whether the competent authority has evaluated all relevant factors, they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination, and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.⁵³

⁵¹ Similarly Helfer, above n 34, at 438, fn 357; Stuart, above n 11, at 774, with regard to Article 16 of the 1979 *Understanding on Dispute Settlement* which was drafted in similar language. The literature on Article 17.6 of the AD Agreement is epic; see, for instance, Bourgeois, above n 6, at 259–76; Croley and Jackson, above n 3, at 187–210; Gomula, above n 6, at 229–50; Horlick and Clarke, above n 28, at 313–24; Palmeto, above n 28, at 62–64. The language of Article 17.6 consists of considerable ambiguity as to the exact degree of deference considered adequate towards national authorities' determinations. In particular, the arguably incompatible relationship between the two sentences in paragraph (ii) remains a matter for ongoing controversy.

⁵² As regards fact-finding, it is commonly held that an active and inquisitorial role of panels does not necessarily need to be based on a sufficient legal provision to this effect since the fact-finding authority of international tribunals is generally inherent in their function, see Kazazi, above n 33, at 165–66.

⁵³ *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ('*US – Combed Cotton Yarn*'), WT/DS192/AB/R (adopted 5 November 2001), para 74.

According to it, two elements are crucial. Panels need to make an objective assessment of whether the competent national authorities (i) examined all relevant facts, and (ii) provided an adequate explanation of how those facts support the factual determination. The first element corresponds to the *formal* aspect and the second element to the *substantive* aspect of the panels' duty to make an objective assessment of the facts.⁵⁴ As the case law reveals, these key elements accurately express the development of common principles generally valid throughout all agreements. Interestingly, this holds true not only for Article 11 of the DSU but also for the application of Article 17.6(i) of the AD Agreement. Overall, the different drafting of the two provisions has, in practice, not yet resulted in different standards of review.⁵⁵

In substance, one of the few constants in panel and Appellate Body reports, as regards the standard of review of facts, has traditionally been the exclusion of both *de novo* panel review and 'total deference'.⁵⁶ Throughout panel reports, and consistently confirmed by the Appellate Body, a deferential standard of review has been advocated on grounds of policy rationales, and emphasis is equally put on resource allocation problems which WTO panels structurally face.⁵⁷ Although statements by panels and the Appellate Body

⁵⁴ See *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ('US – Lamb Meat'), WT/DS177/AB/R, WT/DS178/AB/R (adopted 16 May 2001), Appellate Body report, para 103.

⁵⁵ Similarly Richard O. Cunningham and Troy H. Cribb, 'Dispute Settlement through the Lens of "Free Flow of Trade": A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures', 6 JIEL 155 (2003), at 161–62; John Greenwald, 'WTO Dispute Settlement: an Exercise in Trade Law Legislation?', 6 JIEL 113 (2003), at 117; McGovern, above n 6, § 12.141; Cottier and Oesch, above n 10, at 297–98; Ehlermann, above n 1, para 59; Bloche, above n 37, at 831–32; Vermulst and Graafsma, above n 34, at 211–12; see in particular *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ('US – Hot-Rolled Steel from Japan'), WT/DS184/AB/R (adopted 23 August 2001): for the standard of review of 'raw' evidence Appellate Body report, para 55, where panels are required to conduct 'an active review or examination of the pertinent facts'; for the standard of review of factual conclusions panel report, para 7.235, where the phrase 'reasoned and reasonable explanation' is used. Though, there is one relevant distinction: Article 17.5(ii) of the AD Agreement explicitly limits the facts to those 'made available in conformity with appropriate domestic procedures to the authorities of the importing member'.

⁵⁶ The landmark case being *EC – Hormones*, above n 5, Appellate Body report, para 117. References in the case law are numerous; see the panel reports *Argentina – Safeguard Measures on Imports of Footwear* ('Argentina – Footwear Safeguard Measures'), WT/DS121/AB/R (adopted 12 January 2000), para 8.117; *Australia – Measures Affecting Importation of Salmon* ('Australia – Salmon'), WT/DS18/AB/R (adopted 6 November 1998), para 8.41; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ('US – Wheat Gluten'), WT/DS166/AB/R (adopted 19 January 2001), para 8.5; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ('Korea – Dairy Products'), WT/DS98/AB/R (adopted 12 January 2000), para 7.30; *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or Above from Korea* ('US – DRAMS'), WT/DS99/R (adopted 19 March 1999), para 4.53.

⁵⁷ Cf. *EC – Hormones*, above n 5, Appellate Body report, para 117; *US – Combed Cotton Yarn*, above n 53, panel report, para 7.32.

have usually excluded only the two most extreme standards, namely *de novo* review and 'total deference', and thus have not indicated the exact degree up to which panels should 'second guess' national fact-finding and policy determinations, an analysis of the case law reveals a quite intrusive engagement by panels. Overall, the benchmark on the spectrum between *de novo* review and 'total deference' tends in practice rather towards the former than towards the latter.⁵⁸

1. The method of fact-finding and panel review of 'raw' evidence

This holds particularly true for the *process of fact-finding* itself. Panels have consistently examined the scope and appropriateness of the relevant facts, in the sense of 'raw' evidence, searchingly and thoroughly. Overall, panels have chosen as the appropriate fact-finding method an *inquisitorial* technique rather than an adversarial.⁵⁹ Article 13 of the DSU and the right of panels, as the triers of facts, to seek information from any source which they deem appropriate is crucial in assisting panels to engage in an inquiry of the 'raw' evidence as intrusively and comprehensively as possible. Particularly in cases involving scientific disputes, but also in others, panels have heavily relied on the expertise and knowledge of outside experts.⁶⁰ The Appellate Body has repeatedly confirmed that the DSU accords to panels ample and extensive authority to undertake and control the process of fact-finding on which it bases its final decision.⁶¹ In general, panels have not hesitated to assume a clearly inquisitorial role at least to the extent that the evidence provided by the defendant has been contested by the complainant and thus been controversial. Corresponding with the panels' active and intrusive approach to fact-finding, the standard of review of the 'raw' evidence has been quite close to *de novo* review.⁶² This holds true for cases turning on economic data,⁶³

⁵⁸ Similarly Bloche, above n 37, at 831–82; Terence P. Stewart and Mara M. Burr, 'The WTO's First Two and a Half Years of Dispute Resolution', 23 *North Carolina Journal of International Law and Commercial Regulation* 481 (1998), at 634.

⁵⁹ See Cass, above n 4, at 61; Rambod Behboodi, "'Should' Means 'Shall': a Critical Analysis of the Obligation to Submit Information under Article 13.1 of the DSU in the *Canada – Aircraft Case*", 3 *JIEL* 563 (2000), at 564.

⁶⁰ See *EC – Hormones*, above n 5, panel report, paras 8.5–11; *Australia – Salmon*, above n 56, panel report, paras 6.1–157. Moreover, the right of panels to draw adverse inferences was established under Article 13 of the DSU, see *Canada – Measures Affecting the Export of Civilian Aircraft* ('*Canada – Civilian Aircraft*'), WT/DS70/AB/R (adopted 20 August 1999), Appellate Body report, para 198.

⁶¹ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimps*'), WT/DS58/AB/R (adopted 6 November 1998), para 106; *Canada – Civilian Aircraft*, above n 60, para 185.

⁶² Similarly Behboodi, above n 59, at 564; Gomula, above n 6, at 248; Stewart and Burr, above n 58, at 634–35; McGovern, above n 6, § 2.2325; Waincymer, above n 6, at 350, 544.

⁶³ See *Korea – Dairy Products*, above n 56, panel report, paras 7.54–96; *Argentina – Footwear Safeguard Measures*, above n 56, panel report, paras 8.129–286; *US – Lamb Meat*, above n 54, panel report, paras 7.208–21, and Appellate Body report, paras 127–39. Though, in assessing economic data, members have usually been granted a certain *margin of discretion* in deciding on the choice of methodology for carrying out such an examination.

for cases turning on scientific evidence⁶⁴ as well as for traditional GATT cases.⁶⁵ In *Korea – Dairy Products*, the Appellate Body confirmed that ‘a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.’⁶⁶ In *Australia – Salmon*, it approved of the panel’s intrusive approach as follows: ‘Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do parties.’⁶⁷

In essence, no particular deference has been in theory advocated, nor in fact applied, at the *formal* stage of a panel’s mandate under Article 11 of the DSU. Cass puts it, when commenting on the standard of review applied by the panel in *EC – Hormones*, succinctly as follows: ‘Deference is not the order of the day.’⁶⁸ However, there are two limitations to an apparently comprehensive and unlimited standard of review of the ‘raw’ evidence. Firstly, a certain degree of deference has, time and again, seemed advisable in view of the panels’ limited fact-finding capabilities and resource allocation problems. An illustrative example was provided by *Japan – Photographic Film and Paper* where the factual complexity of the case led to an enormous record before the panel and involved ‘an unprecedented fact-finding element unfamiliar to GATT 1947 panels’.⁶⁹ Secondly, the case law seems to indicate – although being inconsistent – that panels tend to limit the evidence to those factual elements which were realistically available at the time of the national authority’s determination and thus could have been taken into account in the domestic proceedings.⁷⁰ Although such a limitation seems at odds with the active role which panels have generally played in reviewing the ‘raw’ evidence, it nonetheless flows from the established principle that panels must not conduct a *de novo* review of the matter.⁷¹

2. Panel review of factual conclusions

The standard of review of factual conclusions, the *substantive* aspect of a panel’s mandate under Article 11 of the DSU, is more difficult to assess

⁶⁴ See the cases above n 60.

⁶⁵ See *Japan – Taxes on Alcoholic Beverages* (*‘Japan – Alcoholic Beverages’*), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996), Appellate Body report, part H.2.(c); *Canada – Certain Measures Concerning Periodicals* (*‘Canada – Periodicals’*), WT/DS31/AB/R (adopted 30 July 1997), Appellate Body report, part V.A.

⁶⁶ *Korea – Dairy Products*, above n 56, para 137.

⁶⁷ *Australia – Salmon*, above n 56, para 267.

⁶⁸ Cass, above n 4, at 57.

⁶⁹ Bello, above n 18, at 361; see also Cameron and Orava, above n 16, at 228–29; Jackson, above n 6, at 92; and the reports above n 57.

⁷⁰ See *US – Wheat Gluten*, above n 56, panel report, para 8.6; *US – Combed Cotton Yarn*, above n 53, Appellate Body report, para 78.

⁷¹ See *US – Hot-Rolled Steel from Japan*, above n 55, panel report, para 7.7, and the references in fn 24 thereto; Palmeter and Mavroidis, above n 28, at 79–80.

than that of the 'raw' evidence. It comes in particular into play in trade remedy and, arguably, SPS cases where panels are typically called upon to review factual determinations drawn from the 'raw' evidence. Panels and the Appellate Body have consistently emphasized the significance of a 'reasoned and adequate explanation' of whether a policy determination is based on an 'acceptable' evaluation of the relevant facts.⁷² In *US – Lamb Meat*, the Appellate Body illustratively noted that panels need to examine 'whether the competent authorities have given a reasoned and adequate explanation for their determination'.⁷³ From a *due process* perspective, the requirement that national authorities need to issue reasoned reports ensures that the logic behind a factual conclusion is 'on the record' and thus transparent for interested parties as well as for a subsequent examination by a WTO panel. It contributes further to a fair proceeding before national authorities in the sense that the arguments of the participants can be expected to be taken into account in a transparent and deliberative manner. In *substance*, the requirement to issue an adequate explanation forms the starting point for a panel's analysis of whether the national measure in question is based on an 'acceptable' evaluation of the relevant facts. It makes it clear that panels are not to engage in a *de novo* review. At the same time, the Appellate Body fundamentally explained in *US – Lamb Meat* that it does not mean either that panels must simply accept the factual conclusions arrived at by domestic authorities:

[A] panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.⁷⁴

Thus, the Appellate Body mandates a panel to thoroughly and critically examine a domestic authority's explanation of how the 'raw' evidence supports its overall factual conclusion. The scrutiny with which it directs panels to review national authorities' determinations comes close to a *de novo*

⁷² See *US – Combed Cotton Yarn*, above n 53, panel report, para 7.29, and Appellate Body report, para 74; *Korea – Dairy Products*, above n 56, panel report, para 7.30; *Argentina – Footwear Safeguard Measures*, above n 56, panel report, para 7.12, and Appellate Body report, para 121; *US – Wheat Gluten*, above n 56, panel report, para 8.5, and Appellate Body report, para 161; *Canada – Periodicals*, above n 65, Appellate Body report, part V.A.

⁷³ *US – Lamb Meat*, above n 54, para 103.

⁷⁴ *US – Lamb Meat*, above n 54, para 106. The panel in *US – Combed Cotton Yarn*, above n 53, para 7.35, chose as key word 'justifiable' in order to describe the relationship between a final determination of serious damage and the record of the relevant 'raw' evidence.

review. In fact, the actual engagements by panels confirm such a reading. The margin of discretion left to national authorities has in general been *small*.⁷⁵ Though, panels have clearly refrained from substituting their own evaluations of the facts for those of the competent national authorities. As long as a member's conclusion has been *reasonable*,⁷⁶ and in the case of a scientific assessment based on a 'qualified and respected opinion',⁷⁷ it has not been reversed by a panel although another conclusion would have been perfectly possible to arrive at as well. In cases turning on the evaluation of economic data, members have in general been granted a *margin of discretion* in deciding upon the choice of methodology for collecting economic data and weighting the various factors in an injury determination.⁷⁸

3. Domestic law as question of fact

The issue of standard of review relates not only to factual aspects and interpretations of WTO law but also to domestic legal norms administered and applied by national authorities. With the advent of standard setting within the WTO system, beyond the principles of negative integration such as those of *Most Favoured Nation* and *National Treatment* and other obligations stipulating the scope of correct national conduct, the examination of allegedly WTO-inconsistent domestic laws and practices has moved centre stage in many panel and Appellate Body proceedings. In the first relevant dispute in this respect, *India – Patent*, both the panel and the Appellate Body somehow struggled to find an appropriate way to deal with the interaction between the relevant Indian statute and partly divergent administrative practice. In essence, particularly the Appellate Body appeared to assess the Indian legal system as if it were to interpret WTO law; no discernible deference was applied.⁷⁹ It was not until *US – Sections 301–310* that a panel fundamentally set the course and established that the interpretation of domestic legal rules

⁷⁵ Similarly Cass, above n 4, at 57; Bloche, above n 37, at 831–32; McGovern, above n 6, § 2.2325; Stewart and Burr, above n 58, at 634–35.

⁷⁶ Similarly McGovern, above n 6, § 2.2325; Ehlermann, above n 1, para 62. The term to 'reasonably conclude' is expressly used in the context of standard of review in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ('EC – Asbestos'), WT/DS135/AB/R (adopted 5 April 2001), panel report, para 8.193, and in *EC – Hormones*, above n 5, Appellate Body report, paras 186, 193.

⁷⁷ *EC – Asbestos*, above n 76, Appellate Body report, para 178; *EC – Hormones*, above n 5, Appellate Body report, para 194.

⁷⁸ See *US – Wool Shirts*, above n 45, panel report, para 7.52; *US – Combed Cotton Yarn*, above n 53, panel report, para 7.97; *Korea – Dairy Products*, above n 56, panel report, para 7.31; *US – Lamb Meat*, above n 54, Appellate Body report, paras 106–07; *US – Wheat Gluten*, above n 56, panel report, para 8.6; *Argentina – Footwear Safeguard Measures*, above n 56, panel report, para 7.17; similarly Cameron and Orava, above n 16, at 240; Ehlermann, above n 1, para 62; see also Davey, above n 8, at 95; Waincymer, above n 6, at 353–55.

⁷⁹ *India – Patent Protection for Pharmaceutical and Agricultural Products* ('India – Patent'), WT/DS50/AB/R (adopted 16 January 1998); similarly Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd edn, London and New York: Routledge, 1999), at 70; see

should be conceptually treated, for the purpose of judicial review by WTO adjudicating bodies, as a *question of fact*.⁸⁰ The panel held:

[W]e do not, as noted by the Appellate Body in *India – Patents (US)*, interpret US law ‘as such’, the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301–310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect. It follows that in making factual findings concerning the meaning of Sections 301–310 we are not bound to accept the interpretation presented by the US. That said, any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law.⁸¹

The subsequent case law reveals that the principle to treat municipal law as a *matter of evidence* of state practice has been followed in most panel and Appellate Body reports.⁸² Thus, panel review of domestic law is dependent on, and linked to, the collection and subsequent weighing of factual rather than legal elements. The Appellate Body succinctly summarized the potential types of evidence in *US – Corrosion-Resistant Carbon Steel Flat Products* as follows:

The party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.⁸³

Similarly to the inquisitorial role of panels in general fact-finding, they have consistently engaged in a thorough investigation into the elements which

also Davey, above n 8, at 93. The panel invoked the principle of the protection of legitimate expectations, but the Appellate Body subsequently dismissed this approach, see Thomas Cottier and Krista Nadakavukaren Schefer, ‘The Relationship between World Trade Organization Law, National and Regional Law’, 1 *JIEL* 83 (1998), at 87.

⁸⁰ Approving of this qualification Cottier and Nadakavukaren Schefer, above n 79, at 86; McGovern, above n 6, § 1.1212; Palmetier and Mavroidis, above n 28, at 80; Waincymer, above n 6, at 525; in international law in general Kazazi, above n 33, at 44; see the statement by the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, (1926) PCIJ Reat, Ser. A, No. 7, at 19.

⁸¹ *United States – Sections 301–310 of the Trade Act of 1974* (‘*US – Sections 301–310*’), WT/DS152/R (adopted 27 January 2000), paras 7.18–19.

⁸² See the confirmation by the Appellate Body in *United States – Section 211 of the Omnibus Appropriations Act of 1998* (‘*US – Omnibus Appropriations Act*’), WT/DS176/AB/R (adopted 1 February 2002), para 105.

⁸³ *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (‘*US – Corrosion-Resistant Carbon Steel Flat Products*’), WT/DS213/AB/R (adopted 19 December 2002), para 157.

could potentially shed light on the meaning of the relevant domestic law and practice. An illustrative example is provided by the panel in *US – Anti-Dumping Act of 1916*. It did not content itself with the wording of the US law at issue but was looking for auxiliary elements which could be of help in evaluating the provisions' exact meaning such as current administrative practice, legislative history, economic and political context at the time of its adoption, and relevant domestic case law. It stated, *inter alia*, that:

We must determine how we should consider that law and its 'surrounding', i.e. the circumstances of its enactment (including the legislative history) and the subsequent interpretation(s) by the judiciary branch of the US government. . . . How we consider judicial interpretation, as evidence of the meaning given to terms of a legal text, may affect the way we should understand the terms of the 1916 Act.⁸⁴

The characterization of domestic law as a question of fact and, consequently, its treatment as a matter of evidence has gone hand-in-hand with the invention of a deferential standard of review. The case law indicates that panels and the Appellate Body have usually not imposed a *de novo* interpretation of the relevant domestic rules on the member concerned. In *US – Anti-Dumping Act of 1916*, the panel unequivocally stated that it is not the role of panels 'to develop our own independent interpretation of U.S. law, but simply to select among the relevant judgements the interpretation most in conformity with the U.S. law, as necessary in order to resolve the matter before us.'⁸⁵ Such an approach is supported by policy concerns. Adjudication on the level of WTO dispute resolution has no jurisdiction to construe and interpret domestic rules 'as such'. The principle of *iura novit curia* as a general principle of law does not apply to domestic law.⁸⁶ This holds true as a matter of principle as well as from a purely practical perspective. It is not realistic to expect WTO panellists to have sufficient expertise in each of the different domestic laws which might become subject to panel review. The ambit and effect of domestic legal norms depend to a great extent upon the way domestic tribunals and courts seek to interpret possibly ambiguous provisions and administrative guidelines and practice. Different domestic legal systems have developed different principles that apply to interpreting and applying their own legislative regime. The 'expertise argument' allocates interpretative power to domestic agencies and courts which possess greater expertise and more intimate familiarity in the field of their 'own' law and administrative practice than WTO panels are expected to possess.⁸⁷ Moreover, since the interpretation of domestic law is by definition state-specific,

⁸⁴ *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R (adopted 26 September 2000), para 6.19.

⁸⁵ *US – Anti-Dumping Act of 1916*, above n 84, para 6.52.

⁸⁶ Similarly Kazazi, above n 33, at 44; see for this principle above Part II.B.

⁸⁷ See for the 'expertise argument' above n 31.

there can be no uniformity problems as could arise in the case of diverging interpretations of WTO law.

B. Standards of review of law

The issue of standard of review of WTO law has caused no difficulties so far. In the panel and Appellate Body reports to date, very few statements concerning the standard of review of legal interpretations pursuant to Article 11 of the DSU can be found. Apparently, the parties have usually not explicitly raised the issue before panels or brought it before the Appellate Body. This is remarkable against the background that the correct interpretation of the WTO provisions in question, and thus the appropriate methods of interpretation, have been a crucial issue in most disputes. Whereas most panel and Appellate Body reports have contained several pages on the rules of treaty interpretation and thus elaboration on Articles 31 and 32 of the VCLT, they have only very seldom dealt with the standard of review-question. In *Argentina – Footwear Safeguard Measures*, one of the rare statements in which the Appellate Body expressly addressed the issue can be found:

In addition to ‘an objective assessment of the facts’, we note, too, that part of the ‘objective assessment of the matter’ required of the panel by Article 11 of the DSU is an assessment of ‘the applicability of and conformity with the relevant covered agreements’. Consequently, we must also examine whether the Panel correctly interpreted and applied the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguards*.⁸⁸

The Appellate Body required the panel to ‘correctly interpret’ the relevant provisions in question. This choice of terms does not suggest that the Appellate Body considered a certain degree of deference appropriate towards the interpretation presented by the defending party. Rather, it implies that both panels and the Appellate Body are called upon to *de novo* examine interpretations of WTO law and not to defer to members’ interpretative conclusions. Another statement to this effect can be found in *US – Sections 301–310*. The panel addressed the issue, under the heading of ‘Burden of Proof – General’, as follows: ‘Of course, when it comes to deciding on the correct interpretation of the covered agreements, a panel will be aided by the arguments of the parties but not bound by them; its decisions on such matters must be in accord with the rules of treaty interpretation applicable to WTO.’⁸⁹ Again, this view does not indicate that there be any deference towards interpretations of WTO provisions. Irrespective of the lack of clear statements, the actual interpretative approaches of panels and the Appellate Body leave no doubt about their view on the issue. In substance, both panels and the Appellate Body have constantly engaged in a *de novo* standard of

⁸⁸ *Argentina – Footwear Safeguard Measures*, above n 56, para 122.

⁸⁹ *US – Sections 301–310*, above n 81, para 7.16.

review of WTO law.⁹⁰ They have consistently interpreted WTO provisions pursuant to the methods provided for in the VCLT and have not deferred to legal interpretations set forth by national authorities. No example can be found in the case law where a panel or the Appellate Body accepted an interpretative conclusion of a party although it preferred a different reading of the WTO provision in question.

Article 17.6(ii) of the AD Agreement excludes on its face a policy of full *de novo* review towards members' interpretations of the AD Agreement by explicitly recognizing the possible coexistence of more than one permissible interpretation. In fact, defending parties several times argued their case on the grounds, *inter alia*, that their interpretation was 'permissible'. To date, however, neither a panel nor the Appellate Body has ever found in explicit terms that a provision of the AD Agreement gives rise to more than one permissible interpretation. They consistently concluded that the application of Articles 31 and 32 of the VCLT led to one single interpretative meaning of the provision in question and did not leave room for additional 'permissible' meanings.⁹¹ Therefore, the second sentence of Article 17.6(ii) has never come into play in practice after the application of Articles 31 and 32 of the VCLT. In *US – Hot-Rolled Steel from Japan*, the Appellate Body at least made some general statements as to the meaning of the second sentence of Article 17.6(ii):

A permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*. . . . We cannot, of course, examine here which provisions of the *Anti-Dumping Agreement* do admit of more than one 'permissible interpretation'. Those interpretive questions can only be addressed within the context of particular disputes, involving particular provisions of the *Anti-Dumping Agreement* invoked in particular claims, and after application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*.⁹²

The reluctance of panels and the Appellate Body to accept more than one permissible interpretation may give rise to the objection that panels and the Appellate Body have *excessively* limited the members' prerogative to choose among a range of possible interpretations of the AD Agreement.⁹³ After all, Article 17.6(ii) does matter-of-factly require panels and the Appellate Body

⁹⁰ Similarly Cottier, above n 6, at 49; Stewart and Burr, above n 58, at 635–66; Waincymer, above n 6, at 405; see also Cottier and Oesch, above n 10, at 297–98. It is recalled that panels and the Appellate Body have generally applied *state sovereignty conscious* methods of interpretation, see above Part II.C.

⁹¹ Illustrative examples are provided in *US – DRAMS*, above n 56, panel report, paras 6.36–51; *United States – Continued Dumping and Subsidy Offset Act of 2000* ('*US – Offset Act of 2000*'), WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003), Appellate Body report, paras 224–74; see for an overview on the case law Cunningham and Cribb, above n 55, at 162–64; James P. Durling, 'Deference, but Only When Due: WTO Review of Anti-Dumping Measures', 6 JIEL 125 (2003), at 141–45; Greenwald, above n 55, at 117–20.

⁹² *US – Hot-Rolled Steel from Japan*, above n 55, paras 59–61.

⁹³ Greenwald, above n 55, at 117, regrets that 'in the hand of the panels and the Appellate Body, Article 17.6 has quickly become a dead letter.'

to defer to members' interpretations to a certain degree. Panels and the Appellate Body have been well aware of their obligation to apply a deferential standard of review towards members' interpretations in theory, but they seem reluctant to enter unknown territory and to open a Pandora's Box in practice. They lack experience in construing treaty provisions in a diverging and potentially conflicting manner. Against this background, it is not surprising that the sort of ambiguity necessary for a provision to be susceptible to more than one permissible interpretation could not yet be adequately defined.

EPILOGUE

Overall, panels and the Appellate Body have applied intrusive standards of review during the WTO's first eight years of dispute resolution. This holds true in particular for their interpretation of legal issues. The interpretation of WTO law has been perceived to fall entirely within their domain and has consistently been reviewed *de novo*. The observation of a rather undeferential panel practice also stands to reason with regard to questions of facts. Usually, panels have examined the scope and appropriateness of the relevant facts searchingly and thoroughly. The only category towards which a policy of deference has evolved is that of panel review of factual conclusions. Here, panels have usually refrained from substituting their own conclusions for those of the competent national authorities by granting a *margin of discretion* for the evaluation of the 'raw' evidence. Moreover, the assessment of domestic law has in various reports been made in the light of a limited standard, but the development of a consistent theory of deference towards the interpretation by national authorities of their 'own' laws is still in its infancy.

The observation of an intrusive review practice corresponds with the general perception of panel and Appellate Body reports by both parties and the public. Until March 2003, the Appellate Body was called upon in 30 appeals to rule on the allegation that the respective panels had misinterpreted or misapplied the standards of review articulated in Article 11 of the DSU or Article 17.6 of the AD Agreement. In 20 appeals thereof, the appellant claimed that the panel had failed to accord enough deference towards its own factual findings or legal interpretations. It happened only in 4 appeals that the appellant tried to challenge an unfavourable panel report on the grounds that the panel had allegedly applied too much deference in assessing the matter before it.⁹⁴ These figures demonstrate that the panels' interpretation and application of standards of review have realistically allowed, in the losing parties' perceptions, to submit appeals arguing for more deference towards members' actions but not really in favour of more panel

⁹⁴ The other six appeals concerned the alleged violation of Article 11 of the DSU *not* in relation to standards of review.

intrusiveness. Moreover, various comments by national governments and parliaments as well as non-governmental observers reveal the same tendency. Often when the issue of standard of review is publicly discussed, it centres on the contention that panels and the Appellate Body are not giving appropriate deference to competent national authorities' policy determinations. Illustratively, criticism as to allegedly too intrusive standards of review has only recently emerged in the US Congress which submitted, with regard to trade remedy cases: 'WTO panels and the Appellate Body have ignored their obligation to afford an appropriate level of deference to the technical expertise, factual findings, and permissible legal interpretations of national investigating authorities.'⁹⁵

In my view, appropriate consideration of, and deference to, national sensitivities and political preferences in sensible subject-matters was in general ensured through a variety of procedural techniques, most prominently through deferential methods of interpretation, but usually not through deferential standards of review.⁹⁶ To date, not many statements can be found in panel and Appellate Body reports which would *in explicit terms* link the issue of standard of review to the delicate balance of powers between the judiciary of the WTO and its members. When the grounds for a limited standard of review deemed appropriate in a specific dispute were positively provided, reference was usually made to the inferior equipment and expertise of panels (in fact-finding) compared to that of national authorities. From a *legal* perspective, panel and Appellate Body practice so far conforms to the intention of the drafters. The generally intrusive standards of review are consistent with the legal texts. The judicial branch within the WTO has been, so far, aware of the proper role assigned to it within the current contractual system. Arguably, only the (similarly) undeferential approach followed in anti-dumping matters gives rise to the question of whether the members' prerogative to choose among a range of possible interpretations has been *excessively* limited. After all, Article 17.6 of the AD Agreement does matter-of-factly require panels and the Appellate Body to defer to both the members' fact-finding and their interpretative conclusions to a certain degree.

⁹⁵ Bipartisan Trade Promotion Authority Act of 2002, Senate Report of February 2002, at 6. Though, it should be noted that the jurisprudence of panels and the Appellate Body is sometimes criticized as being too 'activist' and 'judicially creative' in general without standards of review being mentioned in explicit terms, see, for instance, Barfield, above n 37, at 45–56.

⁹⁶ Symptomatically, Davey, above n 8, at 96–110, does not mention standards of review in his study on deference shown by panels and the Appellate Body.