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Standards of review in WTO panel proceedings

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1 Introduction

Whenever WTO panels 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 argued by the parties. In other cases, the substantive outcome of the dispute may well depend on the standard of review applied by the panel. Not surprisingly, a routine criticism by WTO Members who have lost disputes in Geneva has been that panels have applied the wrong standard of review because it was either too intrusive or too deferential. Claus-Dieter Ehlermann, who served as member and Chairman of the Appellate Body from 1995 until 2002, noted at the end of his term in office that 'the question of standard of review has become one of the most controversial areas of Appellate Body jurisprudence'.[2]

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

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[2] C.-D. Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO', Policy Paper RSC No. 02/9 (2002), para. 64; *see* on standards of review S.P. Croley/J.H. Jackson, 'WTO Dispute Settlement Panel Deference to National Government Decisions: The Misplaced Analogy to the US Chevron Standard-Of-Review Doctrine', in: E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (London/The Hague/Boston, 1997), 187; T. Cottier/M. Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland – Cases, Materials and Comments* (London/Berne, 2005), at 163–69; C.-D. Ehlermann/J. Lockhart, 'Standard of Review in WTO Law', *Journal of International Economic Law* 7 (2004), 491; H. Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Review', *Journal of World Trade* 38 (2004), 509; J. Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London, 2002), at 347–60; S. Zlepting, 'The Standard of Review in WTO Law', *EBLRev.* 2002, 427; this chapter is based on the author's book *Standards of Review in WTO Dispute Resolution* (Oxford, 2003).

authorities' measures in both domestic and international jurisdictions. However, standards of review fulfil not only a procedural function but can also represent a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it. In the context of the WTO, the political and systemic significance of standards of review is self-evident. They are an important factor in determining the appropriate relationship between WTO legal obligations and national sovereignty. In essence, standards of review subtly reflect the delicate conflict over legal and political authority between panels and national authorities in trade and trade-related matters subject to WTO agreements. They can often determine, though not exclusively, which body – a WTO adjudicating body or a national authority – has the ultimate authority to decide controversial matters of fact and law. Given their importance in the operation of the WTO dispute settlement system, this chapter examines which standards of review have been used in WTO panel proceedings.

2 Definition

The issue of standard of review arises whenever a panel is called upon to review the consistency of a WTO Member's measure or law with WTO law. When the examination of a domestic measure falls within the panel's jurisdiction, the question is with what *depth* or *intensity* the national policy determination should be reviewed. The standard of review applied in a specific case usually defines the degree to which a panel can 'second guess' the measure in order to determine whether it is consistent with WTO law or not. Conversely, the standard of review applied also defines whether, and to what extent, panels should respect a WTO Member's measure even if they would prefer a different factual conclusion or legal interpretation than that of the competent domestic authority. In fact, it can be concluded from the GATT 1947/WTO *acquis*, and is frequently argued in legal writings, that panels should respect national government determinations up to a certain point and, in so doing, should not substitute their own findings for those of the national authority even if a different reading of the matter might be equally possible.

The standard of review applied in a particular case, while procedural in nature, shapes, *in addition* to substantive treaty rules and other procedural techniques, the jurisdictional competence of the WTO adjudicating bodies vis-à-vis Members. It seems obvious that the proper standards of review in any panel proceeding may differ depending on the WTO agreement involved and the particular circumstances of a case. It is therefore

inevitable that there is a context-dependent spectrum of appropriate levels of deference. *De novo* review and 'total deference' are commonly referred to as the two most extreme standards at each end of the spectrum. The former entails a completely new and independent examination of the domestic measure in question by the panel. Indeed, a policy of full *de novo* review allows a panel to substitute completely its own findings for those of the national authority and thus to arrive at totally new and different factual as well as legal conclusions. A standard of review of 'total deference' means that a panel shall not review in substance the outcome of an investigation conducted by the national authority. Rather under such a standard, judicial review is limited to an examination of whether the relevant procedural requirements for the adoption of a measure in question had been followed by the national authority. On the spectrum between these two most extreme forms of standards of review – totally *de novo* or totally deferential – are possible variants as to where the benchmark of panel intrusiveness or deference should be set. Whereas domestic legal systems have usually developed a carefully defined set of different standards of review with varying levels of deference, dispute settlement in international law in general lacks such precision. This holds equally true for WTO dispute resolution.

3 Rationales for panel deference

In the WTO legal framework, the issue of standard of review is related to the two basic categories of *fact* and *law*. The distinction between fact and law is an institutional convention rooted in general legal theory and shaped by legal tradition, and it is indeed embodied in the WTO legal texts themselves (see Article 17.6 of the Anti-Dumping Agreement and Article 17.6 of the DSU). At the same time, such distinction serves as a useful analytical tool for the systematic examination of standard of review questions in WTO panel proceedings.

(a) Questions of fact

The standard of review applied to *facts* is twofold. It relates both to the process of fact-finding in the sense of 'raw' evidence and to the factual conclusions subsequently drawn from the 'raw' evidence. The former concerns the issue of 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; such role can be either adversarial or inquisitorial in technique. The latter focuses on the plausibility of the factual conclusion which is subsequently drawn from the relevant evidence.

It is obvious that panels need to be comprehensively informed about the relevant facts of a case. Therefore, from a functionalist perspective, an active role in the process of fact-finding and an intrusive standard of review would be favoured. However, a series of rationales – apart from general allocation of power considerations – would favour a certain degree of deference by the panel. As for panel review of 'raw' evidence, purely practical considerations such as resource allocation problems and a panel's dependence on the cooperation of the responding party's authorities, as well as that of the private industries and other actors involved, in submitting the relevant evidence might suggest a certain degree of panel deference. Greater expertise of national authorities in fact-finding and their familiarity with the factual surroundings of a case might lead panels to adopt a less intrusive approach in the process of fact-finding. Moreover, the principle of *judicial economy* might favour panel deference. Frequently, WTO agreements require domestic authorities to guarantee procedural fairness and the participation of all interested parties during proceedings before them. Consequently, panels could refrain from *de novo* review of factual records and only interfere if a preliminary examination discloses an egregious error in the procedure followed to establish the facts.

By contrast with determining the relevant factual record (in the sense of 'raw' evidence), factual conclusions and ultimate decisions by WTO Members' authorities 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 could reasonably be drawn from the 'raw' evidence. In such cases, panels and the Appellate Body are well advised not to try to prioritize diverse political and societal values. Rather they should leave some room for domestic regulatory decision-making and be sensitive to the greater legitimacy which domestic institutions of governance might have in deciding substantive trade-offs between competing policy considerations.

Judicial deference towards a factual record established by a national authority has the advantage of avoiding a uniform and possibly rigid approach to fact-finding as between panels. Since factual determinations are by nature case-specific, they are capable of being generally and prospectively applicable only in exceptional circumstances.

(b) Questions of WTO law

The standard of review of *WTO law* addresses how a panel should assess the consistency or inconsistency of a Member's measure or law with the relevant provisions of the covered agreements. At issue here is the extent to which panels should review legal interpretations of WTO law made by domestic authorities. While it seems clear from the terms of Article 3.2 of the DSU that it is, in principle, within the competence of panels and the Appellate Body to interpret the provisions of the WTO agreements, however, it is far from settled whether such adjudicating bodies should accord a certain degree of deference to legal interpretations made by domestic authorities. One systemic concern of the WTO dispute settlement system is to find the proper balance between the Members' interest in protecting their sovereignty and the general interest of all WTO Members in achieving a uniform interpretation and consistent application of WTO law. The authority and legitimacy of WTO adjudicating bodies vis-à-vis the Members continues to evolve. Consequently, the acceptability of, and compliance with, their reports depends in part on whether they succeed in achieving a persuasively justified balance between appropriate deference to important national policy values and the need to strengthen the multilateral trading system and its disciplines.

That being said, there are two important arguments against panel deference to domestic authorities with respect to questions of law. First, it is agreed that the application of the rules of treaty interpretation applied by WTO adjudicating bodies, namely Articles 31 and 32 of the Vienna Convention on the Law of the Treaties (Vienna Convention), will lead to a single, consistent interpretation of a treaty provision. Such a view, albeit not uncontested, is based on the closed set of interpretative tools stipulated in the Vienna Convention and the prominent role attributed to the *wording* of a provision.[3] Articles 31 and 32 of the Vienna Convention, taken together, do not easily provide for a flexible, and thus potentially deferential, approach to treaty interpretation, nor do they allow for the application of inherent unwritten principles and exceptions to a particular wording, as is often the case in domestic constitutional settings. Therefore, any kind of WTO judicial restraint towards a Member's own legal interpretations must be based on an explicit treaty provision to this effect.

[3] Similarly Croley/Jackson, above footnote 2, at 196; D. Palmeter/P.C. Mavroidis, *Dispute Settlement in the World Trade Organization*, 2nd ed. (Cambridge University Press, 2004), at pp. 80–84; to the contrary *see* I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Cambridge University Press, 1984), at p. 153.

Second, it is argued that the expertise of WTO panels and the Appellate Body means that they should not readily defer to the legal interpretation of domestic authorities. WTO adjudicating bodies possess greater experience and institutional knowledge in WTO law and practice than do domestic authorities, be they administrative agencies or courts, even though Members are interested in building up domestic capacity and expertise in the field of WTO law to their own advantage. Notwithstanding this, it is argued that WTO panelists and members of the Appellate Body 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 do national authorities. This argument corresponds with the principle of *iura novit curia*, implying that panels and the Appellate Body are the appropriate fora for the interpretation of WTO law. Therefore, for judicial deference to be exercised, persuasive rationales must be put forward to justify such deference.

From a policy perspective, legal norms serve a multilateral and essentially contractual system best if they are *uniformly* interpreted. Unlike questions of fact which are by nature case-specific, a policy of panel deference to domestic authorities on questions of legal interpretation could easily lead to problems in the uniform interpretation of WTO law.

4 'Article 11 of the DSU bears directly on this matter'

In the *Uruguay Round*, the issue of standard of review became very important during the endgame of the negotiations. However, the only agreement for which a specific standard of review could finally be adopted was the Anti-Dumping Agreement where Article 17.6 stipulates particular standards of review for both findings of fact and legal interpretations of the agreement. As a result, the job of defining the appropriate level of panel intrusiveness or deference in specific circumstances has been left for the most part to the WTO adjudicating bodies themselves. In this regard, in *EC – Hormones*, the Appellate Body established early on 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. The Appellate Body noted that '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.' With respect to panel review of

factual findings, the Appellate Body stated: 'the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts"'. With respect to the standard of review of legal interpretations, it held: 'In so far as legal questions are concerned, . . . 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".'[4]

Ever since, panels and the Appellate Body itself have religiously repeated that Article 11 of the DSU sets forth the appropriate standard of review for panel proceedings. Notwithstanding, it remains doubtful whether a textual interpretation of the term 'objective assessment of the matter' does much to clarify its exact meaning. At a minimum, it can be deduced from the wording of Article 11 of the DSU that it does not clearly promote judicial restraint. In contrast to Article 17.6 of the Anti-Dumping Agreement which is clearly designed to preclude, under certain conditions, *de novo* panel review of both factual findings and legal interpretations of the Anti-Dumping Agreement, Article 11 of the DSU does not discernibly limit the authority of panels to examine comprehensively national measures.

5 Standards of review of facts

In *US – Cotton Yarn*, the Appellate Body summarized the key elements of a panel's standard of review of facts pursuant to Article 11 of the DSU. It did so in the context of safeguard measures (thus the reference to data). The following paragraph from this case describes the approach to be taken by a panel in assessing the factual evidence presented by a responding 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.'[5]

[4] Appellate Body Report on *EC – Hormones*, paras. 116–118.

[5] Appellate Body Report on *US – Cotton Yarn*, para. 74; see also Appellate Body Report on *US – Lamb*, para. 103.

According to this report, two elements are crucial. Panels need to make an objective assessment of whether the competent national authorities: first, examined all relevant facts and second, 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. In substance, one of the few constants in case law has traditionally been, as regards the standard of review of facts, the rejection of both *de novo* panel review and 'total deference'.[6] Moreover, throughout panel reports, and consistently confirmed by the Appellate Body, a deferential standard of review has been advocated on grounds of policy rationales, and equally emphasis has been put on resource allocation problems faced by WTO panels. At the same time, the case law reveals a quite intrusive engagement by panels. The benchmark on the spectrum between *de novo* review and 'total deference' tends in practice rather towards the former than towards the latter. Interestingly, this holds true not only for Article 11 of the DSU but also for the application of Article 17.6(i) of the Anti-Dumping Agreement. Overall, the different drafting of the two provisions has, in practice, not yet resulted in different standards of review.[7]

(a) 'Raw' evidence and factual conclusions

An intrusive engagement by panels holds true in particular for the *process of fact-finding* itself. Panels have consistently and thoroughly examined the scope and appropriateness of the relevant facts, in the sense of 'raw' evidence. Overall, panels have chosen as the appropriate fact-finding method an *inquisitorial* technique rather than one which is adversarial. In this regard, 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 has been crucial in allowing 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 relied heavily on the expertise and knowledge of outside experts. The Appellate

[6] The landmark case being Appellate Body Report on *EC – Hormones*, para. 117; further references in panel reports are numerous, see Panel Report on *Argentina – Footwear (EC)*, para. 8.117; Panel Report on *Australia – Salmon*, para. 8.41; Panel Report on *US – Wheat Gluten*, para. 8.5; Panel Report on *Korea – Dairy*, para. 7.30.

[7] Similarly C.-D. Ehlermann, above footnote 2, para. 59; C.-D.Ehlermann/J. Lockhart, above footnote 2, at 510; Spamann, above footnote 2, at 538–42; see Panel Report on *US – Hot-Rolled Steel*, para. 7.235 and Appellate Body Report on *US – Hot-Rolled Steel*, para. 55.

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 they base their final decisions.[8] 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. 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. However, there are two limitations to an apparently comprehensive and unlimited standard of review of the 'raw' evidence. First, a certain degree of deference has, time and again, been accorded in view of the panels' limited fact-finding capabilities and resource allocation problems. Second, the case law seems to indicate – although it is by no means totally consistent – 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.[9]

The standard of review used by panels to date for factual conclusions, the *substantive* aspect of a panel's mandate under Article 11 of the DSU, is more difficult to assess. It has been an issue mostly in trade remedy and, arguably, sanitary and phytosanitary cases where panels have been 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.[10] 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. Thus, generally speaking, panels have not been engaged in a *de novo* review. At

[8] *See*, for the panels' active role and their reliance on external expertise, Panel Report on *EC – Hormones*, paras. 8.5–8.11; Panel Report on *Australia – Salmon*, paras. 6.1–6.157; Appellate Body Report on *US – Shrimp*, para. 106. Moreover, the right of panels to draw adverse inferences was established under Article 13 of the DSU, see Appellate Body Report on *Canada – Aircraft*, para. 198.

[9] *See* Panel Report on *US – Wheat Gluten*, para. 8.6; Appellate Body Report on *US – Cotton Yarn*, para. 78; Panel Report on *US – Hot-Rolled Steel*, para. 7.7 and the references in footnote 24 thereto.

[10] *See* Panel Report on *US – Cotton Yarn*, para. 7.29; Appellate Body Report on *US – Cotton Yarn*, para. 74; Panel Report on *Korea – Dairy*, para. 7.30; Panel Report on *Argentina – Footwear (EC)*, para. 7.12; Appellate Body Report on *Argentina – Footwear (EC)*, para. 121; Panel Report on *US – Wheat Gluten*, para. 8.5; Appellate Body Report on *US – Wheat Gluten*, para. 161; Appellate Body Report on *US – Lamb*, para. 103.

the same time, as the Appellate Body explained in *US – Lamb*, this does not mean 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.'[11]

Thus, Appellate Body jurisprudence requires 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 panels must review national authorities' determinations comes close to a *de novo* review and the degree of deference given to national authorities has in general been *small*, although 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', and, in the case of a scientific assessment, based on a 'qualified and respected opinion', it has not been reversed by a panel even if another conclusion would have been perfectly possible. 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.[12]

(b) Domestic law

The issue of standard of review relates not only to factual aspects and interpretations of WTO law but also to domestic legal norms administered

[11] Appellate Body Report on *US – Lamb*, para. 106; see also Panel Report on *US – Cotton Yarn*, para. 7.35.

[12] *See* Panel Report on *EC – Asbestos*, para. 8.193; Appellate Body Report on *EC – Asbestos*, para. 178; Appellate Body Report on *EC – Hormones*, paras. 186, 193–194; Panel Report on *US – Cotton Yarn*, para. 7.97; Panel Report on *Korea – Dairy*, para. 7.31; Appellate Body Report on *US – Lamb*, paras. 106–107; Panel Report on *US – Wheat Gluten*, para. 8.6; Panel Report on *Argentina – Footwear (EC)*, para. 7.17.

and applied by national authorities. With the advent of extensive norm-setting within the WTO system, going far beyond such general principles as *most favoured nation, national treatment* and other general 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 dispute in this respect, *India – Patents (US)*, both the panel and the Appellate Body 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 review the Indian legal system as if it were reviewing WTO law; no discernible deference was applied.[13] It was not until *US – Section 301 Trade Act* that a panel set the fundamental course and established that the interpretation of domestic legal rules should be conceptually treated, for the purpose of judicial review by WTO adjudicating bodies, as a *question of fact*.[14] 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.'[15]

The subsequent WTO case law reveals that the principle of treating municipal law as a *matter of evidence* of state practice has been followed in most panel and Appellate Body reports. Thus, panel review of domestic law is dependent on, and linked to, the collection and subsequent weighting of factual rather than legal elements. Similar to the inquisitorial approach of panels in general fact-finding, they have consistently

[13] Appellate Body Report on *India – Patents (US)*.

[14] Approving of this qualification T. Cottier/K. Nadakavukaren Schefer, 'The Relationship between World Trade Organization Law, National and Regional Law', *Journal of International Economic Law*, Vol. 1 (1998), p. 83, at p. 86; D. Palmeter/P.C. Mavroidis, above footnote 3, at 129–33; J. Waincymer, above footnote 2, at 525.

[15] Panel Report on *US – Section 301 Trade Act*, paras. 7.18–7.19.

engaged in a thorough investigation into the elements which could potentially shed light on the meaning of the relevant domestic law and practice. At the same time, 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 evolution 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 – 1916 Act*, the panel unequivocally stated that it is not the role of panels:

> '[T]o develop our own independent interpretation of US law, but simply to select among the relevant judgements the interpretation most in conformity with the US law, as necessary in order to resolve the matter before us. . . . If, after having applied the above methodology, we could not reach certainty as to the most appropriate court interpretation, i.e. if the evidence remains in equipoise, we shall follow the interpretation that favours the party against which the claim has been made, considering that the claimant did not convincingly support its claim.'[16]

Such an approach is supported by policy concerns. Adjudicating bodies at the level of WTO dispute resolution have 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 the interpretation by international adjudicating bodies of domestic law. This holds true as a matter of principle as well as from a purely practical perspective. It is not realistic to expect that WTO panelists would have sufficient expertise for each of the different domestic laws which might be subject to panel review. The ambit and effect of domestic legal norms depend to a great extent upon the way domestic tribunals and courts interpret possibly ambiguous provisions and administrative guidelines and practice. The expertise argument allocates interpretative power to domestic agencies and courts, which possess greater expertise and familiarity in the field of their 'own' law and administrative practice than WTO panels are expected to possess. Moreover, since the interpretation of domestic law is by definition state-specific, there can be no problems of uniform interpretation as could arise in the case of diverging interpretations of WTO law.

[16] Panel Report on *US – 1916 Act (EC)*, paras. 6.53, 6.58.

6 Standards of review of WTO law

The issue of standard of review of WTO law has apparently 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. The parties to disputes have usually not explicitly raised the issue before panels nor have they 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, has been a crucial issue in most disputes. In *Argentina – Footwear (EC)*, one of the rare statements can be found in which the Appellate Body expressly addressed the issue of standard of review of WTO law:

> '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*.'[17]

The Appellate Body thus 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 responding party. Rather, it implies that panels are called upon to *de novo* examine interpretations of WTO law by the disputing parties and not to defer to any Member's interpretative conclusions. 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 review of WTO law.[18] They have consistently interpreted WTO provisions pursuant to the methods provided for in the Vienna Convention and have not deferred to legal interpretations of national authorities.

Article 17.6(ii) of the Anti-Dumping Agreement excludes on its face a policy of full *de novo* review towards Members' interpretations of the

[17] Appellate Body Report on *Argentina – Footwear (EC)*, para. 122; see also Panel Report on *US – Section 301 Trade Act*, para. 7.16.

[18] Similarly C.-D.Ehlermann/J. Lockhart, above footnote 2, at 497–98; Spamann, above footnote 2, at 511, 518; J. Waincymer, above footnote 2, at 405.

Anti-Dumping Agreement by explicitly recognizing the possible co-existence of more than one permissible interpretation. In fact, responding parties several times argued their case, *inter alia*, on the grounds that their interpretation was 'permissible'. In *US – Hot-Rolled Steel*, the Appellate Body elaborated on the meaning 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*.'[19]

To date, however, neither a panel nor the Appellate Body has ever found in explicit terms that a provision of the Anti-Dumping Agreement has given rise to more than one permissible interpretation. They have consistently concluded that the application of Articles 31 and 32 of the Vienna Convention has led to one single interpretative meaning of the provision in question and has not left room for additional 'permissible' interpretations. The matter was most controversially discussed in *US – Softwood Lumber V* where one panelist made a dissenting opinion and considered the United States' interpretation of Article 2.4.2 of the Anti-Dumping Agreement as not prohibiting zeroing 'a permissible one'. The Appellate Body confirmed, however, the reading of the majority of that panel that such an interpretation was not permissible.[20] In practice, the second sentence of Article 17.6(ii) has never become an issue in WTO litigation. The reluctance of panels and the Appellate Body to accept more than one permissible interpretation has given rise to criticism by some that they have *excessively* limited the Members' prerogative to choose among a range of possible interpretations of the Anti-Dumping Agreement. Article 17.6(ii) does matter-of-factly require panels and the Appellate Body to defer to Members' interpretations to a certain degree. However, panels and the Appellate Body have not generally construed the provisions of the Anti-Dumping Agreement in a diverging and potentially conflicting manner and seem reluctant to enter unknown territory and to open a Pandora's Box. Against this background, it is not surprising that the legal ambiguity

[19] Appellate Body Report on *US – Hot-Rolled Steel*, paras. 59–61.

[20] Panel Report on *US – Softwood Lumber V*, paras. 9.1–9.24, and Appellate Body Report on *US – Softwood Lumber V*, paras. 113–116.

that may be necessary for a provision to be susceptible to more than one permissible interpretation has not yet been adequately developed.

7 Epilogue

In conclusion, panels and the Appellate Body have applied generally intrusive standards of review during the WTO's first ten years of dispute resolution. This holds in particular true for the interpretation of legal issues. The interpretation of WTO law has been perceived by WTO adjudicating bodies to fall entirely within their domain and has consistently been reviewed *de novo*. Undeferential panel practice also has developed with regard to questions of fact. 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 and have granted some *margin of discretion* for the evaluation of the 'raw' evidence by domestic authorities.

This conclusion of a generally intrusive practice regarding standards of review corresponds with the general perception of panel reports by both parties and the public. In most cases in which the Appellate Body has been called upon to rule on a claim that a panel had misinterpreted or misapplied the relevant standard of review, the appellant claimed that the panel had failed to accord sufficient deference to the appellant's own factual findings or legal interpretations in domestic proceedings. Moreover, comments by national authorities and non-governmental observers often centres on the contention that panels and the Appellate Body are not giving appropriate deference to domestic policy determinations. As one illustration, criticism as to allegedly too intrusive standards of review has emerged in the powerful Senate Finance Committee of the US Congress, which has jurisdiction in the US Senate over international trade matters: '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.'[21]

In my view, such criticism is unfounded. Overall, panels have remained well within the boundaries of their authority. Appropriate consideration of, and deference to, national sensitivities and political preferences in

[21] Bipartisan Trade Promotion Authority Act of 2002, Senate Report of February 2002, at 6.

sensitive subject matters has in general been given by WTO adjudicating bodies through a variety of procedural techniques, most prominently through deferential methods of interpretation, if not through overtly deferential standards of review. From a *legal* perspective, this practice so far conforms to the apparent intention of the drafters of the WTO agreements. 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 contractually based WTO system. Arguably, only the (similarly) undeferential approach followed in anti-dumping matters might have caused raised eyebrows but with some justification. After all, Article 17.6(ii) of the Anti-Dumping Agreement explicitly requires panels and the Appellate Body to defer to the Members' interpretations to a certain degree, but so far WTO adjudicating bodies have been reluctant to do so.