

## **The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework**

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Consistency and coherence in the application and interfacing of different legal orders—national, regional, and international—are essential goals of legislation, jurisprudence, and doctrine in a world of increasing economic and regulatory integration. This applies to the substance of law. It equally applies to procedural aspects, including the issue of standards of review. Should they remain, as they are, different in national, regional, and international law? Or should we seek to overcome such differences with a view to achieving the goals of consistency and coherence? The paper addresses this question. It explores reasons and seeks to explain why standards of review largely differ among countries, and among different levels of the legal order, national, regional, and global, in the field of trade regulation and beyond. We are dealing here essentially with a problem of constitutional law, explicitly or implicitly. Underlying standards of judicial review of administrative action, of lower court decisions, of civil litigation are the constitutional issue of separation and balance of powers within a particular constituted entity. It is equally, in the final analysis, a matter of balance of power among different levels of constituted entities, within nations and among nations. Different standards of judicial review reflect different modes and constitutional traditions. Exploring the question whether a coherent and uniform approach to judicial review, and a coherent role of the judicial branch of government can and should be sought in international trade regulation both on national, regional, and international levels thus amounts to the question whether or not a coherent and common constitutional doctrine should and could eventually emerge.

The paper first addresses the national and regional levels. It then turns to the international level of judicial control in the WTO. What we find is an interesting paradox. Judicial review, in a domestic context, often seems to act in a more restrained manner than on the international level of the WTO. Strong constitutional structures thus show more reluctance than relatively weak constitutional structures in international law. Is this appropriate? Or, is this one of the causes of current tensions and strains on the world trading system? Should it be remedied, and if so, how? We submit and finally

discuss a constitutional approach which could bring about a better and well-balanced coherence.

## 1. Judicial Review at National and Regional Levels

### Diversity of Constitutional Models and the Role of the Judiciary

Modern states rooted in the Westphalian system of nation states, the movement of enlightenment, and the discourse of rationality commonly share the ideals of separation of powers and of checks and balances among different statal functions (legislature, executive, and judiciary), all based upon the rule of law. The concept of sovereignty, originally enshrined in an absolute and arbitrary ruler (or a small group of rulers) which has characterized extensive periods of human history, no longer is an almost exclusive legal and political ideal in a world of mutual integration, albeit, of course, it still is a predominant aspiration in many countries, in particular in the developing world. The ideal is rather one of submitting some control of governance to the international system in order to secure lawful conduct and to check and balance the impact of domestic law. This is equally reflected in the WTO. The significant number of provisions in the agreements addressing transparency and requiring judicial review reflect, in the field of trade regulation and thus market access, common and significant minimal standards of good governance.<sup>1</sup>

Beyond this point, however, we witness a large panoply of different models and constitutional traditions under the umbrella of international law. There is no uniformity, a fact which not only applies to forms of government and the rule of law. There is not (yet) a minimal democratic requirement, either, albeit many building blocks exist, in particular in the field of international human rights protection and monitoring of the electoral process.<sup>2</sup> Existing differences stem from different cultural and historical experiences in power allocation. "The life of the law has not been logic: it has been experience."<sup>3</sup>

Equally, the role of the judicial branch considerably varies in different countries. The tradition of common law ascribes a leading role to courts, albeit in democracy subject to legislation. The tradition of continental law, based upon ideals of codification and expressed in a limited canon of rules of interpretation, traditionally ascribes a more modest role to the judiciary. If we add Community law at this point (being domestic law from the point of view of the WTO), diversity is further enlarged. Judicial review of administrative acts relating to external economic relations in the EC reflects, as elsewhere, the constitutional structure and takes into account the leading role of the Council and the Commission in shaping external economic relations. Since World War II, the Western legal systems, however, share a common

perception of the leading role of courts in shaping fundamental rights; continental courts today may even be more assertive in this field than common law courts as international instruments, such as the European Convention on Human Rights, play an important role. Outside the transatlantic traditions, the role of courts may again be seen differently. In Western schools, we still know too little about genuine perceptions of the judicial functions in Asian or African traditions. But comparative studies of some detail would provide a picture of great diversity.

Such diversity is likely to exist also in the field of domestic legal review of trade-related measures which fall under the ambit of the WTO. The standards set by the WTO for domestic review are often broadly framed. They do not prescribe details. Whether review of administrative action is limited to law or whether appeals include factual issues is mainly left to countries and respects their constitutional traditions, except for the requirement that there has to be impartial review and transparency. Whether or not courts apply restraint or are proactive, is a matter essentially left to legislation and traditions stemming from the particular perceptions of separation of powers and of checks and balances.

### Judicial Restraint in the Fields of External Economic Relations

Common traits, it would seem, are difficult to define in general terms. However, there is one element which many, perhaps all, constitutional models share: When comparing judicial review relating to traditional fields of domestic law with external economic relations, we are likely to detect that review of the latter is characterized by relative restraint. In the context of what has been called the *introverted tradition of constitutional law*,<sup>4</sup> external relations, including external economic relations, were and still are considered to belong mainly to the province of legislation and, first of all, executive government. Traditionally, they are less so part of the core province of domestic courts. This is explained by the fact that external relations have been, and sometimes still are, operating under legally open textured norms of competence, leaving the matter essentially to discretion. Disciplines were developed rather by international (or regional) law than by domestic law. It is not coincidental that discussions about the rule of law or *Rechtsstaatlichkeit*, expounded in the 18th and 19th century for domestic law and internal relations, are only now being seriously discussed for external relations. Trade regulation, from a domestic perspective, is still largely characterized by discretionary and wide textured rules, while it is international (or regional) law which prescribes conduct in more detail. This common trait may also be explained in terms of political economy and public choice. Market access interests are less represented than producer interests in the domestic political process, and the power to bring about domestic guarantees of markets open to

foreign competition is domestically limited. Neither is it coincidental that such guarantees are much more advanced in terms of negotiated rights enshrined in international (or regional) law and then partly incorporated into domestic law.

### Domestic Review Based on National or Regional Law

We now turn to three jurisdictions, and examine the standards of review as applied by their respective judicial branches in external economic affairs relating to foreign market access. Far from being complete, a few references may indicate that standards of review are generally deferential, with interesting exceptions in civil law matters, in particular intellectual property protection.

#### *European Union*

Measures adopted by Community institutions in the field of external economic relations have in common that they are generally based on complex factual assessments and evaluations. In these subject matters, wide discretion is traditionally granted to the executive branch, either stipulated by legislation or developed by case law, and the European Court of Justice has to appropriately limit its judicial scrutiny when "second-guessing" an economic measure adopted by the Council or Commission. Partly, this stems from internal law. The ECSC Treaty contains a specific provision imposing restraints on the European Court of Justice, namely Article 33, whereas in the EC Treaty no equivalent can be found. However, the case law clearly leads to the conclusion that the position under the EC Treaty is now the same as that under the ECSC Treaty.<sup>5</sup> Competition law (which often has a bearing on foreign as much as internal market access) is an example in point. In *Remina*, the Court held that "the court must therefore limit its review of such an appraisal [of complex economic matters] to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers."<sup>6</sup> This doctrine is equally applied to external relations. The wording is almost identical to that in *Fediol* in which an anti-dumping measure was at issue.<sup>7</sup> In *Fedesa*, the Court examined the legality of a measure relating to the ban of the use of growth hormones adopted within the Common Agricultural Policy (CAP). It limited judicial review as to "whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion."<sup>8</sup> The same level of scrutiny was applied in *Piraiiki-Patraiki*, in which safeguard measures authorized by the Commission were challenged; once again, the court was guided by considerable restraint.<sup>9</sup>

The same holds true for the EC with respect to the principle of proportionality<sup>10</sup> which is closely linked to the issue of standard of review. It is apparent that the proportionality test can be applied more or less intensively. The case law of the European Court of Justice indicates that, in the field of economic policies, the deferential standard of judicial review as generally developed towards Community measures is also applied to claims based on the principle of proportionality. Again, the Court held in *Fedesa* (and with equal implications for third country relations) that "the legality of a measure adopted in that sphere [Common Agricultural Policy] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."<sup>11</sup>

In light of the foregoing, it is concluded that judicial review of measures adopted by Community institutions in external economic affairs relating to market access is considerably *deferential*. Moreover, the European Court of Justice appears to apply a fairly *uniform* deferential standard of review. The terms in which the Court describes the intensity of judicial review applicable in a present case are often almost identical, and do not vary depending on the subject matter involved. The uniform standard of review can be summarized as "manifestly erroneous standard," and its characteristic criteria are the following: - non-compliance with the relevant rules; - inadequate statement of the reasons for the decision; - manifest error in the assessment of the facts; - or misuse of powers regarding the discretion granted to the Community institutions. With regards to the principle of proportionality, only a "manifestly inappropriate" measure affects its legality. As a corollary, international obligations under the WTO are not given direct effect as a matter of principle, while Member States may do so in their respective fields of competence under a mixed agreement.<sup>12</sup>

On the other hand, judicial review in three fields related to external relations is not characterized by restraint. First, the European Court of Justice has been most powerful in the context of delivering legal opinions under Article 300:6 of the EC Treaty. In examining compatibility of a proposed international obligation with the Treaty, the Court has considerably influenced the law of external relations.<sup>13</sup> The Court, for instance, denied in a case concerning an agreement with the U.S. on cooperation in the enforcement of competition law that the Commission has the power to negotiate and *conclude* agreements with third countries in a field in which it only has the *internal* power to take decisions.<sup>14</sup> These rulings essentially relate to the allocation of domestic power and competence and thus the institutional balance within the level of the Community, and less so to substantive rights and obligations or specific economic policies. Secondly, when the Court has to decide on the territorial ambit of community law relating to external economic relations, it generally does not make reference to the traditionally leading role of the executive but makes its legal findings

on the basis of an own assessment of the matter. An illustrative example provides competition law and the territorial ambit of Article 81. It is now well-established, since the landmark decision in *Ahlström*,<sup>15</sup> that Article 81 strikes at any agreement which has an effect, actual or potential, upon trade between Member States whatever the nationality or territorial location of the undertakings concerned (territoriality principle). Thirdly, when a Member State action is being challenged, in the field of external relations, the Court's review generally is searching and thorough under existing regional agreements<sup>16</sup> and, in fact, indirectly amounts to independent *de novo* review. As much as in internal affairs relating to the four freedoms,<sup>17</sup> the Member States are not granted discretionary power in assessing and evaluating relevant facts and determining appropriate measures in order to achieve individually set policy objectives. These decisions do not directly concern the allocation and balance of powers among the Community institutions, but rather shape the *vertical* constitutional framework within the EC, and thus primarily emphasize the promotion of European integration. In conclusion, scrutiny is extensive in matters relating to horizontal or vertical separation of powers among the organs of the Community and vis-à-vis Member States, respectively. It is generally deferential with regard to the implementation of external community policies.

#### *United States of America*

The generally applicable domestic standard of review for agencies' interpretations of law is well-known as "Chevron doctrine."<sup>18</sup> Therein, the Federal Courts are to grant deference to agencies' legal decisions if the Congress has not "directly spoken to the precise issue in question." If the court fails to discover such an interpretative intention of the Congress, the standard of review is whether the agency's interpretation of the statute was "reasonable."

Most cases which involve international trade legislation and its implementation in the U.S. occur before the Court of International Trade (CIT).<sup>19</sup> The standards of review which the CIT applies vary, depending on the type of action that is brought before it. In *anti-dumping and countervailing duty* cases, most government measures are judged according to the substantial evidence standard; a few are reviewed to determine whether they are arbitrary, capricious, or an abuse of powers.<sup>20</sup> Thus, the courts are, in general, clearly bound to considerable restraint when reviewing agencies' actions. Indeed, "Canadian trade analysts generally viewed the CIT as extremely deferential to the determinations of the U.S. agencies";<sup>21</sup> while Davey, on the other hand, points out that "it sometimes appears, however, that the CIT accords less deference to those agencies than the Supreme Court suggests should be accorded by federal courts reviewing agency actions."<sup>22</sup> The same substantial evidence standard of review is applied to *trade*

*adjustment assistance* cases.<sup>23</sup> In other cases, such as classification challenges, origin determinations, and protest denials, the Court's review amounts to a *de novo* examination.<sup>24</sup>

Finally, it is interesting to observe that when reviewing matters other than being part of administrative law, the Courts have shown little restraint despite the fact that trade relations are affected. This particularly applies to intellectual property. Assessing parallel trade in the field of trademarks was based upon extensive and ordinary statutory interpretation.<sup>25</sup> The same holds true for the notorious *Alcoa* case in which the Supreme Court established the territoriality principle of U.S. antitrust law.<sup>26</sup> In deliberating on the issue, the court did not defer to the opinion of other branches nor did it make reference to the leading role of the executive in external economic relations. This is curious enough, since the matter goes to the very heart of international trade regulation, and the opinion of the executive might have been expected to be equally relevant for the outcome of the case.

### *Switzerland*

In Switzerland, a medium-sized trading nation, the government has traditionally been in charge of policy-making in external economic matters, and the role of judicial branches, and ultimately of the Swiss Supreme Court, has generally been characterized by considerable restraint. Discretionary powers are often explicitly delegated to the executive authorities, while in matters to which no judicial deference is granted courts tend to appropriately restrict standards of review "due to the very nature" of policy determinations in external economic affairs. It is two exemplary subject matters in administrative law which we first turn to.

For example, in the field of agriculture, broad discretionary power is by law conferred on the competent authorities of the Federal Economics Department in the implementation of the generally outlined policies.<sup>27</sup> In a case in which the regime for auctioning import licenses for meat and meat products was challenged on the ground that it allegedly was a violation of Switzerland's WTO/GATT obligations, the Court clearly pointed out that "it cannot be the duty of the Supreme Court to examine whether the decisions as adopted in the statute are practical from an economic and agricultural policy point of view."<sup>28</sup> The Court later succinctly stressed that "the political responsibility in the field of agriculture lies within the Federal Council."<sup>29</sup>

In competition law cases (again often having a bearing on market access by foreign operators), there is no explicit legal basis for executive discretion; on the contrary, Article 49 of the Swiss Administrative Procedure Act<sup>30</sup> generally requires *de novo* review to be applied by judicial branches. This, in principle, includes the Appeal Body on Competition (*Rekurskommission für Wettbewerbsfragen*) which is the first instance to review decisions by the Swiss Anti-Trust Commission (*Wettbewerbskommission*), the administrative

agency primarily dealing with competition law cases. Although its powers of review are very wide, encompassing both factual and legal issues, the *Rekurskommission* has generally been reluctant to *de novo* scrutinize decisions of the *Wettbewerbskommission*; rather, it has been long-standing practice that competition matters mainly belong to the province of legislation and executive government, and less so being part of the core province of judicial branches. The *Rekurskommission* has unequivocally stated that "it is willing to grant a great deal of discretion to the *Wettbewerbskommission*, because it is primarily its job to determine competition policy."<sup>31</sup> The Swiss Supreme Court has confirmed such judicial restraint.<sup>32</sup>

Curiously enough, judicial deference is only applied, in external economic relations, when courts review administrative acts. The role of the judiciaries looks different in *civil law* cases concerning international trade regulation. In the field of intellectual property, for instance, the Swiss Supreme Court had to decide, due to silence on the matter in the respective Acts, on the principle of exhaustion of intellectual property rights. It held in landmark decisions that the principle of international exhaustion applies to trademarks<sup>33</sup> and copyrights,<sup>34</sup> but not to patents for which it only recognized national exhaustion.<sup>35</sup> The Swiss Supreme Court, in every respective case, did not defer to the opinion of the executive branches, particularly the Federal Office of Intellectual Property, nor did it make reference to the traditionally leading role of the executive in external economic relations. Rather, the Court examined the legal questions *de novo*, taking into account economic policy and purely dogmatic methods of interpretation, and subsequently ruled on the basis of its own assessment of the matter before it.

The concept of varying degrees of judicial deference needs to be further examined in relation to the protection of fundamental human rights. Article 27 of the Swiss Federal Constitution guarantees economic freedom as a fundamental right, and it can be invoked before courts when public authorities have unjustly violated it.<sup>36</sup> Domestically, the nature of this right implies full review by the Courts, both of legality and proportionality of a measure taken. There is, and rightly so, the general principle that courts shall *de novo* review whether administering authorities' measures are in compliance with fundamental human rights. This principle is generally valid in Switzerland and allows only very few departures.<sup>37</sup> Some authors have strongly advocated that the economic freedom also covers external economic activities ("Aussenwirtschaftsfreiheit").<sup>38</sup> The Supreme Court has approved this dimension in passing in *Chanel*.<sup>39</sup> The implications of this statement, however, are far from clear, and they are quite at variance with traditional standards of deference as normally applied in matters relating to foreign economic relations. The matter will need further consideration. It relates to the basic question (denied for example in the United States) to what extent

fundamental rights standards can be fully applied in external relations, given its implications on standards of judicial review.<sup>40</sup>

### Domestic Review Based upon International Law

The traditions of discretionary regulation of external economic affairs in national and regional law compensated for by increasingly detailed rules in WTO law, of course, renders the issue of relationship between international law and domestic law to paramount importance. While the level of judicial restraint requires still more detailed analysis and research in respect of applying domestic law and its different levels (constitutional, statutory, ordinances), it is clear that multilateral agreements of the WTO are applied reluctantly by most courts in the field of international trade regulation. The general denial of direct effect of WTO law in the U.S. and EC is well-known and does not need rehearsing.<sup>41</sup> While an alleged lack of clarity and density of rules so far established the main argument to reject direct effect of GATT 1947, the doctrine today is denied by the European Court of Justice mainly on trade policy grounds of reciprocity.<sup>42</sup> As U.S. statutory law bars direct effect, this argument is honest, but essentially reflects a power-oriented mercantilist approach. Courts of other, smaller countries such as Switzerland may be more open to direct effect, but little has been achieved so far.<sup>43</sup> Courts limit themselves to the doctrine of consistent interpretation, i.e., to interpretation of national law *as far as possible* in accordance with WTO obligations.<sup>44</sup> They do not overrule national law, even if inconsistent with international law.

In terms of judicial review, this amounts to a doctrine of restraint. Generally, courts have not been willing to overrule domestic legislation which is inconsistent with WTO obligations. This even applies to decisions rendered under the DSU—despite the fact that such rulings, by their very nature, set forth rights and obligations in a sufficiently precise manner. Courts are, in other words, not allowed or not prepared to alter the domestic allocation and balance of powers: giving direct effect would result in shifts towards powers of the court, and ultimately to the executive branch (or commission) which essentially is in charge in the process of negotiations when rights and obligations are shaped. It is interesting to observe that direct effect of agreements is much less controversial where such effects on internal power structures are not likely to occur. The European Court of Justice directly applies regional FTAs<sup>45</sup> or the Lomé Convention,<sup>46</sup> both of which are essentially shaped in accordance with EC law. Moreover, direct effect is likely where obligations are imposed on Member States or foreign countries, but not the bodies of the EC, properly speaking.

The problem of direct effect therefore has to be analyzed and further studied in the context of such effects which are ultimately linked to power

allocation and, in particular, to democratic legitimacy of treaty-making. Judicial review of international agreements apparently has to be in line with judicial powers of review allocated under domestic law. To the extent that the balance of powers is not affected, there seems to be a greater willingness to grant direct effect, and vice-versa. A doctrine of direct effect therefore should be built on this type of rationale. It is not a matter of looking at the wording and precision of a text but rather one of examining as to who is best suited to render a decision in the context of a particular legal issue and dispute in the light of domestic allocations of powers in external economic affairs.<sup>47</sup> This also may explain that a provision may be given direct effect in one community, but not another one.

This constellation, again, may provoke imbalances between states and goes to the heart of the reciprocity argument. Direct effect not only affects domestic checks and balances but, equally, international ones. Concerns relating to reciprocity reveal that domestic effect of WTO law no longer is an exclusive matter of domestic constitutional law. The matter has to be looked at in the overall global context. Both aspects transgress the potentials of the present system of nation states each with its own, individual, and independent constitutional settings.

## 2. Judicial Review in International Fora

### WTO Dispute Resolution

Judicial review on the international level operates within a completely different constitutional setting. Panels and the Appellate Body (as other international tribunals) exclusively operate under international law. Relations between different Member States are exclusively defined by this body of law which does not entail (at least explicitly) considerations of balance of powers and checks and balances present in a national and regional context discussed above. Whether or not judges should, or should not, exercise restraint is defined by different underlying considerations.

#### *Contractual Relations*

These considerations, it is submitted, reflect the *contractual* basis of relations among different states. Judicial review essentially responds to that and consists of examining and adjudicating whether or not conduct is in compliance with contractual obligations and, possibly, with customary international law or general principles of law. It is a matter of objectively assessing as to whether or not a party has been in breach of its obligations under international law. Considerations relating to separation and balance of powers which have shaped domestic standards of review are not overtly present in this context. There is no room to explicitly consider as to whether a

ruling affects the internal or external power relations of Member States and the international system in general. The contractual approach reflects a weak constitutional setting and order which does not allocate powers among different players in a balanced and nuanced manner. This is true with respect to other organs of the WTO itself, and it is equally true with respect to Member States and their governments.

Standards of review therefore are shaped by the rules of treaty interpretation. We all are familiar with these standards, as Panels and the Appellate Body keep religiously repeating them.<sup>48</sup> Defining rights and obligations is based upon the prominent role of the wording, in the context and in the light of the object and purpose of the treaty, and—in our view—upon good faith and thus by protecting legitimate expectations of States emanating from a treaty provision.<sup>49</sup> These rules are characterized by inflexibility. They do not allow—different from constitutional law—for the application of inherent unwritten principles and exceptions within a particular wording. They limit the scope of activist and expansive or restrictive interpretation of rules in light of higher constitutional principles found in domestic or regional law. They reflect the fact that authority and legitimacy of international fora are still comparatively weak—despite the quality of their work—and that acceptability and compliance depends on interpretation closely following the wording of the authoritative texts as agreed and consented to by states.

While it is expected that a weak international order results in judicial restraint applied by its dispute resolution mechanism, the Vienna rules in fact have an opposite effect. Short of appropriate treaty language, there is no legal possibility to grant leeway to domestic rules and practices. And where this is done in effect, it has to be achieved by complicated means and arguments in treaty interpretation. The *Hormones* case comes to mind. Differences between the Panel and the Appellate Body in interpreting the SPS Agreement can be explained in such terms.<sup>50</sup> The Appellate Body resulted in granting more leeway to Members than the Panel which closely followed rules of textual treaty interpretation in order to make its objective assessment under the architecture of the SPS Agreement. We do not argue that the decision of the Appellate Body was not wise. The point we make is simply that, *per se*, there is no room for deference to interpretations given by Member States in accordance with their domestic policies and interests. Treaty language which explicitly directs Panels and the Appellate Body to grant deference to both a Member State's establishment of the facts and its legal findings if they rest upon a *permissible* interpretation can only be found in Article 17.6 of the Antidumping Agreement.<sup>51</sup> But interestingly enough, neither Panels nor the Appellate Body have so far applied a particularly deferential standard of review of both facts and law when reviewing antidumping cases. It seems difficult to articulate a substantive difference to the approach taken under

Article 11 of the DSU and its provision to "make an objective assessment of the facts." The *Thailand – Poland* antidumping case (subject to the Appellate Body's ruling at this time) provides an illustrative example in which the Panel quoted Article 17.6 but did not defer to the defendant's fact-finding or its interpretations at all.<sup>52</sup> Moreover, there is to date no report in which a Panel or the Appellate Body would have determined that a provision of the Antidumping Agreement admits of more than one permissible interpretation and would have dismissed a claim on this ground.

#### *Law and Facts*

A second fundamental difference exists between domestic and international review. Adjudication on the level of international law has, in principle, no jurisdiction to construe and interpret domestic rules. Unlike in domestic law, it is not a matter of interpreting both constitutional rules, statutory law (and possibly treaty rules in case of direct effect and consistent interpretation). Here, domestic rules are conceptually dealt with as questions of fact and not of law.<sup>53</sup> Whether or not domestic law is in compliance with international obligations is based on a comparison of national law as reasonably stated by the respective Member and as interpreted by its authorities and of WTO rules construed and applied by the WTO bodies. The distinction, of course, is difficult to draw in practical terms, and poses considerable conceptual problems within a system where review by the Appellate Body is essentially limited to questions of law. Moreover, Panels and the Appellate Body cannot exclusively rely upon the reading of national law as submitted by the defending party (naturally in an alleged WTO-compatible way), and at least apparent misperceptions and interpretations short of a sound rational basis cannot be accepted. The assessment therefore entails legal analysis, but it has to be dealt with as a matter of evidence, i.e., as to whether a defending party is in a position to demonstrate the alleged meaning and scope of its own and domestic law challenged by the complainant.

#### North American Free Trade Agreement (NAFTA)

Similar effects can also be observed in regional free trade agreements to the extent that they follow (unlike the EC) the structures of international law adjudication. NAFTA is a leading example in point. Chapter 20 includes provisions relating to the settlement of all disputes regarding the interpretation and application of the Agreement, except for subject matters governed by Chapters 11, 14 and 19. The Panels have not yet made explicit statements as to appropriate standards of review; the cases which were brought before a Panel to date and the submissions of the parties seem to indicate that the standards of review *mutatis mutandis* follow those applied by GATT/WTO Panels in the respective subject matters.<sup>54</sup>

The application of the general standards of review similar to those in WTO/GATT dispute settlement reflects the fact that NAFTA equally represents a typical contractual model of international law. It lacks a constitutional approach, its structure is intergovernmental, and its institutional framework is not comparable to that within the EC which is highly elaborated and allows the judicial branches to take into account constitutional deliberations of allocation of powers and checks and balances in a specific case.

Interestingly, things are different in the field of CVDs. Domestic countervailing and antidumping determinations can be brought before an *ad hoc* binational Panel under NAFTA Chapter 19. The standards of review to be applied in these cases follow the respective domestic rules; they are the same as laid down by the relevant statutes of each party.<sup>55</sup> In the case of U.S. countervailing and antidumping decisions, this accordingly requires in most cases that the determinations are based on a "reasonable interpretation" and that the factual findings are supported by "substantial evidence on the record."<sup>56</sup> This standard of review appears to be fairly deferential on its face. However, the binational Panels seem to have ruled in a rather pro-active way, and much U.S. "criticism has centered on the supposedly undeferential treatment of U.S. agency decisions by the Panels."<sup>57</sup> It is interesting to observe that deviation from domestic standards causes concerns as it affects the balance of powers established at home.

### **3. Towards a Constitutional Approach**

The systemic differences between domestic review (including the constitutional structure of the EC) and dispute settlement on the international level leave us with inherently and conceptually different standards of review. Flexibility in practical terms may reduce the tension. International law may be construed with some flexibility, and national or regional law with some rigor. The point, however, is that this does not allow to overcome a fundamentally different starting point under the characteristics of the two legal systems, domestic and international. Domestic review operating under constitutional law and separation of powers allows for more nuanced approaches to review and is embedded in constitutional law. International review, operating under a contractual system which does not reflect balance of powers in legal terms, is more rigid and in the end potentially more intrusive than national review as it lacks a constitutional framework taking into account the balance of powers of various actors, vertically and horizontally. Treaty interpretation in the functionalist traditions of GATT allows for less flexibility in assessing market access than in parallel cases in domestic law. The assessment of hormones within the EC and by the WTO is a striking example in point.<sup>58</sup> Furthermore, the notion of like products is

defined more rigorously in GATT than in EC law, for example, when it comes to assess differential taxation.<sup>59</sup> This is a paradox. We would expect a different result. The international order, given its structural weaknesses and the traditions of state sovereignty, would be expected to grant more leeway to Members than is the case within the Member State. Current tensions within the international system, faced with apprehensions of excessive intrusiveness of liberal trade rules at the detriment of other policy goals, can be partly explained by this constellation. It is submitted that the classical canon of treaty interpretation, stemming from a world of purely contractual relations of inter-state coexistence, no longer is in a position to appropriately deal with complex issues of global integration.

At the same time, we recall that judicial review under domestic law and introverted constitutional traditions often is unable to combat rent-seeking protectionism. Again, we would expect a different result. Established constitutional structures, equipped with strong law enforcing powers, should deal with protectionism more rigorously. The paradox thus requires from us to rethink the basis of judicial review both domestically and internationally if a more coherent overall system were to be achieved. It is submitted that we need to find a common constitutional basis for both domestic and international litigation which allows for interfacing the two levels in a coherent manner.

Firstly, the concept and idea of constitutionalism is to be extended to the international level and should replace a purely contractual model of classical international law. We note the caution to extend the concept of a constitution to the trading system.<sup>60</sup> Yet, we would argue that constitutional thinking would allow to accommodate some of the very concerns and needs expressed by Howse and Nicolaidis. Considering all the differences between the EC and the global system, it is nevertheless interesting to observe the process of transformation in European law.<sup>61</sup> The fundamental steps taken in early leading cases reflected a change from a purely international legal system to a constitutional approach, long before it was called that way.<sup>62</sup> The essence was to create a legal order *sui generis* having direct effect and *primauté* over national law, but equally allowing for more flexible interpretation (cf., e.g., *Cassis de Dijon* principle containing inherent, *non-written* exceptions) and taking into account other legitimate policy goals. It reflects a constitutional approach which has left behind application according to rigid principles of international law treaty interpretation. The shift was followed by efforts to enhance democratic legitimacy of rules having such far-reaching effects. In internal trade regulation, the system has achieved strong disciplines while taking into account national policy goals and needs. It has successfully focused on combating economic protectionism.

Secondly, the ideas of constitutionalism developed on the regional level should also apply to domestic trade law under traditional constitutions and

would lead to reinforced judicial review of governmental measures. Disciplines of bringing about market integration would be reinforced, and courts would deal with these problems more proactively than in the past.

Overall, the quest for coherent and consistent standards of judicial review both on domestic and global level therefore requires an expansion of constitutional thinking. One of the authors has suggested elsewhere that we should start looking at the overall order in terms of a five-story house of governance.<sup>63</sup> Constitutional structures exist on the local level, the level of federate states, the federal level, the regional level, and the global level. We may work with a simplified model of three levels in Europe for members to the EU, neglecting domestic constellations. We may even work with a model of two levels. It is essential, however, that the global level is being included. Of course, it is not a matter of conceiving this house as a formal constitution, perhaps even in terms of global federalism. It is much more a way of thinking, and an effort to bring about reasonable inter-linkages of different layers of governance. The framework will, in the very end, allow to develop standards of judicial review which are appropriate and consistent among these levels. The global level would equally rely upon doctrines of separation of powers, of checks and balances, and of distributions of powers between the global, regional and, national system. It will allow to address the problem of democratic legitimacy of international trade rules in a broader context. And it will equally allow to define in a more appropriate term the scope of action and conduct which national governments should have within the global system of trade regulation. It will address the proper role of courts. The traditions of leaving trade policy almost exclusively to the executive branch under traditions of introverted national constitutions will no longer fit.

Again, we do not argue that a five-story house will be explicitly created. There are no easy parallels in comparing and combining different constitutional levels. But common and coherent grounds and foundations may eventually emerge on the basis of changing attitudes and perceptions in the process of making and applying the law. The paradox, caused by the dichotomy between traditional national constitutional, administrative, and civil law on the one hand and the contractual foundation of classical international law on the other hand needs to be resolved. The process will shape attitudes towards the role of courts in international economic relations and thus of judicial review both at home and on the regional and global level, reflecting a mutual relationship of domestic and international fora. It is likely to bring about a more nuanced set of tools of interpretation as well as a more nuanced balance between market access rights and other equally legitimate policy concerns on the international level. At the same time, it will allow for a stronger role of market access rights in a domestic context. We need to start with elaborating appropriate theoretical conceptions in the first place.

## NOTES

1. Cf. Thomas Cottier, *Emerging Doctrines of Good Governance: The Impact of the WTO and China's Accession*, in: F. Abbott (ed.), *China in the World Trade System*, 1998, pp. 119–26.
2. Cf. Thomas M. Frank, *The Empowered Self: Law and Society in the Age of Individualism*, Oxford 1999, pp. 255–77.
3. J. Holmes, quoted in: R. W. M. Dias, *Jurisprudence*, London 1976, 4<sup>th</sup> ed., p. 11.
4. Cf., e.g., Thomas Cottier, *Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience*, in: M. Hilf/E. U. Petersmann (eds.), *National Constitutions and International Economic Law*, Deventer 1993, pp. 409–92.
5. See Trevor C. Hartley, *The Foundations of European Community Law*, 1998, p. 426; Henry G. Schermers/Denis F. Waelbroeck, *Judicial Protection in the European Communities*, 1992, p. 183.
6. Case 42/84, *Remina*, (1985) ECR 2545, para. 34.
7. Case 191/82, *Fediol*, (1983) ECR 2913, para. 30.
8. Case 331/88, *Fedesa*, (1990) ECR 4023, para. 8.
9. Case 11/82, *Piraiki-Patraiki*, (1985) ECR 207, para. 40.
10. Now incorporated in the EC Treaty, Article 5.
11. Case 331/88, *Fedesa*, (1990) ECR 4023, para. 15. See also Case 265/87, *Schröder*, (1989) ECR 2237, para. 22. Natalie McNelis, in this volume, submits that the standard of review as applied in the *BSE* case (in which the standard of review was identical to that in the *Fedesa* case) "was nearing total deference."
12. See *infra* II. D. and, particularly, fn. 42.
13. See, e.g., Opinion 1/94, (1994) ECR 5267, concerning the controversy in the Community as to where jurisdiction lay to conclude the WTO Agreement and its Annexes. Cf. generally Christine Kaddous, *Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes*, Bruxelles 1998.
14. Case C-327/91, *France/Commission*, (1994) ECR I-3641.
15. Case 89/85, *Ahlström/Commission*, (1988) ECR 5193. See Bellamy & Child, *Common Market Law of Competition*, ed. by Vivien Rose, London 1993, 4<sup>th</sup> ed., paras. 2–147.
16. See, e.g., case 104/81, *Hauptzollamt Mainz/C.A. Kupferberg & Cie.*, (1982) ECR 3641; case T-155/94, *Opel Austria/Council*, (1997) ECR II-39; case 12/86, *Demirel*, (1987) ECR 3719.
17. See, e.g., Case 178/84, *Commission/Germany*, (1987) ECR 1227 (*German Beer case*).
18. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See Steven P. Croley/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: E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997, pp. 187–210.

19. Appeals go to the Court of Appeals for the Federal Circuit and, ultimately, to the Supreme Court. See in general John H. Jackson/William J. Davey/Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, 1995, pp. 158–60. William J. Davey, The United States Court of International Trade and the Court of Appeals for the Federal Circuit, in: Ernst-Ulrich Petersmann/Günther Jaenicke (eds.), *Adjudication of International Trade Disputes in International and National Economic Law*, 1992, pp. 306–12.
20. 28 U.S.C. sec. 2640(b); 28 U.S.C. sec. 1640(b); 19 U.S.C. sec. 1516a(b)(1); see William Davey, in: *ibid.*, pp. 307–11.
21. Michael J. Trebilcock/Robert Howse, *The Regulation of International Trade*, 1999, p. 83.
22. William J. Davey, The United States Court of International Trade and the Court of Appeals for the Federal Circuit, in: Petersmann/Jaenicke (eds.), *ibid.*, p. 308.
23. 28 U.S.C. sec. 2640(c); 19 U.S.C. sec. 2395(b); William J. Davey, the same, in: *ibid.*, p. 311.
24. 28 U.S.C. sec. 2640(a).
25. See *K mart Corp. v. Cartier, Inc.*, et al., 486 U.S. 281, in: Frederick Abbot/Thomas Cottier/Francis Gurry, *The International Intellectual Property System: Commentary and Materials*, 1999, p. 1387.
26. *United States v. Aluminum Co. of America*, 148F.2d 416, in: Henkin/Pugh/Schachter/Smit, *International Law, Cases and Materials*, 1993, 3<sup>rd</sup> ed., p. 1052.
27. See, e.g., Bundesgesetz über die Landwirtschaft vom 29. April 1998 (LwG), SR 910.1.
28. Decision 2A.496/1996 (14 July 1997), *A. SA v. Bundesamt für Landwirtschaft und Rekurskommission EVD* (own translation; not officially published, on file with authors), p. 10. See also BGE 99 Ib 159, 169.
29. *Id.*, p. 16. We should note, however, that the court went on: "Nonetheless, it still is to examine the compliance with the WTO/GATT Agreements."
30. Bundesgesetz über das Verwaltungsverfahren vom 20. Dezember 1968 (VwVG), SR 172.021.
31. Recht und Politik des Wettbewerbs, 1998, p. 676, *Swisscom v. Weko* (own translation). See Paul Richli, Kartellverwaltungsverfahren, in: SIWR V/2, pp. 511–13.
32. Komm. KG – Gross, Art. 44 Rz. 91; Paul Richli, Kartellverwaltungsverfahren, in: SIWR V/2, p. 514, with reference to BGE 115 Ib 135.
33. BGE 122 III 469 ("*Chanel*").
34. BGE 124 III 321 ("*Nintendo*").
35. BGE 126 III 129 ("*Kodak*").
36. Cf. generally Jörg Paul Müller, *Grundrechte in der Schweiz*, 1999, 3<sup>rd</sup> ed., p. 632 et seq.
37. Ulrich Zimmerli/Walter Kälin/Regina Kiener, *Grundlagen des öffentlichen Verfahrensrechts*, 1997, p. 90 et seq. and 197 et seq.
38. René Rhinow, Kommentar zu Art. 28, in: Aubert/Eichenberger/Müller/Rhinow/Schindler (eds.), *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom*

29. *Mai 1874*, loose-leaf, June 1988, para. 67; Thomas Cottier/Remo Arpagaus, Einleitung, Schweizerischen Aussenwirtschafts- und Binnenmarktrecht, in SBVR, para. 39. See also Walter Kälin, Verfassungsgrundsätze der schweizerischen Aussenpolitik, ZSR 1986 II, p. 355 et seq., 368; William Elio Andrich, Die Wirtschaftsfreiheit im schweizerischen Aussenwirtschaftsrecht, 1996, p. 56 et seq.

39. BGE 122 III 469 ("*Chanèl*").

40. See Thomas Cottier/Remo Arpagaus, Einleitung, Schweizerischen Aussenwirtschafts- und Binnenmarktrecht, in SBVR, para. 39.

41. The literature on direct effect is legendary, yet the problem is still unresolved. For a comprehensive analysis, see in particular John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, AJIL 1992, p. 310; Meinhard Hilf, The Role of National Courts in International Trade Relations, *Mich. J. Int'l Law* 1997, pp. 321 and 337-45; Thomas Cottier/Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, in: *JIEL* 1 (1998), pp. 83-122; and Thomas Cottier/Daniel Plüss, WTO Law and Domestic Law: An Uneasy Relationship, *Jusletter* 9 October 2000 ([www.weblaw.ch](http://www.weblaw.ch)).

42. See in particular joined cases C-300/98 and C-392/98, *Dior SA v. TUK Consultancy BV and Assco Gerüste GmbH*, judgment of the Court of 14 December 2000, para. 44. Interestingly enough, the court went on that in a field in respect of which the Community has not yet legislated, it is up to the Member States to decide whether provisions of TRIPs should have direct effect in the domestic legal order, paras. 45-48. This is an interesting finding as it contrasts with the general rationale and qualification that GATT and WTO law is not sufficiently precise and thus unsuitable for direct effect. For previous rulings with respect to GATT 1947, see case 21-24/72, *International Fruit Company*, (1972) ECR 1219; C-149/96, and with respect to the WTO C-149/96, *Portugal/Council*, (1999) ECR I-8395.

43. See Daniel Thürer, WTO – Teilordnung im System des Völker- und Europarechts, in: D. Thürer/S. Kux (eds.), *GATT 94 und die Welthandelsorganisation, Herausforderungen für die Schweiz und Europa*, 1996, p. 50 et seq. In a decision of the Swiss Supreme Court of 14 July 1997, *A. SA v. Federal Office for Agriculture* (not officially published, on file with authors), the court in fact examined the compatibility of Swiss domestic law with WTO provisions in order to address the claim arguing in part that a national regime for auctioning import licenses was a violation of Article 4 of the Agreement on Agriculture. The court explicitly refrained from deciding *obiter dictum* whether the WTO agreements are to be considered directly effective in Switzerland.

44. For an overview see Thomas Cottier/Krista Nadakavukaren Schefer, The Relationship between World Trade Organization Law, National and Regional Law, *JIEL* 1998, p. 88 et seq.

45. See, for instance, case 104/81, *Hauptzollamt Mainz/C.A. Kupferberg & Cie.*, (1982) ECR 3641; case T-155/94, *Opel Austria/Council*, (1997) ECR II-39.

46. See, for instance, case C-469/93, *Amministrazione delle Finanze dello Stato/Chiquita Italia SpA*, (1995) ECR I-4533.

47. For a refinement of this approach in Swiss law, see Thomas Cottier/Alberto Achermann/Daniel Wüger/Valentin Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht*, Bern 2001.

48. See Article 3.2 of the DSU which is understood as reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See, for instance, *U.S. – Standards for Reformulated*

and *Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, Appellate Body report, p. 17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 4 October 1996, Appellate Body report, D.H.2.c); *U.S. – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, Panel report, 22 December 1999, para. 7.21.

49. Being, by the way, quite different from expectations under non-violation complaints, see Thomas Cottier/Krista Nadakavukaren Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in: Marco Bronckers/Reinhard Quick (eds.), *New Directions in International Economic Law, Essays in Honor of John H. Jackson*, 2000, pp. 47–68.

50. *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 26 January 1998. See, particularly, the different approaches in interpreting the term "based on" as stipulated in Article 5.1 of the SPS Agreement, Appellate Body report, paras. 188 et seq.

51. World Trade Organization (Secretariat), *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, Geneva 1995, p. 168.

52. *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-Beams from Poland*, WT/DS122/R, 28 September 2000. The Panel did not elaborate on the standard of review of law but meaninglessly held in para. 7.54: "We are also mindful of the standard of review in Article 17.6(ii), which states: ..."

53. In *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, para. 66, the Appellate Body seemed to support the view that when examining domestic law for the purpose of determining whether it is in compliance with WTO law no particular deference to domestic interpretations of that law should be applied. The same approach is found in *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, para. 167, although there was not domestic law at stake but the Lomé Convention. In *U.S. – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paras. 7.18–19, the Panel eventually held that the interpretation of national and regional law should be established "as factual elements," and it required "considerable deference be given to [the Member's] view on the meaning of its own law."

54. See the arguments brought forward by Mexico and the U.S. in the case *U.S. Safeguard Action taken on Broom Corn Brooms from Mexico*, U.S.-97-2008-01, paras. 39–43, at <http://www.nafta-sec-alena.org/english/index.htm> (visited on 22 February 2001).

55. Article 1904.3, Annex 1911.

56. See Michael J. Trebilcock/Robert Howse, *The Regulation of International Trade*, 1999, p. 84.

57. *Ibid.*, p. 86. For a detailed analysis of the standards of review as applied in the Canada-U.S. FTA, see William J. Davey, Pine and Swine, *Canada-United States trade dispute settlement: The FTA experience and NAFTA prospects*, 1996, particularly pp. 268–69 for a concise summary.

58. Cf. Natalie McNelis, *The Role of the Judge in the EU and WTO*, in this volume, p. 225.

59. See Paul Demaret, *The Non-Discrimination Principle and the Removal of Fiscal Barriers to Intra-Community Trade*, in: Thomas Cottier/Petros C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 2000, pp. 171–90.

60. See Robert Howse/Kalypso Nicolaidis, *Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far*, in this volume, p. 307.

61. See Joseph H. Weiler, *The Transformation of Europe*, *Yale Law Journal* 1991, pp. 2403–83.

62. See, in particular, cases 26/62, *Van Gend en Loos*, (1963) ECR 1, and 6/64, *Costa/ENEL*, (1964) ECR 585.

63. Thomas Cottier, *Reforming the Swiss Federal Constitution: an International Lawyer's Perspective*, in: M. Butler/M. Pender/J. Charnley (eds.), *The Making of Modern Switzerland, 1848–1998*, 2000, pp. 75–96, particularly 80–84; Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, in: *ASIL Proceedings 2000*, pp. 220–22, and the Remarks by John H. Jackson, *id.*, pp. 222–24.