Standards of Review in WTO Dispute Resolution and the Treatment of Domestic Law

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I. Introduction

The peaceful settlement of disputes over interpretation and application of rules has always been a core function within the framework of GATT 1947. This system, however, remained to be based on a "power-oriented technique" of modern diplomacy, and its dispute resolution could be characterised as diplomatic rather than legal.[1] The main feature of the dispute settlement procedure was that the establishment of a panel or the outcome of a panel's deliberations could be blocked by the defendant or losing party, respectively, as the establishment and the adoption of a panel report required consensus among all parties involved in a dispute. It was not until the Uruguay Round and the creation of the WTO that a more "rule-oriented technique" of modern dispute resolution prevailed.[2]

In order to establish a dispute settlement mechanism which is consistent with the rule of law, and based upon principles such as predictability and legal security, it has been necessary to set up, *inter alia*, clear provisions which regulate the proceedings before WTO panels and the Appellate Body. The basic rules of procedure before GATT 1947 panels have evolved case by case, adjusting and finding their current expression in the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). In fact, the development of the comprehensive DSU is generally recognised to be one of the great achievements of the Uruguay Round.

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[1] *Jackson's* famous characterisation of the GATT 1947 and WTO legal system, respectively, in: The World Trading System, 2. ed. 1999, p. 109.

[2] *Jackson* (supra note 1), p. 109.

Some of the procedural provisions in the DSU are of fundamental importance. One of the more interesting features thereof is the issue of standard of review. It is very much a part of procedural law in general, and plays an important role in any judicial review of administrative authorities' measures in both domestic and international jurisdictions.

However, standard of review does not only accomplish a mere procedural function, but also expresses a deliberate allocation of power between an authority acting as first instance and a judicial organ reviewing the legality of its measures.

In the context of the GATT 1947/WTO, the political significance of standard of review becomes particularly apparent; it is one of the elements with which the relationship between international interdependence and national sovereignty can be appropriately laid down by law. The following statement illustrates the high priority that was attached to the standard of review question during the Uruguay Round. It has retained a prominent place on the agenda of international trade negotiations ever since:

> "Can you imagine something so arcane as the standard-of-review issue becoming a deal-breaker? Apparently, that was nearly the case. The standard-of-review question was one of three or four issues that could have broken apart the WTO negotiations."[3]

In its first part, this paper tries to do a current 'stocktaking' with respect to the issue of standard of review in WTO dispute resolution. Regrettably, the DSU does not provide much guidance with regard to panel jurisdiction over facts and legal interpretations. Rather, panels and the Appellate Body have been called upon to develop the relevant rules on a case-by-case basis, and it is thus necessary to analyse the case law in this respect. In the second part, I turn to the treatment of domestic law before WTO adjudicating bodies.

Again, panels cannot rely upon explicit language in the DSU, nor any other agreement, as to how they are to review domestic norms and their factual application. It is submitted that domestic law is to be conceptually treated, for the purpose of judicial review by WTO panels, as a *question of fact*. Accordingly, panels are called upon to apply a certain degree of deference towards interpretations of national and regional law presented as evidence by the member state concerned and to clearly refrain from substituting their own reading for that of

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[3] *Jackson*, Remarks, in: Proceedings of the 88th Annual Meeting of the American Society of International Law, 1994, p. 139.

the national authorities. It is against this background that, in the third part, I trace the pertinent case law to date.[4]

II. The Issue of Standard of Review

Trebilcock and *Howse* offer a comprehensive and concise definition of standard of review:

> "The issue of standard of review arises where a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with provisions of the covered agreements."[5]

Standard of review thus concerns the question of *how* a national government's policy determination should be reviewed. It defines the degree to which panels should 'second guess' a decision of a national authority in order to determine whether that decision is consistent with WTO law.[6] Conversely, the crucial question is whether and, if so, to what extent panels should *respect* a member state measure although they would prefer a different conclusion based on their assessment of the matter. It can be observed in the WTO/GATT 1947 *acquis*, and has overwhelmingly been argued in legal writings, that panels should in fact respect national government determinations up to some point; that

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[4] Case law and literature are considered until June 2001. The then pending case *US – Section 211 of the Omnibus Appropriations Act of 1998*, WT/DS176/R could thus not be taken into account.

[5] *Trebilcock/Howse*, The Regulation of International Trade, 2nd ed. 1999, p. 69. According to *Bourgeois*, WTO Dispute Settlement in the Field of Anti-dumping Law, in: Journal of International Economic Law 1998, p. 268, 'scope of review' concerns *whether* review of a certain national measure is permitted, and 'standard of review' means *how* such a measure should be reviewed.

[6] The question of whether panels can actually 'second guess' a measure depends primarily on the respective substantive provisions. Only if they do not address the issue explicitly, the extent to which a measure should be respected relies on the standard of review that applies in the specific case, see *Cameron/Orava*, GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of proof, and Standard of Review in GATT/WTO Dispute Settlement, in: Weiss (ed.), Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals, 2000, p. 241; *Cameron/Campbell*, Challenging the Boundaries of the DSU through Trade and Environment Disputes, in: Cameron/ Campbell (eds.), Dispute Resolution in the Word Trade Organization, 1998, p. 208.

point up to which they should not substitute their own findings for those of a national authority "has sometimes been labelled the standard of review".[7]

On the spectrum between the two most extreme standards of review, namely *de novo* review and 'total deference', various variants are conceivable as to where the benchmark can technically be set. Whereas *de novo* review allows panels to completely substitute their own findings for those of a national authority and to feel free to arrive at a different factual as well as legal conclusion, panels shall not redo the investigations conducted by the national authority under a 'total deference' standard. In the most extreme form of 'total deference', judicial review is restricted to mere procedural issues.[8]

1. Principal Distinction between Fact and Law

Albeit rarely defined in clear terms, a principal distinction can best be made on the basis of what policy, and other, grounds are considered valid rationales for a somehow limited review of a member state measure, and follows a well-tried pattern: the issue of standard of review is traditionally divided into two basic categories, namely *findings of facts* and *legal interpretations*.[9]

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[7] *Croley/Jackson*, WTO Dispute Settlement Panel Deference to National Government Decisions. The Misplaced Analogy to the U.S. Chevron Standard-Of-Review Doctrine, in: Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, 1997, p. 188.

[8] See *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 111, referring to the EC's appellant's submission; *Desmedt*, Hormones: 'Objective Assessment' and (or as) Standard of Review, in: Journal of International Economic Law 1998, p. 695; *Bourgeois* (supra note 5), p. 269; and *Childress/Davis*, Standards of Review, 1986, Chapter 15, in ascending levels of deference with regard to appeals of administrative actions in the United States: de novo, clearly erroneous, substantial evidence, clear error of judgement, arbitrary and capricious, abuse of discretion, no review.

[9] For the distinction between fact and law see the Appellate Body's elaboration on its limited mandate under Article 17.6 of the DSU in *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R (decided 16 January 1998), para. 132; furthermore *Stuart*, "I Tell Ya I Don't Get No Respect!": The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals, in: Law & Policy in International Business 1992, pp. 752, 760-3, with further references; *Bronckers/McNelis*, Fact and Law in Pleadings Before the WTO Appellate Body, in: Weiss (ed.), Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals, 2000, pp. 321-33.

The standard of review of *findings of facts* relates to both the process of fact-finding and the assessment of facts ('raw' evidence) as well as to the conclusion which is drawn from that evidence.[10] The former concerns the method of fact-finding, and the role panels play in undertaking and controlling the process of fact-finding which can be characterised by either an adversarial or an inquisitorial technique.[11] The latter focuses on the plausibility of the conclusion which is drawn from the facts on the record, and may well involve political, economic, ethical and societal considerations. While various rationales seem to be valid for a certain degree of deference to be granted towards national policy determinations on political grounds, purely practical considerations such as resource allocation problems may favour a less intrusive engagement by panels in the process of fact-finding.[12]

The standard of review of *legal interpretations*, on the other hand, addresses the consistency or inconsistency of a member state's measure with the relevant provisions of the covered agreements. The issue here is to what extent panels should review legal interpretations of WTO law as set forth and argued by national authorities.[13] While it is clear from the terms of Article 3.2 of the DSU that it falls within the competence of a panel to "clarify the existing provisions of [the covered agreements] in accordance with customary rules of interpretation of public international law", it is far from settled whether a panel needs to accord certain deference towards legal interpretations as presented by a defending member state.[14] Some deference seems to be appropriate towards interpre-

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[10] Cf. *Lichtenbaum*, Procedural Issues in WTO Dispute Resolution, Michigan Journal of International Law 1998, p. 1236.

[11] Cf. *Cass*, The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade, in: European Journal of International Law 2001, p. 60, who outlines those techniques and analyses which methods panels have chosen in their case law to date.

[12] Cf. *Cameron/Orava* (supra note 6), pp. 200-1.

[13] See *Bourgeois* (supra note 5), p. 270; *Petersmann*, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, 1997, p. 227.

[14] *Petersmann* (supra note 13), p. 228, correctly points out that deference and 'judicial restraint' must be explicitly warranted by the applicable rule concerned. Both *Jackson*, The World Trade Organization: Constitution and Jurisprudence, Chatham House Papers 1998, p. 90, and *McRae*, The Emerging Appellate Jurisdiction in International Trade Law, in: Cameron/Campbell (eds.), Dispute Resolution in the World Trade Organisation, 1998, p. 110, argue in favour of some deference to be granted to interpretative agencies in the process of ascertaining meaning.

tations of other legal instruments such as international or regional agreements; this category is, on grounds of methodology, usually dealt with separately and is not at issue in this paper.[15]

2. Article 11 of the DSU "Bears Directly on this Matter"

The issue of standard of review in WTO dispute resolution has an enormous political significance. It is one of the decisive elements of drawing the balance between international interdependence and national sovereignty in the field of world trade and related politics governed by the WTO agreements. In essence, it is used as an effective instrument for the allocation of power, and describes the authority which remains on the level of the member states to determine their policy goals without being reprimanded by the judiciary of the WTO. Therefore, it is highly desirable that clear and handy rules exist by which all participants can be guided when examining national authorities' determinations in order to decide their compliance with WTO law. A consistent and well-established standard of review, or various standards depending on the respective agreement involved, plays an important part in a dispute settlement mechanism which deserves the characteristic "rule-oriented".[16]

The standard of review question was highly controversial during the Uruguay Round. Not surprisingly, the negotiators did not succeed in agreeing on a general standard of review applicable to all covered agreements.[17] Thus there are no provisions in the DSU explicitly concerning 'standard of review' as such.[18]

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[15] For some preliminary thoughts on that issue see *Cottier/Oesch*, WTO Law, Precedents and Legal Change, in: Turku Law Journal 2001, pp. 38-40; *Cameron/Gray*, Principles of International Law in the WTO Dispute Settlement Body, in: International & Comparative Law Quarterly 2001, pp. 248-98.

[16] *Jackson* (supra note 1), p. 109.

[17] See *Tang*, The Integration of Textiles and Clothing into GATT and WTO Dispute Settlement, in: Cameron/Campbell (eds.), Dispute Resolution in the Word Trade Organisation, 1998, p. 199; *Croley/Jackson* (supra note 7), p. 194; *Horlick/Clarke*, Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO, in: Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, 1997, p. 317; *Rosenthal*, Scope for National Regulation: Comments, in: International Lawyer 1998, p. 682; *Horlick/Shea*, The World Trade Organization Antidumping Agreement, in: Journal of World Trade 1995, p. 31.

[18] Confirmed by the panel in *US - Wool Shirts*, WT/DS33/AB/R (decided 6 January 1997), para. 7.16.

The only agreement for which the negotiators could adopt a specific standard of review is the Antidumping Agreement; Article 17.6 stipulates particular standards of review of both findings of facts and legal interpretations of the Antidumping Agreement.[19] Nevertheless, and rather unexpectedly by various scholars, the Appellate Body made the fundamental ruling in *EC – Hormones* that Article 11 of the DSU stipulates a general standard of review applying to all cases for which the relevant agreements contain no specific provisions on standard of review. It stated that "a standard not found in the text of the SPS Agreement itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law".[20] In conclusion, the Appellate Body held that, in the absence of a specific applicable standard of review,

> "Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements."[21]

According to *Desmedt*, the Appellate Body thus established the "objective assessment doctrine".[22] Notwithstanding,it has remained doubtful ever since whether a textual interpretation of Article 11 does in fact help much to clarify its exact meaning, and panels and the Appellate Body have been called upon to develop the relevant rules themselves.[23] They have been doing so on a case-by-case basis and have appeared to be quite reluctant to explicitly define what de-

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[19] The Appellate Body clearly stated in *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R (decided 16 January 1998), para. 114, that the standard set out in Article 17.6 is textually specific to the Antidumping Agreement and cannot be applied to, or incorporated into, any other agreement without a clear indication in the respective agreement to do so. As the law stands at the moment, no agreement contains such a reference.

[20] *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 118.

[21] Ibid., para. 116.

[22] *Desmedt* (supra note 8), p. 697.

[23] No other provision in WTO/GATT 1947 law offers grounds for a more appropriate approach to standard of review. Also in legal writings, there are only few alternative proposals. *Croley/Jackson* (supra note 7), p. 195, were looking for relevant language in the DSU, mentioned as "most interesting, perhaps" Article 3.2 and continued: "This language could be interpreted as a constraint on the standard of review, but possibly not to the extent of Article 17.6 of the Anti-Dumping Agreement." Some scholars, e.g. *Trebilcock/Howse* (supra note 5), p. 70, or *Desmedt* (supra note 8), p. 698, content them-

gree of deference is exactly to be granted towards national authorities' factual findings and legal interpretations.[24]

3. Standard of Review of Facts

With respect to standard of review of *facts*, the Appellate Body fundamentally went on in *EC – Hormones* that

> "So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'."[25]

In essence, the Appellate Body directs panels to accord certain deference towards a national authority's fact-finding as presented by the member state concerned. Throughout panel reports, and confirmed by the Appellate Body, a deferential standard of review is advocated by panels on grounds of policy rationales, and emphasis is equally put on resource allocation problems which WTO panels structurally face.[26] Although statements by panels and the Appellate Body have usually excluded only the two most extreme standards, namely *de novo* review and 'total deference', and thus have not yet indicated the exact degree up to which panels should 'second guess' national policy determinations in order to assess their consistency with WTO law, an analysis of the case law reveals a quite intrusive engagement by panels. Overall, the benchmark on the spectrum between *de novo* review and 'total deference' tends in practice rather towards the former than towards the latter.[27] This holds particularly true for the

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selves with general comments that the text of Article 11 of the DSU is too vague to be of useful guidance.

[24] Moreover, it is worth noting that they are quite reluctant to apply standards of review as developed in domestic legal systems *mutatis mutandis* following other judiciaries in the sphere of international law in this respect.

[25] *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 117.

[26] Cf. *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 117; *Australia – Salmon*, WT/DS18/AB/R, report of the Appellate Body (decided 20 October 1998), para. 199.

[27] Same opinion *Stewart/Burr*, The WTO's first two and a half Years of Dispute Resolution, North Carolina Journal of International Law and Commercial Regulation 1998, p. 634; *Rosenthal* (supra note 17), p. 683; *Lichtenbaum* (supra note 10), p. 1243.

process of fact-finding itself. Panels have consistently examined the scope and appropriateness of the relevant facts, in the sense of 'raw' evidence, searchingly and thoroughly. In essence, their engagement in this respect is quite close to *de novo* review.[28] Article 13 of the DSU, and the right of panels "as the triers of facts"[29] to seek information from any source which they deem appropriate, is crucial in assisting panels to engage in an inquiry of the 'raw' evidence as intrusively and comprehensively as possible. The Appellate Body has repeatedly held that the DSU accords to panels ample and extensive authority to undertake and control the process of fact-finding on which it bases its final decision.[30]

To put it with *Mavroidis*: "After all, the court's role is to look for the truth (its truth, of course). The pleadings by the parties to a dispute circumscribe the dispute; they should not be understood as the frontiers of truth."[31] A certain degree of deference has seemed advisable only in view of the panels' limited fact-finding capabilities and resource allocation problems.[32]

Panels have consistently emphasised the significance of a 'reasoned and adequate explanation' of whether a policy determination is based on an 'acceptable' evaluation and reading of the relevant facts. The Appellate Body confirmed the requirement of adequate reasoning and held in *US – Lamb Meat* that

> "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

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[28] Overall, panels have chosen as the appropriate fact-finding method an *inquisitorial technique* rather than an adversarial; see *Cass* (supra note 11), p. 61; *Lee*, Review of the First WTO Panel Case on the Agreement on Safeguards: *Korea - Definitive Safeguard Measure on Imports of Certain Daily Products and its Implications for the Application of the Agreement*, in: Journal of World Trade 1999, p. 34.

[29] *Korea – Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, report of the Appellate Body (decided 18 January 1999), paras. 161-62.

[30] See *US – Shrimps*, WT/DS58/AB/R, report of the Appellate Body (decided 12 October 1998), para. 106; *Canada – Civilian Aircraft*, WT/DS70/AB/R, report of the Appellate Body (decided 2 August 1999), para. 185.

[31] *Mavroidis*, *Amicus Curiae* Briefs Before The WTO: Much Ado About Nothing, p. 14, in: Harvard Jean Monnet Working Paper 02/01, *www.jeanmonnetprogramm.org* (visited: 15 July 2001).

[32] See *US – Combed Cotton Yarn from Pakistan*, WT/DS192/R, report of the panel (decided 31 May 2001), para. 7.32. In *Canada – Civilian Aircraft*, WT/DS70/AB/R, the Appellate Body (decided 2 August 1999), para. 198, approved the right of panels to draw adverse inference from the failure of a party to submit information and documents requested.

authorities' explanation does not seem adequate in the light of that alternative explanation."[33]

In essence, panels are called upon not to substitute their own conclusions for those of the competent domestic authorities. Such an interpretation clearly excludes *de novo* panel engagement, although the step from concluding that an alternative explanation is *plausible* to a *de novo* examination is tiny in theory. The case law confirms such a reading.[34] Panels have not happened to substitute their own conclusions for those of a competent national authorities. As long as a member state's conclusion is *reasonable*, and in the case of scientific assessments based on a "qualified and respected opinion", it might not be reversed by a panel although another conclusion would be perfectly possible to arrive at as well.[35] Considering the delicate allocation of power between sovereign member states and the WTO, panels and the Appellate Body appear to have steered a widely accepted middle course between the partly diverging interests. Moreover, since conclusions drawn from a factual record are by nature case-specific, there can be no uniformity problem as in the case of varying legal interpretations.

4. Standard of Review of WTO Law

The Appellate Body stated in *EC – Hormones* that "here again Article 11 of the DSU is directly on point", but it did not further elaborate on the correct standard of review of WTO law.[36] Besides, there can hardly be found any theoretical statements as to whether, and if so to what extent, a panel should defer to

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[33] *US – Lamb Meat*, WT/DS177/AB/R, WT/DS178/AB/R, report of the Appellate Body (decided 1 May 2001), para. 106 (original emphasis); cf. also *Canada – Periodicals*, WT/DS31/AB/R, report of the Appellate Body (decided 30 June 1997), para. 5.7.

[34] Cf. the engagements by the panels in *US – Underwear*, WT/DS24/AB/R (decided 8 November 1996); *Korea – Dairy Products*, WT/DS98/R (decided 21 June 1999); *US – Lamb Meat* WT/DS177/AB/R, WT/DS178/AB/R (decided 21 December 2001); *Canada – Periodicals*, WT/DS31/AB/R (decided 14 March 1997).

[35] *EC – Asbestos*, WT/DS135/AB/R, report of the Appellate Body (decided 12 March 2001), para. 178; *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 194. Both disputes involved scientific assessments as to whether risks to human or animal health existed or not.

[36] *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 118.

legal interpretations of WTO law as submitted by a member state. Exceptionally, the panel in *US – Sections 301-310* held that

> "Of course, when it comes down to deciding on the correct interpretation of the covered agreements, a panel will be aided by the arguments of the parties but not bound by them; its decisions on such matters must be in accord with the rules of treaty interpretation applicable to the WTO."[37]

In contrast to the standard of review of facts, however, the issue has caused no difficulties. The case law unambiguously indicates that both panels and the Appellate Body have consistently been engaging in a *de novo* standard.[38] This practice has never been challenged by a party to a dispute, nor are there many scholars who argue in favour of a different standard from a *de novo* one.[39]

Moreover, albeit the clear instruction to panels to apply a deferential standard in Article 17.6(ii) of the Antidumping Agreement, there is, to date, no report under that Agreement in which either 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.[40]

The current practice is both correct from a legal perspective and appropriate from a policy point of view. The WTO agreements should be made as effective and automatically applicable as possible for all participants, and only one interpretation of a specific provision can be accepted as consistent with the purpose

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[37] *US – Sections 301-310*, WT/DS152/R, report of the panel (decided 22 December 1999), para. 7.16.

[38] This observation is clearly to be distinguished from the issue of what *methods of interpretation* are appropriate to apply. Panels and the Appellate Body have consistently been following an approach which has not intended to cut down member states' rights and autonomy in politically sensitive matters, see the Appellate Body's endorsement of the interpretative principle of *in dubio mitius* in *EC - Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, report of the Appellate Body (decided 16 January 1998), para. 111; *Cameron/Orava*, (supra note 6), p. 241, who submit that "the Appellate Body has begun to articulate a constitutional doctrine of deference, linked to the substantive rules of the GATT."

[39] Cf. supra fn. 14.

[40] See *Thailand – Iron, Steel and H-Beams*, WT/DS122/AB/R, report of the Appellate Body (decided 12 March 2001), paras. 121-28; *US – Hot-Rolled Steel from Japan*, WT/DS/184/AB/R, report of the Appellate Body (decided 24 July 2001), paras. 57-62, 130, 158.

of providing a high degree of legal certainty and predictability of the law.[41] It is hard to conceive of facing several 'correct' interpretations of one and the same provision at the end of the day. The contrary would have to be explicitly warranted by the DSU or the respective agreements concerned.

III. Domestic Law before WTO Panels and the Appellate Body

The issue of standard of review relates not only to factual aspects and interpretations of WTO law but also to legal norms set up and applied by member states.[42] Article XVI:4 of the WTO Agreement stipulates what should go without saying:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

With the advent of standard setting within the WTO system, beyond the principles of negative integration such as those of *Most Favoured Nation* and *National Treatment* and other obligations stipulating the scope of correct national conduct, the subject matter is of increasing importance. It concerns particularly, though not exclusively, obligations set out in the TRIPs Agreement. As previous cases before panels have brought to light, virtually all disputes in the field of the protection of intellectual property rights involved extensive deliberations as to the correct interpretation and application of domestic laws and practices.

In general, the problem arises in all cases in which panels - and the Appellate Body as far as a claim in this respect falls within its competence pursuant to Article 17.6 of the DSU - are confronted with the interpretation of domestic law. They then have to decide whether and, if so, *how* such norms and their factual application as submitted by the member state concerned should be reviewed. In essence, examination of whether domestic rules are consistent with international

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[41] See *Lichtenbaum* (supra note 10), p. 1237; *Petersmann* (supra note 13), p. 227; *Rubenstein/Schultz*, Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO, Saint John's Journal of Legal Commentary 1996, p. 300.

[42] See in general *Cottier/Nadakavukaren Schefer*, The Relationship between World Trade Organization Law, National and Regional Law, Journal of International Economic Law 1 (1998), pp. 86-7; *McGovern*, International Trade Regulation, loose-leaf, Issue 11 of June 2001, p. 1.12-21.

obligations is based on a comparison of national law as reasonably stated by the respective member, and as interpreted and applied by its authorities, and of WTO rules as interpreted and construed by the WTO adjudicating bodies. It depends on the extent to which panels are granted the competence to determine what the law of a country is. Again, the DSU does not expressly provide as to how panels should address domestic legislation.

What approach is appropriate for WTO adjudicating bodies when judicially reviewing *domestic law*? The starting point might be the common perception that panels and the Appellate Body cannot exclusively rely upon the reading of domestic law as presented by the defending party, and must not accept at face value the characterisation that it attaches to its law. An overly deferential approach would arguably leave domestic authorities too great an opportunity to put forward interpretations naturally in an alleged WTO-compatible way. It is suggested elsewhere that "at least apparent misperceptions and interpretations short of a sound rational basis cannot be accepted."[43] At the same time, however, panels have no authority to *de novo* construe and interpret domestic rules and to substitute their own interpretation for that of national authorities, be it administrative agencies or courts.[44] In sum, it seems to stand to reason that a certain degree of deference is appropriate to be granted towards the manner in which domestic authorities interpreted their own legal norms.

1. Domestic Law as a Question of Fact

Article 11 of the DSU and its duty to make "an objective assessment of the matter" comes to mind again. Neither a textual approach nor the practice of panels and the Appellate Body to date suggests that the 'objective assessment doctrine' does not equally apply to judicial review of domestic norms and their application as it undisputedly does to other factual elements and legal interpretations of WTO law.[45]

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[43] *Cottier/Oesch*, The Paradox of Judicial Review in International Trade Regulation, in: Cottier/Mavroidis (eds.), The Role of the Judge, Lessons for the WTO, World Trade Forum Vol. IV, forthcoming, III. A. 2.

[44] *Cottier/Nadakavukaren* (supra note 42), p. 86.

[45] The panel in *India – Patent*, WT/DS50/AB/R (decided 5 September 1997), para. 7.34, based its review of the Indian mechanism for implementing the obligations at issue on Article 11 of the DSU, whereas other panels did not mention Article 11 at all.

A more difficult question arises, however, as to whether domestic law shall be qualified, for the purpose of judicial review, as 'fact' or 'law' from the perspective of WTO adjudicating bodies. From a systemic point of view, it seems correct that the interpretation of domestic legal norms by national authorities should be conceptually treated as a *question of fact*. The Permanent Court of Justice provided a case to that point; it observed in the *Certain German Interests in Polish Upper Silesia* case in 1926:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures."[46]

Adjudication on the level of international law has, in principle, no jurisdiction to construe and interpret domestic rules 'as such'.[47] 'Iura novit curia' as general principle of law does clearly not apply to domestic law. Nor can the traditional rules of treaty interpretation, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and religiously repeated by panels and the Appellate Body, be considered appropriate and fit to adequately respond to interpretative needs within constitutional settings of national states.

Judicial review of domestic norms as interpreted and applied by national authorities is inevitably dependent on, and linked to, the collecting and subsequent weighing and considering of factual rather than legal elements. Consequently, the assessment of domestic law has to be dealt with as a *matter of evidence*. This means that a panel is called upon to assess whether a defending part is in a position to demonstrate the alleged meaning and scope of its own law which is challenged by a complainant.[48] A panel should seek guidance, as a matter of legal principle as well as for its own benefit, from the manner in which the defending member state, as author of the legislation at issue, itself interprets and applies the relevant provisions. The general rules on burden of proof for the establishment of facts also apply in this respect. Accordingly, a complainant carries the burden to present arguments and evidence sufficient to establish a *prima facie* case of an alleged inconsistency of the defending member state's domestic law with obligations under the WTO. If it succeeds in doing so, such a *prima facie* case will stand unless sufficiently rebutted by the defendant.

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[46] [1926] PCIJ Rep., Series A, No. 7, p. 19.

[47] *Cottier/Oesch* (supra note 43), III. A. 2.; cf. *India – Patent*, WT/DS50/AB/R, report of the Appellate Body (decided 19 December 1997), para. 66.

[48] *Cottier/Oesch* (supra note 43), III. A. 2.

2. *Deferential Standard of Review*

In essence, panels are called upon to apply a certain degree of deference towards interpretations of national and regional law as submitted by the member state involved and to clearly refrain from substituting their own reading for that of the national authorities concerned. The underpinning rationale for deference is fourfold, and is partly based on the same premises as are valid for judicial review of findings of facts in the traditional sense: Firstly, member states are free, if not explicitly directed to the contrary, to choose the appropriate method and technique of implementing the WTO agreements. Although such freedom is positively stipulated only in the TRIPs Agreement, there can be little doubt that it applies to any other obligation which a member state has to comply with.[49] The panel in *US – Sections 301-310* gave a graphic description of the prerogative of a member state to choose the appropriate modes and techniques determined to be most suitable in a specific case of implementation:

> "When evaluating the conformity of national law with WTO obligations in accordance with Article XVI:4 of the WTO Agreement, account must be taken of the wide-ranging diversity in the legal systems of the Members. Conformity can be ensured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved. Only by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established."[50]

Secondly, national authorities and courts enjoy intimate familiarity with the domestic norms they administer, whereas panels and the Appellate Body have no legal expertise in national and regional law and its actual application. Panels benefit to their own advantage from evidence submitted by experts on the domestic law concerned and how it is applied by administrative agencies and courts. Thirdly, since interpretation and application of domestic law is by nature state-specific, there can be no uniformity problem as in the case of diverging legal interpretations of WTO rights and obligations. Thus, the arguably strongest argument *against* a deferential standard of review of WTO law does not apply to judicial review of domestic law. Fourthly, one should bear in mind that the line between fact and law is often difficult to draw.[51] As *Dickenson* put it already in 1927, "matters of law grow downward into roots of fact, and matters of

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[49] Cf. Article 1.1 of the TRIPs Agreement.

[50] *US – Sections 301-310*, WT/DS152/R, report of the panel (decided 22 December 1999), para. 7.24.

[51] See *Stuart* (supra note 9), pp. 752 and 760-3, with further references.

fact reach upward, without a break, into matters of law."[52] This holds true, in the sphere of WTO law, for highly contextual legal tests such as the application of the 'like product' concept in Article III of the GATT, and the distinction may become even trickier when analysing a national authority's measure as to whether it is based on 'pure' fact-finding, domestic legal norms as interpreted by the respective authorities, or a mixture of both.[53]

This having been said, however, it seems important to note that the rationales in favour of deference are not automatically valid for judicial review of the 'raw' evidence. Rather, panels need to adequately determine whether the scope of facts as submitted by the respondent party is appropriate and whether the domestic legal norms at issue and relevant practice are fully and comprehensively stated. It is submitted that panels need to comprehensively examine all relevant facts before them. At that stage, panel engagements shall be searching and thorough, and certain deference might be adequate only in view of their limited fact-finding capabilities. To put it clearly: Panels are not called upon, neither at the stage of considering and weighing 'raw' evidence nor at the interpretative stage, to substitute their own reading of a domestic norm for that of the member state involved. But they shall engage in a thorough inquiry about the 'raw' evidence, i.e. the domestic legal provisions at issue and the auxiliary elements which are of help in evaluating the provisions' exact meaning such as current administrative practice, legislative history and relevant domestic case law. Only the process of interpreting national rules 'as such', in the light of the evidence and against the background of particular domestic legal traditions and characteristics, is primarily a job for specialists in that field, and deference is appropriate to be granted towards interpretations as presented by the defending member state.

In literature, suggestions have been made as to the appropriate standard of review of domestic law.[54] These proposals stem largely from established stan-

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[52] *Dickenson*, Administrative Justice and the Supremacy of Law in the United States, as cited by *Bronckers/McNelis* (supra note 9), p. 326.

[53] *Stuart* (supra note 9), p. 760, points out that "the distinction is artificial, however, and subject to manipulation in order to achieve what a reviewing court considers to be the proper substantive allocation."

[54] Referring to an earlier judgement of the PCIJ, the ICJ took the following view on the issue: "Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ,

dards as applied in domestic contexts, and it is doubtful whether they can be transferred as such and similarly applied by WTO panels. *Kometani*, for instance, proposes to "accept arguments submitted by a regulating country unless they are manifestly erroneous or inconsistent."[55]

Cottier and *Nadakavukaren Schefer* choose another approach; they combine judicial review of domestic law by WTO adjudicating bodies with the doctrine of legitimate expectations and conclude that "the crucial test consists of asking whether national or regional rules as invoked, construed, and applied protect trading partners' legitimate expectations under the WTO agreements."[56] Essentially, this approach was followed by the panel in *India – Patent* (to which *Cottier* served as Chairman) but subsequently rejected by the Appellate Body.[57]

3. Distinction between Mandatory and Discretionary Legislation

It has been long standing practice under the GATT 1947 to allow a Contracting Party to challenge domestic legislation as such independently from the application of that legislation in specific measures and instances. While the text of Article XXIII did not expressly address the matter, panels consistently considered that they had jurisdiction to deal with claims against legislation as such.[58]

The Appellate Body several times held that the legal system under the WTO has not changed in this respect and approved the jurisdiction of panels to hear claims against domestic legislation as such under Article XXIII of the GATT

Series A, Nos. 20/21, p. 124)", *Elettronica Sicula S.p.A. (ELSI)*, Judgement, ICJ Reports 1989, p. 47, para. 62, cited also in *US – Anti-dumping Act of 1916*, WT/DS136/AB/R, report of the panel (decided 31 March 2000), para. 6.53.

[55] *Kometani*, Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?, in: Northwestern Journal of International Law & Business 1996, p. 458; see also *Cottier/Nadakavukaren Schefer* (supra note 42), p. 86, who mention standards of 'patent unreasonableness' and 'arbitrariness and capriciousness'.

[56] *Cottier/Nadakavukaren Schefer* (supra note 42), p. 87.

[57] See below C. I.

[58] In *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R (decided 28 August 2000), para. 60 and footnote 34, the Appellate Body made extensive reference to the relevant case law under the GATT 1947.

1994 and the DSU.[59] Moreover, panels under the GATT 1947 developed the concept of mandatory as distinguished from discretionary legislation as a threshold consideration in determining when domestic law as such – rather than a specific application of that law – was inconsistent with a Contracting Party's GATT 1947 obligations.[60] The practice was illustratively summoned up by the panel in *US Tobacco*. It recalled that

> "panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge."[61]

The Appellate Body made it clear in *US – Anti-Dumping Act of 1916* that this distinction is still valid under the WTO adding that the relevant discretion, for the purpose of distinguishing between mandatory and discretionary legislation, is "a discretion vested in the *executive branch* of government."[62] It might be important to add that discretionary legislation does not *per se* exclude the possibility of inconsistency with WTO obligations.[63] The reason for the distinction between mandatory and discretionary legislation lies within considerations of standard of review and the principle that domestic law is conceptually treated as *question of fact*. The complaining party is duly permitted to try to establish a *prima facie* case of an alleged inconsistency also in the case of discretionary legislation. However, this burden is extremely difficult to meet whereas domestic legislation which directs administrative agencies to *mandatorily* act contrary to WTO obligations will prove much less difficulties for a *prima facie* case.

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[59] The most illustrative statement to this point can be found in *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R, report of the Appellate Body (decided 28 August 2000), paras. 51-83, stating as examples, *inter alia*, *Japan – Alcoholic Beverages*, *Canada – Periodicals*, *EC – Hormones*, *Korea – Alcoholic Beverages*, *US – Copyright Act*.

[60] See for an overview on the relevant cases *McGovern* (supra note 42), pp. 1.13.5-11; he submits that the doctrine has to be presented in a somewhat tentative manner because of a lack of consistency in both GATT 1947 and WTO practice.

[61] *US Tobacco*, DS44/R (adopted 4 October 1994), report of the panel, para. 118.

[62] *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R, report of the Appellate Body (decided 28 August 2000), para. 89.

[63] See *US – Sections 301-310*, WT/DS152/R, report of the panel (decided 22 December 1999), para. 7.53.

IV. Case Law

Subsequently, I shall turn to the case law to date and analyse which view panels and the Appellate Body have taken on the issue of standard of review of domestic law. Simplistically looking at the theoretical statements may easily lead to the conclusion that they have constantly been favouring a deferential approach. However, the actual engagements of panels reveal a different picture and show their tendency to apply less deferential standards in practice than theoretically described.

1. India – Patent

In the first dispute of interest, *India – Patent*, the panel found itself forced to assess the legal framework of Indian administrative and intellectual property law in order to determine whether the administrative instructions and practice would provide the legal security required by Article 70.8 of the TRIPs Agreement. The standing practice was arguably inconsistent with existing statutory law, and the main issue in the dispute was the speculation as to whether the Indian judicial system would give effect to the practice or establish that it was unlawful. India relied, *inter alia*, on Article 1.1 of the TRIPs Agreement and claimed that the panel had no right to question its choice of method which it deemed appropriate to deal with the matter. The panel did not question India's prerogative to decide how to implement its obligations under Article 70.8 of the TRIPs Agreement. It consequently found "that the mere fact that India relies on an administrative practice to receive mailbox applications without legislative changes does not in itself constitute a violation of India's obligations".[64] Then it went on:

> "However, in order to make an objective assessment regarding the consistency of the current Indian mechanism with the TRIPS Agreement, as required under Article 11 of the DSU, we must ask ourselves the following question: can that mechanism achieve the object and purpose of Article 70.8 and thereby protect the legitimate expectations of other WTO Members, by ensuring the preservation of novelty and priority in respect of products which were the subject of mailbox applications?"[65]

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[64] *India – Patent*, WT/DS50/AB/R, report of the panel (decided 5 September 1997), para. 7.33.

[65] Ibid., para. 7.34.

The approach chosen by the panel clearly touched upon the issue of standard of review. Article 11 was explicitly mentioned, and the panel described its task as to how to make an objective assessment of the matter before it. Nonetheless, the approach is unique in the sense that it did not appear to follow a traditional pattern of standard of review questions. Rather than indicating a benchmark on the spectrum between *de novo* review and 'total deference', it derived "its rationale from good faith protection".[66] The panel subsequently concluded that the Indian measure lacked legal security since it did not provide a "sound legal basis for novelty and priority as of those dates, so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated".[67] It based its finding on the view that the answer of the Indian Minister of Industry given in Parliament was insufficient evidence of the existence and legal validity of the practice which was consistent with the TRIPs Agreement. Overall, the panel's engagement in reviewing the relevant Indian laws and practices did not reveal particular deference towards the interpretation of the Indian rules at issue, and the way they were applied by the Indian administrative system. Such a conclusion may be reached irrespective of whether the panel followed a traditional standard of review approach or was guided by the doctrine of legitimate expectations.

The Appellate Body subsequently dismissed the panel's 'good faith approach' but upheld its overall finding stating that "like the panel, we are not persuaded that India's 'administrative instructions' would prevail over the contradictory mandatory provisions of the Patents Act."[68] It was adamant that WTO adjudicating bodies had the right to assess whether or not India's laws and practices were in line with the obligations in the TRIPs Agreement. It stated that

> "in this case, the Panel was not interpreting Indian law 'as such'; rather, the Panel was examining Indian law solely for the purpose of determining whether India had

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[66] *Cottier/Nadakavukaren Schefer* (supra note 42), p. 87; *Thomas Cottier* served as Chairman to that panel.

[67] Ibid., paras. 7.31, 7.41.

[68] *India – Patent*, WT/DS50/AB/R, report of the Appellate Body (decided 19 December 1997), para. 69, citing the report of the panel, para. 7.37. According to *Cottier/Nadakavukaren Schefer* (supra note 42), p. 87, the approach by the panel was misunderstood by the Appellate Body and confused with the doctrine of non-violation complaints; see also *Cottier/Nadakavukaren Schefer*, Good Faith and the Protection of Legitimate Expectations in the WTO, in: Bronckers/Quick (eds.), New Directions in International Law, Essays in Honour of John H. Jackson, 2000, pp. 60-61.

met its obligations under the TRIPS Agreement. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the WTO Agreement. This, clearly, cannot be so."[69]

The Appellate Body essentially followed the same approach as the panel did and considered the treatment of Indian law as a *matter of evidence*. At the same time, though, the Appellate Body seemed to support the view that, when examining domestic law and practice for the purpose of determining whether they are consistent with WTO law, no particular deference should be applied.[70] It is arguable that the Appellate Body did not evidently defer in its assessment of the matter to the view taken and forwarded by India on its own administrative practice and interpretation of its laws at issue. It confirmed its "detailed examination of domestic law"[71] by making reference to previous GATT 1947/WTO practice and explicitly cited *US - Section 337*.[72] This explanation is interesting, as well as striking, since the GATT 1947 practice in this respect happens to be far from consistent and reveals a rather cautious approach chosen by previous panels. In *US – Tobacco* which was formally adopted by consensus among the parties to the dispute, the panel explicitly "noted in this regard that previous panels, con-

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[69] Ibid., para. 66. In order to underline its approach, the Appellate Body cited a decision by the PCIJ, ibid., para. 65. India, on the other hand, argued in its submission to the Appellate Body that the panel should have "given India, as the author of the mailbox system, the benefit of the doubt as to the status of that system under its domestic law. The panel also should have sought guidance on the manner in which the Indian authorities interpreted that law." ibid., para. 9.

[70] The Appellate Body's report was consequently criticised by various scholars; see *Trebilcock/Howse* (supra note 5), p. 70; *Schloemann*, Commentary on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, in: The International Trade Law Reports, Vol. V, p. 15; *Davey*, Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques, Journal of International Economic Law 2001, p. 93, who states that "greater deference to the government's view would have been appropriate." See to the contrary *Brown*, TRIPS: India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, in: European Journal of International Law website, www.ejil.org (visited 10 June 2001), p. 10, who submits that "the Appellate Body's approach stands out as being authoritative and forceful yet sensitive to the understanding that a country's interpretation of its laws should be controlling."

[71] Ibid., para. 67.

[72] Ibid., para. 67 and fn. 54 thereto; *US – Section 337*, report of the panel (adopted 7 November 1989), BISD 36S/345.

sistent with the practice of international tribunals, had refrained from engaging in an independent interpretation of domestic laws, and had treated the interpretation of such laws as questions of fact."[73]

According to *Trebilcock* and *Howse*, the Appellate Body's engagement "entails a predictive judgment on how a particular country's domestic tribunals would understand the interaction between particular administrative decrees and a domestic statute; it is difficult to see how the AB was able to uphold a panel finding on this matter that was not based on evidence by Indian legal experts on Indian administrative and intellectual property law and how it is applied in the Indian courts."[74] In essence, the approach was similar to that with which panels and the Appellate Body consistently review and interpret WTO law, and that clearly is a *de novo* review.[75] This observation of panel scrutiny, and its confirmation by the Appellate Body, is somehow surprising since the Appellate Body implicitly accepted India's argument that domestic law has to be proven and treated as a factual element rather than as an issue of law from the perspective of WTO adjudicating bodies. The consequence of such a finding would logically have been that the panel should have grant a certain degree of deference to the Indian authorities in the interpretation of Indian law and practice.

2. US – Sections 301-310

Neither in *India – Patent* nor in any other case dealing with judicial review of domestic law did the Appellate Body rely on Article 11 of the DSU, the only exception being the panel in *India – Patent* which mentioned Article 11 in passing. Rather, it was made implicitly clear that no such thing as the 'objective assessment doctrine' was to apply to judicial review of national law – at least not for the time being.[76] However, *US - Sections 301-310* eventually offered the next chance to reconsider the jurisprudence and to correct the pursued course. At the outset, the panel held that

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[73] *US – Tobacco*, DS44/R, report of the panel (adopted 4 October 1994), para. 75.

[74] *Trebilcock/Howse* (supra note 5), p. 70.

[75] The same opinion is expressed by *Trebilcock/Howse* (supra note 5), p. 70.

[76] It is interesting to note that the report of the Appellate Body in *India - Patent* is dated 19 December 1997, and therefore published only four weeks prior to the report on *EC – Hormones*. In the latter, the Appellate Body established the 'objective assessment doctrine' as generally valid standard of review of both law and facts.

"In this case, too, we have to examine aspects of municipal law, namely Sections 301-310 of the US Trade Act of 1974. Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we 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."[77]

Thus, the panel explicitly took the view that the interpretation of domestic rules should be treated as a *question of fact*. It corroborated this qualification of domestic law by consequently adding that the rules on burden of proof for the establishment of facts also applied in this respect.[78] Then, it went on in the next paragraph that

"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."[79]

For the first time ever, a panel explicitly stated that the appropriate standard of review applicable to domestic law should be 'deference'. The panel even went a step further and required 'considerable' deference. The exact meaning of the phrase 'considerable deference' does not appear to be outwardly clear. According to *Longman's* Dictionary, 'considerable' means „fairly large" which would indicate that the benchmark is to be set much closer to the 'total deference' standard than towards the other extreme of *de novo* review.[80]

Such a reading also stands firm in the light of the panel's actual engagement. The panel appeared to apply a deferential standard and was far from imposing a *de novo* reading of the relevant Sections of the US law on the United States. It was cognisant of the multi-layered character of the Sections under consideration which included statutory language as well as other institutional and administrative elements. With respect to both Section 304 and Section 306, the overall result of the panel's analysis was that the statutory language constituted a *prima facie* violation of Article 23.2(a) of the DSU. It went on, however, that "this

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[77] *US - Sections 301-310*, WT/DS152/R, report of the panel (decided 22 December 1999), para. 7.18.

[78] Ibid., para. 7.18.

[79] Ibid., para. 7.19.

[80] *Longman Dictionary of Contemporary English*, 3rd ed. 1995, p. 286.

threat had been removed by the aggregate effect of the SAA [the US Statement of Administrative Action] and the US statements before this Panel in a way that also removes the *prima facie* inconsistency and fulfils the guarantees incumbent on the US under Article 23."[81] The United States were thus successful in convincing the panel that its competent administrative agency had the power to determine that it is its duty to exercise the discretion given to it by the statutory language in a way consistent with WTO obligations. Basically, it argued its case along two lines: On the one hand, it submitted various statements one of which was delivered to the Congress by the President at the time of implementation of the Uruguay Round results and others were submitted to the panel as a reflection of official US policy. On the other hand, the United States presented evidence as to the administrative practice of the USTR in specific cases as a means of shedding light on the meaning of Sections 301-310. The complainant, as well as the third parties to the dispute, were explicitly invited to submit any evidence of WTO-inconsistent conduct by the United States corresponding to the claims in question. Three such alleged cases were in fact submitted, but the panel determined that

> "On the face of the record before us, we do not find the evidence submitted to us in this connection sufficient to overturn the US claim of a consistent record of compliance of Section 304 with Article 23.2(a) as invoked by the EC."[82]

In conclusion, the panel appeared to respect the interpretation of Sections 301-310 by the US authorities, *and the way they were actually applied*, and did not substitute its own reading for that of the competent national authorities. It logically sought guidance from the manner in which the United States interpreted its own law and deduced its finding particularly from the way in which the USTR has consistently appeared to apply the discretion granted to it by statutory law. This procedure is in accordance with the panel's preliminary determination to establish the meaning of the relevant US law as factual elements, and is both correct from a legal perspective and convenient from a practical

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[81] Ibid., para. 7.131. Moreover, one of the European Communities' claims was based on Article XVI:4 of the WTO Agreement. However, the European Communities never received a proper finding on this point. The only explanation for the panel's reluctance to examine WTO-compliance of the US law independently from its application in a specific case is *panel deference*. It seems that the panel was aware of its role as to how to examine domestic law, namely that a deferential approach was appropriate towards the way the United States ensured conformity with its WTO obligations, see *McGovern* (supra note 42), p. 1.13-3.

[82] Ibid., para. 7.130.

point of view. By the same token, it abides by the principle of a member state's freedom to decide on its own on the method of best ensuring compliance with WTO obligations.

It might be argued, however, that deference was necessary so as not to arrive at the conclusion that Sections 301-310 is not in compliance with Article 23 of the DSU. On the basis of the clear wording of the relevant provisions, particularly of Sections 304 and 306, the panel could easily have come to establish definite, and not only *prima facie*, inconsistency, had it not accepted the US reliance on internal practice and administrative procedures and considered them as, and attached to them the weight of, decisive factual evidence.

The deferential approach chosen by the panel in *US -Sections 301-310* becomes even more obvious when compared to the intrusive examination of both the panel and the Appellate Body in *India – Patent*, and the difference appears somehow striking. There goes the feeling with it that the overall finding in *US - Sections 301-310* was based not only on purely legal deliberations but at the same time embodied a political compromise. It is questionable whether the highly deferential approach followed in *US – Sections 301-310* is predestined to be generalised without hesitation. Nevertheless, *US - Sections 301-310* seems to better represent the appropriate position of WTO adjudicating bodies in reviewing domestic law and practice than *India – Patent.*

3. Canada – Pharmaceutical Products and US – Anti-Dumping Act Of 1916

Two other panel reports appear to confirm the view taken by the panel in *US – Sections 301-310* since both of them did not adopt overtly intrusive standards and followed a rather deferential approach.[83] In *Canada – Pharmaceutical Products*, the panel was called upon to examine the conformity of two provisions of Canadian patent law with the TRIPs Agreement. The dispute mainly turned on the interpretation of the relevant TRIPs provisions. However, when considering the European Communities' claim that Canada violated Article 27 of the TRIPs Agreement, the panel examined the matter on the basis of both the

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[83] In *Argentina – Bovine Hides and Finished Leather*,WT/DS155/R, report of the panel (decided 19 December 2000), the consistency of an Argentinean Resolution with Article X:3 of the GATT 1994 was at stake, *inter alia*, but the dispute mainly turned on the correct interpretation of the GATT Article, see paras. 11.56-101. The way the panel treated and judicially reviewed the Resolution was apparently not a main issue, and the panel's actual engagement did not add to further clarification in this respect.

wording of the relevant provisions of the Canadian law and "on Canada's representations as to the meaning of that law".[84] It then added that "this finding of conformity would no longer be warranted if, and to the extent that, Canada's representations as to the meaning of that law were to prove wrong."[85] On the one hand, it is arguably possible to submit that a certain degree of deference was accorded to Canada's view on the meaning of its own law. On the other hand, however, it is not discernible from the panel report that the panel would have arrived at a different finding in applying more scrutiny. It simply assessed the available information as to the meaning of the provisions as objectively as possible. At least, and that is reassuring again, the panel did not substitute its own assessment for that of the specialists on Canadian law who seemed to have made a careful evaluation of the matter free from improper influences or discrimination by nationality.

In *US – Anti-dumping Act of 1916*, Japan successfully contested the WTO-consistency of the US Anti-dumping Act of 1916.[86] At the outset, the panel outlined its view on the matter by stating:

> "We must determine how we should consider that law and its 'surrounding', i.e. the circumstances of its enactment (including the legislative history) and the subsequent interpretation(s) by the judiciary branch of the US government. [...] How we consider judicial interpretation, as evidence of the meaning given to terms of a legal text, may affect the way we should understand the terms of the 1916 Act."[87]

The panel was particularly sensitive towards the fact that, in the present case, it was called upon to review the consistency of a law which had been drafted more than eighty years ago. The panel paid appropriate attention to this additional dimension in its assessment and focused on the particularity that "the historical, cultural, legal and economic context of the time undoubtedly influenced

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[84] *Canada – Pharmaceutical Products*, WT/DS114/R, report of the panel (decided 17 March 2000), para. 7.99.

[85] Ibid., para. 7.99.

[86] The report of the panel was subsequently appealed by the United States but judicial review by the panel of domestic law, and the appropriate deference to be granted towards the defendant's reading of its own law, was not appealed. Notwithstanding, it is worth noting that the Appellate Body explicitly confirmed the considerable body of dispute settlement practice under both GATT 1947 and WTO standing for the principle that only legislation that *mandates* a violation of GATT 1947/WTO obligations can be found as such to be inconsistent with those obligations, see ibid., paras. 60, 88.

[87] *US – Anti-dumping Act of 1916*, WT/DS136/AB/R, report of the panel (decided 31 March 2000), para. 6.19.

its terms."[88] It set out a detailed summary of its view as to the proper role of panels in this respect:

> "However, we consider that we should not limit ourselves to an analysis of the text of the 1916 Act in isolation from its interpretation by US courts or other US authorities, even if we were to find that text to be clear on its face. If we were to do so, we might develop an understanding of that law different from the way it is actually understood and applied by the US authorities. This would be contrary to our obligation to make an objective assessment of the facts of the case, pursuant to Article 11 of the DSU. Therefore, we must look at all the aspects of the domestic law of the United States that are relevant for our understanding of the 1916 Act. However, looking at all the relevant aspects of the domestic law of a Member may raise some methodological difficulties, such as how much deference must be paid to that Member's characterisation of its legislation."[89]

Regrettably, the panel did not proceed to elaborate on the *extent* to which it were to defer to the United States' qualification of its domestic law. Rather, the panel left that question open. Nevertheless, this statement appeared to indicate that 'considerable deference' towards domestic law and practice as followed by the panel in *US - Sections 301-310* was not the order of the day, at least not as regards the 'raw' evidence based on which the meaning of the legal norms in question was to be established. Indeed, the panel engaged in a thorough and full-scale investigation into the elements which could have shed light on the meaning of the 1916 Act. It focused mainly on the historical context and legislative history as well as a number of judgements by US courts which applied and interpreted the law since the 1970's. The degree to which the panel went into the minutest detail is reflected in its consideration of the historical context. Beside considering the legislative history of that statute, it even took into account the political and economic context as it emerged from public declarations and studies of the time.[90] The panel's active attitude is also expressed in the following statement on the approach it considered adequate to take into account the US case law relating to the 1916 Act:

> "We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the *Brazilian Loans* case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from 'weigh[ing] the jurisprudence of municipal [US] courts' if it is 'uncer-

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[88] Ibid., para. 6.37.

[89] Ibid., para. 6.47.

[90] Ibid., para. 6.59.

tain or divided'. This would not require us to 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."[91]

In conclusion, the panel comprehensively took into account for its analysis any factual evidence which was considered helpful in shedding light on the meaning of the US law in question. In doing so, it did not noticeably defer to the evidence as presented by the United States. At the same time, a deferential approach is discernible with respect to the method of implementation. The panel appeared to have been conscious of the fact that the US legal system set the background against which it had to make an objective assessment of the matter pursuant to Article 11 of the DSU. The panel was adamant to the principle that it was its duty to respect the characteristic features of the US legal framework, including the weight and importance which it should attach to the legislative history, and particularly the specificities of the US federal judicial system. Such a conclusion stands to reason although the panel finally concluded that the 1916 Act violated several provisions of the GATT 1994, the Anti-dumping Agreement and the WTO Agreement.

V. Conclusive Summary

Regrettably, the DSU does not provide much guidance with regard to panel jurisdiction over facts and legal interpretations. The Appellate Body fundamentally held in *EC – Hormones* that Article 11 of the DSU articulates the appropriate standard of review with sufficient clarity. Moreover, it can be traced from the GATT 1947/WTO *acquis*, and is supported by various policy as well as purely practical rationales, that panels should respect national authorities' measures to a certain extent even though the might prefer a different conclusion based on their own assessment. But, not surprisingly, panels and the Appellate Body have subsequently appeared to be quite reluctant to exactly define where on the spectrum between *de novo* review and 'total deference' the benchmark is to be set.

As to panel review of factual findings, the Appellate Body has directed panels to accord certain deference towards domestic factual records as presented by the member state concerned. Notwithstanding theoretical statements, an analysis

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[91] Ibid., para. 6.52, citing the case *Elettronica Sicula S.p.A. (ELSI)*, Judgement, ICJ Reports 1989, p. 47, para. 62.

of the case law reveals a rather intrusive engagement by panels. This holds particularly true for panel review of the *process of fact-finding* itself. Panels have consistently examined the scope and appropriateness of the relevant facts, in the sense of 'raw' evidence, searchingly and thoroughly. Their engagement in this respect has essentially come quite close to *de novo* review. A certain degree of deference has seemed advisable only in view of the panels' limited fact-finding capabilities and resource allocation problems. Furthermore, panels have consistently emphasised the significance of a 'reasoned and adequate explanation' of whether a policy determination is based on an 'acceptable' evaluation and reading of the relevant facts. Panels have clearly refrained from substituting their own conclusions for those of the member states concerned, particularly in cases which involved politically sensitive and value-based considerations. As long as a member state's conclusion has been *reasonable* and *plausible*, and, in the case of scientific assessments, based on a 'qualified and respected opinion', a factual conclusion has not been reversed by a panel although another conclusion would have been perfectly possible as well.

With regard to standard of review of WTO law, panels and the Appellate Body have unequivocally engaged in a *de novo* review. Moreover, albeit the clear instruction to panels to apply a somewhat deferential standard in Article 17.6(ii) of the Anti-dumping Agreement, no report has yet been issued in which either a panel or the Appellate Body would have determined that a provision of the Anti-dumping Agreement admits of more than one permissible interpretation.

Panel review of domestic law and its actual application is more difficult to assess. Again, Article 11 of the DSU is directly to the point in its description of the parameter of panel jurisdiction. In the first relevant dispute in this respect, *India – Patent*, both the panel and the Appellate Body somehow struggled to find an appropriate way to deal with the interaction between the relevant Indian statute and partly divergent administrative practice and decrees. In essence, particularly the Appellate Body appeared to assess the Indian legal system as if it were to interpret WTO law. It was not until *US – Sections 301-310* that a panel fundamentally set the course: the interpretation of domestic legal norms is to be conceptually treated, for the purpose of judicial review by WTO adjudicating bodies, as a *question of fact*. It corroborated this qualification of domestic law by consequently adding that the general rules on burden of proof for the assessment of the factual record, and the subsequent establishment of a *prima facie* case of WTO-inconsistency, also apply in this respect.

Furthermore, the panel in *US – Sections 301-310* disregarded the intrusive engagement carried out by the Appellate Body in *India – Patent* and held that 'considerable deference' be granted to the defendant's views on the meaning of its own law. Ever since, subsequent case law has been in line with this seminal finding. Panels have been far from imposing a *de novo* interpretation of the relevant national norms on the member state concerned and clearly refrained from substituting their own reading for that of the competent national authorities. It is noticeable that, particularly in *US – Anti-dumping Act of 1916*, panels have consistently engaged in a thorough and full-scale investigation into the elements which could have shed light on the meaning of the relevant law and practice. After the factual record had been established and its completeness and relevance comprehensively reviewed, however, a deferential approach towards the interpretation of domestic law and practice has generally been, and rightly so, the order of the day.