Journal of World Trade **38(3)**: 509–555, 2004.

Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis

Holger SPAMANN*

In any system of legal rules and institutions, standard of review defines the role of the adjudicative body in relation to the other actors of that system. It defines the limits of the adjudicative body's authority and duty to control the interpretation of, and the respect for, the legal rules for which the adjudicative body has been entrusted with jurisdiction. In the international context of the World Trade Organization (WTO), it therefore partly defines the relationship between the nation state Members and the international organization WTO (and, by the same token, the scope of the obligations binding Members *vis-à-vis* each other under the WTO agreements). Despite its fundamental importance, many questions regarding standard of review for Panels reviewing Members' measures, in particular trade remedy measures, have not yet received sufficiently clear answers in WTO jurisprudence. Doubts persist as to the precise content as well as to the legal basis of standard of review applicable in WTO dispute settlement proceedings. Behind these doubts stands an insufficiently clearly articulated understanding of the logical structure as well as the practical effect of standard of review. The recent *US—Steel* dispute highlighted the problems and uncertainties surrounding standard of review. This article aims to show that standard of review results from a combination of procedural and substantive rules, and that the Appellate Body's jurisprudence can be understood as developing a special standard of review for safeguard and countervailing measures cases on the basis of the substantive rules of the Agreement on Safeguards (SG), Agreement on Subsidies and Countervailing Measures (SCM) and Agreement on Textiles and Clothing (ATC), rather than Article 11 DSU. However, the Appellate Body's analysis of the relevant provisions has so far lacked the necessary rigour and thoroughness. A fresh look at the standard of review in safeguards and countervailing measures cases might well lead to the endorsement of *de novo* review of such measures by Panels. This article will argue that national authorities would not necessarily fare worse under such a standard that might be preferable from a policy perspective. Article 17.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADP) is discussed in passing.

---

* LL.M. (Harvard), Maître en Droit (Panthéon-Sorbonne), Attorney-at-Law (New York), Referendar (clerk) at the Hanseatic Court of Appeals in Hamburg. I am indebted to Lothar Ehring, M.P.A. (Harvard), formerly of the Appellate Body Secretariat and the Legal Affairs Division of the WTO, for inspiration and helpful comments on two consecutive drafts. All mistakes remain mine.

I. Introduction

In 2002, Claus-Dieter Ehlermann, looking back on six years of experience as a member of the Appellate Body, called standard of review one of the hottest topics in WTO jurisprudence today.[1] And indeed, standard of review for WTO Panels examining national trade remedy measures has been one of the recurring topics in these first years of WTO dispute settlement. Most Panel and Appellate Body (AB) reports in anti-dumping (AD), safeguard or countervailing duties (CVM) cases contain a separate section dedicated to the applicable standard of review.

Standard of review refers to the degree to which a Panel has power to substitute its judgment for that of the national authorities imposing the trade remedy measure.[2] Standard of review therefore defines the control by WTO Panels over Members' exercise of their rights to impose trade remedy measures. It concerns all elements of any legal determination: the interpretation of the legal rules, the establishment of the raw facts, and the evaluation of those raw facts under the applicable legal rules. Roughly speaking, three approaches can be distinguished. Under a *de novo* approach, the Panel reviews the issues anew, without having regard to the national authorities' findings. Inversely, the Panel may simply accept the national authorities' findings, at least as long as certain purely procedural requirements are complied with (total deference). In between these two extremes, the Panel may accept the national authorities' determination if certain conditions regarding the determination are fulfilled. Such conditions may be of various kinds, and there are consequently several types of such intermediate or deferential standard of review. It seems obvious that the choice between these approaches deeply affects the world trading system. Depending on the applicable standard of review, the same rules can impose strict or virtually no practical limitations on Members' possibilities to apply trade remedy measures. For while in theory national authorities would be bound by the same WTO rules regardless of the standard of review applied by WTO Panels, the practical enforcement of those bounds will vary depending on the standard of review applied.

The concept, or at least the terminology, of standard of review first came into the spotlight in late General Agreement on Tariffs and Trade (GATT) jurisprudence[3] and, in parallel, in the Uruguay Round negotiations. In both Panel proceedings and negotiations, the United States pushed for a deferential standard of review preventing a full review of national authorities' determinations in Panel proceedings. Other Members opposed this, however, and the result of the negotiations was a last-minute compromise consisting of Article 17.6 of the Agreement on the Implementation of

[1] Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court"—Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J.W.T. (2002), pp. 605, 621; see also John H. Jackson and Rafael Tiago Juk Benke, *The WTO Cases on US 'Trade Remedies': Opening a Discussion*, 6 J.I.E.L. (2003), p. 111, calling standard of review "one of the main subjects debated in 2002".

[2] Cf. Matthias Oesch, *Standards of Review in WTO Dispute Resolution,* 6 J.I.E.L. (2003), pp. 635, 637–638, and the references cited there in note 6.

[3] A brief overview of GATT 1947 case law is given below in III.B.2.

Article VI of the General Agreement on Tariffs and Trade 1994 (ADP), the Ministerial Decision on Review of Article 17.6 ADP,[4] and the Ministerial Declaration on Dispute Settlement Pursuant to the ADP or Part V of the Agreement on Subsidies and Countervailing Measures (SCM).[5,6] Article 17.6 ADP reads:

> In examining [a dispute under the ADP]:
> (i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

On its face, Article 17.6 ADP provides for a deferential standard of review for anti-dumping cases. No equivalent provision exists in any of the other multilateral or plurilateral agreements covered by the WTO Agreement (WTO agreements), and in particular in the Agreement on Safeguards (SG), the Agreement on Textiles and Clothing (ATC), and the SCM. For factual issues, Panels and the AB have, however, developed an intermediate standard of review in safeguard cases that, at first sight, bears considerable similarity to Article 17.6(i) ADP. As explained in more detail below, Panels are to examine only whether the national authorities imposing a safeguard measure have considered all relevant factors and provided a reasoned and adequate explanation of how the facts support their determination. On the other hand, regarding legal interpretations, Article 17.6(ii) ADP has not yet led any Panel or the AB to defer to a national authorities' interpretation. The practical impact of Article 17.6 ADP has thus been rather small.[7]

This limited practical impact of Article 17.6 ADP is the first puzzle regarding standard of review in WTO jurisprudence. If Article 17.6 ADP has hardly had any noticeable impact, has it been incorrectly applied—or have other provisions and cases been incorrectly treated such as to blur the boundaries to Article 17.6 ADP? Numerous

---

[4] The Ministerial Decision on Review of Article 17.6 ADP reads, "The standard of review in [Article 17.6 ADP] shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."

[5] The Ministerial Declaration on Dispute Settlement Pursuant to the ADP or Part V of the SCM reads, "Ministers recognize, with respect to dispute settlement pursuant to the [ADP] or Part V of the [SCM], the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

[6] See, in detail, Steven P. Croley and John H. Jackson, *WTO Procedures, Standard of Review, and Deference to National Governments*, 90 A.J.I.L. (1996), pp. 193, 195–199; Gary N. Horlick and Peggy A. Clarke, "Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO", in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), pp. 317–320; Oesch, as note 2 above, pp. 645–646.

[7] Cf. Ehlermann, as note 1 above, pp. 619–620; James Cameron and Stephen J. Orava, "GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement", in Friedl Weiss (ed.), *Improving WTO Dispute Settlement Procedures* (2000), pp. 195, 239; Oesch, as note 2 above, p. 649.

critics have indeed accused the AB of not giving Article 17.6 ADP its full meaning (although these critiques have focused on its paragraph (ii)).[8] This article raises the other possibility, the mistreatment of cases other than anti-dumping cases, and offers a reconciliatory position, which maintains that the import of Article 17.6(i) ADP may simply have been meant to be much smaller than what a superficial reading of the provision might suggest.

The second puzzle concerns the practical consequences of standard of review. The standard of review in Article 17.6 ADP and the jurisprudential standard of review for safeguard cases were described above as "deferential", i.e., favourable to the defending Member. Strangely enough, in the *US—Steel* dispute, the United States asked the Panel not to apply this "deferential" standard of review to certain issues.[9] Why would the United States, a long-standing supporter of intermediate standards of review, the driving force behind Article 17.6 ADP and the defending Member in the *US—Steel* case, argue against the application of such an intermediate standard of review? This article suggests that "deferential" standards of review are not always as favourable to defending Members as is commonly assumed.

According to the Ministerial Decision, Article 17.6 ADP should have been reviewed after three years "with a view to considering the question of whether it is capable of general application". While no such review has taken place, standard of review in trade remedy cases has been put on the Doha Round negotiating agenda, and proposals for reform have been made both for abolishing[10] and for strengthening and expanding[11] Article 17.6 ADP. Commentators have often argued that a more deferential standard of review would be desirable for all WTO cases, or at least WTO

8 See, e.g., Richard O. Cunningham and Troy H. Cribb, *Dispute Settlement Through the Lens of "Free Flow of Trade"—A Review of the WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures*, 6 J.I.E.L. (2003), p. 155; John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J.I.E.L. (2003), pp. 113–124; Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, 34 Law and Policy of Int'l Business (2002), p. 109; and most importantly the US Senate Finance Committee, Bipartisan Trade Promotion Authority Act of 2002 Report, S. Rep. No. 107–139, at Sec. III.1 (2002); and its ranking minority member Senator Max Baucus who authored that Finance Committee Report, see in addition to the foregoing for example his letter to USTR Robert Zoellick dated 15 April 2002 and available at <http://usembassy.state.gov/tokyo/wwwhec0528.html>, and in his comments dated 30 July 2003 and available at <http://finance.senate.gov> on the US General Accounting Office's *Report to the Ranking Minority Member, Committee on Finance, US Senate, World Trade Organization—Standard of Review and Impact on Trade Remedy Rulings* (GAO-03-824, July 2003) (available at <www.gao.gov/cgi-bin/getrpt?GAO-03-824>) (hereinafter GAO Report). The majority of experts interviewed by GAO were of the opinion that Panels and the AB had not exceeded their authority under Article 17.6 ADP; ibid., pp. 26–32.

9 This is indeed the picture that seems to emerge from the US arguments in that case, see note 121 below and accompanying text (although the recent US negotiation proposal, see note 11 below, seems to speak a different language). Whether it is really what the United States wanted is rather irrelevant and will not be further pursued in this article.

10 India's Proposals Regarding the Anti-Dumping Agreement, 7 June 1999, para. 12, available at <http://www.indianembassy.org/policy/WTO/wto_india/anti_dumping_06_99.htm>; also cf. Canadian Department of Finance, Consultation Paper on WTO Subsidies and Trade Remedies Negotiations, June 2002, available at <http://fin.gc.ca/activity/consult/wtosub_1e.html>, raising the question whether Article 17.6 ADP undermines the predictability of the WTO dispute settlement system.

11 United States Proposal dated 18 June 2003 to the WTO Negotiating Group on Rules, cited from Senator Chuck Grassley, Press Release on New GAO Report on Trade Remedy Rulings 31 July 2003, available at <http://finance.senate.gov/press/Gpress/2003/prg073103a.pdf>.

trade remedy cases.[12] This article provides some arguments why full *de novo* review could be more appropriate for WTO proceedings, at least in trade remedy cases, given the particularities of the international setting.

II. Structure and Purpose of Standard of Review

A. Standard of review results from a combination of procedural and substantive rules

In thinking about these questions, it is critical to understand that any of the different types of standard of review can result not only from a procedural rule (i.e., a rule addressed to the Panel or AB), but also from a substantive rule (i.e., a rule addressed to the national authorities). Indeed, a key to understanding standard of review lies in recognizing its hybrid nature as a combination of procedural and substantive rules. While standard of review seems generally to be discussed as a matter of procedure, especially in trade law circles, it is in truth as much a matter of substantive law.[13] The same standard of review can result from a substantive or procedural rule.

Combining the substantive rule "when X[14] exists, administration may do Y" (this will be called in this article a substantive obligation) with the procedural rule "adjudicator: verify only if administration reasonably established its right to act under the substantive rule" is equivalent to combining the substantive rule "if administration reasonably establishes the existence of X, it may do Y" (this will be called in this article a procedural obligation) with the procedural rule "adjudicator: thoroughly verify every element of the substantive rule". Likewise, to take one extreme case, the combination of the substantive rule "administration may do Y only in the very narrowly circumscribed conditions X" with the procedural rule "adjudicator: assume that administration acted correctly" is equivalent to the substantive rule "administration may do what it pleases" combined with the procedural rule "adjudicator: thoroughly verify every element of the substantive rule"—in both cases, there will be no judicial control on the administration's actions in practice.[15]

---

[12] See, e.g., generally, Stefan Zleptnig, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, 6 E.Io.P. 17/10–13 (2002), at <http://eiop.or.at/eiop/texte/2002-017a.htm>; for factual issues, see Ehlermann, as note 1 above, p. 620; and Oesch, as note 2 above, pp. 639–641; for trade remedy cases generally, see Jeff Waincymer, WTO Litigation para. 6.15.5 (p. 353) (2002); for AD cases, see Lee D. Hamilton, *US Antidumping Decisions and the WTO Standard of Review: Deference or Disregard?*, 4 Chi. J. Int'l L. (2003), pp. 265, 270; for safeguard cases Yong-Shik Lee, *Safeguard Measures—Why are they not applied consistently with the rules?—Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards*, 36 J.W.T. (2002), pp. 641, 664.

[13] Another such hybrid matter is burden of proof, see, e.g. Mojtaba Kazazi, *Burden of Proof and Related Issues—A Study on Evidence Before International Tribunals* (1996), p. 30.

[14] This "X" will be called in this article a "substantive condition", i.e. a certain fact or situation independent of the behaviour of the administration that under some legal rule is supposed to be present in order for a measure to be legally taken. For example, under WTO law, trade remedy measures may be taken only if there is material injury to domestic industry, or the threat of such injury.

[15] On the other side of the spectrum is the combination of the procedural rule "adjudicator: uphold the administrative act only if X" with any substantive rule, even "administration: do what you please"—in any event, the court will control everything anew.

On a theoretical level, one may want to distinguish the two cases and maintain that the measure "is" really only justified if the substantive rule itself grants the margin of appreciation, whereas if a procedural rule only restricts control by the courts, the measure may still "be" illegal although it is sheltered from judicial invalidation. But in a realist perspective, there is no difference between the two cases. It is more accurate then to regard standard of review not as a legal rule itself, but as the description of the interplay of substantive and procedural rules which, together, specify the role of Panels when reviewing national authorities' determinations, and thus define the structural relationship between Members and Panels (and, by the same token, the scope of the obligations binding Members *vis-à-vis* each other under the WTO agreements). As a terminological matter, one might still prefer to reserve the term standard of review to procedural rules, but as will be shown in this article, this is not how the term is used in WTO law.

B. Deference serves practicability and the allocation of subjective judgment

Recognizing the hybrid nature of standard of review as a combination of procedural and substantive rules reveals that intermediate standards of review are a universal phenomenon not limited to one or a few legal systems.[16] Be it under the heading of standard of review, margin of appreciation, or some other term or even just unreflected judicial practice, most legal systems practice or at least discuss intermediate standards of review for courts reviewing decisions of administrative agencies or the legislator, even though the details vary considerably from country to country.[17] It seems that the reasons for limiting the courts' control of such decisions are, roughly speaking, of two kinds:

First, the courts' power and duty to review the decisions of administrative agencies and legislators may be limited for purely practical considerations: to avoid duplication of efforts and, possibly, an overload of the courts' capacities. If the administrative agency (and, in some instances, the support staff of the legislator) has already engaged in a thorough review and analysis of the available evidence—as national authorities are mandated to do by the ADP, SG and SCM in trade remedy cases—it might be a waste of time if the court repeated this—a waste of time that might, depending on the docket

---

[16] In particular, standard of review problems and rules are not limited to common law systems, as Cunningham and Cribb, as note 8 above, p. 164, believe. It is possible, however, that the US intermediate standard of review for (abstract) legal interpretations adopted by *Chevron USA Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837 (1984) has no equivalent elsewhere, not even in other common law countries.

[17] See in the United States in addition to the *Chevron* test for legal interpretation (previous note), for example the "reasonableness test" for the application of law to fact, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); and as examples of intermediate standards of review in other legal systems the margin of appreciation doctrine as practised by the European Court of Human Rights, In the case of *James and others v. The United Kingdom*, 3/1984/75/119, 21 February 1986, paras 46, 49; and generally R. St J. Macdonald, "Margins of Appreciation", in R. St J. Macdonald, F. Matscher and H. Petzold (eds), *European System for the Protection of Human Rights* (1993); in the EU the European Court of Justice's limitation of its review of Community measures to manifest errors, misuse of powers or exceeding the bounds of discretion, e.g., Case 138/79, *SA Roquette Frères v. Council* [1980] ECR 3333, para. 25, and Joint Cases C-248/95 and C-249/95, *SAM Schiffahrt GmbH and Heinz Stapf v. Federal Republic of Germany* [1997] ECR I-4475, para. 24; in France the "contrôle minimum", cf. Jean Rivero and Jean Waline, *Droit Administratif* (19th edn: 2002), para. 265-1; in Germany the "Einschätzungsprärogative" in constitutional law, and in administrative law the "Lehre vom Beurteilungsspielraum" and its brethren, cf. Hartmut Maurer, *Allgemeines Verwaltungsrecht* (14th edn: 2002), § 7-III.

of the court, exceed the court's capacity. In an extreme case such as oral or practical examinations (e.g., an oral exam for admission to the bar, or a driving test for obtaining a driver's licence), it may simply be impossible for the court to conduct a *de novo* review (short of filming the whole event—repeating it in front of the court would not be the same!). In situations where the administrative agency (or legislator) is trusted (!) to perform such review and analysis correctly (at least generally), the role of the courts may thus be limited in order to save time and efforts without fear that the rule of law will be eroded. In order to achieve this purpose, however, the role of courts must be limited in the right way, i.e., the standard of review must be of a kind that really makes the courts' task less time consuming. Limiting the courts' review to egregious errors presumably achieves this task, while limiting the courts' review to scan every step of the agency's or legislator's reasoning etc. for reasonableness or the like may actually make the courts' task more burdensome.

Second, and most importantly, the standard of review may reflect a separation-of-powers concern to leave the subjective elements of a legal determination to the administrative agencies or the legislator that may be considered, from a technical or democratic point of view, to be better qualified to exercise such subjective judgment.[18] It seems universally accepted in modern jurisprudence that the interpretation and application of law involves some degree of subjectivity.[19] If there is indeed subjective judgment involved, it may be preferable to leave the exercise of this judgment to more directly democratically legitimized actors such as the parliament or even the administration if it is directly elected or nominated by the parliamentarian majority.[20] From a technical point of view, the administration may be specialized in a certain area and thus command better judgment than unspecialized courts (that would often need to have recourse to external experts—the subjective judgment would then be exercised by the external experts who have the least democratic legitimization to do so).

Standard of review is, of course, not the only method to limit courts' control of the decisions of administrative agencies and legislators. Putting the burden of proof on the party challenging the decision and requiring a high level of proof is another example of

[18] Cf. Claus-Dieter Ehlermann and Nicolas Lockhart, *Standard of Review in WTO Law*, manuscript on file with the author (to be published in a collection of essays in honour of David Edwards), pp. 1–2.

[19] Article 17.6(ii) ADP seems to acknowledge this subjective element for the interpretation of law. For factual issues, some subjective judgment is involved in setting the threshold of evidence for a certain fact (e.g., which side of the evidence is preponderant in a given case?) (establishment of facts), and, most importantly, for evaluating the facts under a certain legal term (e.g., how much injury is material injury?) (evaluation of facts). This latter problem of evaluating the facts arises because the general language of abstract legal rules has no direct counterpart in the real world of facts. One way lawyers try to narrow down this problem is by breaking down the terms of the abstract rule, especially broad terms like "causation" and "serious injury", into a bundle of more readily observable sub-terms, sub-sub-terms, and so on, through (abstract) legal interpretation (which in itself will involve some degree of subjectivity). Inversely, lawyers may use *ad hoc* reasoning elaborating on certain observable facts in a given case to *persuade* that the broad legal requirement of, e.g., "serious injury" is indeed fulfilled. Both approaches serve to make the gap between observable facts and legal requirements smaller, without being able to bridge it completely. To a greater or lesser extent, it seems inevitable that at some point law and facts have to be brought together in what is essentially an act of persuasion, which necessarily involves some degree of subjectivity.

[20] Whether the legislator or the administration really *are* more directly democratically legitimized with respect to the relevant constituency is of course dependent on the circumstances and may differ from judicial system to judicial system.

a potent method to shelter administrative or legislative decisions. At the limit, access to courts can be closed for certain potential plaintiffs or certain decisions, or substantive conditions for certain decisions can be set at a low level such as to leave the decision largely to the discretion of the administration or legislator. In WTO law, one may think of the lack of direct effect of WTO law, and the closure of the WTO dispute settlement system to individuals (rather than Members), as a limitation of judicial control of Members' decisions under WTO law. The specificity of standard of review as opposed to these other methods limiting judicial review (with the partial exception of burden of proof) is that it tries to carve out only the issues involving subjective judgment from a court's review.[21] This article will be limited to issues of standard of review.

III. The Standard of Review as Articulated by WTO Case Law

With these general considerations in mind, this section will introduce the major outlines of the AB's jurisprudence regarding standard of review. A more detailed explanation of the basis of the AB's jurisprudence will follow in the subsequent section.

A. Anti-dumping cases are reviewed under Article 17.5/6 ADP

Article 17.6 ADP should be treated first, being the only provision explicitly addressing standard of review. To recall its wording:

> In examining [a dispute under the ADP]:
> (i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The AB explained these two provisions in its *US—Hot-Rolled Steel* and *Thailand—H-Beams* decisions. According to the AB, Article 17.6 ADP supplements the relevant DSU provisions, in particular Article 11, in placing certain limitations on Panels in ADP cases.[22] As far as factual issues are concerned,

> Article 17.6(i) places a limitation on the Panel in the circumstances defined by the Article [and its] aim … is to prevent a Panel from "second-guessing" a determination of a national authority

[21] This does not, of course, rid the judicial proceedings of all subjectivity—determining what is "reasonable" etc., i.e. determining the limits of the judicial body's own power and duty of review, will itself involve subjective judgment.

[22] AB Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras 55, 57, 62; cf. DSU Appendix 2.

> when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective.[23] . . .
> Article 17.6(i) does *not* prevent a Panel from examining whether a Member has complied with its obligations ... In evaluating whether a Member has complied with [its] obligation, a Panel must examine whether the . . . determination was based on positive evidence, and whether the . . . determination involved an objective evaluation.[24]

An important additional limitation on Panels' review of factual issues is in Article 17.5(ii), which limits the Panels' mandate ". . . to examine the matter based upon . . . the *facts made available* in conformity with appropriate domestic procedures *to the authorities of the importing Member*" (emphasis added).

There is thus an explicit limitation of the factual basis of any Panel review—only "facts" made available to the national authorities are to be taken into account. In view of the Panel in *Guatemala—Cement II*, this includes "new evidence that was not part of the record of the investigation".[25]

As to legal issues, Article 17.6(ii), 2nd sentence ADP holds the potential for deference by a Panel to national authorities' interpretation of provisions of WTO law. However, the AB strongly emphasized that:

> This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations".[26]

In the AB practice to date, such a case has not arisen. In fact, given that the rules of treaty interpretation are designed to arrive at only one interpretation, and given the reluctance of most judicial systems to acknowledge the indeterminacy of legal rules, one may think that such a case will never arise.[27] However, it has been argued forcefully that, in the cases decided to date, the AB would have had to admit many times that there was more than one permissible interpretation, had it not dodged such a conclusion by improper means, most notably by selective citations from dictionaries.[28] Taking a view on this controversy is all the more difficult because the very term defining the AB's control over national authorities' interpretation of ADP provisions—permissible—is in itself not easy to interpret, and such interpretation must by necessity be undertaken by the AB itself. Any critique alleging that a certain interpretation

---

[23] AB Report *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 117.

[24] Ibid., para. 137.

[25] Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.19 (emphasis added); confirmed by Panel Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003 (with AB report), para. 7.33, 7.160 note 157, 7.173 note 169, 7.416.

[26] *US—Hot-Rolled Steel*, as note 22 above, para. 59 (emphasis in original); see also ibid., para. 60.

[27] Cf. Croley and Jackson, as note 6 above, pp. 200–201; Oesch, as note 2 above, pp. 642–643, 657–658; less sceptical are Claus-Dieter Ehlermann and Lothar Ehring, *WTO Dispute Settlement and Competition Law—Views from the Appellate Body's Experience*, Robert Schuman Paper 12/02, para. 23 footnote 385.

[28] See, in particular, Tarullo, as note 8 above; see also Greenwald, as note 8 above; but see, to the contrary, James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J.I.E.L. (2003), pp. 125–153.

refuted by Panels or the AB was in fact permissible must be careful not to commit with respect to the term permissible and Article 17.6(ii) ADP the same mistake that it accuses the Panels and the AB of committing with respect to the other provision(s) of the ADP.[29] In any event, it is surely not enough to point only at the wording of a provision, as is commonly done,[30] to show that more than one interpretation is permissible—Article 17.6(ii) ADP refers to the customary rules of interpretation that look beyond the mere wording.[31]

Article 17.6(i) ADP, however, has close equivalents in GATT 1947 and WTO practice for (other) trade remedy cases, as will be seen in the next section. The impact of Article 17.6 ADP has thus been surprisingly limited.[32]

B. Safeguards and countervailing measures cases are reviewed under a jurisprudential "all relevant factors" and "reasoned and adequate explanation" standard for factual issues, and *de novo* review for legal issues

That the impact of Article 17.6 ADP would be so limited was not obvious when the WTO came into existence. In fact, in the first disputes under the new system, the United States argued for an application of Article 17.6 ADP beyond the scope of application of the ADP. However, this was rejected by the AB, just like some early Panels' application of the late GATT 1947 standard of review *qua* GATT *acquis*. Instead, the AB developed a standard of review identical to the late GATT 1947 standard taking Article 11 DSU as the starting point.

1. *Non-applicability of Article 17.6 ADP*

As mentioned in the introductory section, the last-minute compromise that led to the adoption of Article 17.6 ADP included a Ministerial Decision and a Ministerial Declaration.[33] The Decision provides "The standard of review in [Article 17.6 ADP] shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."[34]

> In the Declaration, ministers recognize "... with respect to dispute settlement pursuant to the [ADP] or Part V of the [SCM], the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".[35]

---

[29] But see Cunningham and Cribb, as note 8 above, p. 162, criticizing that: "The AB then showed no hesitation in making its own assessment of what is a 'permissible interpretation' and what is not."

[30] E.g., Greenwald, as note 8 above, pp. 115–117; Cunningham and Cribb, as note 8 above, pp. 158, 162.

[31] Durling, as note 28 above, p. 143.

[32] See the references cited in note 7 above.

[33] See notes 4–6 above and accompanying text.

[34] Decision on Review of Article 17.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[35] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

In the first CVM case under the new SCM, the *US—Lead and Bismuth II* case brought in 1999, the United States as defendant argued that by virtue of this Declaration, the standard of review of Article 17.6 ADP should apply in CVM cases under the SCM as well. The Panel and the AB, however, swiftly and rightly rejected this argument, pointing to the hortatory language of the Declaration and the fact that the Decision seems to assume the opposite of what the US argued.[36] In the *EC—Hormones* dispute, the European Communities even asked for an extension of Article 17.6(i) ADP to "all highly complex factual situations". Fortunately, the AB dismissed this textually completely unfounded suggestion in one single paragraph.[37]

2. *GATT Acquis*

Alternatively, the United States in the *US—Lead and Bismuth II* case asked that a standard of review similar to the one developed by GATT 1947 Panels for trade remedy cases be applied.[38] Similarly, the parties in the first WTO safeguard cases, and the 1996 *US—Underwear* and the 1999 *Argentina—Footwear* Panels, naturally referred to GATT 1947 case law for guidance and reference.[39]

At closer view, however, such guidance should not have been easy to come by, since standard of review went through a very contrasted history under the GATT 1947.[40] In the early years of the GATT 1947, national authorities did not need to be concerned about any strict standard of review, as shown by the 1951 *Hatters' Fur* case.[41]

---

[36] AB Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (*US—Lead and Bismuth II*), WT/DS138/AB/R, adopted 7 June 2000, paras 44–51; Panel Report, WT/DS138/R, paras 6.15–6.17; cf. AB Report, *EC—Hormones*, following note, para. 114, note 79.

[37] AB Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, paras 113–114.

[38] Panel Report, *US—Lead and Bismuth II*, as note 36 above, para. 6.11.

[39] Panel Report, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997 (with AB Report), paras 7.7–7.13; Panel Report, *Argentina—Safeguard Measures on Imports of Footwear,* WT/DS121/R, adopted 12 January 2000 (with AB Report), paras 8.117–8.121; and the parties' arguments in Panel Report, *United States—Measure Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997 (with AB Report), para. 7.15.

[40] On that history generally, see Croley and Jackson, as note 6 above, pp. 195–197.

[41] Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, GATT document CP/106, adopted on 22 October 1951 (CP.6/SR.19), version published by the Secretariat in November 1951, preface by E. Wyndham White. The majority of the working party held that

> "the United States is . . . entitled to the *benefit of any reasonable doubt*. No facts have been advanced which provide any *convincing evidence* that it would be *unreasonable* to regard the adverse effects . . . as amounting to serious injury or a threat thereof; and the facts as a whole certainly tend to show that *some* degree of adverse effect has been caused or threatened." (para. 30, emphasis added)
>
> "These members were satisfied that the United States authorities had investigated the matter thoroughly on the basis of the data *available to them* at the time of their enquiry and had reached *in good faith* the conclusion that the proposed action fell within the terms of Article XIX *as in their view* it should be interpreted." (para. 48, emphasis added)

The decision thus combined elements of burden of proof ("benefit of any reasonable doubt", "no facts have been advanced which provide any convincing evidence") and standard of review ("unreasonable to regard the adverse effect . . . as amounting to serious injury", and the entire second quoted paragraph) to make the complaining party's case a very difficult one. In fact, reading the report (the majority even considered a change in hat finish fashion an unforeseen development, paras 11–12), one may come to the conclusion that, in 1951, a

As the GATT system became more firmly established over the years, the pendulum swung to the other extreme in *New Zealand—Transformers*, a 1985 case under the Tokyo Round Anti-Dumping Code endorsing full *de novo* review by the Panel.[42] In subsequent Panel proceedings in the early 1990s during the last years of the GATT 1947, the United States sought—and obtained—a middle ground, introducing the term standard of review into GATT jurisprudence.[43] In the *US—Norwegian Salmon* AD (1991) and CVM (1992) cases,[44] the Panel articulated a standard of review that is very similar to the one used in trade remedy (except ADP) cases today. The Panel defined its mandate in reviewing whether, as a factual matter,[45] the national authorities' determination of material injury was based on positive evidence and involved an objective examination, as required by the Codes,[46] as follows:

> [A] review of whether a determination of material injury was in conformity with this requirement [of an objective examination] necessitated an examination of whether the investigating authorities had examined all relevant facts before them (including facts which might detract from an affirmative determination) and whether a reasonable explanation had been provided of how the facts as a whole supported the determination made by the investigating authorities. [47]. . .
> A review of whether [a determination of material injury was based on positive evidence] involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities had correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities. In this context, the Panel considered that the mere fact that in a given case reasonable, unprejudiced minds could differ as to the weight to be accorded to certain facts was not a sufficient ground to find that a determination of material injury based on such facts was not based on positive

Cont.
Contracting Party's measure would have been upheld as long as the Contracting Party was able to give any explanation, no matter how dubious.

42 Panel Report, *New Zealand—Electrical Transformers from Finland,* L/5814–32S/55, adopted 18 July 1985. This case is sometimes incorrectly cited as endorsing an intermediate standard of review. In truth, New Zealand's argument that, under Article VI.6(a) GATT 1947, its determination of material injury should not be scrutinized by the Panel, was vigorously rejected. The Panel held that to accept New Zealand's argument:

> "would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT. . . . The Panel fully shared the view . . . that "it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged" (para. 4.4).

The Panel then proceeded to examine itself whether material injury had been caused to New Zealand's transformer industry (and concluded it had not) (para. 4.7).

43 In Panel Report, *United States—Imposition of Anti-Dumping Duties on Imports on Seamless Stainless Steel Hollow Products from Sweden*, ADP/47, adopted 20 August 1990, para. 3.11, the United States explicitly asked the Panel to consider the "standard of review". Also, all other cases discussing the standard of review involved the United States.

44 Panel Report, *United States—Imposition of Anti-Dumping Duties on Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, and Panel Report, *United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994.

45 Ibid., para. 491/para. 257.

46 Article 3.1 Tokyo Round Anti-Dumping Code; Article 6.1 Tokyo Round Subsidies Code (with note 17).

47 Panel Reports *Norwegian Salmon Anti-Dumping* and *Countervailing Duties*, as note 44 above, para. 492 and para. 258, respectively.

evidence ... The Panel, however, recalled in this connection its observations ... on the requirement of an "objective examination" ...[48]

The subsequent decisions *Korea—Resins*[49] and *US—Lead and Bismuth I*[50] underlined the key element that a Panel was limited to reviewing the national authorities' factual determination, rather than making such a determination itself. The Panels, however, retained full control of legal interpretation.

In any event, the AB vigorously rejected the idea that GATT 1947 case law could serve as the legal basis for standard of review in WTO proceedings, claiming that Article 11 DSU is now the relevant yardstick.[51] This corresponds to the general line of the AB that even adopted GATT 1947 Panel reports, while being part of the GATT *acquis* and able to provide useful guidance, have no binding force under WTO law.[52]

3. *Article 11 DSU* et al.

The AB first discovered Article 11 DSU as a key provision for standard of review in the famous *EC—Hormones* case. Although not a trade remedy case (the case was brought under the SPS), it became the leading case for the AB's subsequent decisions regarding standard of review in safeguard cases. Considering the standard of review, the AB held that, "... Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for Panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements".[53]

The AB then recalled that Article 11 DSU called for "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[54]

From this, the AB concluded that

> [s]o 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". Many Panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[55]

---

48 Ibid., para. 494/para. 260.

49 Panel Report, *Korea—Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92, adopted 27 April 1993, para. 227.

50 Panel Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, adopted 15 November 1994, para. 371.

51 AB Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras 117–118; cf. Panel Report, *US—Shirts and Blouses*, as note 39 above, para. 7.15.

52 AB Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

53 AB Report, *EC—Hormones*, as note 37 above, para. 116.

54 Ibid.

55 Ibid., para. 117.

> In so far as legal questions are concerned—that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement—a standard not found in the text of the SPS Agreement itself cannot absolve a Panel (or the AB) from the duty to apply the customary rules of interpretation of public international law.[56]

In a series of SG decisions, the AB gave more precise meaning to this general rule for "fact-finding". The *Argentina—Footwear* case held that the Panel had correctly applied the standard of review of Article 11 DSU in not conducting:

> a *de novo* review of the evidence, [n]or . . . substitut[ing] its analysis and judgment for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 [SG], the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.[57]

As to the first requirement (all relevant facts), the *US—Wheat Gluten* case specified that national authorities may not:

> . . . limit their evaluation of "all relevant factors" . . . to the factors which the interested parties have raised as relevant. . . . If the competent authorities consider that a particular "other factor" may be relevant . . . their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. ... [T]he competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors.[58]
>
> However, as is clear from the preceding paragraph of this Report, we also reject the . . . argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant.[59]

As to the second requirement (adequate explanation), the *US—Lamb* decision held that it is not sufficient for a national authorities' explanation to respond to only those alternative explanations of the data that were advanced during the national proceedings. Rather, the national authorities' explanation has to refute all alternative explanations.[60] It seems that the *US—Wheat Gluten* decision endorses the view that such adequate explanation must be embodied in the national authorities' published report.[61]

The resulting standard of review was most elaborately articulated in the *US—Lamb* decision:

> [A]n "objective assessment" of a claim under Article 4.2(a) [SG] has, in principle, two elements. First, a Panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a Panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the Panel's objective assessment

[56] Ibid., para. 118. See also AB Report, *Argentina—Footwear*, as note 51 above, para. 122; and Oesch, as note 2 above, p. 656.

[57] AB Report, *Argentina—Footwear*, as note 51 above, para. 121.

[58] AB Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, para. 55.

[59] Ibid., para. 56 (footnote omitted).

[60] AB Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001, paras 110–114, 148–149.

[61] AB Report, *US—Wheat Gluten*, as note 58 above, paras 156–163.

involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors". The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.[62]

[A]lthough Panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that Panels must simply *accept* the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a Panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the Panel critically examines that explanation, in depth, and in the light of the facts before the Panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A Panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[63]

In this respect, the phrase "*de novo* review" should not be used loosely. If a Panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that Panel has not, thereby, engaged in a *de novo* review. Nor has that Panel substituted its own conclusions for those of the competent authorities. Rather, the Panel has, consistent with its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 [SG].[64]

The *US—Cotton Yarn* decision found this standard under Article 11 DSU to be applicable also in safeguard cases under the ATC.[65] It added to the existing case law that Panels must not consider evidence (of facts that existed during the time of the national proceeding) that became available only after the closure of the national proceeding.[66] Finally, the recent *US—Steel* decision confirmed that this standard of review under Article 11 DSU is also applicable to the requirement of unforeseen developments in Article XIX GATT that does not feature in the text of the SG.[67]

The AB has not yet spelled out this elaborate standard of review for CVM cases under the SCM. It has, however, confirmed that Article 11 DSU contains the applicable standard of review for such cases, too.[68] Parties in CVM cases have referred to the standard of review as elaborated in SG cases.[69]

---

[62] AB Report, *US—Lamb*, as note 60 above, para. 103.

[63] Ibid., para. 106 (underscore added, italics in original).

[64] Ibid., para. 107.

[65] AB Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, paras 74, 76.

[66] Ibid., para. 77-80.

[67] AB Report, *United States—Definitive Safeguard Measures on Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, para. 275-280; confirming AB Report *US—Lamb*, as note 60 above, para. 72 (but see also para. 76).

[68] AB Report, *US—Lead and Bismuth II*, as note 36 above, paras 45–46, 51 (add. Panel Report, ibid., paras 6.18–6.19); AB Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* WT/DS213/AB/R, adopted 19 December 2002, para. 142.

[69] See, e.g., US arguments in Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R, circulated 29 August 2003 (notice of appeal filed 21 October 2003), para. 7.130.

C. Other cases, in particular SPS cases, do not apply the trade remedy standard of review

Although the aforementioned SPS case *EC—Hormones* was at the origin of the jurisprudence just explained, the latter is limited to standard of review for trade remedy measures.[70]

Cases other than trade remedy and SPS cases have never referred to the "all relevant factors" and "reasoned and adequate explanation" tests, nor even to the *EC—Hormones* holding that neither *de novo* review nor total deference, but rather the objective assessment of facts is required by Article 11 DSU. Panels have made their own assessment of factual and legal issues, without any form of deference to any findings that may have been made by the domestic authorities, and the AB and the parties have accepted this. For example, in the *US—Gasoline* case, the Panel examined *itself* the factual and legal issues of whether the statutory baseline method adopted by the US Environmental Protection Agency was necessary in the sense of Article XX(b) GATT.[71] Neither the parties nor the AB took issue with this.[72] Of course, many of the measures at issue were not preceded by an explicit domestic procedure of fact-finding and legal evaluation, such that the intermediate standard of review from trade remedy cases (or any other intermediate standard of review, for that matter[73]) would have been totally out of place.

However, SPS cases often involve such an explicit domestic procedure. Nevertheless, none of the Panel and AB decisions in SPS cases mention the "all relevant factors" and "reasoned and adequate explanation" test, or cite to the trade remedy cases discussing standard of review.[74] Panel decisions at least paid lip service to the *EC—Hormones* holding that Panels should not undertake *de novo* review in SPS cases.[75] Not so the AB. Neither in *Australia—Salmon* nor in *Japan—Apples* did the AB

---

[70] One commentator has maintained that the "all relevant factors" and "reasoned and adequate explanation" standard of review applies in all WTO cases, see Oesch, as note 2 above, p. 649. But Oesch cites only trade remedy and SPS cases in this part of his analysis.

[71] Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996 (with AB Report), paras 6.22–6.29. The Panel asked if the United States had "demonstrated" that the statutory baseline method was necessary, but this was only because the burden of proof was on the United States, not because the Panel looked at any "demonstration" by the Environmental Protection Agency rather than at the issue of necessity as such.

[72] AB Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, pp. 25–28 (the AB dealt with the matter in relation to Article XX(g) GATT, as the US appeal was limited to that provision).

[73] Waincymer, as note 12 above, para. 6.15.1 (p. 348); Ehlermann and Lockhart, as note 18 above, pp. 12, 23; cf. Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 Mich. J. Int'l L. (1998), pp. 1195, 1236 (distinguishing "on-the-record" proceedings in which the facts are said already to be established, and other proceedings in which Panels would have to make factual findings first).

[74] Cf. Ehlermann and Lockhart, as note 18 above, p. 25: "the 'objective assessment' applied under the *SPS Agreement* does not appear to be the same as the assessment under the trade remedy agreements."

[75] The Panel Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/R, adopted 6 November 1996 (with AB Report), stated twice that it did not undertake a *de novo* review (paras 8.41, 8.172). The Panel Report, *Japan—Measures Affecting the Importation of Apples*, (WT/DS245/R), adopted 10 December 2003 (with AB Report), reproduced the relevant passages from the *EC—Hormones* AB report in footnote 236 in the section regarding burden of proof. The Panel Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999 (with AB Report), does not mention the standard of review at all.

repeat the *EC—Hormones* holdings on *de novo* review and Article 11 DSU.[76] Whether this is a soft reversal of the *EC—Hormones* decision on this point remains to be seen. It is true that none of the two cases involved an appeal by either party that was directed straight at the issue of standard of review properly speaking (the issue was instead the handling of evidence by the Panel). But in both cases the appeals at least alleged a violation of Article 11 DSU and the obligation of the Panel to make an objective assessment. Certainly the AB could have referred to the relevant passages of its *EC—Hormones* decision at least in passing.[77] Instead, the *Australia—Salmon* decision held:

> [I]n response to Australia's contention that the Panel failed to accord "due deference" to matters of fact it put forward, we note that Article 11 of the DSU calls upon Panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Therefore, the function of this Panel was to assess the facts in a manner consistent with its obligation to make such an "objective assessment of the matter before it". We believe the Panel has done so in this case. Panels, however, are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.[78]

It is quite remarkable that the AB did not find it necessary to explain why the due deference demanded by Australia was not what was required by the *EC—Hormones* decision that rejected total deference. The AB also did not take issue with what seems to have been a direct assessment of the evidence by the Panel, rather than control of the assessment of the evidence by the Australian authorities. In fact, the last sentence of the quoted passage seems to endorse such an approach. It is not quite clear what would distinguish this approach from the *de novo* review that was refuted by the AB in its *EC—Hormones* decision.

D. THE EVALUATION OF FACTS IS REVIEWED UNDER THE STANDARD OF REVIEW FOR FACTUAL ISSUES

To conclude this section, it will be helpful to explain the respective scope of the different standards of review for legal issues on the one hand, and factual issues on the other. Both Article 17.6 ADP and the *EC—Hormones* decision distinguish legal and factual issues. Clearly, the establishment of the "raw" facts will be dealt with under the standard of review for factual issues, i.e., Article 17.6(i) ADP and the "all relevant factors" and "reasoned and adequate explanation" test, respectively. On the other hand, abstract legal interpretation will be dealt with under the standard of review for legal issues, i.e., Article 17.6(ii) ADP and full *de novo* review, respectively. But what about the step in between, the evaluation (qualification, characterization) of the raw facts

[76] AB Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998; AB Report *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003.

[77] As did the parties: Australia in *Australia—Salmon*, ibid., para. 12, and the United States in *Japan—Apples*, ibid., para. 85.

[78] AB Report, *Australia—Salmon*, as note 76 above, para. 267 (emphasis added). See also AB Report *Japan—Apples*, as note 76 above, para. 221.

under the applicable legal rules, i.e. the act of linking facts and law by determining whether a set of facts matches the situation described by a certain legal term?[79]

An example regarding the determination of increased imports will illustrate the problem and provide the key for its solution. Putting together the numbers that imports were at level i_1 at time t_1 and at level i_2 at time t_2, and calculating from this that the change in the level of imports between time t_1 and t_2 was ∂, is a matter of establishing the (raw) facts. On the other hand, deriving from the legal requirement that "a product is being imported in ... increased quantities" (Article 2.1 SG) that the required increase in imports needs to be recent, but that imports need not be increasing at the time of the determination,[80] is a matter of abstract legal interpretation. The same holds for the statement that the increase must have a certain degree of recentness, suddenness, sharpness and significance, and that these requirements can only be shown on the basis of a concrete case-by-case analysis considering all the features of the development of import quantities.[81] By contrast, the performance of this case-by-case analysis *in casu* to determine whether, given the other circumstances of the concrete case, the increase ∂ between t_1 and t_2 legally qualifies as having the requisite degree of recentness etc. is a matter of evaluating the (raw) facts. In the *US—Steel* case, the Panel dealt with this hybrid matter of fact and law under the "reasoned and adequate explanation" test, and the AB approved.[82] This shows that the evaluation of the facts is being reviewed under the standard of review for factual issues in SG cases, some confusing language in the AB's *EC—Hormones* report[83] notwithstanding.[84]

---

[79] On this concept see already note 19 above.

[80] Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003 (with AB Report), paras 10.159, 10.161–10.162.

[81] Ibid., paras 10.167–10.168, 10.170–10.171; confirmed by the AB Report, as note 67 above, paras 358–360; cf. AB Report, *Argentina—Footwear*, as note 51 above, para. 131.

[82] Panel Report, as note 80 above, paras 10.169, 10.176, and, e.g., 10.181; AB Report, as note 67 above, paras 368–370, 374, 376.

[83] The confusion stems first of all from the AB's choice of words that distinguished the standards of review for "fact-finding" on the one hand, and "legal questions" on the other (AB Report, *EC—Hormones,* as note 37 above, paras 117–118, quoted above, text accompanying notes 55-56). The ordinary meaning of the term "fact-finding" seems to be limited to the establishment of "raw" facts. In addition, the AB explicitly counted the evaluation or characterization of the facts as a legal question (albeit in the slightly different context of determining the scope of appellate review under Article 17.6 DSU):

> Findings of fact, as distinguished from legal interpretations or legal conclusions, by a Panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; ... Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a Panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question (ibid., para. 132, emphasis added).

This would make one think that the evaluation of facts is to be reviewed under the standard of review applicable for legal issues. But a second reading of the pertinent sections of the *EC—Hormones* decisions casts doubts on this picture. One reason the AB gave for its apparent opposition to any kind of deference for "legal questions" was 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 (ibid., para. 118).

It would seem, though, that the customary rules of interpretation of international law, like any rules of interpretation, have nothing to say about the evaluation of facts. Also, the AB made a connection between "legal questions" and Art. 17.6(ii) ADP (ibid.), which covers, as will be shown in the following paragraph, only abstract legal interpretations.

For AD cases, the same answer seems to be provided by the very text of Article 17.6 ADP. It distinguishes legal interpretation (paragraph (ii)) and the "assessment of the facts" (paragraph (i)). Article 17.6(ii) ADP explicitly refers only to legal interpretations. One would not usually refer to the evaluation of the case-specific facts under the applicable legal rules as an issue of interpretation. Article 17.6(i) ADP, however, counts not only the establishment of the facts, but also their evaluation as part of the assessment of the facts. Establishment must refer to fact-finding properly speaking, i.e., the collection and weighing of evidence to establish if certain facts exist(ed) or not.[85] It is difficult to see what evaluation would refer to if it were not the act of linking these established facts to the applicable legal rules. Thus, in AD cases, the standard of review for Panels reviewing the evaluation of the facts by the national authorities is paragraph (i) of Article 17.6 ADP.[86]

For SG cases, a textual justification for the solution found here will be provided in the next section dedicated to the legal basis for standard of review in trade remedy cases.[87]

IV. Legal Basis for Standard of Review in Safeguard and CVM Cases

From the citations above, it may appear that the AB has based its jurisprudence regarding the standard of review in safeguard cases (and one can expect that it will be the same in CVM cases) primarily on Article 11 DSU. This has indeed often been the interpretation, or at least short-form description, in scholarly writing on the topic.[88] However, this section aims to suggest that Article 11 DSU is not the decisive provision at the basis of the AB's case law. Instead, the substantive rules of the relevant agreements (SG, ATC) form the basis of this case law.[89] Consequently, rather than simply referring to Article 11 DSU, Panels will need to closely examine the substantive rules at issue in a

---

[84] Ehlermann and Lockhart, as note 18 above, pp. 21–22; cf. Oesch, as note 2 above, pp. 639–644 (from which it follows that Oesch treats the evaluation of facts as a question of fact) and 648–653 (which describes only one standard of review of facts).

[85] Cf. AB Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Article 21.5 of the DSU by the United States,* WT/DS132/AB/RW, adopted 21 November 2001, para. 85: "the 'establishment' of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses".

[86] But see Ehlermann and Lockhart, as note 18 above, pp. 13–14, according to which the evaluation of facts falls under both para. (i) and (ii) of Article 17.6 ADP.

[87] See Section IV.B. below, text accompanying note 112.

[88] Ehlermann, as note 1 above, p. 619; Duane W. Layton and Jorge O. Miranda, *Advocacy Before World Trade Organization Dispute Settlement Panels in Trade Remedy Cases*, 37 J.W.T. (2003), pp. 69–103, at 83; Yong-Shik Lee, as note 12 above, p. 643; Waincymer, as note 12 above, para. 6.15.2 (p. 350); Zleptnig, as note 12 above, pp. 3–5.

[89] Matthias Ruffert, *Der Entscheidungsmasstab im WTO-Streitbeilegungsverfahren—Prozessuale Relativierung materieller Verpflichtungen?*, 100 ZVglRWiss (2001), pp. 304, 320; Stefan Ohlhoff, "Durchsetzung und Überwachung des WTO-Rechts", in Hans-Joachim Priess and Georg M. Berrisch (eds), *WTO Handbuch* (2003), para. 97; Wolfgang Weiss and Christoph Herrmann, *Welthandelsrecht* (2003), para. 289; cf. Edmond McGovern, *International Trade Regulation*, loose-leaf (15th supplement, 2003), §2.2325(a) (p. 2.23-35) and §2.2325(b) (pp. 2.23-40 note 1); Ehlermann and Lockhart, as note 18 above, pp. 5–6, 12, 21.

given case to derive the applicable standard of review. The AB's analysis itself has sometimes been slightly cursory, leaving some doubts about the accuracy of its findings.

A. Article 11 DSU alone cannot support the AB's jurisprudence in safeguard cases

The import of Article 11 DSU is already brought into doubt by a comparison of the standard of review enunciated by the AB in WTO safeguard cases with the one elaborated by late GATT 1947 Panels in trade remedy cases. One notices that they are very similar, although Article 11 DSU did not exist in the GATT 1947 system, and its predecessor, paragraph 16 of the Tokyo Round Understanding on Notification, Consultation, Dispute Settlement, and Surveillance,[90] was not mentioned by GATT 1947 Panels in this context. The doubt grows into disbelief when one looks at the standard of review employed in WTO cases other than trade remedy cases that, as explained above, do not contain any mention of the intermediate standard of review described above. Article 11 DSU, however, is a rule of general application. If it were the basis of the WTO safeguard standard of review, how could the standard of review in other cases be different (absent special provisions like Article 17.6 ADP)?[91]

This disbelief is confirmed by a sober examination of the text of Article 11 DSU. That a Panel is to conduct an "objective assessment of the matter" is self-evident and could not be otherwise; the AB has said as much itself.[92] Obviously, such "objective assessment" has to apply to both "the facts of the case and the applicability of and conformity with the relevant covered agreements". But neither Article 11 DSU as such nor any other provision of the DSU give any guidance on whether the "objective assessment" should take the form of a *de novo* review, some kind of deferential approach, or whatever.[93] If anything, one might point to the wording that "*a Panel* should *make* an objective assessment" to argue that a Panel itself is to analyse facts and law, rather than to defer to national authorities in any way.[94] This, by the way, is the meaning that the AB itself gave to "objective assessment" in the context of "legal questions"![95] Thus, the most one can say about Article 11 DSU is that this central provision *does not preclude* any

[90] GATT, BISD, 26S/210, 28 November 1979.

[91] Cf. Ehlermann and Lockhart, as note 18 above, pp. 5–6; McGovern, as note 89, §2.2325(b) note 2 (p. 2.23-37).

[92] AB Report, *US—Japan Hot-Rolled Steel*, as note 22 above, para. 55; cf. Panel Report, *US—Underwear*, as note 39 above, para. 7.8 ("the DSU does not contain a provision mandating a specific standard of review").

[93] Axel J. Desmedt, *Hormones: "Objective Assessment" and (or as) Standard of Review*, 1 J.I.E.L. (1998), 695, 697; Ehlermann and Lockhart, as note 18 above, p. 5; Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd edn: 1999), pp. 69–70; Ohlhoff, as note 89 above, para. 97.

[94] Cf. Pierre Pescatore, "Drafting and Analyzing Decisions on Dispute Settlement", in Pierre Pescatore *et al.* (eds), *Handbook of WTO/GATT Dispute Settlement*, Vol. 1, loose-leaf (2002), p. 38. Lichtenbaum, as note 73 above, pp. 1234, 1236, has even argued that showing any kind of deference to the national authorities would taint the result with the subjective views of those national authorities, and an objective assessment was therefore incompatible with such deference. This argument, however, confuses the "objective assessment of the matter" with an objective determination of the substantive conditions required to impose trade remedy measures. If "the matter" refers only to the national authorities' determination (more on this in the next subsection), a Panel can still objectively evaluate the quality of that determination.

[95] AB Report, *EC—Hormones*, as note 37 above, para. 118.

particular standard of review.[96] And this is all the AB can have meant by its famous *EC—Hormones* quote that, "... the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts".[97]

Without at least a thorough discussion of the wording and context, it is inconceivable that the AB might have deduced from the text of Article 11 DSU alone anything so fundamental as the applicable standard of review.[98] Surely the AB's assertion of the practical difficulties a *de novo* review would supposedly entail[99] could not have sufficed as a reason for any particular standard of review under the accepted rules of interpretation and given the care given to interpretive questions in WTO law. There are, of course, other instances where the AB could not rely on any clues in the wording of the WTO agreements to derive some fundamental rule, in particular the rules on burden of proof, where the AB could take recourse to a comparative approach and the existence of (almost?) universally accepted core rules.[100] But no such universally accepted rules exist for standard of review, so that the AB could not be relieved from its task of scanning the wording of the WTO agreements for clues, or at least explain why the wording was inconclusive in this respect (which it is not, as discussed below).

In this context, it is worth pointing out some disharmony in the *EC—Hormones* AB report. While the above quoted passage of the report proclaims that "Article 11 of the DSU ... articulates ... the appropriate standard of review",[101] the AB also stated two paragraphs earlier that there are *no* provisions in the DSU prescribing a particular standard of review. Instead, the AB referred to the applicable substantive agreement, the SPS, as the relevant textual source for standard of review:

> The standard of review appropriately applicable in proceedings under the *SPS Agreemen*t, of course, must reflect the balance established <u>in that Agreement</u> between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not <u>clearly rooted in the text of the *SPS Agreement* itself</u>, may well amount to changing that finely drawn balance; and neither a Panel nor the Appellate Body is authorized to do that.[102]

[96] Similarly, Ruffert, as note 89, pp. 314–315, 318; Oesch, as note 2 above, pp. 647–648 (although he does not draw from this observation the conclusions drawn here); also cf. Ehlermann and Lockhart, as note 18 above, p. 5.

[97] AB Report, *EC—Hormones*, as note 37 above, para. 117.

[98] Critical of the general approach to standard of review in WTO law therefore Waincymer, note 12, para. 6.15.1 (pp. 349–350) and para. 6.15.5 (p. 354), pointing out that in the absence of some express guidance in the DSU, the default standard of review should be full *de novo* review.

[99] AB Report, *EC—Hormones*, as note 37 above, para. 117 (quoted text accompanying note 55).

[100] AB Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 14 (with references to international and domestic law in notes 15 and 16); Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement—Who Bears the Burden?*, 1 J.I.E.L. (1998), pp. 227, 229–233.

[101] AB Report, *EC—Hormones*, note 37, para. 116 (quoted text accompanying note 53).

[102] Ibid., para. 115 (emphasis added, footnote omitted).

B. THE AB'S JURISPRUDENCE IS BASED ON A COMBINATION OF ARTICLE 11 DSU AND THE RELEVANT SUBSTANTIVE RULES

Indeed, a closer look at the AB's jurisprudence reveals that the AB has provided good and valid, if somewhat cursory, textual reasons based on provisions of the SG and ATC for the standard of review it developed in safeguard cases. As explained above, standard of review results from the interplay of procedural and substantive rules.[103] The AB seems to have a perfectly clear vision of this interplay and routinely cites the substantive rules of the relevant WTO agreements in developing the standard of review. Thus, in the *Argentina—Footwear* case, the AB explained that, "… the Panel was obliged, *by the very terms of Article 4* [SG], to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination".[104]

Even more clearly, in *US—Lamb*, the AB held that:

> [t]his dual character of a Panel's review is mandated *by the nature of the specific obligations that Article 4.2 [SG]* imposes on competent authorities. …[105]
> It follows that the precise nature of the examination to be conducted by a Panel, in reviewing a claim under Article 4.2 [SG], stems, in part, from the Panel's obligation to make an "objective assessment of the matter" under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2 … [A]s with any claim …, Panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim.[106]

Finally, in *US—Cotton Yarn* the AB summarized, "In describing the duties of competent authorities, we simultaneously define the duties of Panels in reviewing the investigations and determinations carried out by competent authorities.[107]

So the AB is saying here that the duties of the national authorities, i.e. the substantive rules, define the duties of Panels, i.e. the standard of review! Indeed, under the substantive rules of the relevant agreements (ADP, SG, SCM, ATC) and GATT 1947/1994 provisions, the right to impose trade remedy measures might be understood to depend on the national authorities' determination of certain circumstances (e.g., material injury), *not* the existence of such circumstances as such. For example, Article VI.6(a) GATT reads, "No contracting party shall levy any anti-dumping or countervailing duty … *unless it determines* that the effect of the dumping or subsidization … is such as to cause or threaten material injury …" (emphasis added).

---

[103] See Section II.A above.
[104] AB Report, *Argentina—Footwear*, as note 51 above, para. 121 (emphasis added).
[105] AB Report, *US—Lamb*, as note 60 above, para. 104 (emphasis added).
[106] Ibid., para. 105.
[107] AB Report, *US—Cotton Yarn*, as note 65 above, para. 73. Cf. AB Report, *US—Hot-Rolled Steel*, as note 22 above, paras 55–56: "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *Panels* … the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement*" (para. 56, italics in original).

And while Article XIX GATT does not contain equivalent wording, Article 2.1 SG reads, "A Member may apply a safeguard measure to a product only *if that Member has determined*, pursuant to the provisions set out below, that . . .".

Similarly, Article 6.2 ATC (quoted in full by the AB in *US—Cotton Yarn*) provides that, "Safeguard action may be taken . . . when, *on the basis of a determination by a Member*, it is demonstrated that . . .".

To determine something is more than asserting it. The pertinent dictionary meaning of "determine" is "ascertain or establish exactly, typically as a result of research or calculation".[108] The relevant provisions of the SG, SCM and ATC might translate this into more precise requirements that a Member's determination must fulfil in order to constitute a valid basis for a trade remedy measure. In particular, the SG requires national authorities to "evaluate *all relevant factors*" (Article 4.2(a)) and "publish a report setting forth their findings and *reasoned conclusions* reached on all pertinent issues of fact and law". (Article 3.1) This, and only this, might be "the *matter*" of which Article 11 DSU requires "an objective assessment". The existence of similar requirements in the Tokyo Round Anti-Dumping and Subsidies Codes would explain the similarity of the WTO safeguard and the GATT 1947 anti-dumping and CVM standards of review.[109] As the US pointed out in the *US—Steel* case, the AB's jurisprudence on standard of review in WTO safeguard cases is just a gloss on these WTO provisions.[110] In the *EC—Hormones* SPS case, the AB could and did refer to the process-oriented language of certain SPS provisions, in particular Articles 3 and 5 ("on the basis of an examination and evaluation . . . determines", "shall take into account"), to deduce the inappropriateness of full *de novo* review in SPS cases.[111]

Incidentally, this view of the AB's jurisprudence would also provide a textual explanation why the standard of review for factual issues applies also to the evaluation of facts.[112] If the procedural rule is full *de novo* review of the matter and the matter is defined by the relevant substantive rules which require only a determination of the national authorities, a Panel must by necessity interpret these substantive rules to define what that matter is that the Panel is supposed to review. This justifies, and requires, *de novo* review of legal interpretations. However, national authorities do not make determinations of naked facts, but of certain legal conditions required for the imposition of a trade remedy measure. Thus, the matter to be reviewed by the Panel is

[108] *The New Oxford Dictionary of English* (1999).

[109] Cf. Article 6.1, 6.4 and in particular 6.3 of the Tokyo Round Subsidies Code, and Article 3.1, 3.4, 3.6 and in particular 3.3 of the Tokyo Round Anti-Dumping Code.

[110] *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB, WT/DS249/AB, WT/DS251/AB, WT/DS252/AB, WT/DS253/AB, WT/DS254/AB, WT/DS258/AB, WT/DS259/AB; United States, Appellant's Submission 21 August 2003, paras 59–64, and Oral Statement at the Oral Hearing of the AB 29 September 2003, paras 5–6; see also European Communities, Oral Statement at the 1st Meeting of the Panel—Standard and Scope of Review—29 October 2002, para. 7.

[111] AB Report, *EC—Hormones*, as note 37 above, para. 193, and the argument of the United States, ibid., para. 41.

[112] See Section III.D above.

the national authorities' determination of those legal conditions, i.e., including the evaluation of the facts by the national authorities.

C. The AB Views (Certain) SG and ATC Obligations as Purely Procedural in Nature

This interpretation of the AB's jurisprudence on standard of review implies that the AB takes the cited text of the substantive rules seriously and views the corresponding obligations of the national authorities as being purely procedural. In other words, the AB's view must be that at least on certain points, the legality of the determination suffices for the legality of the measure—a flawless determination of certain circumstances is required, rather than the existence of such circumstances as such. There are indications in the AB jurisprudence that this is indeed the AB's view. In *US—Line Pipe*, the AB distinguishes the "right" to impose a safeguard measure, and the conditions set on its "application". With respect to the former, the AB required no more than:

> *For this right to exist, the WTO Member in question must have determined*, as required by Article 2.1 of the Agreement on Safeguards and pursuant to the provisions of Articles 3 and 4 of the Agreement on Safeguards, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry.[113]

By contrast, with respect to the latter, and more generally where the text of the applicable rules flatly required certain circumstances to exist, the AB seems to have performed a full review of the facts.[114]

And in *US—Cotton Yarn*, the AB hinted that there might be:

> an *obligation*, flowing from the "pervasive" general principle of *good faith* that underlies all treaties[53], to *withdraw* a safeguard measure if post-determination evidence relating to pre-determination facts were to emerge revealing that a determination was based on such a critical factual error that one of the conditions required by Article 6 [ATC] turns out never to have been met.
>
> ---
>
> [53]We recall that in *US—Shrimp*, we stated:
>
> This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. (footnote omitted)[115]

---

[113] AB Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Line Pipe)*, WT/DS202/AB/R, adopted 8 March 2002, para. 84 (emphasis added); accord ibid., paras 157–158, 232–236, 262.

[114] Ibid., paras 261–262.

[115] AB Report, *US—Cotton Yarn*, as note 65 above, para. 81 (emphasis in original, other footnote omitted).

Significantly, the AB thought that this obligation would stem from the principle of good faith, not the ATC itself. And, as the AB recalls in the footnote, the principle of good faith is a limitation on the exercise of a right—from which it can be inferred that in the view of the AB, the right to impose the safeguard measure must exist in spite of the "factual error". This would mean that the right to impose the safeguard measure depends not on the objective facts, but only on the flawlessness of the determination by the national authorities. This flawlessness (as defined by the "all relevant factors" and "adequate explanation" test) would thus be all that a Panel can and must review—which gives the standard of review developed by the AB.

D. Procedural and substantive obligations need to be distinguished (and coordinated)

If the standard of review were based on the procedural nature of certain obligations in the relevant substantive SG, SCM, ATC and GATT rules, distinguishing those obligations and rules from other rules that flatly require the existence of certain facts (substantive obligations) would be key. Not all rules of, e.g., the SG refer only to a national authorities' determination in their wording.

For example, in the *US—Line Pipe* decision, the AB distinguished the right for the application of a safeguard measure, which required (only) a certain determination (explanation!) by the national authorities under Article 2.1, 3 and 4 SG, from the conditions for the application of the safeguard measure under Article 5.1 SG first sentence, which needed to exist as such but that did not need to be set out in a justification (explanation!) by the national authorities.[116] Such differences create problems of coordination, though. In their injury determination under Article 4.2(b) SG, the national authorities had to separate the effect of increased imports from the effect of other factors. Under Article 5.1 SG, the safeguard measure had to be applied only to the extent necessary to prevent or remedy such injury resulting from increased imports.[117] Since the AB found Article 4.2(b) to be violated in the given case, it did not need to resolve the tricky question of what would constitute the relevant benchmark of injury attributable to increased imports under Article 5.1 SG—the injury as flawlessly determined by the national authorities, or the injury as determined by the Panel? It would appear that the first solution imposes itself, as the second would devoid the characterization of Article 4.2(b) SG as procedural of all practical meaning.[118] This is

[116] AB Report, *US—Line Pipe*, as note 113 above, para. 84 (accord paras 157–158, 232–236, 262); also AB Report, *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, paras 96–103; Panel Report, *US—Steel*, as note 80, paras 10.25–10.27.

[117] AB Report, *US—Line Pipe,* ibid., para. 260.

[118] The second solution would double the possibilities of losing the case for the Member imposing the safeguard measure—it would be enough if either its determination was flawed or the Panel reached a different result (cf. at V.B.1. below).

The AB Report, *US—Line Pipe*, as note 113, para. 262, would have allowed the US to rebut Korea's *prima facie* case (based on the violation of Article 4.2(b) SG) of a violation of Article 5.1 SG by showing that, in fact, the safeguard measure was applied in such a manner that it addressed only the portion of the identified injurious effects just one of the many difficult problems of linking procedural and substantive obligations that will necessarily arise if one follows the AB's view.

The necessary delimitation of procedural and substantive obligations will not always be easy. Certain provisions that do not refer to a national authorities' determination themselves may just be complements to other provisions that do, and may share their procedural nature. Article 4.1 SG is clearly a complement to Article 4.2 SG in that sense. For other provisions, however, the situation is much less clear. Some of the controversy surrounding standard of review in the recent *US—Steel* case concerned the correct characterization of the "unforeseen developments" requirement in Article XIX GATT. As Article XIX:1(a) GATT itself does not refer to any sort of determination, the characterization of the "unforeseen development" requirement as procedural or substantive, and thus the formulation of the corresponding standard of review, depended—from the point of view propagated here—on the precise nature of the relationship between Article XIX GATT and Article 2.1 SG. The United States strongly pushed for separate treatment of the "unforeseen development" requirement in Article XIX:1(a) GATT. Referring to the difference in wording between Article XIX:1(a) GATT and Article 2.1, 4.2 SG, the United States argued that the "reasoned and adequate explanation test" is inappropriate for Article XIX GATT.[119] Generally, the United States put a lot of effort in distinguishing procedural and substantive obligations, and demanding different standard of review for the two.[120] This effort of the United States may have been hampered by its reluctance as a long-standing proponent of deferential standards of review to admit that it was thus arguing for a *de novo* review for certain GATT Article XIX/SG requirements (as the EC recognized).[121] This reluctance and even denial enabled the AB to dispose of the US argument simply by pointing out that there must be *some* control of the national authorities' determination, as required by Article 11 DSU:

> We do not see how a Panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on "unforeseen developments".[122]

Cont.
that is equal to or less than the injurious effects of increased imports. The AB thus left the door open for looking back to the facts themselves, rather than the national authorities' determination, if that determination was faulty, and for the purposes of Article 5.1 SG only. It does not follow that such recourse would be possible if the national authorities' determination was not faulty. But this whole discussion seems artificial anyway, as in fact it is hard to see what the benefit would have been for the United States to show that Article 5.1 SG was not violated—they needed to make a new injury determination anyway if they wanted to uphold or reimpose the safeguard measure at issue.

119 *US—Steel*, Appellant's Submission of the United States, as note 110 above, paras 15, 77–79; and the US Response at the Oral Hearing, quoted from the AB Report, *US—Steel*, as note 67 above, note 177.

120 See ibid., and, e.g., United States, Written Rebuttal 26 November 2002, paras 16, 20, 23–24, 29, 33–35, and Responses to the Panel's Questions for the Parties at the Second Meeting of the Panel 6 January 2003, pp. 1–3.

121 United States, Oral Statement, as note 110 above, para. 11; European Communities, 1st Oral Statement, as note 110 above, para. 13; and AB Report, *US—Steel*, as note 67 above, para. 273, note 172.

122 AB Report, *US—Steel*, as note 67 above, para. 279; see also para. 278.

But surely, such an objective examination by the Panel could have taken the form of a *de novo* review!

E. The AB's arguments supporting the standard of review are too cursory

The AB's *US—Steel* decision brushed aside the US textual arguments based on the difference in wording between Article XIX GATT and Article 2.1, 4.2 SG, "We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994."[123]

The AB hereby de-emphasized the wording of the provisions at issue, contrary to established WTO practice of treaty interpretation[124] and the AB's own approach to standard of review as shown above. This is not to say that the result reached by the AB was necessarily incorrect, nor that the AB did not provide any argument for it. For the AB also referred to the "inseparable relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*" as explained by previous decisions,[125] and the requirement in Article 3.1 SG for the national authorities to "publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law".[126] However, one would have wished that more absolute and relative weight had been accorded to these arguments.[127] Generally, arguments in WTO dispute resolution decisions are quite expansive. In particular, the wording is usually analysed in excruciating detail. No exception should be made for a question so fundamental as standard of review. The AB itself has pointed out this necessity. To quote again the precited passage from *EC—Hormones*:

> The standard of review appropriately applicable in proceedings under the . . . Agreement, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not *clearly rooted in the text of the . . . Agreement itself*, may well amount to changing that finely drawn balance; and neither a Panel nor the Appellate Body is authorized to do that.[128]

Unfortunately, *US—Steel* is not the only decision that might be considered a bit too cursory from this point of view. The problem is systemic and concerns the details of formulation as well as the very basis of the "all relevant factors" and "reasoned and adequate explanation" standard.

---

[123] Ibid., para. 276.

[124] Based on Article 3.2 DSU and the customary rules of interpretation of public international law.

[125] AB Report, *Korea—Dairy*, as note 116 above, paras 74–90; AB Report, *Argentina—Footwear*, as note 51 above, paras 78–97; AB Report, *US—Lamb*, as note 60, paras 69–71.

[126] AB Report, *US—Steel*, as note 67 above, paras 275, 277.

[127] These good arguments were contained in no more than two paragraphs, which is less than the space dedicated to the two preceding, less convincing arguments. The corresponding section (para. 72) in the AB Report, *US—Lamb*, as note 60 above, was only slightly more developed.

[128] AB Report, *EC—Hormones*, as note 37 above, para. 115 (emphasis added, footnote omitted).

1. *The Details of the "Reasoned and Adequate" Test Are Not Explained*

First, the AB has never explained why the explanation demanded by the national authorities would need to be "adequate", nor indeed why there should be a (published) "explanation" at all. In contrast to "evaluate all relevant factors" (Article 4.2(a) SG), neither term features as such in the relevant provisions of the SG. The provisions of the SG only require national authorities to publish "a report setting forth their findings and reasoned conclusions" (Article 3.1) and "a detailed analysis of the case ... as well as a demonstration of the relevance of the factors examined" (Article 4.2(c)). The question of whether the published explanation needs to be "adequate" is of central theoretical and practical importance. An example of national authorities losing a case because their explanation was not "adequate" is the AB report in *US—Wheat Gluten*.[129] On a theoretical level, the "adequate" criterion is the element of the standard of review that determines how much subjective leeway the national authorities will be granted (see below Section V.A.1). It seems that the only indication of how the cited provisions translate into the AB's requirement that the national authorities give a reasoned and adequate explanation is in the *US—Lamb* report, "By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, Panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*."[130]

There are two problems with this statement. Firstly, taken strictly literally, it treats the "reasoned and adequate" test as a sufficient, but not as a necessary condition for a national authorities' determination to be in compliance with the SG. The latter is, however, the meaning given to the "reasoned and adequate" test in WTO jurisprudence. Second, there is no explanation of how and why the cited provisions translate into the "reasoned and adequate" test. The statement is, in fact, not more than a simple assertion.

Again, this is not to say that the AB was necessarily wrong to adopt the "reasoned and adequate" standard, including the term "adequate". In particular, under Article 4.2 SG, frequently cited by the AB in this context, the required determination of causation must not be made unless the investigation demonstrates it on the basis of objective evidence (subparagraph (b)). The pertinent dictionary meaning of "demonstrates" is "clearly show the existence or truth of (something) by giving proof or evidence".[131] One could certainly consider that clearly showing the existence of causation is only possible through reasoned and adequate explanation. Similarly, one could perhaps derive from the requirement in Article 3.1 SG that the national authorities publish a

[129] As note 58 above, para. 161. The AB found the Panel's findings on Article 4.2 SG to be in violation of Article 11 DSU because the US determination had not contained an "adequate explanation" of profits and losses, one of the factors to be taken into account under Article 4.2(a) SG.

[130] AB Report, *US—Lamb*, as note 60 above, para. 105; see also AB Report, *US—Wheat Gluten*, as note 61 above, para. 91: "It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(b), that ..." (underscoring added), but the word "adequately" is not in Article 4.2(b)!

[131] *The New Oxford Dictionary of English* (1999).

written report with reasoned conclusions that the national authorities must provide an adequate explanation, keeping in mind that the dictionary meaning of "reasoned" is "underpinned by logic or good sense".[132] But the point is that the AB has never engaged in this interpretation exercise.

2. *The Wording Could Also be Interpreted to Support a* de novo *Approach*

In fact, and second, the outcome of a thorough analysis of the wording of the relevant provisions and the other relevant criteria as demanded by Article 3.2 DSU and the customary rules of interpretation of public international law, might as well show that the relevant agreements do, after all, require the Panel *itself* to make a finding of causation etc. Can the investigation demonstrate, i.e. clearly show—yet alone prove!—the existence of, e.g., causation if causation does not exist in the given case? If the answer is no, should it not be open to a complaining party to claim and prove the non-existence of causation and thus force the Panel itself to make a finding on this question?

One may object that such reasoning would neglect the context of the individual provisions requiring a demonstration, and the purpose of the SG as a whole.[133] The relevant context is the comprehensive set of procedural obligations that the SG prescribes for the domestic administrative proceedings. One might argue that these procedural obligations would lose all purpose if in the end a Panel would redo the entire analysis anyway.[134] The counterargument would be, however, that the procedural requirements would maintain their full significance in those cases which are not disputed before WTO Panels—by far the majority of safeguard cases decided by national authorities. The procedural requirements of the SG and ATC might be a necessary, but not a sufficient condition for the national authorities' determination to withstand scrutiny by a WTO Panel. Compliance with the procedural requirements (including reporting requirements) would guarantee that a Panel finds before it a developed factual record on which to base its findings, requiring only marginal additional evidence-taking.

In addition, if Panels undertook a *de novo* review of the substantive conditions for the imposition of safeguard measures, the procedural obligations of the SG would lose some of their weight and might be given a slightly less stringent meaning (which might be a great relief for national authorities, see Section V.B. below). If all that matters for the right of a Member to depart from its usual WTO obligations is to issue a report laying out how and why the conditions for such departure are met, it is almost inevitable to demand that such report follows a methodology and logic that ensures—in as far as possible—that the substantive conditions are in fact met.[135] If, on the other

---

[132] Ibid. However, this argument could hardly explain why the explanation needs to be adequate and reasoned.

[133] Cf. Article 31.1 of the Vienna Convention on the Law of Treaties.

[134] Cf. Ehlermann and Lockhart, as note 18 above, pp. 16–17.

[135] This point was made by the European Communities before the Panel in the *US—Steel* dispute, as note 116 above; see EC, 1st Oral Statement, as note 110 above, paras 10–14; 2nd Oral Statement, 11 December 2002, paras 11–12; 2nd Written Submission, 26 November 2002, paras 17, 30.

hand, the report only serves the purpose of establishing a developed factual record enabling other Members to evaluate the appropriateness of the measure, and a Panel to review the measure *de novo* with the help of that factual record, some gaps may be acceptable. In this context, one should note again the wording of the relevant SG provisions which require from the national authorities only "a report setting forth their findings and reasoned conclusions" (Article 3.1) and "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined" (Article 4.2(c))—this is, arguably, much less than a "reasoned and adequate explanation" ensuring the fulfilment of all the substantive requirements.[136]

3. *The Article 22.6 DSU Arbitration Award in* EC—Bananas III (Ecuador) *Sets a Positive Example*

It is not the proper role of the commentator to take a final position on such intricate questions with no one clear answer. But surely the question needs to be addressed by any adjudicating body under the WTO rules if the above-quoted demand of the AB is to be respected. In this regard, the Article 22.6 DSU arbitration award in *EC—Bananas III (Ecuador)* should be favourably noted. The arbitrators conducted a careful textual and contextual analysis of the term "considers" in Article 22.3 DSU and found a standard of review very similar to the one developed by the AB in SG cases.[137] (The pertinent dictionary meaning of "consider" points, however, much more strongly in the direction of an intermediate standard of review—it is "believe; think; regard (someone or something) as having a specified quality".[138]) The arbitral award sets a good example for developing the applicable standard of review through a solid deliberation of the relevant arguments based on the applicable provisions without even mentioning the term "standard of review" or any other broad theoretical concept not found as such in the WTO agreements.

F. The Role of Article 17.6(i) ADP Might Be Limited to Providing Qualitative Criteria of Intermediate Review

The relationship between the standard of review in SG and ATC cases and Article 17.6(i) ADP had been bracketed in the preceding discussion. An important question arises, though. The substantive rules of the ADP contain process-oriented language, i.e. procedural obligations, similar to the procedural obligations of the SG that, according to what has been identified here as the AB's reasoning, already results in an intermediate standard of review. What then is the role of Article 17.6(i) ADP in this view? None? Or

---

136 On the argument of *effet utile* and Article 17.6(i) ADP in this context, see subsection F below.

137 Decision of the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, circulated 24 March 2000, paras 47–60.

138 *The New Oxford Dictionary of English* (1999).

does Article 17.6(i) ADP add a second layer of standard of review (i.e., a second layer of deference)?

The solution is neither of the two. Article 17.6(i) ADP simply provides the qualitative criteria under which a Panel is to scrutinize the national authorities' determination. This means that the criteria mentioned in Article 17.6(i) ADP ("proper" and "unbiased and objective") fulfil the function that the "reasoned and adequate explanation" test fulfils in safeguard cases. In ADP cases, Article 17.6(i) ADP thus provides an explicit solution to a question where the AB's jurisprudence has been found to be particularly lacking in SG cases. In other words, the substantive rules of the GATT, ADP, SG, ATC and SCM may already prescribe that there be an intermediate standard of review, but Article 17.6(i) ADP still determines its qualitative criteria, i.e. the standard of review for ADP cases.[139] (Or perhaps it would be more accurate to say: a part of the standard of review, because the "all relevant factors" test is contained not in Article 17.6(i) ADP, but in other rules of the ADP. Article 17.6(i) ADP speaks only to how the Panel is to assess the *existence* (establishment) of the facts and their *meaning* under the relevant provisions (evaluation), but not to *which* fact(or)s need to be established and evaluated—this question is addressed in detail in Article 2, 3 and 17.5 ADP, not in Article 17.6(i) ADP.)

This reading of Article 17.6(i) ADP explains why the argument of *effet utile*—interpreting the individual provisions in a way as to give every provision an effect[140]—cannot be used either for or against the deduction of an intermediate standard of review from the SG's substantive rules (based on arguments that would also be applicable to the equivalent ADP rules)[141]: if the substantive rules do indeed already mandate an intermediate standard of review, then Article 17.6(i) ADP just provides the qualitative criteria of that standard of review; otherwise, Article 17.6(i) ADP itself embodies that standard of review.[142]

V. Practical Effect of the Intermediate Standard of Review for Factual Issues

The preceding sections tried to provide a solution for the first puzzle raised in the introduction of this article: why has the practical impact of Article 17.6 ADP been so limited? But there remains the second puzzle: why would the United States, the staunchest supporter of intermediate standard of review, the driving force behind Article 17.6 ADP, and the defending party in the *US—Steel* dispute, have pushed—

[139] As presupposed in the Ministerial Decision: "*The* standard of review in paragraph 6 of Article 17 ..." (emphasis added).

[140] On this principle, see AB Report, *Japan—Alcoholic Beverages*, as note 52 above, p. 12; Waincymer, as note 12 above, para. 7.18.7.

[141] Such an argument has been made by Lichtenbaum, as note 73 above, pp. 1234–1235.

[142] If one does not give weight to the *effet utile* argument in this context, there is, of course, another possible explanation why Article 17.6 ADP might not add to the generally applicable standard of review for all WTO cases: Article 17.6 ADP might just give explicit expression to that generally applicable standard of review that was already practised under the GATT 1947 and was meant to be continued after the creation of the WTO, cf. McGovern, as note 89 above, §2.2325(a) (p. 2.23-36); Ehlermann and Lockhart, as note 18 above, p. 17, note 39.

without saying so expressly—for a *de novo* review on some factual points in that dispute? The unconventional solution proposed in this section is that *de novo* review may in some ways be more favourable to the defending party than certain intermediate standards of review.[143], [144]

The crucial point is that unlike a total deference approach, intermediate (deferential) standards of review, and in particular those applicable in WTO trade remedy cases discussed above, contain control criteria, i.e. limits on the national authorities' liberty to make factual determinations. The immediate effect of these limits is that the substantive leeway accorded by the deferential standard of review may be much smaller than one might initially think (A). At the same time, however, such limits can multiply the possibilities to find procedural errors in a national authorities' determination, thus raising the probability that the national authorities will lose the case, no matter what the substantive merits of the national authorities' determination are (B). The only consolation for national authorities is that the consequences of "losing" a case under a deferential standard of review are limited (C).

A. The Substantive Leeway Accorded by "Deference" May Be Small

1. *"All Relevant Factors" and "Reasoned and Adequate Explanation" Test (SG and ATC)*

Under the "all relevant factors" and "reasoned and adequate explanation" test for disputes under the SG and the ATC, the limits on the national authorities' liberty to make factual determinations are defined by the terms "relevant" and "reasoned and adequate". These broad terms are rather deceiving. While they seem to afford some leeway to the national authorities, a closer look reveals that they at least carry the potential to align the national authorities very closely along the views of the Panels and the AB, and this is indeed what has happened in WTO jurisprudence.[145]

This is particularly true of the term "relevant". It is difficult to state in the abstract what is or is not "relevant" in a given case. It seems safe to say, though, that nobody aspiring to be objective would turn to irrelevant factors when assessing them. Panellists, one should think, aspire to be objective (as Article 11 DSU mandates them to) and thus all factors that they would consider in view of any given determination should, in their mind, be relevant. Consequently, they will fault the national authorities for not having looked at the same factors that they would have looked

[143] Whether this was indeed the motivation of the United States is of course a matter of speculation (just as whether the United States really wanted a *de novo* review in the first place, see note 9 above). The United States might also have been concerned about the growing use of trade remedy measures by other Members, and in particular by India and China, and felt that tighter control might make more sense in these changed circumstances.

[144] The following discussion is concerned only with standard of review for factual issues, as Panels exercise full review of legal issues in all but ADP proceedings, and even in ADP proceedings the role of Article 17.6(ii) ADP has so far been very limited. In addition, the following thoughts would hardly be applicable to an intermediate standard of review for legal issues.

[145] McGovern, as note 89 above, §2.2325(b) (pp. 2.23-39–2.23-40). It is commonplace to note that the margin of discretion left to national authorities is small; see, e.g., Oesch, as note 2 above, p. 653.

at.[146] As the AB held in the *US—Wheat Gluten* case, this includes factors not raised by the parties in the national proceedings, and, thus, presumably all factors that the Panellists would have thought useful to investigate.

A similar observation can be made for the term "reasoned". Given the close relationship of logic and reason, it would seem natural to consider an explanation containing logical errors to be not "reasoned".[147]

If "reasoned" points to issues of logic, "adequate" might point primarily to those issues in the assessment of facts that are not accessible to pure logic, i.e., that involve an element of subjectivity and are thus subject to persuasion, rather than proof.[148] More precisely, "adequate" might refer to the explanations' aptitude, in the Panel's view, to show that the substantive conditions that it refers to are indeed met.[149] At the limit, this could mean that as long as the Panellists are not persuaded by the explanation of the national authorities, it is inadequate ("What is wrong is always inadequate."). Of course, the AB stressed in the *US—Lamb* decision that Panels would not substitute their own views for those of the national authorities[150]—something that they would be doing, though, if they were to qualify as inadequate any explanation that does not persuade them. Nevertheless, it seems inevitable that the Panel will have a margin of appreciation as to what constitutes an "adequate" explanation—and who could prove that an *ad hoc* Panel that by definition rules only on one case would always find the national authorities' determination to be inadequate if it does not agree in substance, i.e., that the Panel has exceeded its margin of appreciation?

At this point, the gravity of the AB's failure to explain the origin of the "adequate" criterion becomes apparent. If the interpretation given here is correct, the "adequate" criterion is by far the most far-reaching in the "all relevant factors" and "reasoned and adequate explanation" test. To give an explanation that is free of logical errors (i.e., "reasoned") may not be easy, but with sufficient care the national authorities should be able to comply with this requirement in each case. And while what a Panel will consider "relevant" in a given case may not be clear in advance, once the national authorities get attuned to the new WTO rules and dispute settlement system,[151] the national authorities should be able to avoid any problems in this regard by taking into account all even remotely related factors and then explaining why certain factors are not

[146] National authorities can look at more factors. But even here, there is a risk that the Panel might consider it "inadequate" to look at "irrelevant" factors.

[147] Cf. *US—Steel*, US Appellant's Submission, as note 110 above, para. 60, with dictionary quotations.

[148] See note 19 above, and accompanying text.

[149] The European Communities indeed argued in the *US—Steel* case, as note 116 above, that if the Panel is not to perform a *de novo* review and is instead limited to reviewing the national authority's determination, then the reasoning ("methodology") performed by the latter must be enough to ensure that all requirements for the imposition of a trade remedy measure are met (even those not explicit in the text of the agreements and not yet clarified through AB jurisprudence); EC, 1st Oral Statement, as note 110 above, paras 10–14, 17; 2nd Oral Statement, paras 11–12; and 2nd Written Statement, paras 26–27, 30, both as note 135 above.

[150] Quoted at note 60 above, para. 107.

[151] Cf. V.B.4. below.

decisive in the case at hand. By contrast, the "adequate" criterion goes to the heart of the matter, and potentially curbs any or most subjective leeway that the national authorities might be meant to have under the relevant WTO agreements. As explained above, leaving the exercise of subjective judgment to the administration (or legislator) is one of the two principal rationales for an intermediate standard of review.[152] Whether the SG and ATC provisions *do* provide for such an intermediate review, and whether the national authorities are meant to be entrusted with such unreviewable subjective judgment, and if so, to what extent, is a question of debate—but it is a debate that the AB would have to engage in using the customary rules of interpretation of international law.

2. *"Proper" and "Unbiased and Objective" (Article 17.6(i) ADP)*

No such doubts exist regarding the existence of the intermediate standard of review under the ADP. Article 17.6(i) ADP defines the limits of this intermediate standard of review by the terms "proper" and "unbiased and objective". As explained above, the terms "proper" and "unbiased and objective" in Article 17.6(i) ADP constitute the qualitative criteria that the national authorities' determination, as required by Article VI GATT and the substantive provisions of the ADP, must fulfil. The precise meaning of these qualitative criteria, and thus how much leeway this intermediate standard of review accords to the national authorities, is, however, similarly dubious as under the jurisprudential standard of review for safeguard and CVM cases.[153] Clear indications are hard to come by, as easy leads such as those discussed above for "reasoned" do not seem to be available. "Unbiased and objective" might even be understood to refer to national authorities' subjective intent, which would be quite hard to establish in any Panel proceeding. Certainly the Panel would have to have recourse to objective criteria as indicators for any subjective intent. In this regard, it seems plausible to consider the failure to refute, or at least reasonably respond to, alternative explanations as an indicator of bias. The same would be true at least for major logical errors. Any logical error, giving weight to irrelevant factors, or omitting relevant ones, should render the establishment of facts improper. If such indicators were indeed used, they would position the standard of review as under Article 17.6(i) ADP at least in proximity of the "reasoned and adequate explanation" test in safeguard cases. Arguably though, the margin of appreciation granted to national authorities would be greater.

[152] Section II.B. above.

[153] Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 (with AB Report), para. 7.235 underlined these difficulties by apparently using "unbiased and objective" and "reasoned and reasonable" synonymously.

B. THE POSSIBILITIES OF MAKING PROCEDURAL ERRORS ARE MULTIPLIED

1. *Multiple Procedural Criteria Instead of One Result*

One might think that as long as the national authorities enjoy at least some degree of substantive leeway under an intermediate standard of review—i.e., as long as the standard of review does not necessarily completely align the national authorities' substantive views on those of the Panel on all points—their chances of winning a case should still be better under the intermediate standard of review than under *de novo* review. But while this may be conventional wisdom, it is not necessarily correct. An intermediate standard of review with its control criteria such as the "all relevant factors" and "reasoned and adequate explanation" test shifts the focus from the result of the national authorities' determination to its reasoning, and thereby multiplies the points reviewed by a Panel and the potential for finding errors. Whereas under *de novo* review the national authorities' determination will stand as long as the Panel agrees with the result (a yes/no problem and thus, in the abstract, a 50/50 chance, so to speak), it will be invalidated under the intermediate standard if the national authorities made just one mistake (as defined by the standard of review) in reaching that result. For example, if a Panel considers that ten factors were relevant for determining causation in a given case, under the intermediate "all relevant factors" standard the national authorities will fail if they forget to take into account any one of the ten—regardless of whether the Panel itself (or the national authorities, for that matter) would also have found causation based on all ten relevant factors. Likewise, any logical error in the national authorities' explanation should vitiate their determination, even though the Panel might agree with the result.[154] Occasional statements to the contrary[155] would seem to ignore the fundamental difference in the type of analysis undertaken under the intermediate standard of review, and the type of analysis that would even allow the Panel to arrive at a statement that certain facts are existent or certain legal conclusions warranted in a given case. Thus, for example, the AB in *US—Lamb* explicitly emphasized that it only found the USITC's explanation of threat of serious injury to be insufficient, and made no finding on whether there actually *was* threat of serious injury.[156]

Of course, this does not mean that the intermediate standard of review will always be worse for the national authorities. The intermediate standard of review may shelter the national authorities' determination from a Panel's divergent substantive view. The point made here though is that it may also—and possibly more often—work the other

[154] Cf. AB Report, *Mexico—HFCS (21.5)*, as note 85 above, paras 92, 127 *et seq.*, in particular para. 131. Mexico had based its determination on a certain assumption (detrimental to the right to impose the anti-dumping duty). The Panel found the determination to be not sustainable on that basis, but found it unnecessary to assess whether the measure might be justified on other grounds. The AB agreed.

[155] Panel Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001 (with AB Report), para. 7.252; Waincymer, as note 12 above, para. 6.15.5 (p. 354).

[156] AB Report, *US—Lamb*, as note 60 above, para. 160; cf. AB Report *Mexico—HFCS (21.5)*, para. 92; AB Report, *US—Line Pipe*, as discussed at note 118 above; McGovern, as note 89 above, §2.2325(c) (pp. 2.23-41–2.2342).

way even in a case where on substance, the Panel would have agreed with the national authorities.

2. *More Elaborate Substantive Conditions Create More Sources of Possible Errors*

One needs to be mindful that this control of national authorities' reasoning applies to each and every substantive condition subject to the intermediate standard of review. This further multiplies the possible sources of error. For example, the national authorities have to take into account all relevant factors and provide a reasoned and adequate explanation for every factual and legal determination that they are required to make under the SG provisions. And the multiple possibilities of finding faults in national authorities' determinations described above will come to bear on each and every substantive condition that the national authorities are required to establish. By contrast, one could imagine that under a *de novo* standard of review, the Panel would look only at the overall result, and it would matter only if the national authorities got this overall result right.

In this context, one should note an interesting interplay between legal interpretation and the standard of review for the assessment of facts. Broad legal terms, as for example those contained in the WTO agreements, may be broken down into more readily observable sub-terms, sub-sub-terms, and so on, by way of legal interpretation. This is often indispensable for working with such broad terms, and part of the standard work of courts all over the world. It is therefore well within the AB's task "to clarify the existing provisions of [the covered] agreements",[157] and must not be confused with "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements" (cf. Article 3.2 DSU). Nevertheless, it increases the number of substantive conditions that the national authorities must establish in order to apply a trade defence measure by replacing one or more broad condition by a higher number of narrower conditions. If these narrower substantive conditions are closer to the facts and thus truly easier to observe, the national authorities' task will be made easier in spite of the higher number of required determinations. If not, however, the potential for finding faults in the national authorities' determinations will increase as a consequence of the interpretative work performed.

3. *Written Report*

The requirement that the reasoned and adequate explanation for all those required determinations needs to be contained in the written report only makes matters worse for the national authorities.[158] It is not enough to have taken "all relevant factors" into

[157] Under reserve of special conditions under Article 17.6(ii) ADP.

[158] Horlick and Clarke, as note 6 above, p. 316. On the written report requirement, see AB Report, *US—Wheat Gluten*, as note 58 above, paras 156–163, and text accompanying note 61.

account and to have come up with a "reasoned and adequate explanation" of one's determination for each and every substantive condition—it all needs to be embodied in the written report. Not surprisingly, complaining parties in general, and the European Community in the recent *US—Steel* dispute in particular, have insisted on this requirement.[159] Since in a complex case like the *US—Steel* dispute, it is highly probable that there will be some gap or another in the report when measured against this exacting standard, one can understand the concerns of the United States, defending party in the dispute, that the standard will become impossible to meet in practice.[160] It is worth repeating that errors that would make the defending party lose a case do not necessarily mean that the conditions that would enable the national authorities to impose a trade defence measure are not present in substance, i.e., that the national authorities could not have imposed the measure had they argued properly and written a corresponding report, or that a Panel would not have found that all conditions for the measure are present had the Panel reviewed the matter *de novo*. This is particularly true of errors that consist in pure (negligent) omissions.

4. *Novelty of the Rules and Dispute Settlement System*

Additional, but temporary, troubles for national authorities result from the novelty of the relevant provisions of the ADP, SCM, SG and ATC and the WTO system as a whole. The case law explaining these provisions is only now developing. Many questions of interpretation have thus not yet been clarified. Contours of what Panels and the AB will consider "relevant", "reasoned" and "adequate" (or "proper", "unbiased" and "objective") under these provisions are only now emerging. National authorities therefore can hardly know in advance what points exactly need to be considered and how. Given the—as compared to national legal systems—low case density of the WTO dispute settlement system, and the limited number of issues raised in particular before the AB in each case, this situation is bound to persist for quite a while.

In sum, and using hyperbole, one can say that in order to win a case before a WTO Panel, the national authorities have to establish a written report containing an "adequate explanation" free of logical errors of how a yet undefined set of factors supports determinations of a yet undefined set of conditions. From this perspective, it is hardly surprising that defending parties have generally lost in the trade remedy cases brought under the WTO system so far.[161]

---

159 EC, 1st Oral Statement, as note 110 above, para. 20; 2nd Written Submission, as note 135 above, paras 32–33.

160 United States, 1st Written Submission, 4 October 2002, paras 59–60; 2nd Written Submission (Written Rebuttal), 26 November 2002, paras 1–2.

161 GAO Report, as note 8 above, pp. 12–13; for safeguard measures in particular Yong-Shik Lee, as note 12 above, pp. 642–643. Of course, this record also reflects the fact that only a small number of trade remedy measures have been challenged; cf. Durling, as note 28 above, at pp. 127–129, and GAO Report, pp. 10–11.

C. Losing a Case May Have Limited Consequences

However, to the extent that the growing body of case law does clarify the legal requirements, the national authorities will little by little find it easier to set out all the relevant determinations and take into account all relevant factors in their reports.[162] One should also not forget that the low case density reflects the fact that only a very small proportion of all trade remedy measures imposed are ever challenged before the WTO.[163] For those measures that are challenged, the impact of "losing" a case under the standard of review described may be less dramatic than the word may suggest. All that is required from the concerned Member in many cases might be to supplement its attacked decision, rather than withdrawing it, or even to repay duties collected until such withdrawal.

As stressed above, "losing" a case does not mean that a certain measure could not have been imposed at all. It only means that the explanation given by the national authorities so far, perhaps only the written report, is insufficient. The Member concerned may thus be able to sustain the measure on different or amended grounds. From the perspective of WTO law, it may not be necessary to open a new procedure for that purpose.[164] It may be sufficient to supplement the explanation and the written report from the original proceedings to weed out the shortcomings found by the Panel, i.e. to make a redetermination.[165] For while the ADP, SG and SCM do require national authorities to hold public hearings and give all parties an opportunity to be heard before making a determination, they do not require hearings on each point of argument or evidence and thus may not require a relaunch of this procedure for the sole purpose of supplementing arguments and evidence. Under Article 21.3 DSU, the concerned Member would be granted a "reasonable period of time" for such implementation by supplementation.

Such prospective action is perhaps all that is required "to bring the measure into conformity with [the] agreement" (Article 19.1 DSU). Whether retrospective remedies are permissible and/or required under WTO law is an open question. The trend in opinion seems to be that they are not.[166] If all this were so, the concerned Member

---

[162] Cf. Cunningham and Cribb, as note 8 above, p. 169, who suggest that in order to improve the US success rate in front of WTO Panels, the United States should have its internal WTO law specialists review all of its trade remedy determinations before they are adopted.

[163] See note 161 above.

[164] National administrative law may of course limit the national authorities' possibilities to supplement their decision.

[165] As apparently assumed by all parties in, e.g., AB Report, *Mexico—HFCS (21.5)*, as note 85 above.

[166] Decision of the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint by the United States—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, circulated 12 July 1999, paras 76–77; Gavin Goh and Andreas R. Ziegler, *Respective Remedies in the WTO after Automotive Leather*, 6 J.I.E.L. (2003), p. 545; McGovern, as note 89 above, §2.234; both with further references to WTO and GATT 1947 case law and Members' statements; and on anti-dumping cases in particular Durling, as note 28 above, p. 146. Mexico did repay some of the unjustifiedly collected anti-dumping duties in the HFCS case, see Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States—Recourse to Art. 21.5 of the DSU by the United States*, WT/DS132/RW, adopted 21 November 2001 (with AB Report), para. 6.2. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather—Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, concerned the special case of Article 4.7 SCM.

would not have to repay any anti-dumping, countervailing or safeguard duties levied before the supplemented explanation and report brought its measure into conformity with the relevant agreement.

VI. Policy of Standard of Review

The main part of this article was dedicated to an analysis and explanation of standard of review in WTO trade remedy cases as it is embodied in the current texts of the WTO agreements and currently practised by Panels and the AB. Both puzzles mentioned in the introduction of this article, the origin and the effect of the intermediate standard of review, were addressed. In that discussion, certain points were identified where more clarifications can be expected in future case law. Standard of review can thus be expected to evolve in WTO law even if the current texts remain unchanged. But there is also the possibility that more profound changes will be brought about by amendments of the WTO agreements. Standard of review in trade remedy cases has been put on the negotiating agenda of the present Doha Round.[167] There is thus a need to discuss the respective merits of *de novo* and intermediate standards of review from a policy point of view. Most commentators have argued for an intermediate standard of review in WTO cases.[168] This article aims to provide some arguments to the contrary, i.e. why full *de novo* review could be the more appropriate standard of review in WTO dispute settlement, at least for trade remedy cases.[169]

A. The analogy to domestic law is misplaced

The argument is based on the recognition of the fundamental differences in institutional context between WTO dispute settlement on the one hand, and domestic administrative law litigation on the other.[170]

Intermediate standards of review belong to the sphere of administrative (public) law.[171] WTO dispute settlement cases, and in particular trade remedy cases, resemble the latter in that the object of the dispute is a measure taken by a public authority, in trade remedy cases usually a measure taken by national administrative authorities. But the similarities end there. In the domestic (administrative law) setting, administration

[167] See the US Proposal, as note 11 above.
[168] See the references at note 12 above.
[169] This view seems to be shared by Pescatore, as note 94 above, p. 39.
[170] See, similarly, Croley and Jackson, as note 6 above, pp. 208–211 with particular regard to Article 17.6(ii) ADP and the US *Chevron* doctrine. The particularities of the international situation are entirely overlooked by Zleptnig, as note 12 above, pp. 13–16.
[171] Full review is perhaps not strictly logically required in private law adjudication. But the parties to a private contract will hardly ever entrust one party with making final and binding determinations as to the content of a provision of that contract, or its application in individual cases. And there certainly do not seem to be any procedural rules in domestic legal systems that prescribe anything like an intermediate standard of review in civil cases.

(and legislators) and courts are representatives of the same national citizenry.[172] (And the same can be said about the European Court of Justice reviewing measures of the other European institutions (Commission, Council, Parliament).) This fact is at the basis of the two principal reasons for intermediate standards of review (as explained at II.B above): First, being representatives of the same citizenry, the domestic administration (and the legislator) may in some situations be equally suitable as a neutral arbiter between competing interests within that domestic citizenry as a domestic court—i.e., there is no general reason to suspect systematic bias in the administration's (or the legislator's) decisions.

Second, being a more directly democratically legitimized representative of that citizenry than the domestic courts, some domestic administrative agency (or legislator) may be better qualified, on democratic grounds, to be entrusted with the exercise of subjective judgment. None of this is the case in the WTO setting, and in particular in trade remedy cases. For decisions that are primarily domestic in nature, such as generally applicable health measures, and that therefore directly both favour and disfavour domestic interest groups, it may not be of major concern that foreign importers are not as well represented in that process, although even here this may lead to a certain bias in the choice of method etc. But when national administrative authorities apply trade remedy measures specifically against foreign imports in order to protect domestic industries, there is certainly major cause for concern—the national administrative authorities can hardly be called neutral in these circumstances (and neither can the national court reviewing such measures). They are certainly not better qualified, from a democratic point of view, to exercise subjective judgment on behalf of other Members and their citizens whose interests are necessarily implicated in any trade remedy determination—in fact, they have no democratic legitimacy in this respect.[173] For trade remedy measures (as contrasted, e.g., to health measures), national administrative authorities do not even seem to have much of an edge in terms of technical expertise, as the highly specialized Panels and the AB with their competent secretariats are certainly as much experts in policy and economics of trade remedy measures as anybody else (although admittedly the national authorities may be more experienced, at least in an institutional sense).[174] And whatever advantage they may have in knowledge of local conditions in their own territory is neutralized by their lack of knowledge of local conditions in the exporting Member.[175]

To avoid misunderstandings, it should be stressed that the preceding paragraph does not allege bad faith on behalf of national legislators, administrations or courts. National courts (and administrative agencies where they fulfil a court-like function)

---

[172] Except in a federal system—but such subtleties are ignored here.

[173] Cf. Croley and Jackson, as note 6 above, p. 209.

[174] Cf. Croley and Jackson, as note 6 above, pp. 208–209, for issues of legal interpretation. To the contrary, Lichtenbaum, as note 73 above, p. 1236. For Panels, this will of course depend on the composition of the individual Panels, but generally the selection process should be expected to assure that Panellists are highly knowledgeable in the sort of matter they are called to rule upon.

[175] But see Oesch, as note 2 above, p. 641; Ruffert, as note 89 above, p. 315.

may be doing their best to avoid bias of any kind. But their insertion in the national system of one Member and their legitimization through the citizens of that one Member is bound to unconsciously influence their judgment, or at least creates doubts as to their impartiality in other concerned Members. National administrations and legislators, on the other hand, arguably must be biased if they faithfully serve the citizenry that they have been elected or appointed to represent. It is their duty to exhaust all possibilities left open to them under the WTO rules, including by the applicable standard of review, in order to advance the interests of their citizens. Of course, they may often feel that the interests of their citizens would, in the long run, be best served by a certain stricter interpretation and application of a certain WTO rule, if and because other Members follow the same interpretation and application. But since they cannot impose this interpretation and application on other Members if the applicable standard of review shelters the other interpretation and application from negative WTO Panel findings, they will follow the sub-optimal laxer interpretation and application to secure at least the short-run advantage. This prisoners' dilemma type situation is completely absent in the domestic administrative law setting.[176]

All of this is not to say, of course, that national authorities should be more tightly controlled by international "courts" (WTO Panels) than by domestic courts. This should not be the case, and it will not be the case under any imaginable standard of review for the simple reason that the substantive conditions imposed by WTO law are several orders of magnitudes less dense than those imposed by domestic law. WTO law has become much more detailed since 1947, but it still covers only a fraction of the issues that are regulated by domestic legislation (i.e., only some (!) issues related to external trade), and even there it often only imposes outer limits on otherwise unrestricted Members (e.g., Members are free to apply any tariff as long as it does not exceed its scheduled rates, and to impose any restriction on trade in services for which it has not scheduled a commitment under the GATS and which respects MFN). Where WTO law ventures deeper into domestic policy making, such as sanitary and phytosanitary measures, negotiators have taken great care to respect Members' liberty to make domestic policy choices, for example by not interfering with their choice of an acceptable risk level,[177] leaving the possibility to act even if scientific evidence is not available (Article 5.7 SPS), etc. Even in core trade areas such as trade remedy measures, Members have preserved considerable flexibility because, e.g., the threat of material injury is sufficient to impose a measure, safeguard measures can be imposed without any "unfair" trade on behalf of the importers, etc. And the interpretive principle of *in dubio mitius* will assure that Panels and the AB will err on the side of less constraint for Members when interpreting these provisions.[178] But at the same time, the substantive

[176] Cf. Croley and Jackson, as note 6 above, p. 209.

[177] AB Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 168.

[178] On this principle, see, e.g., AB Report, *EC—Hormones*, as note 37 above, para. 165, with note 154; Waincymer, as note 12 above, para. 7.18.8.

conditions that have been included in the WTO agreements have been included for a reason. Without such conditions, the benefits of free trade risk being eroded by Members being locked into the classical, fundamental perceived prisoners' dilemma of international trade: everyone knows that certain disciplines on everybody's behaviour would be beneficial for everyone, but nobody believes they have an incentive, at least given the usual domestic interest group pressures, to act on their own. It would seem contradictory to impose these conditions only to recreate a part of the prisoners' dilemma type situation at the application stage.[179] The (limited) multilateral control established over Members' trade remedy measures through the WTO rules can hardly be assured on the basis of a "'trust the competent authority's approach".[180] If negotiators wish to preserve a certain margin of freedom for the Members, they should do so through agreement on the substantive conditions included in the agreements.

It is worth underlining the special nature of trade remedy measures in this respect. Nowadays, many domestic measures scrutinized under WTO rules are formally indistinctly applicable measures that at least purport to pursue a policy objective unrelated to international trade and perhaps only incidentally also hit foreign products. WTO rules and rulings must be extremely careful not to interfere unduly with such measures to respect non-trade domestic policy choices. The object of trade remedy disputes, on the other hand, are measures that by their very nature are directed only against foreign products. They are by their purpose, design and application discriminatory.[181] Their only and explicit objective is the modification of trade flows through exceptions to the most basic bargain struck in the GATT, which is the reduction of tariff barriers.[182] They go directly to the core of the central object of the WTO agreements. Here more than anywhere else, WTO dispute settlement bears less resemblance to domestic administrative and constitutional law adjudication than to the settlement of classical contractual disputes—in contractual disputes, however, intermediate standards of review are unheard of.

B. THE ASSESSMENT OF FACTS CAN BE REVIEWED *DE NOVO*

As a general matter, it would therefore seem that trade remedy cases are the least suitable candidate for an intermediate standard of review. Still, it might be argued that Panels do not have the necessary capacity to engage in full *de novo* review for factual

[179] Cf. Ruffert, as note 89 above, p. 317; Lee D. Hamilton, as note 12 above, p. 269.

[180] Paraphrasing EC, 2nd Oral Statement in front of the Panel, *US—Steel*, as note 135 above, para. 25 (although the EC was here reacting to what it perceived to be a push for total deference by the United States).

[181] This is evident for safeguard measures. But it is certainly true also for AD measures, as domestic and foreign products and industries alike are subject to domestic competition rules, but only foreign products are targeted by AD measures. For CVM, the discriminatory nature is less clear, but ultimately nevertheless plausible: domestic products receiving the same subsidy and undercutting prices of foreign products on the domestic market with the help of the subsidy would not be subject to CVM and would only be dealt with under the less stringent (cf. in particular Article 6.1 SCM, and Article 7.9 SCM: countermeasures would have to be specifically authorized by the DSB, rather than unilaterally decided by the national authorities) disciplines of Part III of the SCM (Actionable Subsidies).

[182] Cf. Ruffert, as note 89 above, p. 320.

issues. It has often been underlined that Panels do not command the same expertise and resources for fact-finding as do the national authorities. It is the particularity of trade remedy cases that, as required by the relevant agreements (SG, SCM, ADP, ATC), a Panel proceeding is necessarily preceded by an extensive formal national proceeding that aims (or should aim) at establishing precisely the facts and conclusions that are relevant under the aforementioned agreements.[183] In the words of the *US—Steel* Panel, "the Panel is *not* the initial fact-finder".[184] Sheer practicability might suggest or even demand that the results of the initial fact-finding procedure be given some meaning and respect. The AB has pointed out that the Panels would be badly suited to perform complex fact-finding, as assumed by the national authorities in trade remedy cases, e.g., for determining material injury to a domestic industry. Panels should therefore refrain from *de novo* review.[185] This view seems to be shared by most commentators.[186]

However, in order to assess the force of this argument in the present context, one has to take a more careful look at the meaning of *de novo* review and the scope of fact-finding as it would be required from a Panel under the procedural rules applicable in all WTO proceedings. In truth, it is inconceivable that a Panel would have to perform the equivalent of the national authorities' task of collecting evidence under *any* standard of review. The reason is that Panel proceedings are not inquisitorial, but adversarial in nature. Panels may have the right to seek information and consult experts under Article 13.2 DSU, but the general rule remains that it is up to the parties to present their evidence to the Panel.[187] In addition, Panels need and must not rule on all issues related with the matter, but only those issues for which a specific legal claim has been asserted by the complaining party based on specific facts.[188] Fact-finding therefore means no more for a Panel than assessing the evidence presented by the parties on these specific points, and *de novo* review does not mean more than assessing this evidence independently of what the national authorities saw in that evidence regarding these issues. This is no different from the task that courts and *ad hoc* commercial arbitral tribunals (operating without anything like the WTO Legal Affairs Division to support them) are routinely called on to perform. In fact, it is questionable whether evaluating the evidence and facts itself would not be easier for the Panel than to scan every challenged element of the national authorities' determination for mistakes in light of the same evidence and facts, as is required under the current standard developed by the AB in SG cases. The results of the national proceeding would certainly not be lost under a

---

183 McGovern, as note 89 above, §2.2325(a) (p. 2.23-35).

184 Panel Report, *US—Steel*, as note 80 above, para. 10.25 (emphasis in original). This is of course the reason why one is pondering an intermediate standard of review in the first place.

185 Cf. AB Report, *EC—Hormones*, as note 37 above, para. 117 (quoted above, text accompanying note 55).

186 E.g., Croley and Jackson, as note 6 above, p. 208, with note 65; Ehlermann and Lockhart, as note 18 above, p. 11; Oesch, as note 2 above, p. 640; Waincymer, as note 12 above, para. 6.15.1 (pp. 348–349).

187 Cf. AB Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse to Art. 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, paras 166–167; and generally Kazazi, as note 13 above, p. 27.

188 Cf. AB Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, para. 129.

de novo approach, as they would be used by the defending party as evidence to defend its case, as a filter for sorting out clear cases either way, and most importantly as a filter for identifying the problematic, contentious issues in a given case. In fact, it is perhaps precisely the existence of the preceding extensive formal national proceedings and what it turns out in information that ensures that *de novo* review by a Panel will indeed be possible.[189]

One should also be mindful of the kind of factual disputes likely to be involved in trade remedy cases. It seems that none of the GATT 1947 or WTO trade remedy cases involved disputes over the establishment of "simple" facts. Panellists would therefore not be obliged to travel to some factory to verify if it is really closed down (to determine injury), or to hear witnesses to determine the amount of imports of the concerned product in a given year (to determine increased imports). Instead, what was at issue in almost all trade remedy cases before Panels and the AB were what may be called "complex facts", i.e., facts that need to be inferred from other facts on the record, such as causation or the probability of the occurrence of some injury, and the evaluation of those facts under the applicable legal rules. Panels should not face any major problems in performing such an inference and evaluation themselves. The national authorities do not get direct impressions of the evidence (e.g., visits of closed factories) either, and they are arguably not necessary in trade remedy cases—these cases are about numbers. The national authorities may have special knowledge of the local conditions and susceptibilities that may, e.g., influence a finding of material injury, but they are much more likely to neglect the equally important conflicting interests of parties in other countries and the international trading system as a whole that may also be relevant in determining whether, e.g., some injury is important enough to be considered material and thus give the right to impose the trade remedy measure.

In sum, therefore, considerations of practicability should not prevent a full *de novo* review of factual issues by Panels. For the reasons mentioned in this and the preceding subsection, Panels can and should perform a *de novo* review of factual issues.

C. LEGAL QUESTIONS SHOULD ALWAYS BE REVIEWED *DE NOVO* BY THE INSTITUTIONS SET UP FOR THAT PURPOSE, THE WTO PANELS AND AB

For legal issues, i.e. for the interpretation of WTO law, the argument is even clearer, and has been forcefully presented by John H. Jackson and Steven P. Croley.[190] The picture that would result if different interpretations by different Members were accepted is an illustration of the problems an intermediate standard of review creates in the international setting where not one, but multiple administrative agencies are called upon to apply (and interpret) the relevant rules—the same rule would in effect have

[189] The judicial economy argument for an intermediate standard of review, Oesch, as note 2 above, p. 641, is therefore unconvincing.

[190] Croley and Jackson, as note 6 above, pp. 208–211 (with references to the *Chevron* doctrine in US law).

different meanings in different Members.[191] In addition, national authorities apply and interpret (at least primarily) national law, and the specialists for WTO law are, after all, the Panels and especially the AB, the ultimate arbiter in WTO law by virtue of the WTO's institutional setup.[192], [193]

The Panels and the AB will of course not always adopt an interpretation that is particularly restraining for the national authorities. On the contrary, the principle of *in dubio mitius* will direct Panels and the AB to respect Members' freedom to make policy choices.[194] But the limits of this principle and the resulting interpretations of the relevant rules should be set uniformly for all Members.

D. THE NOTION OF "SOVEREIGNTY" IS NOT HELPFUL IN THE PRESENT CONTEXT

To finish this discussion, some words must be said regarding the notion of "sovereignty". It is true that standard of review defines the structural relationship between courts and administrations, which in the international setting of the WTO is an important part of the general relationship between the nation state Members and the international organization WTO. Standard of review therefore touches directly on the issue of "sovereignty".[195] But while recognizing the link between standard of review and "sovereignty" underlines the importance of the former, it is of little help for resolving issues of standard of review in practice.

The reason for this, as far as the interpretation of existing agreements is concerned, is that the standard of review results from the multilateral agreements. Consequently, whatever impact on "sovereignty" the standard of review may have, it is one voluntarily assumed by the Members. This is true even where Panels and the AB choose between different possible meanings of the wording of the multilateral agreements, if and because that choice will be made in accordance with customary rules of interpretation of public international law, including the rule *in dubio mitius*. In fact, one may consider the voluntary assumption of that impact under the WTO agreements to be an expression (rather than a limitation) of a Member's "sovereignty", just like one considers individuals' decisions to avail themselves of their ability to assume a binding obligation under a simple contract to be expressions of individual liberty.[196]

If the voluntary assumption of international obligations were an expression of "sovereignty", the concept would not have significance for the negotiation of agreements either. In any event, a negotiator will have to weigh any loss of

---

[191] This has been disapprovingly called a legal "tower of Babel" by Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997), p. 227.

[192] Under reserve of the Ministerial Conference's and the General Council's exclusive authority to adopt authoritative interpretations. Cf. Articles 3.2, 17.6, 23 DSU, Article IX:2 MAR AG.

[193] Cf. Croley and Jackson, as note 6 above, pp. 208–209; Oesch, as note 2 above, pp. 643–644.

[194] Cf. Oesch, as note 2 above, pp. 644–645.

[195] Cf. Croley and Jackson, as note 6 above, pp. 194, 211–213; Oesch, as note 2 above, p. 636; Zleptnig, as note 6 above, pp. 2, 7–16.

[196] This last thought is owed to Lothar Ehring.

"sovereignty" from a stricter standard of review against the advantages resulting from the reciprocal obligations of all other Members, just like in any other negotiation. It is the essence of international agreements that negotiators opt for the advantages arising from the reciprocal obligations, rather than to pursue a "sovereignty-preserving" policy, which would ultimately mean that no agreement could be concluded at all. Of course, this leaves open the question of just how much "sovereignty" negotiators are willing to trade in for the reciprocal obligations of others. There is, so to speak, a diminishing marginal return and increasing marginal cost from further obligations assumed in international agreements. One of the means negotiators may choose to draw a line at how much freedom of action their countries will surrender is a laxer standard of review. No one can tell whether the politics and coincidences of WTO negotiations will lead negotiators to choose this means in the WTO's future. All that this article tried to suggest was that it would be an inefficient means to achieve the desired purpose.

VII. Conclusion

It would be preposterous to advance any definitive opinion on what should be the "right" standard of review for trade remedy cases in a short article like the present one. And it is not the proper role of the commentator to take a final position on what the standard of review "is" under the present agreements properly understood. This task must rest with the AB. What this article could do, however, was to explain the way the AB has so far approached this task. It found that the AB had drawn on the substantive rules of the relevant agreements to deduce an intermediate standard of review in safeguard cases. This analysis also showed, however, that the AB's arguments on this point have so far been slightly too cursory, and in particular with respect to the most important criteria defining the intermediate standard of review for safeguard cases, the requirement that the national authorities' explanation be adequate. This criterion was in effect shown to be the key element in limiting the discretion of national authorities. Under the present standard of review not only for safeguard, but also for ADP and, it can be speculated, CVM cases, national authorities are rather tightly constrained by the applicable standard(s) of review, so much that in the eyes of the national authorities, the drawbacks of the intermediate standard(s) of review (the possibility to fail because of procedural errors) might outweigh the advantages of the margin of discretion afforded by such intermediate standard(s) of review. Good arguments in the text of the agreements were found, however, that could sustain such tight control by Panels and the AB.[197] In fact, it was argued that they might sustain and demand an even tighter standard of review—*de novo* review—in all but ADP cases, and that there is presently no basis for applying anything else than *de novo* review as a general procedural rule absent specific textual support in the specific agreement at issue. It is hoped that the AB will

[197] Cf. Oesch, as note 2 above, pp. 658–659, calling the standard of review applied to be "intrusive" but correct.

tackle these remaining gaps in its jurisprudence in the future. Given the frequency with which standard of review is raised by the parties in WTO disputes, it is almost safe to say that the AB will indeed do so soon. Less certain is the prospect of any change to the pertinent provisions of the WTO agreements, given the difficulties in negotiating Article 17.6 ADP and the divergent proposals for changing it. But the last word on standard of review for WTO Panels in trade remedy cases has certainly not yet been spoken.