

Preface

This book deals with the question of what kind of standard of review WTO panels should apply when reviewing whether a WTO member has complied with its obligations under the WTO Agreements. The key conceptual issue is the degree of deference (if any) that WTO panels ought to apply to measures of WTO members. This is important because it may affect the allocation of power between international organizations and States. In the case of the WTO, this question is particularly relevant because many measures derive from domestic administrative or judicial processes, and WTO panels are often not merely examining whether domestic laws or decisions made by domestic governments comply with WTO obligations.

I argue that the WTO should adopt a flexible standard of review that would vary depending upon the type of measure being examined. It is contended that panels should, as a general proposition, apply a highly intensive and non-deferential factual standard of review when examining domestic measures. If, however, WTO members have separately retained certain jurisdictional competencies to deal with particular disciplines, such as in the case of anti-dumping and countervailing measures, then a more deferential standard of review should apply. This approach constitutes a completely new conceptual framework, but it would not always vary the standard of review that is presently applied.

In this book, I examine existing WTO jurisprudence and literature on this issue, and I also conduct a brief survey of standards of review within selected domestic and international legal systems. From this analysis, I contend that the WTO standard of review should be based on three major considerations: the promotion of key objectives of WTO dispute settlement, enhancing adjudicative legitimacy, and procedural effectiveness. I conclude that a new flexible standard of review as proposed would best satisfy these considerations in an overall sense. That is, this test provides the best balance of these sometimes competing issues. I then go on to articulate the theoretical elements of this new standard, and then discuss how this standard may be applied to several WTO Agreements where its application may be contentious.

I conclude that this new standard of review would be a significant enhancement to the WTO dispute settlement system. It would provide for a more balanced and consistent interpretation of the WTO Agreements. Further, this

standard, and the underlying principles, may provide the foundations for developing similar standards in other international dispute bodies in the future. This work ultimately concerns the nature and scope of judicial review in international trade law, treaty interpretation, and constitutional questions about the level of intrusion by international bodies in domestic affairs.

The genesis of this book was the idea that the standard of review exercised by WTO panels may affect the way in which the WTO Agreements are interpreted and applied. This legal concept may then result in more or less strict adherence to WTO commitments. Therefore, the standard of review is an influential mechanism that has the potential to mediate the legal relationship the WTO and its membership, being predominantly sovereign States. It is my view that the reform of the standard of review as advocated in this work will develop and strengthen the WTO and the international trading system.

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