

1. Introduction

Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions.¹

1.1 THE IMPORTANCE OF WTO OVERSIGHT OF GOVERNMENT TRADE MEASURES

This book deals with standards of review in WTO dispute settlement. Under the present WTO system, disputes are resolved primarily through panel adjudication and a second tier review by the WTO Appellate Body. It is the role of panels, at the request of a member, to review measures of another member in order to determine if the measures are consistent with WTO obligations. When panels review matters in order to reach findings, they will inevitably do so with a particular level of scrutiny or oversight that is referred to as a standard of review. This book concerns the question of what is the appropriate standard of review that WTO panels should apply when examining domestic measures. It does not deal with the standard of review applied by the WTO Appellate Body, which hears appeals on the basis of errors of law.²

The question of what kind of standard of review a WTO panel should apply is important because it is part of the broader issue of determining the role of panels in the WTO dispute settlement system. If a standard is less intrusive in nature, then panels may not have a great deal of power to review domestic measures. The reverse is of course equally true. Accordingly, the standard of review may be seen as an element of procedure that has a number of substantive and institutional consequences. For example, it may affect the ‘vertical’ allocation of competency of decision-making between WTO panels and the membership, or it may affect the ‘horizontal’ relationship that panels have in relation to other parts of the WTO structure, such as the Ministerial Conference and the General Council in that these organs may loosely be said

¹ Michel Foucoult, ‘Vous Etes Dangereux’, *Liberation* No 639, 10 June 1983 (available at <http://foucoult.info/documents/foucoult.entretienDangereux.fr.html>, last accessed 31 March 2012.

² DSU, art 17.6.

to have legislative functions.³ In recent times, the standard of review has also been cited as an issue that may affect the way in which the WTO Agreements are interpreted, and which may potentially affect how the WTO rules are applied.⁴ It has therefore sometimes been associated with the idea of the WTO ‘overreaching’ its mandate, and feeds into the general issues of legitimacy, competency and sustainability of international institutions. In this book I will argue that the current standard of review applied is inadequate, and that a new standard of review should be formulated. The current objective assessment test articulated by the Appellate Body in the *EC-Hormones* case is not an adequate basis for a standard of review, and it has not been applied consistently.⁵ I will contend that the Appellate Body should instead develop a new flexible standard of review. This approach has two components. The first involves the formulation of a general standard of review that would be applied in all disputes concerning member obligations under the WTO Agreements, subject to the particular exceptions discussed below. The general standard of review advocated in this book requires panels to conduct a full and unrestricted review of both issues of fact and law in relation to measures. This has similarities to what is often termed *de novo* review in many domestic legal systems.

The second aspect involves modifying the general standard of review, where necessary, to take into account the specific responsibilities or ‘competencies’ retained for members under the various WTO Agreements. This would potentially lead to different standards of review being applied in some types of WTO disputes. However, at the same time, this type of approach is likely to lead to similar standards of review being applied in respect of Agreements dealing with similar subject matters and processes. For example, this book contends that a similar standard may be applied in relation to the trade remedy agreements, comprising the Anti-Dumping, Safeguards and SCM Agreements.⁶ The Anti-Dumping Agreement presently sets out a unique standard of review, which on its face, is quite different from the standard of review that is applied in respect of other WTO Agreements.⁷ The development of a new standard of review will arguably eliminate any major divergence between

³ Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford University Press, 2003) 35.

⁴ See for example, Andrew Stoler, ‘The WTO Dispute Settlement Process: Did the Negotiators get what they wanted?’ (2004) 3(1) *World Trade Review* 99, 113.

⁵ See Chapter 2, Section 2.4.3.

⁶ Trade remedy mechanisms are also contained within other WTO Agreements such as the Agreement on Agriculture and the Agreement on Textiles and Clothing.

⁷ This specific standard is set out in Article 17.6 of the Anti-Dumping Agreement. There is no standard of review explicitly prescribed in other WTO Agreements, including in the DSU.

the anti-dumping standard of review and the standard of review applied in relation to other trade remedy measures.

There has been a modest amount of literature on what might be an appropriate standard of review for panels to apply in WTO dispute settlement.⁸ The most comprehensive work to date on the subject is Oesch's *Standards of Review in WTO Dispute Resolution*.⁹ However, this work as with other works is largely descriptive in nature and does not overtly prescribe a new WTO standard of review. In 1996 Croley and Jackson published an influential and thought-provoking article on the subject in which the authors conclude that some deference may be preferable in developing the WTO standard of review, but that there should be caution in applying domestic administrative law concepts to WTO dispute settlement.¹⁰ Since then there have been various publications on the subject which put forward alternative formulations of the WTO standard of review.¹¹ Arguably, debate was somewhat provoked by the Appellate Body's decision in *EC-Hormones*. The reforms argued for range from a highly intensive standard of review, such as advocated by Spamann,¹² to a more deferential test suggested by Zleptnig,¹³ based on the idea of deliberative democracy.¹⁴ Button puts forward a 'reasonable regulator' test,¹⁵ which is somewhere between a highly intensive standard of review and an extremely deferential standard of review.¹⁶ Finally, Ehlermann and Lockhart¹⁷ have identified that the WTO standard of review is already to some degree being applied in a flexible manner, based on the type of WTO obligations being reviewed.¹⁸

⁸ See Chapter 3, Section 3.2.

⁹ Oesch, *Standards of Review in WTO Dispute Resolution*, above n 3.

¹⁰ Stephen Croley and John H. Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments' (1996) 90(2) *American Journal of International Law* 193, 208–12.

¹¹ These works vary enormously in the level of detail in the treatment of this subject.

¹² Holger Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis' (2004) 38(3) *Journal of World Trade* 509.

¹³ Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) 6(17) *European Integration Online Papers* 1 (available at <http://eiop.or.at/eiop/texte/2002017.htm>, last accessed 31 March 2012).

¹⁴ See Chapter 3, Sections 3.2.2 and 3.2.4.

¹⁵ Catherine Button, *The Power to Protect: Trade Health and Uncertainty in the WTO* (Hart Publishing, 2004) 217.

¹⁶ See Chapter 3, Section 3.2.3.

¹⁷ Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law' (2004) 7(3) *Journal of International Economic Law* 491.

¹⁸ See Chapter 3, Section 3.2.5.

This book concerns the search for a new WTO standard of review. My conclusion is that a standard of review that is highly intensive should be the default position. This is essential in order for the WTO to adequately enforce the WTO Agreements. However, it is appropriate to modify this default standard of review to make it more deferential in cases when the WTO Agreements provide WTO members with specific responsibilities to ensure that trade measures comply with WTO obligations. The standard of review proposed in this book would therefore not involve WTO panels applying a singular level of intensity in reviewing domestic measures, but rather the nature of the review would vary depending upon the WTO obligations being examined. Accordingly, what I am putting forward in this book is what might be described as a hybrid test.

The approach I take in this book is to critique the current standard of review and then to identify and test the merits of a new standard of review. The book is divided into two parts. In the first part, comprising Chapters 1 to 3, I identify the major conceptual issues, provide a critique of the current standard and discuss alternative approaches. The second part, as set out in Chapters 4 to 8, involves essentially a detailed description of the two limbs of the proposed standard, and a defence of its application across the most commonly litigated provisions of the major WTO Agreements.

The remainder of this chapter consists, firstly, of an introduction to the concept of a standard of review (including how standards of review are currently formulated in several other legal systems). Secondly, I will deal with the issue of how and to what extent standards of review may apply to WTO dispute settlement. Finally, I will conclude with a short summary of the major arguments, methodology and chapter outlines.

1.2 CONCEPTUAL FOUNDATIONS OF STANDARDS OF REVIEW

1.2.1 The Definition of Standards of Review

The expression ‘standard of review’ refers to the manner in which an adjudicative body reviews a party’s compliance with a form of regulation or the correctness of prior decisions made in the same matter. It therefore conceptualizes in legal form the scope or extent of the review task performed. A number of different words and phrases are used to describe the same process. These include the expressions ‘intensity of review’ and ‘intrusiveness of review’, all of which frequently appear in literature. The key concept to bear in mind is the relative comprehensiveness of the review exercise. Therefore, if a reviewer limits the process of review, it may be said that the reviewer applies a degree

of deference or restraint in relation to the conduct or decision being reviewed. In everyday language, it may be said that the reviewer exercises some 'leeway' or grants some 'room to move' to the original decision-maker.¹⁹ It is also sometimes referred to as the 'margin of appreciation' that a reviewer exercises towards the decision or conduct being reviewed.²⁰ In short, it may be envisaged as a spectrum depicting the relative intrusiveness or deference exercised by the reviewer in relation to the subject under review.

Standards of review may be formulated in a wide variety of ways. Firstly, they may be directly prescribed through judicial doctrine or legislation and both in positive and negative terms. In other words, a standard may be determined through the presence or absence of any restriction on the ability of the reviewer to conduct its review, or conversely, it may refer to any positive direction as to how the review should be conducted. The absence of any restriction of itself does not equate to an intrusive standard of review. This is because the absence of any restriction, whilst permitting the reviewer to exercise an unfettered discretion in the review process, may nonetheless result in the reviewer exercising a less intrusive standard. Secondly, standards of review are shaped by (and yet must be distinguished from) a number of other adjudicative principles and techniques. The most influential example of this is the process of fact-finding prescribed, which if extensive, may lead to a more intrusive standard being applied.²¹ The review process may also be affected by matters such as the burden of proof, the method of interpretation of regulation, and the degree to which the reviewer relies upon 'issue avoidance' techniques such as the use of judicial restraint, the requirement for standing or exhaustion of alternative remedies.²² This book does not deal with these types of principles and techniques, other than to refer to them when they directly affect the standards of review being advocated.

Generally standards of review are regarded as instruments of legal procedure given that they directly concern or are a part of the process by which a proceeding or a review is conducted. However, it has been argued that standards of review are, in reality, a product of both procedural rules and the substantive regulation being examined.²³ In my view, the standard of review should still be regarded as an aspect of procedure, albeit one which has a

¹⁹ Button, *The Power to Protect: Trade Health and Uncertainty in the WTO*, above n 15, 164.

²⁰ Oesch, *Standards of Review in WTO Dispute Resolution*, above n 3, 14 and 51. Specific reference is made to the development of the margin of appreciation doctrine by the European Court of Human Rights.

²¹ See Michelle T. Grando, *Evidence, Proof and Fact-Finding in WTO Dispute Settlement* (Oxford University Press, 2010).

²² Oesch, *Standards of Review in WTO Dispute Resolution*, above n 3, 24–5.

²³ Zlepnig, above n 13, 6.

number of wider influences and effects. Certainly, substantive provisions may affect the review task because such provisions may directly dictate the type or scope of review that may be undertaken. This type of interplay between procedural and substantive rules will be discussed in the second part of the book in relation to the question of how obligations in the WTO Agreements may alter the standard of review being applied by panels.

1.2.2 Types of Standards

Standards of review are frequently identified by reference to their relative scope of review. If this scope is seen as a spectrum, then two types of standards, namely *de novo* and total deference, occupy each end of the spectrum. *De novo* review generally refers to a situation where the reviewer conducts a full merits review of a matter and is not required to defer to or accept any of the findings of the original decision-maker.²⁴ The expression is usually associated with a formal hearing conducted by a court or tribunal. A hearing *de novo* has been described in a domestic administrative law context as ‘the administrative law equivalent of a retrial where the matter is reconsidered with evidence produced and witnesses called.’²⁵ Therefore, such a hearing requires a litigant to make out its case again and the court or tribunal exercise their powers based upon the evidence before them, whether or not such evidence had been before the primary decision-maker or even existed at the time of the original decision. The key point is that there is no restriction on the later decision-maker from reviewing the merits of the case to arrive at the ‘correct’ decision.

When a *de novo* review is conducted, usually the degree of intensity of review is not prescribed, but rather the adjudicating body has the role of examining the case as if no prior decision had been made in order to arrive at an independent decision. A major argument in favour of conducting a *de novo* review of administrative decisions in domestic law is that it provides a new and independent avenue of review of government agency decisions.²⁶

²⁴ *De novo* has a literal English translation of ‘Anew’. See Mick Woodley, *Osborn’s Concise Law Dictionary* (Sweet & Maxwell, 11th ed, 2009) 135.

²⁵ William B. Lane and Simon Young, *Administrative Law in Australia* (Law Book Company, 2007) 268.

²⁶ A broad scope of review of this kind is primarily directed at keeping administrative behavior of governments fair, reasonable and accountable. See Kenneth F. Warren, *Administrative Law in the Political System* (Prentice Hall, 3rd ed, 1997) 330. It is also more common where there is a serious risk of harm or disadvantage such as in deportation and family law cases: see William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 309–10.

In contrast, a standard that espouses almost total deference would result in the reviewer being required to accept the findings of the original decision-maker, unless there is a major flaw in the procedures carried out by the original decision-maker.²⁷ This might include, for example, a failure to accord natural justice or due process to one of the parties. Total deference therefore refers to an avoidance of the responsibility of reviewing the substantive question at issue.²⁸

Between *de novo* and total deference there are various intermediate standards, which usually involve a limited scope of review that is set down in procedural rules or via the application of general principles. In a sense intermediate standards may be regarded as a ‘build up’ or a ‘build down’ from the extreme standards, depending upon the approach taken. Standards that are determined by procedural rules or legislation are sometimes referred to as statutory standards, whereas the standards that are applied by courts and tribunals based on doctrine or general principles are often known as adjudicative standards.²⁹ One of the most pervasive adjudicative standards is that of reasonableness. In the well-known decision of *Associated Provincial Picture Houses v Wednesbury Corporation*, the English Court of Appeal established that it is the role of the Court to examine whether an administrative decision-maker has applied a level of reasonableness. In that decision, Lord Greene MR held that:

The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nonetheless come to a conclusion so unreasonable that no reasonable authority could have ever come to it.³⁰

The above extract shows the imprecise nature of utilizing concepts such as reasonableness in that the question of what conduct is reasonable may vary depending upon the circumstances or the subjective judgment of the decision-maker.³¹ The same criticism may be made of similar tests such as

²⁷ Spamann, above n 12, 510.

²⁸ See Macquarie Dictionary (Macquarie, 5th ed, 2009) 444 which defines deference as ‘1. submission or yielding to the judgment, opinion, will etc., of another. 2. respectful or courteous regard: in deference to his wishes.’

²⁹ Jeffrey Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 349.

³⁰ [1948] 1 KB 233, 228.

³¹ There are also different types of reasonableness tests that many domestic courts have applied. See Dean R. Knight, ‘A Murky Methodology: Standards of Review in Administrative Law’ (2008) 6(1) *New Zealand Journal of Public and International Law* 117.

proportionality.³² A higher degree of subjectivity may enable a more intrusive standard of review to be exercised, as the reviewer is not going to be restricted as would be the case with a more rigorous or checklist form of standard. By the same token, the use of an adjudicative standard of this kind does give the reviewer more flexibility in carrying out the review task. It is common for courts and tribunals to have to apply a mixture of statutory and adjudicative standards of review. The various models employed to set the scope or intensity of review in some major legal systems will be discussed in the next section of this chapter.

1.2.3 Review of Facts versus Law

An important distinction needs to be drawn between the standard of review applied to the review of facts as compared with the review of questions of law. Standards of review are normally associated with a second tier of review, where the extent of the second tier of review needs to be defined.³³ In that case, the review is normally of a decision of some kind. However, the decision made will consist of interpretations of factual matters and interpretations of law. Therefore, a separate standard of review may apply to these different interpretations. The distinction between the review of facts and law is often lost because standards are most commonly associated with a review of facts. This is largely because decision-makers may reach very different factual conclusions depending upon the way the facts of a case are scrutinized. Standards of review of law are nonetheless also important as they deal with the question of whether the reviewer must accept the original decision-maker's interpretation of laws or regulation.

The review of facts can be broken down into various sub-categories dealing with matters such as the type and extent of evidence considered, the relative weight given to different evidence, the reasoning processes, and the form of conclusions that are drawn. Broadly, a review of facts can be divided into two basic parts, being a review of the 'raw' evidence that was or ought to be have been examined by the original decision-maker, and a review of the

³² A lack of proportionality may be referred to as the absence of reasonable correspondence between the object or purpose of a regulation and the regulator's decision or chosen means for achieving that object or purpose. See Christopher Enright, *Federal Administrative Law* (Federation Press, 2001) 404; Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 6th ed, 2009) 476.

³³ The concept of a standard of review is traditionally associated with the degree of scrutiny that a reviewer applies when examining a prior decision, and therefore, arguably a standard of review does not apply to a first time review where the reviewer is simply reviewing a set of facts to determine compliance with some form of regulation.

factual conclusions subsequently drawn from the 'raw' evidence.³⁴ The examination of 'raw' evidence is to some extent governed by fairly practical considerations, such as the fact-finding powers of the reviewer, the extent of reasons given at first instance, and availability of expertise and resources.³⁵

The distinction between facts and law is not always conceptually clear.³⁶ In the context of standards of review, the line is frequently blurred between factual and legal conclusions. This is because many facts, such as in the trade remedies fields, are derived from other groups of facts. These 'inferred' facts, then may become mixed questions of fact and law. A good example in WTO law is under the Safeguards Agreement, where it is necessary to prove the 'causation' of 'serious injury'.³⁷ Causation of injury requires a qualitative assessment of more basic facts and also involves inferences that may constitute questions of law.

In domestic legal systems, standards of review of facts are historically more likely to be deferential than standards of review of law.³⁸ This is due to a number of policy reasons associated with the role of the first-instance decision-maker. Such reasons include the need for finality in decision-making and the usually high level of expertise of the decision-maker in relation to the subject matter and their proximity to witnesses. For these types of reasons the decision-maker is afforded certain privileges concerning the establishment of facts and conclusions drawn. By contrast, standards of review of law are often stricter and closer to being *de novo* in nature. This is because there is normally a policy imperative of ensuring a consistency in the interpretation of laws. Therefore, the reviewer will need to ensure that original decision-makers interpret laws in a uniform manner and the reviewer will wish to retain the competency to ensure that this occurs.

The focus of this book is on the review of facts rather than law, principally because the review of facts is more open to controversy. By this I mean that under WTO law, the role of a panel is to review measures of members. A measure may be any act or omission attributable to a WTO member.³⁹ It is

³⁴ Oesch, *Standards of Review in WTO Dispute Resolution*, above n 3, 18.

³⁵ *Ibid.*

³⁶ See Tania S. Voon and Alan Yanovich, 'The Facts Aside: The Limitation of WTO Appeals to Issues of Law' (2006) 40(2) *Journal of World Trade* 239, 245.

³⁷ Agreement on Safeguards Agreement, art 4. 'Serious Injury' is defined in Article 4.1(a) and 'causation' in Article 4.2(a).

³⁸ Waincymer, above n 29, 348.

³⁹ Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review* [81] cited in Panel Report, *US-Oil Country Tubular Goods Sunset Reviews* [7.136] and referred to in Alan Yanovich and Tania Voon, 'What is the Measure at issue?' in Andrew D. Mitchell (ed), *Challenges and Prospects for the WTO* (Cameron May, 2005) 115, 119.

reasonably uncontroversial that the role of panels is to determine the conformity of a domestic measure with the WTO Agreements.⁴⁰ This compliance task carried out by panels is also reinforced by the role of the WTO Appellate Body to hear appeals from panel decisions on questions of law.⁴¹ Therefore, strictly, the role of panels should be to accord no deference to the interpretations of WTO provisions relied upon by members. The more controversial consideration is whether, or to what extent, members should be accorded deference in relation to factual determinations made by members themselves. This will be explored further in the next section of this chapter.

1.2.4 Rationales for Standards of Review

A key question is why standards of review are necessary in any administrative law review process. The reviewer could simply seek to answer the question of whether the original decision-maker arrived at the correct decision, and then use whatever means are available to answer that question. Other procedural rules concerning the nature of fact-finding and legal interpretations could potentially set the boundaries of that review without the need to add a layer of complexity to the process. The difficulty with this approach is that it does not deal with the need in any sophisticated dispute settlement system for there to be general principles or rules concerning the nature of the review task so as to improve the quality of decision-making. Put simply, the general rationale for standards of review is that they enhance the quality of decision-making in dispute settlement systems.

In many domestic legal systems, standards of review may regulate the degree to which governments can be held accountable for their decisions through judicial review.⁴² For many common law-based domestic legal systems they are also one of the mechanisms used to guarantee a separation of powers. This is because they predominantly concern a court's scrutiny of legislation or administrative decisions. They therefore define the parameters within which judges work and may establish 'no go' areas beyond which the

⁴⁰ There are also non-violation complaints where no breach of WTO obligations is alleged but instead that the measure nullifies or impairs its benefits or impedes a WTO objective. See Alan Yanovich and Tania Voon, 'What is the Measure at issue?', above n 39, 118.

⁴¹ DSU Article 17.6 provides that 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.'

⁴² Standards of review are heavily influenced by the design and history of the institution in which they function. See Chapter 1, Section 1.2.5. For a broader discussion of administrative law systems see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values* (2006) 17(1) *European Journal of International Law* 187.

courts must accept the decisions of legislators and public officials.⁴³ Accordingly, they may be seen as part of the checks and balances between the judiciary and the executive and legislative arms of government. Standards of review should therefore also be viewed as an important element in the constitutional arrangements of any legal system. To link this back to the quality of decision-making point, arguably standards of review, if appropriately formulated, may enhance the quality and legitimacy of government decision-making as a whole.

From the previous discussion in this section, it can be seen that the institutional effects of standards of review are both vertical and horizontal in nature. The vertical effects exist because standards may have the capacity to alter the relationship between different levels of decision-making within the same legal system. Typically this will relate to the allocation of decision-making responsibilities between public officials or legislators and the various tiers within review courts. Standards may have horizontal effects in that they can affect the allocation of responsibilities between the different organs within an institution or constitutional system. All of these considerations may be seen as a means of allocating the responsibility for decision-making within an institutional framework. Therefore, a stricter standard imposed upon a decision-maker may lead to the transfer of more decision-making power to that decision-maker, with a consequential loss of decision-making power to other parts of the institution or system. For this reason, standards of review are usually prescribed or constructed to give an appropriate 'weighting' to these different institutional structures. This idea has been succinctly described in the following terms: 'It is nothing other than the embodiment of a carefully drawn balance between the jurisdictional and institutional competences of the actors.'⁴⁴

In addition to constitutional considerations, standards are often based on quite practical considerations, mainly around the question of identifying appropriate review procedures. The most obvious example of this imperative is the need to prescribe the degree of a decision-maker's fact-finding powers and responsibilities in relation to the review of established facts. A common scenario, which I will cover in the next section, is the restriction on courts of review in many jurisdictions to review only questions of law. Such courts have no independent fact-finding responsibilities. These types of systems are based upon the need to avoid a duplication of judicial effort and to best use limited court resources. However, they are also frequently designed with the constitutional setting in mind, as is the case with judicial review of government decision-making within many political systems. Other than the issue of

⁴³ Douglas, *Douglas and Jones' Administrative Law*, above n 32, 56–7.

⁴⁴ Oesch, *Standards of Review in WTO Dispute Resolution*, above n 3, 23.

fact-finding powers, there are a number of other overlapping procedural considerations such as the level of expertise or experience that a decision-maker may have to deal with factual or legal matters, and whether the decision-maker has the benefit of an adversarial or inquisitorial process.⁴⁵ Standards of review may also be informed by the need for the decision-maker to exercise natural justice and due process in the treatment of the legal complaint or action.⁴⁶

1.2.5 Standards Applied in other Relevant Jurisdictions

Prior to discussing standards of review in the WTO, it is useful to briefly outline some examples of standards of review applied in a relevant selection of other legal systems. This will allow analysis of standards in the WTO to be viewed against their application in other legal systems, particularly in relation to the question of the degree of deference exercised by courts and tribunals on factual and legal questions. This section is divided into five parts with parts one to three covering the Australian, United States and French legal systems.⁴⁷ Part four will deal with the ECJ as an example of a regional legal system and part five will deal with other selected international dispute settlement bodies. The United States and France provide good examples of how major economies with common law and civil law traditions respectively deal with the standard of review question. Australia is an example of a common law country with which I am familiar. The ECJ is somewhat unique in being a supranational court having well developed jurisprudence.⁴⁸ Finally, the selected international dispute settlement bodies comprise the ICJ, ICSID arbitral tribunals, and NAFTA panels. The ICJ is of course a central dispute settlement body in public international law and the other two are more specialized bodies dealing with international trade matters, which may be partly analogous to WTO dispute settlement.

⁴⁵ An inquisitorial process arguably may increase the intensity of review and thus change the standard of review in practice.

⁴⁶ For discussion on these principles, see Andrew Mitchell, 'Fair Crack of the Whip: Examining Procedural Fairness in WTO Disputes Using an Australian Administrative Law Framework', in *Ten Years of WTO Dispute Settlement: Australian Perspectives* (Commonwealth of Australia, 2006) 45.

⁴⁷ These legal systems are examples of modern legal systems with common or civil law origins. Further these countries are significant trading nations. Whilst developing countries are not specifically represented in these examples, there is a reasonable prospect that many developing countries would apply similar standards of review due to being common or civil law based systems.

⁴⁸ The ECHR, which is briefly referred to in Section 1.2.5D, could be described in similar terms.

A. Australia

Australia possesses a federal system of government in which the Commonwealth Government and the States have independent legal systems.⁴⁹ Within both systems, the judicial review powers of the courts in respect of administrative decisions are generally quite restricted in that courts are frequently cautious about encroaching on the merits of administrative decision-making, and the scope of review is predominantly limited to examining whether there has been an error of law. As a common law nation, Australia inherited *Wednesbury* reasonableness from the United Kingdom as the basic standard of review in administrative law cases.⁵⁰ Whilst this test requires some degree of intrusion into the merits of a decision, in recent times, Australian courts have often applied the test in a restrictive manner.⁵¹ There will usually have to be something exceptional in the considerations or actions of the decision-maker for the decision to be overturned.⁵² In addition, the Australian courts have been reluctant to adopt an independent test of proportionality, instead conceptualizing it as part of whether a decision is unreasonable.⁵³

The standard of review applied by Australian courts in respect of legal issues may best be described as a correctness test in that courts have the responsibility for interpreting and applying the law which constrains administrative decision-makers. In other words, there is no deference to the original decision-maker in respect of legal questions. Errors of law in administrative cases commonly relate to the legality or procedural regularity of a decision. This might involve, for example, the doctrine of *ultra vires* which requires that administrative action not exceed the limit of a grant of power given to a decision-maker.⁵⁴

The common law grounds for challenging administrative decisions as described above have been codified in relation to decisions of Federal government departments and agencies. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) sets out approximately 20 separate grounds for contesting the validity of administrative decisions.⁵⁵ Unreasonableness is one of these grounds, but most of the grounds concern legal errors such as taking irrelevant considerations into account and the denial of procedural

⁴⁹ Douglas, *Douglas and Jones' Administrative Law*, above n 32, 56.

⁵⁰ *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, discussed in D.C.M. Yardley, *Principles of Administrative Law* (Butterworths, 2nd ed, 1986) 48.

⁵¹ Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 180.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Douglas, *Douglas and Jones' Administrative Law*, above n 32, 57.

⁵⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss5–7.

fairness.⁵⁶ The role of the Federal Court is therefore quite restricted in its oversight of Federal administrative decisions.

By contrast, a different approach to the standard of review of administrative decisions is found in the jurisdiction of a federal body known as the Administrative Appeals Tribunal. The AAT was constituted through legislation in 1975 and its basic mandate is to provide a fast and effective type of review for aggrieved parties.⁵⁷ The AAT's jurisdiction does not cover all administrative decisions.⁵⁸ In a hierarchical sense the AAT sits within the Federal System between the primary decision-maker and Federal Court review process. The important difference between AAT and judicial review is that the AAT conducts a merits review.⁵⁹ This means that the AAT stands in the shoes of the primary decision-maker and will remake the decision. A merits review usually involves a full *de novo* hearing before AAT members with documentary and oral evidence being presented.⁶⁰ The AAT may examine any evidence relevant to the case, whether or not it was relied upon in arriving at the original decision.⁶¹

The boundary between merits review and judicial review can sometimes be difficult to draw. Where decisions are quashed by courts on the grounds of unreasonableness and are remitted back to the original decision-maker, the nature of the court decision will often leave the primary decision-maker with little choice but to make a different decision. Further, decisions on what constitute relevant and irrelevant considerations can come close to involving a merits review because the court will need to examine the facts and the original decision in some detail. This difficulty is not unique to the Australian system but is important given the very different roles of the AAT and the Federal Court in the review process. In summary, the Australian system has a mixture of deferential and non-deferential processes. The AAT affords little or

⁵⁶ *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss5–7.

⁵⁷ Section 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) provides: 'In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.'

⁵⁸ Section 25(1) of the *Administrative Appeals Act 1975* (Cth) provides that 'an enactment may provide that applications may be made to the Tribunal' and therefore jurisdiction is only conferred by specific reference in other legislation.

⁵⁹ The expression 'merits review' does not appear in the *Administrative Appeals Act 1975* (Cth). The role has often been described as to 'make the correct and preferable decision.' (See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 78.) In addition, in order to enable the AAT to reach the correct conclusion on the review, it may exercise all the powers and discretions that are conferred on the original decision-maker, and by s43(6), the decision of the AAT is deemed to be the decision of the decision-maker.

⁶⁰ *Administrative Appeals Act 1975* (Cth) s35(1).

⁶¹ *Administrative Appeals Act 1975* (Cth) s33(1).

no deference to government agencies in relation to questions of fact. By contrast, in most cases judicial review involves a very high level of deference on questions of fact and no deference on questions of law.

B. The United States

The United States does not have a specialized court or tribunal that deals with the review of federal-level administrative agency action. This task falls to the national courts possessing general jurisdiction.⁶² It is suggested that the lack of a specialized administrative court or tribunal is the product of the constitutional theory of checks and balances between the different branches of government. In other words, a body that is set up by the executive branch of government as an internal review mechanism may not provide a sufficient check on the power of executive government.⁶³ Courts are generally regarded as an independent source of review. It is also important to note, however, that within the United States there is a large number of administrative review processes undertaken by a broad range of agencies ranging from industry regulators to government departments. Therefore, the courts are called upon to review a wide variety of actions, decisions and regulations.

In this context, it is noted that traditionally the courts in the United States have exercised considerable restraint when reviewing agency conduct. This general principle of deference is based on three major arguments.⁶⁴ Firstly, it is rooted in the separation of powers doctrine under the American constitution whereby courts are empowered to exercise judicial rather than administrative functions. Secondly, courts are mindful of the expertise possessed by agencies in their specific fields and are reluctant to second-guess decisions of agencies. Thirdly (and related to the first two arguments), courts traditionally rely on the well-established principle that they should defer to the views of administrators in relation to questions of fact. Despite these strong arguments, in recent years the United States courts have become more interventionist in administrative law matters. This has led to charges that they are overstepping their authority and interfering with public policy-making.⁶⁵ However, the courts do not have an easy role in satisfying all affected parties. This tension has been concisely described in the following terms:

⁶² Peter L. Strauss, *An Introduction to Administrative Justice in the United States* (Carolina Academic Press, 1989) 212.

⁶³ *Ibid* 211.

⁶⁴ Warren, above n 26, 333.

⁶⁵ *Ibid* 329.

Ideally, the courts should seek a scope of review broad enough to prevent dangerous administrative abuses, yet narrow enough that normal administrative operations are not disrupted by unwanted judicial interference.⁶⁶

The scope of review of agency action is prescribed by the *Administrative Procedure Act*.⁶⁷ The APA, enacted in 1946, is largely a codification of common law principles. Under section 706 of the APA two general standards of review are provided for in relation to the review of factual findings.⁶⁸ These two standards are known as the ‘substantial evidence’ standard and the ‘arbitrary and capricious’ standard. The former applies to formal rule-making by agencies and in quasi-judicial hearings, whereas the latter applies to informal decisions or rule-making.⁶⁹

The substantial evidence test under section 706 (2)(E) of the APA provides that:

The reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence subject to sections 556 or 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.⁷⁰

The United States Supreme Court has determined this test to mean that courts must determine whether the agency’s findings are supported by substantial evidence on the record considered as a whole.⁷¹ Therefore, if a reviewing court finds that substantial evidence exists to support the agency determination, then its review task is complete, and it must not look any further into the matter. On its face, this standard creates a high degree of deference towards agencies due to the courts being simply asked to determine whether there is sufficient evidence to support the conclusions.

On closer inspection this standard may not necessarily afford a great deal of deference. Firstly, no clear guidance has been provided by the courts as to what constitutes ‘substantial evidence’. Most of the authorities focus on the question of reasonableness, but without providing any further guidance as to how to define this expression.⁷² For example, in *Consolidated Edison Co. v*

⁶⁶ *Ibid* 330.

⁶⁷ 5 USC § 559 (1946).

⁶⁸ The APA is a codification of judicially made administrative law principles.

⁶⁹ Button, *The Power to Protect: Trade Health and Uncertainty in the WTO*, above n 15, 194.

⁷⁰ Sections 556 and 557 of the APA prescribe various minimum procedural requirements for reviews by agencies.

⁷¹ *Universal Camera Corp v National Labor Relations Board*, 340 US 474 (1951).

⁷² See *Consolidated Edison Co. v NLRB*, 305 US 197, 299 (1938); *NLRB v*

NLRB the expression was defined to mean ‘...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’.⁷³ Secondly, in assessing the existence of substantial evidence, the courts must take into account the body of opposing evidence that may contradict the agency’s position. In effect the courts are being asked to weigh up the presence of supporting and contradicting evidence, which in itself requires some qualitative review of the matter. Therefore, in the absence of more concrete direction to agencies, the courts are to a large extent assuming the responsibility for the reasonableness and fairness of agency decisions.⁷⁴

The ‘arbitrary and capricious’ standard is found under section 706(2)(A) of the APA. This standard applies to informal procedures such as agency decisions that may involve written notification and reasons. Ostensibly this standard is more deferential than the substantial evidence test and is more designed to ensure that procedural fairness has taken place. In other words, that the agency has considered all relevant factors and its decision contains ‘no clear error of judgment’.⁷⁵ In *Citizens to Preserve Overton Park Inc v Volpe*, Justice Marshall famously described arbitrary and capricious review as follows:

Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.⁷⁶

Since the *Overton Park* case, a number of decisions have shown that the courts have not applied this standard in a deferential manner. This is particularly the case with questions of methodology for experiments or data collection undertaken by agencies. A well-known example is the *Industrial Union Department, AFL-CIO v American Petroleum Institute* case, which concerned the lowering of exposure limits for the chemical benzene.⁷⁷

In the United States, a distinction is made between the standard of review applied to facts and legal questions. In *Chevron USA Inc v Natural Resources*

Columbian Enameling and Stamping Co., 306 US 292, 300 (1939); *Consolo v Federal Maritime Commission*, 383 US 607, 619 (1966), referred to in Warren, above n 26, 334.

⁷³ *Consolidated Edison Co. v NLRB*, 305 US 197, 229 (1938).

⁷⁴ *Ibid* 490. The court noted at page 489 that ‘The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.’

⁷⁵ *Pacific Coast Federation of Fishermen’s Associations v National Maritime Fisheries Service* 265 F 3d 1028, 1034 (9th Cir, 2001) (referring to *Arizona v Thomas* 824 F 2d 745, 748 (9th Cir, 1987), which quotes *Citizens to Preserve Overton Park Inc v Volpe* 401 US 402, 416 (1971)).

⁷⁶ 401 US 402, 416 (1971).

⁷⁷ 448 US 607, 100 (1980).

Defense Council, the Supreme Court deferred to the expertise of the Environmental Protection Authority in its interpretation of a statutory scheme.⁷⁸ The *Chevron* test will be discussed in further detail in Chapter 2 given that it was influential in the drafting of the standard of review for WTO anti-dumping disputes. However, this test stipulates that the courts must defer to an agency's interpretation of a statutory provision if the statute is ambiguous or silent and the agency's interpretation is reasonable.⁷⁹ Conversely, if Congress has 'directly spoken on the precise question at issue', then its intention must be respected.⁸⁰ Therefore, despite it being the traditional competency of the courts to review legal questions with a non-deferential standard of review, this test does provide for considerable deference. However, the apparent simplicity of this test masks a number of potential problems.⁸¹ For example, the test leaves open the question of whether there is ambiguity over the provision, and there is always the issue of what constitutes a question of fact versus law.⁸² The Courts may therefore not necessarily afford the degree of deference that is first suggested, and they may retain a moderate degree of competency in overseeing agency conduct.

C. France

France is a good example of the treatment of administrative law in a civil law country, as opposed to the countries based on the common law tradition, such as Australia and the United States.⁸³ Administrative law in France is very much based upon the constitutional structures that originate with the French Revolution of 1789.⁸⁴ Administrative law in France, as with many civil law countries, is categorized differently from private law, and separate administrative courts hear administrative-related disputes.⁸⁵ Such courts perform both administrative and judicial functions. The court of first instance is known as the Tribunal Administratif, from which decisions may be appealed on both

⁷⁸ 467 US 837, 104 (1984).

⁷⁹ *Ibid* 842–3.

⁸⁰ *Ibid*.

⁸¹ Button, *The Power to Protect: Trade Health and Uncertainty in the WTO*, above n 15, 196.

⁸² See David M. Wagner, 'Gonzales v Oregon: The Assisted Suicide of Chevron Deference' (2007) 2 *Michigan State Law Review* 435. This article argues that the Chevron test has been narrowed through recent cases and administrative agencies have less discretion with interpretations of regulation.

⁸³ See Rene Chapus, *Droit du contentieux administrative* (Montchrestien, 12th ed, 2006); Pierre Laurent Frier and Jacques Petit, *Precis de Droit Administratif Mis a Jour, Precis Domat* (Montchrestien, 5th ed, 2008).

⁸⁴ Rene David, *French Law: Its Structure, Sources and Methodology* (Louisiana State University Press, 1972) 127.

⁸⁵ *Ibid* 128.

questions of fact and law to either the Cour Administrative d'Appel or the Conseil d'Etat.⁸⁶ The latter is considered to be at the apex of the French administrative law system.⁸⁷

The major doctrine under French administrative law with regard to the standard of review of facts is that of 'manifest error'.⁸⁸ This is where the relevant administrative court determines that the administration, although making no mistake in the finding of facts, had nonetheless committed a manifest error in the assessment of those facts.⁸⁹ For example, in the typical case of *Rougemont*, the Conseil d'Etat categorized a decision of a local medical committee refusing to place a well-known and highly-qualified surgeon on a special list that would entitle him to charge higher fees, as being a manifest error.⁹⁰ Therefore, traditionally the standard of review of facts provided a great deal of discretion to public officials and it was only in the case of more obvious factual errors or misclassifications that a court of review would reverse the decision. In more recent years, there has been a modest trend by the courts towards a more intensive standard of review of facts. This has been through the influence of the concept of proportionality and also the use of a bilan or balance-sheet approach, whereby the courts may weigh up positive and negative factors relied upon by public officials or agencies in reaching administrative decisions.⁹¹ This would appear to be much closer to merits review than the traditional manifest error test.

The influence of French administrative law is apparent in many other European jurisdictions including the Netherlands, Luxembourg, Italy, Spain,

⁸⁶ An appeal before the Conseil D'Etat is known as the 'pourvoi en cassation'. Appeals may be instituted to the Conseil d'Etat either directly from the Tribunal Administratif or from the Cour Administrative d'Appel depending upon the type of dispute. The reconsideration by the Conseil d'Etat or the Cour Administrative d'Appel of a decision by the Tribunal Administratif is referred to as 'l'effet devolutif' which means that the law and facts are both subject to review.

⁸⁷ David, above n 84, 128.

⁸⁸ L. Neville Brown and John S. Bell, *French Administrative Law* (Clarendon Press, 5th ed, 1998) 261. There are also various categories of errors of law that are applied by the French administrative courts. These include *incompetence* (want of authority), *vice de forme (ultra vires)*, illegality and *detournement de pouvoir* which is a more unique concept meaning 'internal illegality'.

⁸⁹ The manifest error doctrine has been principally developed in France by the Conseil d'Etat.

⁹⁰ *Ibid* 262. *Rougemont* Conseil d'Etat 7 July 1967. See also *La Grange*, Conseil d'Etat 15 February 1961 concerning the checking by a public official of the equivalence of diplomas. Later cases such as *Société de Lotissement de la Plage de Pampelonne*, Conseil d'Etat 29 March 1968 and *Société Anonyme Librairie François Maspero*, Conseil d'Etat 2 November 1973 have broadened out this doctrine to apply to a range of administrative functions.

⁹¹ Brown and Bell, above n 88, 263.

Portugal and Greece, all of which have separate courts to deal with administrative law disputes.⁹² France has also been quite influential on the jurisprudence of the ECJ and the ECHR,⁹³ given that it was one of the five founding members of the European Community.⁹⁴

D. The European Court of Justice

The European Union differs constitutionally from national legal systems in that it is a supranational organization with nation states as its members. It has evolved from a strictly trade-related body in the 1950s to become a regional polity. The present legal foundations of the European Union comprise the Treaty of the Functioning of the European Union (formerly Treaty of Rome), the Maastricht Treaty and subsequent amending treaties, the most recent of which is the Treaty of Lisbon.⁹⁵ Executive functions of the European Union are undertaken by the European Commission, with review of its actions falling to the Court of First Instance or the ECJ.⁹⁶ The Court of First Instance may review matters of fact and law, whereas the ECJ is restricted to reviewing questions of law.⁹⁷

Article 173 of the Maastricht Treaty grants broad jurisdiction upon the ECJ to review the legality of acts of various EU institutions, including the Commission.⁹⁸ Article 189 of the treaty defines acts as ‘regulations, directives, decisions, recommendations or opinions’, and the ECJ has adopted a liberal interpretation of the kinds of agency conduct that may be reviewable.⁹⁹

⁹² *Ibid* 268.

⁹³ There is a close connection between administrative law of European Community member states and that of European law, particularly in the field of human rights. See for example, *Delcourt v Belgium* (1970) 11 Eur Court HR (ser A) where the Court found that Article 6(1) of the European Convention on Human Rights guaranteeing a fair hearing applied to the Court of Cassation in Belgium even though this Court did not deal with the merits of a case.

⁹⁴ Brown and Bell, above n 88, 279.

⁹⁵ L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell, 4th ed, 1994) 124; Jurgen Schwarze, ‘The Future of the European Union Legal and Political Order’ in Patrick J. Birkinshaw and Mike Varney (eds), *The European Union Legal Order after Lisbon* (Kluwer Law International, 2010) 3, 22–3. See also http://europa.eu/lisbon_treaty/index_en.htm, last accessed 31 March 2012.

⁹⁶ See Brown and Kennedy, above n 95, 124.

⁹⁷ *Ibid*.

⁹⁸ Article 173 states: ‘The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.’

⁹⁹ This is despite the apparent incongruity of s173 and s189 on the reviewability of recommendations and opinions. See Brown and Kennedy, above n 95, 124–9.

Article 173 of the Maastricht Treaty sets out four grounds for the annulment of EU acts. These are for a lack of competency (authority), infringement of an essential procedural requirement, infringement of the Maastricht Treaty or of any rule of law relating to its application, or a misuse of powers. All four grounds appear to raise only questions of law, not of fact, and at first glance do not appear to deal with the merits of the challenged act. However, the ECJ may be led inevitably into a review of the facts, (as found by the Commission), if the issue is whether there was such a manifest error in determining questions of fact, that this error would constitute an error of law.¹⁰⁰ Several ECJ cases have interpreted the standard of review that is to be applied. In *SA Roquette Freres v Council*, the applicant claimed that the Council had infringed the essential procedure requirement in Article 173 by adopting a regulation for the fixing of a quota on isoglucose without first receiving an opinion on the matter from the European Parliament.¹⁰¹ The ECJ found in favour of the applicant but defined the standard of review in the following terms:

When the implementation by the Council of the agricultural policy of the Community involves the need to evaluate a complex economic situation the discretion which it has does not apply exclusively to the nature and scope of the measures to be taken but also to some extent to the finding of the basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bound of its discretion.¹⁰²

It can be seen from the above quotation, that the ECJ defined the scope of its review in extremely limited terms. Misuse of power and lack of authority are parts of the test that mirror section 173, whereas ‘manifest error’ is a separate element that, although requiring the Court to examine facts, does not require a high level of scrutiny.

The ‘manifest error’ test was discussed by McNelis in the context of the decision of *UK v Commission*, concerning the total ban on exports of bovine animals, bovine meats and derived products from the United Kingdom to other

¹⁰⁰ *Ibid* 143.

¹⁰¹ (C-179/80) [1980] ECR 3333, 3393. This case followed closely the reasoning in *Italy v Council* (C-166/78) [1979] ECR 2575 where it was also found ‘To prove that the Council has made a serious mistake in the exercise of its discretion given to it would require evidence more definitive and less disputable than that adduced by the Italian government during the proceedings.’ Both decisions were followed in *SAM Schiffahrt GmbH and Heinz. Stapf v Bundesrepublik Deutschland* (C-248/95) [1997] ECR I-4475.

¹⁰² *SA Roquette Freres v Council of the European Communities* (C-179/80) [1980] ECR 3333, 3393.

EU member states and to third countries in the wake of mad cow disease.¹⁰³ In that case, the Court concluded:

Lastly, it must be recalled that, since the Commission enjoys a wide measure of discretion, particularly as to the nature and extent of the measures which it adopts, the Community judicature must, when reviewing such measures, restrict itself to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether the Commission did not clearly exceed the bounds of its discretion.¹⁰⁴

McNelis argues that a major reason for the highly deferential approach taken by the ECJ is that the ECJ is judging a member of its own institutional ‘family’ when it reviews Commission findings.¹⁰⁵ The Commission is somewhat of a protector of the advancement of the European common market, which is based on the original idea of freedom of movement of goods. It is contended that this makes the high level of deference more acceptable than the applicable standard within a national system of government that may rely upon a separation of powers doctrine to ensure proper public accountability.

The European system is complex and it would appear that not all legal disciplines are subject to the same standard of review. A case in point is in the field of merger control. In the decision of *Tetra Laval* the ECJ sanctioned a more interventionist standard by determining that the Court must examine whether the evidence is factually accurate, reliable, consistent, complete and capable of substantiating the conclusions drawn.¹⁰⁶ In other words, in economic assessments, the Court will conduct a detailed analysis or re-examination of the Commissions’ findings as well as the economic analysis on which the decision is based. Such an approach is vastly different from a ‘manifest error’ approach and, in many respects, is not greatly different from *de novo* review. The Commission unsuccessfully, but perhaps correctly, argued in *Tetra Laval* that the standard of review had gone beyond a mere review of the legality of its findings.¹⁰⁷

¹⁰³ Natalie McNelis, ‘The Role of the Judge in the EU and WTO: Lessons from the BSE and Hormones Cases’ *Journal of International Economic Law* (2001) 189; *UK v Commission* (C-180/96) [1998] ECR I-2265.

¹⁰⁴ *UK v Commission* (C-180/96) [1998] ECR I-2265, [60].

¹⁰⁵ Natalie McNelis, above n 103, 202.

¹⁰⁶ *Commission v Tetra Laval* (C-39/03) [2005] ECR I-987 as discussed in T.R. Reeves and Ninette Dodoo, ‘Standards of Proof and Standards of Judicial Review in European Commission Merger Law’ 29 *Fordham International Law Journal* 1034.

¹⁰⁷ T.R. Reeves and Ninette Dodoo, ‘Standards of Proof and Standards of Judicial Review in European Commission Merger Law’ 29 *Fordham International Law Journal* 1034, 1035.

The uniting thread in European jurisprudence would appear to be that the ECJ will generally only have an interest in ensuring that measures are arrived at with due consideration from the Commission or other agency.¹⁰⁸ There is evidently some flexibility in the standard depending upon the field and level of economic analysis required. It should also be borne in mind that the standard of review, and questions of discretion are somewhat tied in with other doctrines, such as the requirement for proportionality of measures.¹⁰⁹ This is frequently linked to the idea that measures ought to be least trade restrictive in nature, so as to promote the free movement of goods in Europe.

Within the European system, there has also been the development of what is known as the margin of appreciation doctrine.¹¹⁰ This doctrine has principally developed through the case law of the European Court of Human Rights in interpreting the European Convention on Human Rights, and was first laid down in the decision of *Handyside v United Kingdom*.¹¹¹ The margin of appreciation allows a court to apply a more deferential interpretation to measures of European Union members. This doctrine is a principle of interpretation rather than a standard of review. However, it may result in a court moving away from *de novo* review and applying a more deferential standard of review. The result is that the ECHR has moved gradually towards 'a shared baseline of human rights rules, with room for disparate national solutions at the margins'.¹¹² The manner in which this doctrine has been applied will also vary according to the specific right in question, the subject matter and the circumstances of each case.

It is arguable that the margin of appreciation is a unique response to the different legal, political and cultural traditions existing in European nations.¹¹³ If this rationale is accepted, then it would make introducing such a doctrine into WTO jurisprudence difficult in light of the different context of and objectives of the WTO.¹¹⁴

¹⁰⁸ Button, *The Power to Protect: Trade Health and Uncertainty in the WTO*, above n 15, 210.

¹⁰⁹ *Ibid* 208.

¹¹⁰ For discussion of this doctrine see Oesch, *Standards of Review in WTO Dispute Settlement*, above n 3, 51–3.

¹¹¹ (1976) 26 Eur Court HR (ser A) 47–9. The Court held that the right of freedom of expression under Article 10 of the European Convention on Human Rights was not absolute and was to be balanced against measures of members that had a legitimate aim and are necessary in a democratic society.

¹¹² Oesch, *Standards of Review in WTO Dispute Settlement*, above n 3, 51 referencing Laurence Helfer and Anne-Marie Slaughter, 'The Effectiveness of the Council of Europe's Human Rights Regime', in Bob Reinalda and Bertjak Verbeek (eds), *Autonomous Policymaking By International Organizations* (Routledge, 1998) 141.

¹¹³ Oesch, *Standards of Review in WTO Dispute Settlement*, above n 3, 52.

¹¹⁴ *Ibid* 53.

E. Selected international dispute settlement bodies

In the previous sections, I have discussed the standard of review developed in several domestic legal systems and one regional system. In this section, I will briefly refer to how the concept of a standard of review is or may be treated in selected international courts and tribunals. I will deal with the ICJ, ICSID Arbitrations and NAFTA Tribunals.

The jurisdiction of the ICJ is principally governed by Article 36 of the ICJ Statute.¹¹⁵ Article 36(2) provides that States may declare that they recognize as compulsory the jurisdiction of the ICJ concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation or the nature or extent of reparations to be made for the breach of an international obligation. The jurisdiction of the ICJ is therefore very broad and covers questions of both fact and law. However, the concept of a standard of review is not readily apparent for the ICJ as the ICJ is not necessarily undertaking an examination of domestic decisions that are administrative in character. It is therefore not likely to be carrying out a process of review that is akin to judicial review of administrative action. Given that the ICJ, in the main, deals with disputes between states on matters of public international law, it will not commonly need to address the question of whether it must defer in any way to the decision-making processes of a State. The ICJ, in most cases, would simply examine the question in issue and make a legal judgment based on the best facts available.

The above comments concerning the ICJ are also applicable concerning ICSID arbitral tribunals, which are composed in an ad hoc manner to resolve disputes concerning international investment.¹¹⁶ The litigants in such matters are either states or the host state and a private investor. Disputes frequently relate to fair treatment of an investor under the provisions of a bilateral investment treaty or similar investment regulation.¹¹⁷ The notion of a standard of review is not going to be important where the arbitral body is merely deciding on whether an international obligation has been observed. There is, however, the potential for it to become more relevant where the arbitral body is examining a discretionary decision of a domestic body, for example, where the dispute concerns the discretionary decision to grant an operating licence for a company.

¹¹⁵ *Statute of the International Court of Justice* art 36.

¹¹⁶ *International Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) arts 36–49.

¹¹⁷ See ICSID art 25.

The application of a standard of review is certainly more relevant under the NAFTA, whose members are the United States, Canada and Mexico.¹¹⁸ In particular, Chapter 19 of the NAFTA provides for the establishment of ad hoc bi-national review panels to review anti-dumping and countervailing measure determinations made concerning goods imported into a NAFTA member state. This mechanism therefore specifically contemplates the review pursuant to an international agreement of domestic administrative decisions. Article 1904(3) of the NAFTA requires panels to apply the standard of review embodied in various domestic statutes of the importing country, as well as general judicial principles that would be applied in the importing country.¹¹⁹ Accordingly, Chapter 19 panels will be applying a domestic law standard of review as if they were a court of review in the country that has issued the challenged measure.¹²⁰

F. Assessment of other legal systems

The above survey of standards applied in the Australian, United States and French legal systems and by the ECJ demonstrates a high degree of deference overall towards agency conduct. The types of factors that influence the standards of review are somewhat similar, albeit the result of different institutional priorities. For instance, in all four systems there must be a prioritization of issues such as agency expertise, efficiency and authority. In all four examples, there is a significant difference between standards of review that apply to questions of law and fact. Generally, a higher degree of deference applies to questions of fact. Arguably, the rationales for deference apply more so to facts as the agency will frequently have more competence than courts to examine factual matters. Despite this, these examples show that there may be considerable ambiguity in the precise standard applied in relation to facts. This can

¹¹⁸ North American Free Trade Agreement, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994).

¹¹⁹ Article 1904(3) requires panels to apply the standard of review as defined in NAFTA Annex 1911, which provides: 'standard of review means the following standards, as may be amended from time to time by the relevant Party: (a) in the case of Canada, the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended, with respect to all final determinations; (b) in the case of the United States, (i) the standard set out in section 516A(b)(1)(B) of the *Tariff Act* of 1930, as amended, with the exception of a determination referred to in (ii), and (ii) the standard set out in section 516A(b)(1)(A) of the *Tariff Act* of 1930, as amended, with respect to a determination by the United States International Trade Commission not to initiate a review pursuant to section 751(b) of the *Tariff Act* of 1930, as amended; and (c) in the case of Mexico, the standard set out in Article 238 of the Federal Fiscal Code ('Código Fiscal de la Federación'), or any successor statutes, based solely on the administrative record.'

¹²⁰ See Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, 3rd ed, 2005).

give rise to a 'creeping' intrusion as in the case of the United States' substantial evidence test, or in recent developments regarding European Union merger assessments.

In the case of the international dispute settlement bodies discussed above, the application of a particular standard of review will be more apparent where the body is directly reviewing domestic agency conduct, and the converse proposition is equally valid. If, for example, the ICJ is examining the lawfulness of state conduct, then the question of whether there should be any deference towards factual and legal issues is unlikely to arise. By contrast, Chapter 19 NAFTA panels are specifically charged with the responsibility of reviewing measures that are the result of formal domestic administrative procedures. In that case, NAFTA panels must apply various domestic standards of review, but there is scope for international bodies, and particularly those reviewing technical international trade decisions, to apply an institution-specific standard of review that is based on more universal principles.

Whatever the merits or demerits of the above systems, their usefulness in the context of the WTO dispute settlement system should be considered in a cautious light. It is always a difficult proposition to transplant legal doctrines from one system to another. In this case three of the systems examined are domestic systems, and all have very different institutional designs. This does, however, lead to the important conclusion that the development of an appropriate standard of review in WTO dispute settlement is likely, to some extent, to be influenced by the function and institutional design of WTO dispute settlement system as well as its history. Further, the value in this type of comparative enquiry is also in identifying the relevant legal concepts and principles that may shape the development of a new standard of review. In this regard, the issue of the degree of deference or intrusiveness of judicial review would appear to be a universal 'tension' in dispute settlement systems, as are the underlying principles such as the allocation of judicial responsibility, expertise and efficiency. There is certainly evidence of common jurisprudential approaches evolving in international law, and the need to define what is being reviewed, and how it is to be reviewed is ever present.¹²¹ This suggests the potential evolution of a global system of administrative law in which a common theoretical framework is adopted by courts and tribunals in different jurisdictions.¹²² In the next section I will discuss how a standard of review operates as part of the WTO dispute settlement system.

¹²¹ See for example, Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative law' (2006) 115 *Yale Law Journal* 1490; Sabino Cassese, 'Administrative Law Without the State? The challenge of Global Regulation' 37 (2005) *New York University Journal of International Law and Politics* 663.

¹²² Daniel C. Esty, above n 121, 1490.

1.3 APPLICATION OF STANDARDS OF REVIEW IN THE WTO

Having introduced standards of review on a conceptual level, in this section I will deal with the issue of how and to what extent standards of review may apply to WTO dispute settlement. This section is divided into three parts. In the first part, I will discuss how a standard of review may be relevant in the WTO panel process. In the second part, I will outline some possible limitations on developing a WTO standard of review. In the third part, I will discuss the relative usefulness of drawing upon domestic law in identifying an appropriate WTO standard of review. I conclude that the development of a standard of review is an important and inevitable aspect of WTO law, and that caution should be exercised when examining whether domestic standards of review may be transplanted into the WTO system.

1.3.1 Relevancy, Definitions and Application

WTO dispute settlement involves resolving disputes concerning the interpretation of the WTO Agreements. Panels are charged with the responsibility of providing rulings and recommendations in relation to provisions of the WTO Agreements.¹²³ The question therefore arises as to whether standards of review are at all relevant. Panels must simply decide whether or not a party's conduct conforms to its WTO obligations.¹²⁴ There is certainly a conceptual simplicity with this approach. However, problems arise because of the nature of the measures being reviewed. Many WTO obligations are implemented through domestic agencies. These agencies may make discretionary decisions based on a series of facts. This is particularly the case with anti-dumping, countervailing, safeguard and SPS measures. In these types of matters, panels are generally reviewing the validity of a prior decision, rather than simply laws or regulations implementing WTO obligations. In order to review a prior decision, a panel must then determine the level of intrusiveness it will apply in order to be satisfied that the measure is WTO compliant. This will involve questions of whether panels may look at any evidence, or only evidence that was before the agency, and the extent to which panels should review the reasoning undertaken by the agency. Therefore, to a significant degree, the review function of WTO panels does mirror the concept of a standard of review found in other legal systems, such as those discussed in the previous section.

¹²³ DSU, art 3.2.

¹²⁴ Jeffrey Waincymer, above n 29, 349.

Arguably, panels should do whatever is required in each case to determine a member's compliance with WTO obligations. However, this simply begs the question of how far panels should go in this exercise. If it is an entirely discretionary matter for panels, then there may be a significant variation both in the treatment of members and in the enforcement of the WTO Agreements. This would contradict the movement by the WTO towards having a dispute settlement system that is more 'legalized' and based upon ideas of security and predictability in the trading system.¹²⁵ In the absence of established principles, if different standards have been applied in different cases, then members may argue that they have not been afforded due process and this may encourage more WTO litigation generally. The type of WTO standard of review adopted also links in to the issue of the broader observance and enforcement of WTO obligations by the membership, that is, whether WTO rules should be totally binding, or whether the WTO Agreements should operate more in the nature of guidelines. A weaker WTO dispute settlement system may have undesirable consequences for the development of the WTO as an institution. The type of standard of review applied may also be shaped by practical issues such as the amount of resources that the WTO can afford to devote to the review of measures.¹²⁶

The centrality of the standard of review question is brought to mind when one examines the broad range of policy issues that may be reviewable as a measure. These may include environmental, security, health, labour as well as commercial issues. It can be seen therefore how, in the WTO context, the standard of review has the potential to be a sensitive matter for members. Without too much imagination, the standard of review can lead to charges of panel intrusion into the domestic affairs of members and allegations of an erosion of national sovereignty.¹²⁷

All legal systems face the difficulty of defining the nature of what is reviewable. In many domestic systems, this is often restricted to a decision or act mandated under legislation. Under the WTO Agreements measures being reviewed may take a wide variety of forms.¹²⁸ For example, they may be in the form of domestic legislation, or alternatively, agency decisions that are based on either formal or informal processes. This can make the formulation

¹²⁵ See DSU, art 3.2; The WTO Secretariat, *Guide to the Uruguay Round Agreements* (Kluwer Law International, 1999) 19–20.

¹²⁶ The WTO operates a very robust trade agenda with a modestly staffed secretariat.

¹²⁷ See for example, J. Greenwald, 'WTO Dispute Settlement: An exercise in Trade Law Legislation?' (2003) *Journal of International Economic Law* 6, 113.

¹²⁸ Alan Yanovich and Tania Voon, 'What is the measure at Issue?', above n 39, 115.

of a uniform standard of review very difficult, given that a uniform level of intrusion may be inappropriate. There is also the difficulty of making the traditional distinction between facts and law. Certainly the provisions of the WTO Agreements may be considered analogous to ‘laws’, but facts cannot so easily be treated uniformly when they may concern an analysis of domestic laws or domestic processes.¹²⁹

WTO panels may determine disputes concerning domestic regulation as opposed to the specific application of domestic regulation.¹³⁰ This distinction is referred to as ‘as such’ versus ‘as applied’ claims. The rationale for determining ‘as such’ claims is that the WTO dispute settlement system is intended to protect the security and predictability of future trade and avoid a multiplicity of litigation regarding particular issues.¹³¹ An ‘as such’ claim is likely to require the application by panels of a legal standard of review because these claims will generally involve an assessment of whether domestic regulation is consistent with a member’s obligations under the WTO Agreements.¹³² By contrast, many ‘as applied’ claims, especially in the trade remedy disciplines, will involve an assessment of a domestic authority’s findings, and hence the standard of review of facts is likely to be more important.

Different standards of review may produce very different outcomes for the parties to a dispute. The WTO system is no exception, and the application of *de novo* review, total deference or any intermediate standard may lead to such variances. *De novo* review would give the complainant more of an opportunity to have its case heard, in that the panel would be reviewing all relevant facts, and would not be deferring in any way to the impugned domestic decision or regulation. A *de novo* standard would therefore arguably advantage complainants. The reverse would apply where the panel engages in a cursory review of the measure. The consequences may become more unpredictable if panels were to apply a standard that is value or objective-specific, such as a determination of whether the measure is reasonable, or whether it is at least trade restrictive. Arguably, these types of standards add in an unnecessary layer of complexity to the task of panels.

¹²⁹ *Ibid* 137.

¹³⁰ Appellate Body Report, *US-1916 Act* [60]–[61].

¹³¹ Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review* [82].

¹³² This is not always the case as some factual assessment of the meaning of domestic regulation may be required. Further, there is on occasion argument about whether the regulation under review is in fact a measure at all. See for example Appellate Body Report, *US-Oil Country Tubular Goods* [186]–[187], in which the Appellate body overturned the panel’s finding that a ‘Sunset Policy Bulletin was not a measure’.

1.3.2 Institutional Considerations and Limitations within the WTO System

Earlier in this chapter, it was asserted that standards of review are ultimately a mechanism to enhance the quality of decision-making in dispute settlement systems, albeit within the context of particular institutional structures and objectives. Further, standards of review have both constitutional and procedural dimensions within the legal system in which they function. The WTO, like many international organizations, does not have the same historical and constitutional foundations of many domestic legal systems, but rather the legal system that has evolved is derived from international treaties and practices. In this case, the WTO administers a series of multilateral trade agreements designed principally to promote trade liberalization. It does not have a sophisticated constitution that imposes checks and balances or other constraints on the actions of its dispute settlement organs. Nor does it have the automatic benefit of judicial doctrines, such as standards of review, which may have developed over many years in conjunction with a legal system. Whilst standards of review may be prescribed legislatively or judicially, there is some scepticism as to whether the Appellate Body can formally adopt a standard of review in the absence of its direct inclusion in the text of the WTO Agreements.¹³³

There is therefore a potential limitation on the degree to which a standard of review can be imposed upon the WTO membership. The WTO is an international treaty-based organization that relies on the consent of its membership. Accordingly, there is a question of whether the principle of state sovereignty could affect the type of standard of review that might be applied to domestic measures.¹³⁴ If state sovereignty is a relevant consideration then it is arguable that a more deferential standard of review should be applied by WTO panels.

The status of the WTO as a treaty-based organization also raises the question of whether it can or should be interpreted consistently with other international treaties. Articles 31 and 32 of the VCLT set out the basic rules for interpretation of international treaties. Article 31(1) provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹³³ Article 3.2 of the DSU is frequently raised in support of this proposition. The final sentence of this Article provides 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

¹³⁴ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 76, 299.

The question is whether a standard of review can be developed and imported into a system that is treaty-based, and yet still be within the object and purpose of the treaty.¹³⁵ In *US-Gasoline*, the Appellate Body determined that these provisions of the VCLT apply to the interpretation of the WTO Agreements.¹³⁶ Unfortunately, the VCLT does not of itself resolve the issue of whether a 'judicial-like' standard may be introduced, and what form such a standard should take. At best, the VCLT may be a useful interpretative tool used in the examination of these issues or as part of the justification for the construction of a new standard.

In examining the place of a standard of review in WTO jurisprudence, the design of the WTO system is significant. The system grew out of the GATT 1947 and its various deficiencies experienced from the 1960s onwards.¹³⁷ It was also very much a product of vigorous negotiations that took place from 1986 to 1994, known as the Uruguay Round of negotiations. The membership was aware of the need for a permanent institution to administer the expanding range of trade agreements. Further, the membership was unsatisfied with the increasing numbers of GATT panel reports that were unadopted, and therefore unenforceable, due to a lack of member consensus in support of such decisions.¹³⁸ There was therefore considerable political will available to support basic improvements to the dispute settlement system.¹³⁹ This was particularly the case with ensuring that panel decisions were binding and enforceable on the membership. A major example of this was the introduction of the negative consensus rule whereby all members of the DSB are required to vote against panel decisions in order for them to remain unadopted.¹⁴⁰ Despite the development of a comprehensive dispute settlement system, the membership did not expressly include reference to a general standard of review. The DSU, which sets out the objectives of the system as well as both substantive and procedural provisions, makes no mention of any general standard of review. The Anti-Dumping Agreement does prescribe a specific standard in relation to anti-dumping matters.¹⁴¹ This was a product of robust negotiations pursued by the United States that will be discussed in Chapter 2.

¹³⁵ Asif H. Qureshi, *Interpreting WTO Agreements* (Cambridge University Press, 2006) 7–8, 224.

¹³⁶ Appellate Body Report, *US-Gasoline* [30].

¹³⁷ See Chapter 2, Section 2.2.1.

¹³⁸ Stoler, above n 4, 99.

¹³⁹ *Ibid* 100.

¹⁴⁰ The negative consensus rule is set out in DSU Articles 6.1, 16.4, 17.14 and 22.6.

¹⁴¹ Anti-Dumping Agreement, art 17.6.

1.3.3 Usefulness of the Domestic Law Analogy

Given that the notion of a standard of review has predominantly developed as a domestic law concept, it is relevant to examine the extent to which the concept is transportable to the WTO context. Croley and Jackson considered whether any domestic law justifications for deference apply to WTO dispute settlement.¹⁴² Three main arguments are raised in support of deference: expertise, democracy and efficiency. These arguments are important justifications for deference by Courts in the United States towards administrative agency conduct as discussed in section 1.2.5B above. In each case, Croley and Jackson determined that the justifications are not easily transplanted into the WTO context.¹⁴³ Firstly, it cannot be forcefully put that WTO panels have less expertise in WTO matters compared with the domestic agencies implementing the obligations.¹⁴⁴ Indeed, quite the reverse is true. Secondly, it does not follow that deference creates more democratic accountability, because there is no analogous constitutional structure between the WTO and a domestic political system.¹⁴⁵ Domestic standard of review considerations involve power sharing between different branches of government, whereas the WTO has a vertical and supranational (rather than horizontal) relationship with the member measures being reviewed. Indeed, arguably there is more democratic accountability if the WTO affords less deference to the membership, given that all members agreed to the specific obligations set down in the WTO Agreements. Thirdly, the efficiency argument fares no better for similar reasons.¹⁴⁶ Unlike in domestic systems, the agencies are not co-ordinators of the disciplines giving rise to the measures.¹⁴⁷ It is the WTO that is the 'central agency' responsible for this task. This argument, in fact, mitigates against the notion of deference because there is a risk that domestic agencies will apply their own interpretations of WTO Agreements.¹⁴⁸ This 'tower of Babel' argument is perhaps the strongest argument against deference. It is highly likely that multiple countries will confront interpretive questions about the same WTO provisions.¹⁴⁹

¹⁴² Croley and Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments', above n 10, 208–12.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* 208.

¹⁴⁵ *Ibid* 209.

¹⁴⁶ *Ibid* 210.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ This is correct if we consider the large number of disputes that concern a small number of provisions within the major WTO Agreements. Examples would include Article III of the GATT 1994 (national treatment), Article 5.1 of the SPS Agreement (risk assessments), the dumping and material injury provisions of the Anti-Dumping Agreement and the threat of injury provision in the Agreement on Safeguards.

Given the limitations on direct relevance of domestic law rationales, it is important to be cautious about transplanting standards of review from domestic law to the WTO forum. These conceptual models are, however, most definitely our starting point as the standard of review question does still apply to WTO dispute settlement. The key consideration when identifying appropriate standards is to carefully consider the underlying principles giving rise to those standards, and to also consider the likely effects of implementing such standards. This book will progressively deal with such issues in determining the optimal standard or standards available to the WTO. Given the domestic justifications for deference do not for the most part apply in the WTO context, there needs to be careful scrutiny of any departure from a non-deferential or intensive standard of review for panel review of domestic measures. I will be contending that a highly intensive general standard of review be adopted as a default position. However, I will also be arguing that a more deferential standard should be applied in some cases based on the wording and subject matter of the WTO Agreements.

1.4 ARGUMENT, METHODOLOGY AND CHAPTER OUTLINES

1.4.1 Summary of Argument

It is contended in this book that the present standard of review adopted by the WTO Appellate Body is inadequate, and that a new standard of review should be developed. The current standard is confusing, and is particularly unclear about the degree of deference (if any) that WTO panels should apply, and the principles that inform its construction. The new standard proposed in this book consists of two limbs. The first is to provide a general standard of review that is unrestricted in nature and that is similar to a *de novo* style of review found in many domestic legal systems. The second limb stipulates a variation to the first limb in specific instances when the WTO Agreements restrict or vary the competencies existing between WTO panels and members. In other words, the second limb will operate where the review function, that might otherwise have been carried out by panels, has been modified based upon the wording or structure of particular WTO Agreements. This model provides a new conceptual framework through which panels may apply a standard of review. In some cases the standard of review will not be any different from that which is currently prescribed or applied. Therefore, in referring to a 'new' standard of review, I am emphasizing the novelty of the approach rather than advocating any radical change in practice. The coherency and consistency of approach is, in many ways, as important as applying a more optimal standard of review.

In arguing for such a model, this book also examines the underlying principles that inform the construction of an appropriate standard of review. Three such principles are identified and comprise the need for standards of review to promote the major objectives of the WTO, the need for standards to maintain adjudicative legitimacy, and the requirement for standards to be procedurally appropriate. In this book I contend that the new proposed model satisfies such criteria, and that it will result in an improvement in the workings of the WTO dispute settlement system. This book does not make extensive claims about the suitability of the proposed standard of review for other international institutions. However, the principles, themes and arguments raised in this work do have the potential to be applied for the improvement of governance in international institutions.

1.4.2 Methodology

This book utilizes a predominantly doctrinal methodology in its approach to the subject matter. This will involve in the first instance the exposition, analysis and critical evaluation of the current WTO standard of review. From this critique, I seek to identify the principles from which a new standard of review may be developed. The work is essentially divided into two parts, the first being a critique of the current standard, and the second being the extrapolation of a new standard of review model. In this type of work, it is important to appreciate that it is quite difficult to separate argumentation from methodology. In the first part of this work, the methodology will consist of a general review of the subject matter, and a discussion of both positive and negative aspects of the current approach to the standard of review issue within the WTO system. Based upon this survey, key principles are derived that it is argued should form the basis of a new standard of review. In the second part, the new model is proposed and is described in considerable detail. It is then tested against the principles identified in the first part and against a number of anticipated criticisms. Finally, this new model is then analysed in the context of each of the major WTO Agreements to determine its appropriateness for introduction into the WTO dispute settlement system. The new model is not based upon any particular theoretical approach, such as rights-based or constitutional approaches.¹⁵⁰ The analysis is ultimately based upon a number of sequential research questions that focus on whether the current standard of review is adequate, and whether the new proposed model would represent an overall

¹⁵⁰ See for example, Deborah Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade' (2001) 12(1) *European Journal of International Law* 39. There may be several other approaches to the standard of review, such as democratic or developing country approaches.

improvement to the WTO dispute settlement system. In this work I seek to identify and articulate the best normative approach to the standard of review issue in WTO dispute settlement.

1.4.3 Chapter Outlines

The purpose of this chapter has been to explain the concept of a standard of review and its importance in relation to WTO law. Chapter 2 will provide a detailed history of how the standard of review has developed within the GATT and WTO systems, and identify any major problems experienced to date. Chapter 3 will first examine a number of different theoretical approaches to the standard of review and discuss their attractiveness for adoption in the WTO. It will then identify relevant principles that may form the basis of a new standard. These principles are on the whole deduced from the common factors within (or axiomatic to) different theoretical approaches discussed by scholars. In Chapters 4 and 5 a new standard of review test is outlined and its overall strengths and weaknesses are discussed. The new test is also examined by reference to the underlying principles in order to evaluate its appropriateness within the WTO system. In Chapters 6 and 7, I will move away from a theoretical description of the new test and discuss how the standard may be practically applied. Chapters 6 and 7 will, in this regard, involve a brief assessment of how the new standard of review may be applied in relation to the major trade remedy and non-trade remedy agreements respectively. Of the non-trade remedy agreements, the following agreements will be scrutinized: the GATT 1994, the SPS Agreement and the TBT Agreement.¹⁵¹ Finally, Chapter 8 is a summary of findings and a discussion of the implications for the WTO of adopting the new standard or failing to do so.

¹⁵¹ These Agreements account for the vast majority of non-trade remedy based disputes. See Chapter 7 Section 7.1.